

1953

# Harry Alexander, Ralph H. Alexander and Evelyn Alexander Howick v. Zion's Savings Bank & Trust Company and Hanna Wilson Alexander : Brief of Respondents

Utah Supreme Court

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John L. Black; Counsel for Plaintiffs and Respondents;

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

---

HARRY ALEXANDER, RALPH H.  
ALEXANDER and EVELYN  
ALEXANDER HOWICK,

*Plaintiffs and Respondents,*

vs.

ZION'S SAVINGS BANK & TRUST  
COMPANY, a corporation,

*Defendant,*

and

HANNAH WILSON ALEXANDER,  
*Defendant and Appellant.*

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**BRIEF OF RESPONDENTS**

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# IN THE SUPREME COURT of the STATE OF UTAH

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HARRY ALEXANDER, RALPH H.  
ALEXANDER and EVELYN  
ALEXANDER HOWICK,

*Plaintiffs and Respondents,*

vs.

ZION'S SAVINGS BANK & TRUST  
COMPANY, a corporation,

*Defendant,*

and

HANNAH WILSON ALEXANDER,

*Defendant and Appellant.*

Case No.  
8042

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## BRIEF OF RESPONDENTS

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### STATEMENT OF FACTS

#### A. PRELIMINARY STATEMENT

Throughout this brief the parties will be referred to as follows: The plaintiffs and respondents, Harry Alexander, Ralph H. Alexander and Evelyn Alexander Howick will frequently be referred to as the beneficia-

ries; the defendant and appellant, Hannah Wilson Alexander, will be referred to as the wife, or widow. The settlor, Henry A. Alexander, will occasionally be referred to as the husband.

All italics are ours.

## B. THE FACTS

The respondents have no substantial dispute with the facts as related in appellant's brief. The differences arising between the parties concern the interpretation of the facts as stated.

## STATEMENT OF POINTS

### POINT I.

THE TRIAL COURT CORRECTLY DENIED THE WIDOW HER ONE-THIRD STATUTORY INTEREST IN SAID PROPERTY SINCE THE TRUST WAS VALID AND REAL AND GAVE THE HUSBAND AN EQUITABLE LIFE ESTATE TO WHICH THE STATUTORY INTEREST COULD NOT ATTACH.

### POINT II.

THE TRIAL COURT CORRECTLY DENIED THE WIDOW HER ONE-THIRD STATUTORY INTEREST IN SAID PROPERTY SINCE THE HUSBAND HAD NO GREATER TITLE THAN AN EQUITABLE LIFE ESTATE IN THE PROPERTY.

## POINT III.

THE TRIAL COURT CORRECTLY DENIED THE WIDOW HER STATUTORY INTEREST IN THE PROPERTY SINCE THE HUSBAND GAINED NO INTEREST IN ADDITION TO AN EQUITABLE LIFE ESTATE BY REASON OF THE CONVEYANCE BY A THIRD PARTY OF THE PROPERTY TO THE TRUSTEE.

## POINT IV.

THE ACTIONS OF THE WIDOW SHOULD PRECLUDE HER FROM NOW ASSERTING HER STATUTORY INTEREST IN THE PROPERTY.

## ARGUMENT

## POINT I.

THE TRIAL COURT CORRECTLY DENIED THE WIDOW HER ONE-THIRD STATUTORY INTEREST IN SAID PROPERTY SINCE THE TRUST WAS VALID AND REAL AND GAVE THE HUSBAND AN EQUITABLE LIFE ESTATE TO WHICH THE STATUTORY INTEREST COULD NOT ATTACH.

The assertion and argument of appellant that the trust in question was illusory and that the Zion's Savings Bank & Trust Company was an agent rather than a trustee is entirely without merit under the facts of this case and existing law.

The trust was originally created by a formal written agreement between the two "trustors" and the trustee



(Ex. "1"). The "trustors" reserved the use and income of the property in the trust fund for their joint lives. The "trustors" also reserved unto themselves jointly and to the survivor the right to revoke the trust in whole or in part and the right to amend, such revocation or amendment to be in writing and signed by the "trustors" during their joint lifetime or the survivor of them (Ex. "1", par. 1). The trustee was given powers of sale of trust property and of execution of necessary legal documents (Ex. "1", par. 4). The trustee was given the duties of paying expenses of last illness and funeral charges of the survivor and distributing the balance remaining in the fund to the beneficiaries specifically named (the respondents herein) in the shares designated, and further if either of the two grandchildren at the time of distribution be a minor, the trustee had the further duty to manage the share of such minor during minority for the benefit of said minor using its own discretion in fulfilling the goals set out (Ex. "1", par. 3).

