

1953

In the Matter of the Estate of Emma G. Buttars : Contestants and Appellants Brief

Utah Supreme Court

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In the Supreme Court
of the State of Utah

MAR 28 1953

Clerk, Supreme Court, Utah

In the Matter of the Estate of
EMMA G. BUTTARS,
Deceased.

Case No. 7945
Contestants
and appellants
Brief

Appeal from the District Court of the First Judicial
District of the State of Utah, in and for
the County of Cache.

Honorable Lewis Jones, District Judge

GEO, C. HEINRICH
Attorney for Contestants
Appellants.

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In the Supreme Court of the State of Utah

In the Matter of the Estate of
EMMA G. BUTTARS,
Deceased.

Case No. 7945
Contestants
and appellants
Brief

PRELIMINARY STATEMENT

THIS IS AN APPEAL from a Judgment Notwithstanding the Verdict entered by the District Court of Cache County, Utah, under date of November 15, 1952, setting for naught the Verdict of the Jury finding as contended for by contestants, appellants herein, that Emma G. Buttars, the deceased, at the time of subscribing Exhibit "A" (the will question) was not of sound and disposing mind and memory, and entering an order admitting said will to probate as the last will and testament of said deceased. The parties will be referred to as Contestants and Proponents as they were known in the court below. Contestants insist that the jury based its verdict upon substantial competent evidence and that the lower court improperly interferred therewith so

under the law committed reversible error. That the so-called will should be denied probate.

STATEMENT OF FACTS

Emma G. Buttars all her married life, and nearly all her life, was a resident of Clarkston, a small farming community located on the Western slopes of Cache County, Utah. There, she and her husband reared a large family, 10 children, and accumulated extensive farming interests. They were successful in their farming operations. Her husband, Daniel Buttars, died in Clarkston January 10, 1916, and at the time of his death his children were of the following ages: Daniel D. 33, Margaret 29, Melvin H. 27, Orson M. 24, Maybell 22, Gover 20, Ira 17, Hattie 15, Archulius 12, and Wallace 9. Emma G. Buttars, widow, Daniel D., and Melvin H., sons were appointed administrators of the estate, and Decree of Final Distribution and Partition was entered therein March 10, 1917. (Con. Ex. 27)

Thereafter, Emma G. Buttars and her sons, Ira and Gover, operated the farm for some years. Ira later married, sold his 60 acres to his brother, Gover, and then moved to Burley, Idaho. Gover then operated the farm until 1930 when he also moved to Burley, and he then sold his 120 acre tract to his mother, thus adding this acreage to her holdings. From 1930 to the date of his mother's death, Wallace operated the farm for her on a lease basis. He had married and lived close by. During these years no particular complaint was regist-

ered against him by any of his brothers and sisters, they believing everything was satisfactory, until the incident known in this record as the "Service Station Meeting", held at Cornish, Utah, the fall of 1950, when Archulius complained to Margaret and Maybell about certain irregularities on the part of Wallace in dealing with his mother and which they wanted to discuss with their brother, Melvin. Archulius had become at "outs" with Wallace. (Tr. 206) Until this time everybody seems to have had confidence in Wallace (Tr. 184) At least there were no open complaints. More of this later.

Emma G. Buttars was 51 years of age when widowed in 1916. She had never had any serious illnesses until 1940, when she was 75 years of age. All the testimony is to the effect that at all times while she enjoyed good health she was self-reliant, frugal, determined, had a will of her own (Tr. 223), was inclined to be close or even stingy, and believed everybody should work and earn what they got (Tr. 201, 215, 226, 292), and, in fact, she kept her own holdings intact until the conveyances and transfers hereinafter mentioned and which were made by her commencing six days after she made her "will" and in which she stated that she desired to treat all of her children equally. She made this so-called will March 22, 1945. Always previous she stated she wanted to treat everybody equal. (Tr. 219).

Advancing years made their impact on her health. In 1940 she had her first really serious illness. (Tr. 145).

She was then hospitalized in the Cache Valley Hospital, Logan, Utah. About everything was wrong with her. She suffered from high blood pressure, hardening of the arteries, heart ailment, pneumonia, kidney trouble, and thereafter suffered terrific headaches. (Tr. 145, 201, 226). Thereafter she was never the same according to the testimony of her grandchildren who had seen her more or less infrequently (Tr. 29, 31) and also according to her own children who waited upon her and saw her almost daily or at short intervals (Tr. 168, 201). After this illness, from which she never fully recovered according to all of contestant's witnesses, she continued to deteriorate physically and mentally. (Tr. 146, 185, 203, 185, 186, 201, 203), and in 1944 she was again seriously ill and hospitalized (Tr. 203).

