

1953

## George Roth v. Albert Roth : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH.

In the Matter of the Estate ) JUL 31 1953  
of George F. Roth, deceased. )  
George Roth, Petitioner and )  
Appellant, ) APPEAL.  
vs. ) No. 8040.  
Albert Roth, defendant and )  
Respondent. )

BRIEF OF APPELLANTS.

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# INDEX.

	Page.
STATEMENT OF POINTS . . . . .	12
STATEMENT OF THE CASE. . . . .	1 TO 12.
ARGUMENT.	
POINT 1. The Answer and Counter-claim fail to state facts upon which relief can be granted. . . .	12 to 14
POINT 2. The evidence is insufficient to support the findings. . .	14 to 18
POINT 3. The Findings and Conclusions are insufficient to support the Decree. . . . .	18 to 19.
POINT 4. The Court should have applied Petitioners' plea of the Statute of Frauds-- Sec. 33-5-3 U.C.A. 1943. . . . .	19 to 24
POINT 5. The Court improperly changed his decision after court had adjourned. . . . .	25.
CONCLUSION . . . . .	25 to 27.

## TABLE OF CASES CITED.

Adams v. Cox (W.M.) 191 P. 2nd, 352.	21,22
Campbell v. Nelson 102 U.78; 125 P. 2nd, 413 . . . . .	22.
Hargraves v. Durton 59 U. 575; 206 P. 262 . . . . .	14,17,22,23.
Maxfield V. West 6 U. 327; 23 P. 754 . . . . .	22.
Price v. Lloyd 31 U. 86; 86 P. 767	22,23.
Shrive v. Barrow (Cal.) 199 P.2nd, 693 . . . . .	22
Ward v. Ward 96 U. 263; 85 P. 2nd, 632 . . . . .	21.

## INDEX TO TESTIMONY.

	Page.
George Roth . . . . .	4 to 6
Albert Roth . . . . .	6 to 10
Aften Roth . . . . .	10.
Janie Roth . . . . .	10 to 11.
1st decision of Trial Judge. . . . .	11.

## STATUTES CITED.

33-5-3. U.C.A. 1943 . . . . .	19.
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IN THE SUPREME COURT OF THE STATE OF UTAH.

In the Matter of the Estate )

of George F. Roth, deceased. (

George Roth, Petitioner and )  
Appellant, (

APPEAL

vs. )

No. 8040

Albert Roth, defendant and )  
Respondent. (

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

George F. Roth died intestate in Cache County, Utah on the 3rd day of November, 1935, leaving, among other property, the following described real property in Cache County, Utah, which is the subject matter of this action:

Beginning at a point at the SE corner of Lot 1, Block 18 Plat "A" Providence Townsite Survey and running thence North 18 rods; west 10 rods and 7 1/2 feet; thence southerly to a point 6 rods 10 1/2 feet west of the SE corner of said lot; thence east to the point of beginning, with all water and water rights belonging to or used on or in connection with said land. (R.4.)

Said George F. Roth left surviving him, as his

George Roth and Albert Roth. (R.4). After the death of said George F. Roth, and during the administration of his estate, an agreement was entered into between the heirs that the widow should have a life estate in and to the above described property and one third interest in the personal property and each of the two sons should <sup>share</sup> the remainder interest and estate of the said real property, after the death of the widow, in equal shares, share and share alike and each should have one third interest in the personal property, and a Decree of Distribution was entered in accordance with said agreement. (R.5). Emma Roth, the widow, remained in possession of the real property until her death which occurred on May 30, 1951.

Albert Roth became the administrator of the said estate of George F. Roth, deceased and shortly after the death of his father Albert Roth went to live in the home on the real property in question with his step mother, Emma Roth, and has continued to occupy the premises to the present time. ( R. 63 & 64).

Shortly after the death of Emma Roth, George

Roth demanded of Albert Roth a settlement of his

and profits thereof since the death of Emma Roth and when Albert Roth refused to make settlement, George Roth, on the 22nd day of April 1952 filed his petition asking the court to appoint some disinterested person as referee to sell said real property and divide the proceeds thereof, after paying the expenses of sale, between petitioner and Albert Roth, and prayed for an accounting of rents and a division of the proceeds (R. 6 & 7).