Respondents maintain that by the great weight of authority in this country, such a transaction as is involved in this case, constituted an enforceable trust and gave the beneficiaries a vested interest subject to divestment by the exercise of the power of revocation. Therefore, the trust not having been revoked, the beneficiaries are entitled to their respective interests as provided in the trust document. See *Scott on Trusts*, Vol. 1, pars. 57.1, 57.2; 73 *A.L.R.* 209; 43 *Harv. L. Rev.* 521, *Trusts and The Statute of Wills* by Austin W. Scott.

Indeed, at 73 *A.L.R.* p. 212, it is stated:

“Instead of imparting a testamentary character to the instrument, the reservation of a right of revocation has been held to rebut the idea that the instrument was intended as a testamentary disposition of property, since such a reservation would be wholly superfluous if the instrument were a will, as a will requires no express power to make it revocable.”

Citing *Hall v. Burkham*, 59 Ala. 349 and *Cribbs v. Walker*, 85 S.W. 244.

An excellent discussion of the law on this point is contained in the case of *Rose v. Rose* (Mich. 1942), 1 N.W. 2d 458, where the settlor retained a beneficial life estate plus a power of revocation plus extensive powers of control over the trustee. The case held that title to the trust property passes to the trustee by virtue of the trust instrument and that the beneficiaries take vested interests in the property, the powers reserved to the trustor amounting to conditions subsequent, upon the happening of which the vested interests are divested. Also, see *Kelly v. Parker*, 54 N.E. 615; *Goodrich et al v. City National Bank & Trust Company of Battle Creek*, 258 N.W. 253; and *Keck v. McKinstry et al.*, 221 N.W. 851.

The case of *Kelly v. Parker* placed significance in the fact that the subject matter of the trust was land and that it was conveyed by a formal instrument in which the

purposes of the trust were fully stated. Along this line of thinking the *Restatement of the Law of Trusts*, Sec. 57, par. g, p. 179, states:

“In determining whether the reserved powers are so great as to make the trustee an agent of the settlor, one of the factors to be considered is the formality of the transaction. Thus, if the transfer to the trustee was by a deed formally executed and recorded, the conclusion that the trustee was also the agent of the settlor would be less likely to be drawn than if the transfer were less formally evidenced.”

When all is said and done, the determination of the cases on this subject boils down to an interpretation by the court of the intent of the settlor. It is stated in the case of *Talbot et al v. Talbot et al.*, 78 A. 535, that in determining whether or not there was an intent to create a trust, the facts should be construed as strongly as possible in favor of a trust. In a case with more powers reserved to the settlor than in the case at bar, *Nichols v. Emery et al.*, (Calif.), 41 Pac. 1089, the court, speaking about the reservation of the right of revocation, stated:

“Indeed, this power of reservation was strongly favored in the case of voluntary settlements at common law, and such a trust, without such a reservation was open to suspicion of undue advantage taken of the settlor.”

Citing *Lewin, Trusts*, pp. 75, 76, and *Perry, Trusts*, par. 104.

It is wondered if there can be any doubt whatsoever in the present case, but that the intent of the settlor was to create a legal and binding trust. The settlor and his first wife created the trust, of their home and certain personal property, obviously for their own present benefit and for the ultimate benefit of their own heirs. How can the settlor be said to have given up nothing when his first wife, Emily, was given a life interest along with him as a joint beneficiary? How can it be said that the bank was the mere agent of Henry A. Alexander when the property was formally conveyed to the said bank and when said bank was given duties to perform in relation to the property so given? Would not the overthrowing of this trust agreement as testamentary be the grossest kind of derogation of the intent of Henry A. Alexander that the heirs of himself and his first wife, Emily J. Alexander, should ultimately have the full ownership of the property that he and Emily had accumulated during their marriage? Is it so strange that a man and wife should desire their own children and grandchildren to succeed to the property they accumulate during their marriage? And what of the distribution provided in the trust instrument leaving shares of the remainder to specifically named persons? Is the court to ignore this provision and hold that these beneficiaries so named have no interest at all under the trust agreement? Respondents respectfully submit that the overwhelming weight of authority gives these beneficiaries an immediate vested

interest in the trust property, subject only to being divested by exercise of the powers of revocation or amendment.