After her first illness in 1940, a serious and obvious change came over Emma G. Buttars—her mind continued to deteriorate. (Tr. 146, 185, 203). She couldn't remember, particularly recent events, even from morning until later in the day. (Tr. 31, 43, 150, 146, 147, 201-3). Nor remember her eldest grandsons, whom she knew best. (Tr. 31, 33, 34, 42, 53), nor their wives, didn't realize that her eldest son, Dan, was dead, his death occurring February 21, 1945, (Tr. 30-37, 42) one month before the "will" was made; worried over finances (Tr. 202, 204, 190); her mind was always confused, as to whether she had enough to live on, when in fact she was well fixed (Tr. 167, 190); she disliked

people for no apparent reason, would repeat, asking the same thing over and over again (Tr. 168, 203); was incoherent and couldn't stick to a subject (Tr. 228, 167) hid silverware in bed (Tr. 202, 227), accused some of her children of borrowing money from her when they did not (Tr. 227, 229) hid money, couldn't distinguish between her own property and others and claimed her son's turkeys as her own (Tr. 168), stayed in all the time (Tr. 228). Even the family didn't want her condition generally known. She didn't know what she had or possessed in the way of property (Tr. 204, 205, 208) or what she had done or signed away, and couldn't handle any amount of money (Tr. 204, 211, 222, 223, 228), purchased dress to go to the funeral of her son, Ira, who died in 1949, and then forgot he had died (Tr. 109, 212), did not know pursuant to arrangement that her son, Wallace, was handling her finances, writing her checks, etc. (Tr. 213, 344-50), did not know pursuant to arrangement that her own daughters were being paid by her son, Wallace, for taking turns in caring for her (Tr. 213), sold 10.25 acres to her daughter, Archulus for \$500.00, one-fourth of its real value.

On July 1, 1918, Dan borrowed \$1500 from his mother on his note payable on or before five years after date, and at the same time gave her a mortgage as security therefor, which was never recorded. (Con. Ex. 2 and 3) Dan's cancelled check dated January 17,

1923, payable to the deceased and upon which she had written "Pd. in full" was produced. (Con. Ex. 1). No one ever heard her say Dan owed her money (Tr. 211). She filed no claim against Dan's estate. She was always affectionate toward Dan, her eldest son, yet one month before drawing her "will" she showed no emotion at his passing. (Tr. 211). In her will she said she wanted to treat all of her children alike, then omitted her son, Dan's children because she had forgotten he had repaid the loan, said he owes her more than his share of the estate would amount to, (Prop. Ex. A) and then six days after making her "will", on March 28, 1945, conveyed 60 acre tract of land to her son, Wallace (Con. Ex. 24), on May 6, 1948, conveyed another tract to him consisting of 60 acres (Con. Ex. 23), on January 29, 1947, added Wallace's name on a \$5000.0 savings account in the First National Bank of Logan (Cont. Ex. 10) with the agreement that whoever should die first should pay the other's funeral expenses, and also added his name to three U. S. Savings bonds Series E., totaling \$1125.00; and on January 29, 1947, conveyed approximately 48 acres to Archulius (Con. Ex. 22), which Archulius told her brothers and sisters was given to her because certain stock distributed to her out of her father's estate turned out eventually to be poor stock and that had she known which tract Wallace had previously been given she would have taken the other a more valuable tract instead. (Tr. 158, 159); and on March 3, 1948, sold to Archulius a tract of land for

\$500.00 (Con. Ex. 21) which was one-fourth its real value (Tr. 165) and yet, when the deceased's savings box was opened, there was found a statement apparently signed by the deceased on April 9, 1945, (the will was dated March 22, 1945) in which it was stated that because "the Clarkston Trenton Mill stock that came to her from Daniel Buttars' estate" was a loss, that she delivered \$1000.00 War Savings Bond, Series E., to Archulius, and also 22 shares of First Security Bank Stock, (which has since been split 4 for 1) and that for the same reason she, the deceased, delivered to Hattie \$1000.0 in War Savings Bonds and 22 shares of First Security Bank Stock (since split 4 for 1) (Con. Ex. 20). See Con. Ex. 7 for a complete list and summary of savings Box when opened. Thus with 18 days after making her "will" she disposed of 60 acres to Wallace \$2000.00 in Bonds, and 22 shares (now 88) First Security Bank stock.