Albert Roth filed his answer and counterclaim in which he admitted the agreement and decree dividing his father's estate and alleging that George Roth Janie Roth, his wife, had sold their interest in said real property to Albert Roth, prior to the death of Emma Roth, for \$900.00, and prayed that the court specifically enforce such agreement. (R 10 & 11).

On May 29, 1952 Albert Roth obtained an order making Janie Roth a party plaintiff. (R.8) and accordingly, on June 19, 1952, Janie Roth filed her appearance adopting the petition of George Roth as her own and denying the material allegations of Albert Roth's answer and counterclaim. (R. 20).



which, in effect is a general denial of the claim of Albert Roth. (R. 21 ). On September 22, 1952 petitioners filed a supplemental reply and answer to counterclaim in which they set up the additional defense of the Statute of Frauds, reciting that Albert Roth's pretended agreement for the purchase of said real property was in violation of Section 33-5-3 of Utah Code Annotated 1943 and in violation of Section 33-5-4 Sub. (1) Utah Code Annotated 1943. (R.22.)

Upon the pleadings thus joined the case came on for trial before the Honorable J.A. Hendricks at Logan, Utah.

The material substance of the evidence is as follows:

George Roth.

George Roth, being called by defendant testified in substance: That his father died sometime in 1935. Prior thereto he had married a second wife not the mother of George. (R 44). He was a son of eldest wife. After his father's death there was some talk with Albert about the sale of the place. He went out in the kitchen and had some talk, Albert and I (R.45).



Albert said he couldn't afford to make this settlement now, unless I can sell me cow and what I have got, to pay you off (R. 46) (Notice however the witness was obviously confused about the time of this conversation which was not until 1951 See R. 50 & 61) All I know is, it was to be a fifty-fifty proposition. Didn't have to pay until the step-mother died. (R.46)

I recall going to Providence to see Albert at the old home. I didn't say anything about money. About May 27, 1949 my wife went up and got some money from Albert Roth. She brought it home. \$400.00. I did not send my wife, she went of her own volition. (R.47) I authorized her to give a receipt. I didn't tell my wife she could get some money. (R.48). The Albert Roth on the receipt is my writing. I never did have a talk with Albert about getting money about two weeks before May 27, 1949 (R. 49).

In answer to question by Mr Sjostrom,

Q. Now, at your step-mother's funeral which was in 1951 sometime, did Albert Roth, your brother, ask you or say to you that " We will have a settlement pretty soon or words to that effect, or that he would get the rest

of the money for you?

A. "He said 'I can't do it now, unless I sell my cow,' and some other stuff he had." (R.50).

Albert Roth.

Albert Roth testified in substance:

Resides at Providence. At the old home (R.50).

Had a talk with George after father's funeral. "He says, during the conversation he didn't want the place.

I says, "will if you don't want it, I will take it".

"I don't recall whether at that time we made the agreement then but later. We talked about it so I could pay him off."

The agreement was I could pay it as we went along and could afford to pay it, otherwise I could not pay it off. I paid part and I would have to pay the balance at the time of her death, or thereabouts. Am ready to pay." (R.51).

Had a conversation with brother at mother's death. Was shown receipt. Said Janie gave it to him. Had a conversation with Janie about two weeks before that.

Janie was back out to the house, out to the front gate

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~~that the receipt was given to him by the says, "that~~

George is in quite a critical condition. He has been sick. She said it cost them a lot of money for hospital and doctor bills. x x x I told her at the time that I had a building and loan taken out, and I expected enough to make up to pay off this obligation to pay for half of the property to him. (R.52) I got a cashier's check. took it across the street to bank it was closed. Took the check to the car and told her the bank was closed, that she could cash it in Salt Lake."

"She says 'here is the receipt, George only made out part of it; you fill out the balance of it.'" (R.59)

Referring to the time of the visit just before the check was given the witness said. "He had been up home, I think I could say between that time and the mother's funeral. We had never no conversation at that time. It was just a visit." (R.54. )

The witness when told by the court to tell what was said (At the conversation after the step-mother's funeral) said A. "That conversation, I asked him, I told him, I says, 'I suppose we will have to make a settle-

you. I says 'I will have to mortgage the property and get the money from the bank.' He says 'I guess that it is the only way there is about it.' I told him I would get the money from the mortgage and send it to him

Then there wa s testimony of a conversation had between Albert on one side and George and Mr. Elliot Wight on the other which was an attempt at settlement which we deem immaterial and irrelevant. (R.55 )

He (Albert) put improvements on the place while the step-mother was living. Hot water system cost about Two Hundred Dollars. (R.56.). Put in linoleum- cost one hundred dollars or one hundred fifty. Fixed the roof on the barn- That was one hundred including my labor. Bought some paint and did work on the house- cost around twenty five dollars for paint and my time. (R.57). Put in shrubs after father died about 1939 or 1940- cost about a hundred dollars. Wouldn't have stayed in Providence if sale had not been made. (R.58) Place worth about twenty six or twenty seven hundred dollars.

Cross Examination-Albert Roth.

~~Witnessed and settled on stipulation- Moved~~

in August following year. Have remained in the premises ever since. I was to buy the property fifty-fifty. (R.60). The next conversation was at the death of my step-mother.

Q. What was said and done at that conversation?

A. "I says 'I guess I owe you some money on this property.' "I says, 'I don't know how much I could get unless I sell my cow, I don't know whether I can get enough out of it to pay for it.'" I says 'about the only thing I can think of about the property is to mortgage the property.'".

Q. That was about the extent of that conversation at that time?

A. Yes (R.61)

I have had no more talk with him. Had a talk with Mr. Wight. He offered to settle for One Thousand Dollars. Wanted an answer by Thursday. (R.62)

All the improvements put on the place was while my step-mother was alive. No date for payment. No interest mentioned. Moved into the place with the consent of my step-mother. (R.63) Raised my family



Re-Direct.

Was to make payment at step-mother's death.

Mrs. Afton Roth.

There was some testimony about a purported conversation with George Roth which we deem immaterial and irrelevant to the issues. (R 65 & 66).

Janie Roth.

Wife of George Roth. One of the petitioners. Knew nothing of any contract for the sale of the real property involved in this case. Nothing was ever talked about it in my presence. Related conversation at Providence home about two weeks prior to May 27, 1949. Albert remarked how bad George looked and asked if four or five hundred dollars would help. She replied it would. Could she come up in about ten days to get it. Said George couldn't drive but she would try some way to get back. Nothing said about any sale. (R. 71) Came back later and got check. Didn't look at the receipt. Nothing said about the property or any other arrangement. (R. 72) Albert wrote part of the receipt and George wrote part.



decision as follows:

THE COURT: The Court finds that there was a contract made as to the price that was determined as of July 6th, 1936 - I think that was the date-- and that your client purchased the share for \$900.00; and on \$900.00 at six per cent interest until May 27th, 1949, and six per cent interest on \$500.00 until this time. Each party to stand their own costs. The order will be that this amount be forthwith deposited with the Clerk of the Court, along with a quit claim deed. I don't want that sum left one dollar in the quitclaim deed. It is to be for the full amount. Mr. Sjostrom Would that include the \$500.00 plus interest.

THE COURT: \$500.00, plus interest whatever is due today.

MR. WIGHT: That is \$900.00 and interest from 1935?

THE COURT: Interest on \$900.00 from 1935, till May 27th, 1949, then interest on \$500.00 - - -

MR. SJOSTROM: Just a moment, Your Honor-- Well, all right.

THE COURT: That is the judgment of the Court.

That is to be paid into Court within five days.  
(R.77).

### STATEMENT OF POINTS.

Appellant relies upon the following points for a reversal of the Decree of the trial court.

1- The Answer and Counterclaim fail to state facts upon which relief can be granted.

2- The evidence is insufficient to support the Findings of the trial court.

3- The Findings and Conclusions are insufficient to support the Decree.

4- The Court should have applied Petitioners' plea of the Statute of Frauds-Section 33-5-2 Utah Code Annotated 1943.

5- The Court improperly changed his decision, made in open Court, after the case had been submitted and court had adjourned.

### ARGUMENT.

POINT 1. The Answer and Counterclaim fail to state facts upon which relief can be granted.