The will bears date March 22, 1945. Before the will was drawn, in 1944, Wallace and Archulius called the family together and a meeting was held at Margaret's place. It was there reported by Archulius and Wallace that their mother was not physically or mentally in a condition to be left alone. The appointment of a guardian was suggested. Margaret, Gover, Melvin, Archulius, and Wallace were present. She was not on the date the will was made physically or mentally competent to make it. (Tr. 148-151) There was a confident-

ial relation existing between Wallace and his mother. He wrote all her checks (Tr. 346) Ran her business but didn't want a guardian appointed. Knew always what he took her to Logan for (Tr. 350-361) except making of will (Tr. 354). Before the will was made he inquired of both Melvin and Orson if Dan had adopted a grandson—Sherrill Brown (Tr. 151-3)

Reference to other facts will be made in argument in order not to unduly lengthen this brief.

ARGUMENT. POINT 1

It is well settled in this estate that a will contest is an action at law. In *re Alexander's Estate*, 139 P2d, 432 (Utah). Being an action at law the court cannot weigh and pass on conflicting evidence, or pass on the credibility of witnesses. It is restricted to a review and determination of errors at law and the competency and sufficiency of the evidence to support the verdict or findings if tried before a court. In *re, Dong Ling Hing's Estate*, 2 Pac. 2d, 902, (Utah). Where there is some substantial support in the evidence of the court's findings, or the jury's verdict, that is, if the court's findings or Jury's verdict is such where reasonable men could arrive at different conclusions, the court is prohibited from interfering therewith. *Swan's Estate* 170 Pac. 452, (Utah). And it is so well settled in this state as to hardly need citation of authority that on appeals from a judgment of nonsuit-and the same rule applies under Rules of Civil Procedure, Rule 50, where

a Judgment Notwithstanding the Verdict is entered, as was done in this case, that the Supreme Court will take all evidence against the defendants as true and will give the plaintiff the benefit of every favorable inference and intendment which fairly arises from such evidence. *Galarowidz vs. Ward et al*, 230 P2d 576 (Utah). *Swan's Estate*, *supra*.

The fundamental question involved, therefore, on this appeal is: Was the jury's verdict that the deceased lacked testamentary capacity at the time of the execution of the will supported by substantial competent evidence? If so, then the Judgment Notwithstanding the Verdict entered by the lower court must be vacated and the previous order of the court upon receiving the jury's verdict denying admission of the will to probate, reinstated. And in order to assist this court to understand the basis for the jury's verdict the following is respectfully submitted.

At the time of the death of her husband in 1916, Emma G. Buttars was 51 years old. Certain of her children, Dan, Margaret, Melvin, Maybell, Gover and Orson were all married, while Ira, Hattie, Archulius, and Wallace were still at home. Emma G. Buttars, Dan and Melvin were appointed administrators of the estate of Daniel Buttars, deceased, and on March 10, 1917, Decree of Final Distribution and Partition was entered by the District Court of Cache County in which the Court adopted the plan proposed by the three admin-

istrators. After the death of their father, Dan advised, but Mrs. Buttars, Gover, and Ira took over the active management and operation of the farm. Ira later married, sold his 60 acres to Gover, and moved to Burley, Idaho. Gover operated the farm until 1930 when he then moved to Burley, Idaho, and sold his 120 acres to his mother, thus increasing her holdings by this acreage. From 1930 to the date of the death of his mother, Wallace has operated the farm pursuant to the terms of a lease.

Gover and Ira remained in Burley, where Ira died in 1949. Melvin lived at Cornish and Dan at Lewiston, Utah. Both of them always made frequent trips to Clarkston to visit with their mother. Melvin's wife was a Clarkston girl, so he made frequent trips to see his mother-in-law and mother also. Hattie married, moved Burley and later to Garland. Wallace married and built a home just a few rods from where his mother lived. Archulius lived across the street. Maybell and Margaret both lived in Clarkston, close to their mother's home. Family ties were strong and they all visited back and forth frequently. The record also shows that the grandchildren, the children of Dan, the contestants and appellants herein, also upon occasion more or less frequently, visited with their grandmother.

All of the evidence is also to the effect that Emma G. Buttars was a lady of resolute will, inclined to be very frugal and saving in her disposition, and habits,

and that she enjoyed good health until the year 1940 and that from the time of the death of her husband in 1916 until the many conveyances and transfers made by her beginning with the year 1945, she not only made none but that she increased her holdings by purchasing an additional 120 acre tract of land from her son Gover, besides the money in the banks, the bonds herein mentioned and the First Security Bank Stock (See Decree). All of contestant witnesses who testified on the subject stated positively that they never ever heard their mother express any dissatisfaction with the terms of the said Final Decree of Distribution and Partition. No where in the record does it appear that she ever stated to anyone that her son Dan owed her any money, until the very day she made her will when Wallace took her to Logan to enter her safety deposit box at the First Security Bank. The record is also clear that up until the year 1940 the deceased always enjoyed good health and that thereafter she was never the same strong and healthy individual or did she transact any business; that while deceased enjoyed good health the Buttars family was a united one. The children visited with their mother and Wallace continued to operate her farm on a share basis. No one interfered. The record is silent as to any quarrel ever between the mother and any of her children.

In 1940 Emma G. Buttars was 75 years old. She became seriously ill and thereafter was never the same.

About everything was wrong with her. She suffered from hardening of the arteries, high blood pressure, heart ailment, kidney trouble, and terrific headaches. Deterioation had set in. Every indication of senility was and remained apparent. She couldn't remember recent events, from morning until later in the day. She didn't recognize some of her eldest grandsons, nor their wives. One month before she made her will, she didn't realize her son, Dan, had died nor could she remember or carry on coherent conversations. She worried over finances when she in fact had plenty. Her mind was confused over finances and property particularly and she constantly worried about having enough to live on. She was forgetful, particularly as to recent events, disliked people for no reason at all, would repeat, ask the same thing over and over again, hide silverware in bed, accuse some of her children of borrowing from her when they had not, hide money, couldn't distinguish between her own property and that of her sons. She didn't know what she had or possessed in the way of property, or what she had done or signed way. There was no doubt intellectual deterioration had taken place. Her condition became so bad that the family didn't want her condition generally known. Long before 1945 deceased failed to attend to any of her own business. All she did was to sign check and follow Wallace or be lead around by him. (Tr. 360 etc.)

In late summer or early fall of 1944 Wallace and Archulus called the family together and it was there reported that their mother was not physically or mentally in a condition to be left alone. The appointment of a guardian was suggested. Before her will was made she did not know that pursuant to an arrangement Wallace was caring for her finances, nor that thereafter in 1951 and 1952, her daughters were taking turns in caring for her and were being paid therefor. After returning from the hospital following her first illness her daughters cared for her without pay. She also had a second serious illness in 1944. Such is the positive testimony of contestants and their witnesses.

Those of the contestants who testified, grandchildren of the deceased, viz, Villa Bronson, Ted Buttars, Omar Buttars, Wendell Buttars, and Ormas Buttars, are all grown persons, 40 years of age or thereabouts, all of whom were intimately acquainted with the deceased during her lifetime, knew of her physical and mental condition earlier in her life, and each of them visited with their grandmother at different intervals after her illness in 1940, and so were competent witnesses. They testified that in their opinion the deceased at the time of the execution of her last will was not of sound and disposing mind. And other witnesses, Maybell and Margaret, daughters, who lived close-by, took their turns in caring for their mother and so saw her nearly daily or very frequently, both before, at the

time of, and after making the will, and Melvin, a son, who visited his mother very frequently during the same period of time, all testified to the same effect as to her testamentary capacity. (Tr. 211, 216, 219, 229, 231, 32, 34, 60-67).