The Answer of Albert Roth merely denies that any part

petitioner, or that if it did said George Roth and Jamie Roth, by oral agreement sold the same to Albert Roth (Par. 2 of Answer R. 9. Underscoring ours ) That said contract was made for the sum of \$900.00 of which \$400.00 was paid. That the answering party went into possession of said property pursuant to said agreement and has made valuable improvements thereon. (R.10)

The Counterclaim merely restates the allegations of the answer.

Certainly these allegations are not sufficient to support any contract against the Statute of Frauds and in view of the defendant's own testimony.

The allegation is emphatic that the purported contract was oral. Albert Roth then attempts to evade the Statute by alleging that he went into possession under the purported contract and made valuable improvements relying upon the purported contract. It is self evident that such allegations are ridiculous. In the first place no one but Emma Roth, who had the life estate in the property, could legally have put

mother (R.63)

As to the improvements having been put on the premises in reliance on the purported contract, please note that he claims the agreement to have been entered into about two weeks prior to May 27th, 1949, and all the improvements testified about were put on the property prior to that time. Under those facts they could not have been put on in reliance of any agreement had later. Further, Albert Roth was permitted to live there at the suffrance of Emma Roth and the meager improvement he made in sixteen years (Some \$700.00 worth) would be very small rental.

Slight expenses for improvements such as might naturally be made by a person incident to occupation of the premises is not evidence of reliance upon a contract. See Hargraves v. Burton 59 Utah 575 ; 206 Pac. 262.

POINT 2. The Evidence is insufficient to support the Findings.

Analyzing the testimony, briefly, we find that

George and Albert had a very brief talk about their

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in Nov. 1935. There is no evidence that they ever met again until some time in May, 1949 and there is definite evidence, by Albert Roth himself, that they had no other conversation about the property in question until after the death of Emma Roth which occurred May 30, 1951. (R. 49, 54 and 61 ) Jamie Roth received the \$400.00 from Albert Roth ~~Albert Roth~~ on May 27th, 1949, two years prior to the death of Emma Roth. At that time George and Albert had had no talk about the property since 1935. How could George have made an oral agreement with Albert about this land on May 27th, 1949 when he didn't meet, see or talk with him on the day ?

Also, at the time of the talk just after the father's funeral, no appraisement had been made. all was in the usual state of sadness and bewilderment attendant upon such occasions, and, undoubtedly, that was the time when the three heirs agreed on the division of the property and also that Albert should act as Administrator. That, we submit, was the only agreement ever entered into between George and Albert, and



that agreement is fully embodied in the Decree of Distribution in the George E. Roth estate. That must be so because George and Albert never talked about this property again until after the death of Emma Roth, according to the testimony of Albert Roth, just cited.

So George could not have entered into any agreement with Albert two weeks before May 27th, 1949 when he went to Providence because as Albert said, "We didn't talk about the property it was just a visit. (R. 54. And they couldn't have entered into any oral contract on May 27th, 1949 because they didn't even meet. Now can any one contend that there is any evidence to support Finding No. 5 that there was an agreement entered into between Albert Roth and George Roth on May 27th, 1949 or the Finding No. 6 that upon the death of Emma Roth all of the real property herein described reverted to Albert Roth, or the Finding No. 7 that there is no cause for the appointment of a referee when it is undisputed that Albert refuses to make settlement and distribution according to the Decree in the Estate of George



F. Roth, deceased?

The only thing that took place on May 27th, 1949, according to the evidence, was that Janie Roth went to Providence by pre-arrangement with Albert Roth to go \$400.00 or \$500.00 to help them over a very bad situation. There is not one word of evidence that any conversation about any agreement to purchase any property ever took place between Albert Roth and Janie Roth and on the contrary Janie Roth testified positively that she never heard anything about any such agreement (Top of page R.71). So she can't be bound personally or as an agent of George Roth under such testimony.

Even aside from the defense of the Statute of Fraud we contend that there is no evidence of any binding contract for George to sell Albert his  $\frac{1}{2}$  interest in the said real property sufficient to authorize specific performance. See Hargraves v. Barton 59 Utah 575, 206 Pac. 262 at page 265; "It is an elementary doctrine of the courts of equity that they will not specifically enforce any contract unless it is con-

In this case there is not only a lack of sufficient evidence of a binding contract, there is no evidence of any contract on May 27th, 1949 with regard to the property in question.

**POINT 3.** The Findings and Conclusions are insufficient to support the Decree.

There is no Finding that possession of said property was taken under the purported agreement; no Finding that the \$400.00 for which Janie Roth gave receipt was part payment for any land; no Finding that the improvements were placed upon the said property pursuant to the purported agreement. In order to support a Decree for specific performance all three of these elements are necessary under an oral contract.

Having shown that the evidence does not sustain Findings Nos. 5, 6 and 7 and when the Findings 1, 2, 3 and 4 are based upon facts that are not disputed, in other words that Petitioner is entitled to  $\frac{1}{2}$  the remainder of the real property left, after the death of ~~Decedent~~ ~~the~~ ~~decedent~~ ~~is~~ ~~nothing~~ ~~left~~ ~~but~~ ~~to~~ ~~Decree~~

that the value of the estate at the time of the death of Emma Roth should be divided fifty-fifty between George Roth and Albert Roth.

Defendant has admitted that the present value of the property is around \$2,700.00 and we believe it is more than \$4000.00 because we have made an offer of that amount which has been refused by Albert Roth. Probably both the estimate of Albert Roth and our offer are immaterial, but the fact remains that George is entitled to  $\frac{1}{2}$  of the value of said property as of the time of Emma Roth's death.

POINT 4. The Court should have applied the Petitioners' plea of the Statute of Frauds; Section 33-5-3 Utah Code Annotated 1943. That Section reads;

"33-5-3. LEASES AND CONTRACTS FOR INTEREST IN LANDS.

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is made, or by his lawful agent thereunto authorized in writing."

Defendant contends that the receipt given by

a memorandum in writing and if not sufficient in itself to make a binding contract, that the case is taken out of the Statute by payment of the \$400.00 and the placing of improvements on the property. Neither stand is tenable.

We have already shown, we believe, that George Roth and Janie Roth never made any contract at all for the sale of their  $\frac{1}{2}$  interest in the land involved. Most certainly the receipt given by Janie Roth to Albert Roth on May 27th, 1949 is no contract at all for the sale of any interest in land. The whole receipt reads:

May 27, 1949  
Received of Albert Roth Four Hundred Dollars  
\$500.00 balance due.

George Roth  
By Janie Roth."

A contract to admit of specific performance as against the Statute of Frauds, must contain all of the following elements, namely:

(a) The memorandum claimed as proof of such agreement must contain a description of the land involved

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or information from which the

exact land can be ascertained.

(b) It must be definite and certain.

(c) The payment of money is not sufficient to take the case out of the Statute.

(d) Small improvements such as an ordinarily industrious tenant would place on the premises for his own use and enjoyment is not sufficient to furnish any evidence of part performance.

(e) Any payments made or improvements placed on the land in reliance of part performance must be exclusively referable to the contract.

(f) The agreement must be equitable and fair.

(g) The one seeking specific performance must be without a plain, speedy and adequate remedy at law.

Albert Roth's pleadings and proof measure up to none of these requirements.

(a) There is no description of any land in the receipt of May 27th, 1949 and no information therein which directs any attention to any land. See Adams v. Oak (N.M.) 191 Pac 2nd, 352.

(b) There is nothing definite or certain about



was no date mentioned when the contract should be paid; no interest mentioned; no terms of payment. (R.63) Also acts done prior to a verbal contract to convey land are never part performance upon which to base specific performance of the agreement. See *Price v. Lloyd* 31 Utah 80; 86 Pac 767; *Hargraves v. Burton* 50 Utah 575; 206 Pac. 262 *Campbell v. Nelson* 102 Utah 78; 125 Pac 2nd, 413.

(c) The payment of money is not sufficient to take the case out of the Statute of Frauds. On this see *Maxfield v. West* 6 Utah 327; 23 Pac 754 *Adams v. Manning* 46 Utah 82; 148 Pac 465 *Shrive v. Morrow* (Cal) 199 Pac. 2nd 693.

The last cited case at page 699 says:

"It is well settled that the payment of money even though it is the full amount agreed to be paid, nor the rendering of services which formed the consideration of an oral agreement, is a sufficient part performance to take the case out of the statute of frauds or to authorize a decree of specific performance."