Such is only some of the direct and positive testimony produced by appellants, and as to such evidence In re Swan's Estate, supra, at page 458, right hand column, our court has this to say: "that nonexpert witnesses are competent in cases of this kind, and many of them go so far as to hold that testimony of witnesses who were intimately acquainted with the deceased in his lifetime, and familiar with his mental condition at the time when the instrument was executed, is entitled to greater weight than the testimony of medical experts who had no such knowledge of conditions". See also In re, McCoy's Estate, 63 P2d 622 and In re, Hansen's Est, 52 P2d 1103. In fact in the Swan case the lower court believed and followed the testimony of the lay witnesses as against the two medical experts and this court upheld the lower court in its decision. That Margaret, Maybell and Melvin each at all times had first hand knowledge of their mother's physical and mental condition cannot be controverted. In the case at Bar, Dr. Randall, the attending physician, was of no assistance to the jury because he seldom saw her, at most about twice a year, didn't recall whether he saw her in 1945, or at least if so, what time of the year, didn't state

what her condition was, except that he did say that last time he saw her in 1952 she was not alert. (Tr. 258-263) His testimony is practically worthless so far as aiding the jury is concerned. In McCoy's Estate, 63 P2d 620 (Utah) the doctor did not see deceased from Dec. 1 to Dec. 26, the day after the will was made and his opinion was said not to be controlling.

This is a much stronger case on the facts than is the Swan case when it comes to upholding the verdict of the jury. And our court is committed to that doctrine in law cases. Says the court in the Swan Case, Supra, page 457, left hand column:

“As before stated, all we have the power to do in a law case appealed to this court on a question of insufficiency of the evidence to sustain the verdict or a finding is to determine whether or not there is substantial evidence to sustain it.” And again: “The competency of this evidence is not questioned. The materiality of the testimony is self-evident. The findings of the court are sustained by that testimony, and the testimony is substantial. What power has this court in such a case to disturb the findings, even if every member of the court, looking at the case from the standpoint of triers of fact, believed the findings should have been against the validity of the will?” And again, on the right hand column of page 457 the court says: “But, as we have already intimated, enough has been said in this opinion to conclusively demonstrate the utter powerlessness of the court to do other than affirm the judgment. *In arriving at this conclusion we have not, as will appear, brought in re-*

view the evidence relied on by appellant. We have been unable to see what effect it could possibly have upon the decision we feel bound to render. As before stated, if there is any substantial evidence to support the findings, our duty becomes fixed and absolute, no matted how much or what kind of evidence there may be on the other side.''

In the Swan case it is pointed out that the deceased had made three prior wills, then made a new written memo to correct an error made in a previous will wherein he failed to provide a one-third share of the realty to Mrs. Swan, took the memo to the scrivener, his lawyer who had known his condition and who had done business for him for more than 25 years, and that after the will was drawn in accordance with the memo, the deceased then called to witness his will two witnesses, both of whom knew his condition and knew him intimately and had done business with him on many occasions. All three of these testified that deceased had testamentary capacity in their opinion at the time of the signing of the will.

The lower court very much upon the basis of such strong and positive testimony on the part of the subscribing witnesses and the attorney, found in favor of the validity of the will even though two medical experts testified otherwise, and this court upon the basis of such strong and positive testimony upheld the decision of the lower court. But in the case at bar, we do not have positive testimony on the part of the proponent; respon-

dent herein. Attorney Daines had never seen the deceased until the day she was brought into his office by her son Wallace, introduced to her, and he has never seen her since. He could not remember whether she was alert or otherwise, nor could he remember whether she had a written memorandum with her or not. The only thing he could remember was that she, a stranger, called into the office, said she wanted to draw her will, and he drew it for her. (Tr. 8-12) The other witness to the will, Lois Schenck, was a stenographer employed in Attorney Daine's office. She had never seen the deceased but the one time. She only observed she was an elderly lady when she was accompanied into the office by her son, Wallace, and then introduced to Attorney Daines. The only other time she was even in her presence was when the will was dictated to her and then read back (if it was) and signed. The deceased was in attorney Daines' private office "maybe 15 or 20 minutes". The stenographer spent "maybe 10 minutes to draw it up and fix it up". The two witnesses then signed the will. After the will was drawn attorney Daines left his office went down stairs and reported to Wallace that he was through and Wallace then went back to the office and assisted his mother down (Tr. 332) In the writers opinion it is doubtful if such weak testimony is sufficient to make a prima facie case in so solemn and important a matter as making a last disposition particularly involving at least \$80,000.00 worth of property. There is nothing in attorney Daine's testi-

mony to indicate that the deceased knew anything about her holdings, large as they were. To say the least the drawing of her will was done in haste. Altogether attorney Daines could not have discussed the contents of her will but a few minutes before he dictated to the stenographer, and so only in her presence altogether for about a half hour, and the stenographer was only in the deceased's presence long enough to meet her when she arrived, to take dictation, and then in her presence again while it was being read and during the time it was being signed. There is no evidence that the stenographer discussed anything at all with her. She did not even know anything about her. Certainly the jury who saw these two witnesses and heard their testimony were unwilling to conclude therefrom that the deceased had testamentary capacity at the time of the drawing of the will. According to the Swan case, *supra.* at page 456, a subscribing witness must not only witness the signatures of testator but must pass on the sanity of testator and testamentary capacity. The jury in this case undoubtedly did not believe these witnesses passed on any such facts, or if they did, the jury did not agree with their conclusion, and differed, which they had a right to do. Testamentary capacity is a question of fact, not law. In fact, it is submitted that under the rule laid down in the Swan case, had the lower court decided the facts therein otherwise, that this court would have affirmed such holding of the lower court.

In addition to the above the jury had the following testimony, documentary, direct and indirect, all of which no doubt also aided the jury in arriving at its verdict that the deceased did not have testamentary capacity when the so-called will was made and published: Pictorial exhibits of deceased which at least tend to show physical condition in corroboration of oral testimony. The numerous check exhibits to determine how much of her own business, if any, she did or was able to do when the will was made; whether or not and over what period of time her son Wallace held confidential relations and the effect thereof, keeping in mind the condition of the deceased, both mental and physical; her income tax reports, and all of the other exhibits received in evidence, all of which are hereby referred to. The fact that from the time the Decree of Distribution was entered in her deceased husband's estate in the year 1917 to the date of her first serious illness, during which time she always enjoyed good health, she never mentioned to anyone that her son, Dan, was indebted to her, nor did she during this period of time make any conveyances or gifts to any of her children to correct the plan of distribution provided for in the said Decree if she was not satisfied with it, and that she made no gifts from the time of her first illness until six days after she made her so-called will. And the fact that in her will (and according to the testimony of Attorney Daines) she desired to treat all of her children alike, yet on the sixth day thereafter she conveyed

one 60 acre tract to Wallace, for which purpose he brought her to Logan (Tr. 350); that when the deceased's safety box was opened a statement was found, apparently signed by the deceased, dated April 9, 1945, in which it was stated that because the Clarkston-Trenton Mill stock eventually turned out to be a loss, she therefore delivered to Archulius \$1,000.00 in Series E Bonds and 22 shares of First Security Stock (which has since been split 4 for 1) and that for the same reason she delivered to Hattie \$1000.00 Series E. Bonds and a like amount of First Security Bank stock. These transfers transpired within eighteen days after she made her so-called will. Thus within eighteen days after making the "will" she disposed of a large proportion of her holdings contrary to the express purpose stated in her will. And all of the testimony is to the effect that all the time the deceased was in good health she not only was determined and close, but that she held her properties intact and added much thereto.

Such a disposal record as above so soon after making the "will" taken in connection with other testimony given on the part of contestants respecting deceased physical and mental condition certainly must have caused the jury to inquire into deceased's "lost memory", and to inquire "how far the faculty of understanding has lost its original strength and vigor as regards those facts of personal history of testator, which enter into and form a part of the planning and execution of a rational.

fair, and just testament." In re Swan's Estate, supra. It will be further noted that in the Swan estate there was evidence of the deceased doing business before making his will, such as making conveyances and collecting rents, but not of regularly doing business thereafter. Here, the reverse is true, which undoubtedly bears upon her testamentary capacity.

But the above is not all: she continued to convey away her holdings. On January 29, 1947, she added Wallace's name to a \$5,000.00 savings account which had been recently transferred from the First Security Bank to the First National Bank of Logan with the understanding that whoever died first should pay the other's funeral expenses, and this at a time when the deceased was 82 years old and in very poor health. (See Con. Ex. 19, particularly the letter on the reverse side in the handwriting of Wallace, but bearing the signature of Emma G. Buttars). Over this, even Archulius became at "outs" with Wallace because she reported at the "Service Station Meeting" that Wallace had wrongfully had his name added to this savings account without the authorization of the others and that his signature should only have been added to the checking account. At this time deceased did not understand this transaction. (Tr. 155-158, 205-208). And, also a confidential relation did exist between Wallace and his mother. And on the same day (1-29-1947) she also added his name to three E Bonds totalling \$1125.00.