(d). Small improvements such as an ordinarily industrious person would place on the real property for his own use and enjoyment is no evidence of part performance. In this case the defendant claims approximately \$700.00 worth of labor improvements in thirteen years or about \$50.00 per year, not nearly sufficient



for fair rental. Further, it will be remembered that he claims the contract to have been made in May, 1949 and that all of the claimed improvements were placed on the land prior to that date and when he was on the premises at the surrurance of his step-mother. In the case of Hargraves v. Burton 59 Utah 575, 206 Pac. 262, this court said;

" Slight expenditures for repairs, and the like such as might naturally be made by a person as incident to an occupation of the premises are insufficient." See also Price V. Lloyd 31 Utah 86, 86 Pac. 767.

(c) Any payments made or improvements made must be exclusively referable to the contract and no other. In this case the \$400.00 paid by Albert to Janie was clearly referable as a loan to help over a bad family situation. She had heard of no agreement to sell  $\frac{1}{2}$  of the property. The improvements testified about, aside from being very meager, were placed on the premises prior to the alleged agreement and therefor could not be referable to the agreement. In Price v. Lloyd 31 Utah 86, 86 Pac. 767 rea ding from page

770 of 86 Pac. it is held:

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**It is also held that the parol agreement**

or gift should establish by clear, unequivocal and definite testimony, and the acts claimed to be done thereunder, should be equally clear and definite and referable exclusively to the contract or gift."

(f) The agreement must be equitable and fair before specific performance will be decreed.

Defendant is asking for petitioner's  $\frac{1}{2}$  interest in this property for \$900.00 when he admits that the whole property is worth not less than \$2,600.00 or \$2,700.00. We believe it is worth much more than that. All we ask is what was decreed in the Estate of George F. Roth, deceased, namely,  $\frac{1}{2}$  of the value of the property. Nothing less would be equitable. In Ward v. Ward 96 Utah 263, 35 Pac. 2nd, 635, reading from page 641 of 35 Pac. 2nd, we find;

" ". In order to entitle a party to specific performance, it must be made to appear that the contract is in all respects fair, just and reasonable and that the compensations are mutual. It must be attended with all the attributes of fairness and honesty as will appeal to the chancellor. The terms may not be pieced out of oral testimony, often uncertain and contradictory."

(g) Specific performance will not be decreed in such case if the one alleging the contract has an otherwise plain, speedy and adequate remedy at law. In this case the legal remedy would furnish both parties ade-

**POINT 5.** The Court improperly changed his decision made in open court, after the case had been submitted and court adjourned.

We raise this point, not because we believe the first decision, made in open court, was correct, but because we feel that it is unfair to counsel and their client, after a case has been submitted and argued and a definite, detailed decision made for the court, without advising or consulting counsel, and for some undisclosed reason, to materially alter such decision. As the first decision stood it would have given petitioner some \$1,294.00, which would have been more nearly fair and just and may have ended the litigation, though, as mentioned above, it was not correct because there never was a contract on the part of George Roth to sell his  $\frac{1}{2}$  interest in the property. We mention this point for another reason. That is to draw attention to the difficulty the trial judge had in finding any agreement at all.

#### **CONCLUSION**

the one immediately after the father's funeral in 1935 where the three heirs agreed that Emma Roth should have a life estate in the real property and at her death the remainder should be divided equally between George and Albert. The same agreement which was incorporated in the Decree of Distribution in the estate of George F. Roth, deceased and the one which should be enforced by a sale of the property and a division of the proceeds of the sale.

We further contend that there could have been no agreement relative to this property between George and Albert between 1935 and May 30, 1951, because the testimony of Albert Roth is that he saw George only about two weeks prior to May 27, 1949 but that they did not talk about the property at that time. They only visited. Albert and George did not meet or talk to each other on May 27, 1949. Only Janie met Albert on that day. The only time Albert ever talked to George about this property after 1935 was just after Emma Roth's funeral in May, 1951, two years

The only way an agreement could have been made on May 27, 1949 would have to have been through Janie Roth as agent of George. There is no testimony that Janie ever heard about any such agreement. She says positively that she didn't.

The petitioners appeal should be granted and the case remanded to the District Court of Cache County, State of Utah, with instructions to sell the property and divide the proceeds strictly in accordance with the Decree of Distribution of the estate of George F. Roth, deceased.

Respectfully Submitted

Elliot R. Wight

O.A. Tangren

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