And also on this very same day according to the testimony Archulius said (and Archulius did not deny it) that her mother conveyed to her approximately 48 acres of land for the reason that certain mill stock she received out of her deceased father's estate eventually turned out to be a loss. It will be noted that this is also for the same reason stated in memo found in deceased's safety box that deceased made the transfers on April 9, 1945. And in this connection it will be further noted that on 1-29-1947 both Wallace and Archulius were favored with further conveyances and transfers but that Hattie was omitted. And Wallace took his mother to Logan this day. And on March 3, 1948, she sold to Archulius a tract of land for \$500.00, which was one-fourth its real value. Other transfers were also made, but it is believed that a reference to the above will suffice for the purposes of this brief.

That the above matters-conveyances and transfers disposing of so much property—taking place from six to eighteen days after making her so-called will—are material and proper considerations for the jury in determining mental or testamentary capacity at the time of the making of the will, seems too plain for argument or citation of authority, 57A J. Wills, Sec. 78| From so close a time—or even a more distant time—to the last conveyance mentioned in the preceding paragraph, particularly in view of the testimony that the deceased's mental or physical condition did not improve with age—

mental condition or capacity may be determined by the triers of fact. But even if evidence were necessary to the fact that no such capacity existed on the date the will was made, Melvin H. Buttars so testified. 57A J Wills, Sec. 99 etc. From every viewpoint it is evident something went wrong. There was never a quarrel between the mother and any of her children. During all the years of good health and mental vigor she never made a conveyance but continued to accumulate. According to Attorney Daines and the express terms of the will she desired to treat all her children alike, yet within a few days thereafter she favored Wallace and Archulius with substantial preferences, Wallace getting more than Archulius and Archiulus getting more than Hattie, and all three of these being favored over the others. Therefore, within few days after the making of her will, instead of being equal it thus becomes unequal, unjust and an unnatural disposition of her property resulting in gross and unaccountable sudden inequalities among her then living children. The jury did not find sufficient evidence to return a verdict of undue influence, but then evidence of undue influence bears on mental capacity and the jury no doubt also considered this element.

In addition to the foregoing the will should fail for a further reason: The will itself (Prop. Ex. A) states "that I loaned money to my son Daniel Buttars, that

he never paid the money back and the amount he owes is more than his share would be of my estate''. The evidence shows the testatrix was mistaken on both grounds, viz; that Dan had paid his debt in full many years before the will was made, and that even if no part had been paid the original amount thereof would not amount to what his share would be. And Attorney Daines, a subscribing witness, testified that the deceased never would have omitted Dan's children had she not believed the statement she made in the will was true. The will therefore fails to carry out her testamentary intent so far as these grandchildren are concerned, and so affords direct proof of her lack of testamentary capacity which the jury no doubt considered in connection with the other testimony produced. For this reason alone her will is void, if not in whole, then in part. 57 A. J. Wills, Sec. 375, note 17.

As stated in the Swan case *supra*, at age 454 right hand column:

“When a will is made by a person who has reached the age of upward of 80 years, and is shown that the usual infirmities of old age, such as hardening of the arteries and consequent loss of memory, etc., have supervened, and, in addition thereto, it is contended, as in this case, that the testator was afflicted with some form at least of senile dementia, the question of whether the testator possessed the necessary legal capacity to make a will at the time of its execution is

never free from difficulty, and is nearly always shrouded in more or less doubt. The case at bar merely illustrated the general rule”.

Contestants and appellants rely upon the Swan case and believes it and the references therein made is sufficient authority in every way to govern the case at bar. The writer has read many other cases, but after careful consideration it is not believed citation of them would aid this court. The question is, should the verdict of the jury be upheld. In the case at bar the jury, it is submitted, upon sufficient competent evidence, found the issues in favor of contestants and under the authority of the Swan case it is believed the lower court erred in setting aside the verdict and that this court should reinstate the verdict and deny admission of the will to probate. Certainly there is nothing in the decision as announced by the lower court which would justify setting aside the verdict. See Tr. 395. The court should always be reluctant to take the case from the jury. The right to trial by jury should be safeguarded. It is believed the lower court failed to give that due consideration to the jury's verdict to which it is entitled and so committed reversible error.

Respectfully submitted,

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Appellants.