In the amendment which was executed by Henry A. Alexander (Ex. "2") a further reaffirmation of Henry A. Alexander's intent is shown when he provided for the right of personal use and occupancy of the home by his second wife, defendant herein, and in the last sentence stated:

"Further I hereby declare said original trust agreement as hereby amended to be in full force and effect."

It appears that the possibility of a second wife's statutory dower interest interfering with the rights of the heirs of Henry A. Alexander and Emily J. Alexander could indeed have even been a reason for establishing such a trust fund.

The cases cited by appellant in her brief are in the main not in point and the ones which may be in point represent a minority point of view.

The case of *Warsco v. Oshkosh Savings & Trust Co.*, 196 N.W. 829, which relies on *McEvoy v. Boston Five Cents Savings Bank*, 87 N.E. 465, represents a weak stand in the law of trusts. The *Warsco* case itself could not be used as authority in Wisconsin today inasmuch as a later statute has changed the law in Wisconsin so as

to conform with the majority point of view (*Wis. Stat. 1935*, par. 231.205).

The *McEvoy* case was subsequently weakened in Massachusetts by the case of *Jones v. Old Colony Trust Co.*, 146 N.E. 716, a case with very similar facts which held that there was a valid trust. For a discussion of these cases, see 43 *Harv. L. Rev.*, p. 531 and following; and *Scott on Trusts*, Vol. 1, par. 57.2.

The New York cases cited by appellant involve situations where husbands are attempting to defeat rights given wives under a New York statute and are therefore not in point. The same comment applies to the Ohio cases.

Other cases upholding respondents' view of the law on this subject are as follows:

*Van Cott v. Prentice and others*, 10 N.E. 257;

*Kelley v. Snow et al.*, 70 N.E. 89;

*Roche v. Brickley*, 150 N.E. 866;

*Lines v. Lines et al.*, 21 A. 809;

*Windolph v. Girard Trust Co., et al.*, 91 A. 634;

*Beirne v. Continental Equitable Trust Co.*, 161 A. 721;

*Louise Bergmann v. Foreman State Trust and Savings Bank et al.*, 273 Ill. App. 408.

Also, see *Bogert, Trusts and Trustees*, Vol. 1, par. 104.

## POINT II.

THE TRIAL COURT CORRECTLY DENIED THE WIDOW HER ONE-THIRD STATUTORY INTEREST IN SAID PROPERTY SINCE THE HUSBAND HAD NO GREATER TITLE THAN AN EQUITABLE LIFE ESTATE IN THE PROPERTY.

In appellant's Point II the argument is made that Henry A. Alexander owned full and complete equitable title to the property in question to which the statutory interest attached.

The respondents have no disagreement with the cases cited by appellant which hold that dower will attach to an equitable fee simple estate. *Utah Code Annotated*, 1953, Sec. 74-4-3 makes it clear that the widow's interest provided therein will attach to an equitable fee simple estate in real property possessed by the husband at any time during the marriage. However, it is also clear, under the facts in this case and under existing law, that the settlor retained only an equitable life estate and not an equitable fee simple estate, and therefore, the widow does not qualify under *Utah Code Annotated*, 1953, Sec. 74-4-3.

Any such reasoning as suggested by appellant would state that the beneficiaries specifically named in the trust agreement had nothing but a mere expectancy. It is difficult to see how the terms of a formal agreement could be so utterly disregarded as to hold that the beneficiaries had no more than they would have had, had there been no trust agreement at all.



It is stated in *Tiffany Real Property*, Third Ed. Vol. 1, at page 81:

“While the gift of a power of disposition to one to whom the property has been devised without words of limitation has been regarded as sufficient to show an intention to give him an estate in fee simple, no such effect properly follows from the gift of a power to one to whom a life estate has been explicitly given. In other words, the gift of a power of disposition does not enlarge an estate for life to an estate in fee simple, especially where the power is limited to disposition in the lifetime of the devisee, \* \* \* \* Somewhat singularly, in a few states, a contrary view has been asserted, provided the power is general in character.”

A thorough study of the law on this point is contained in 36 *A.L.R.* 1218. In that annotation, the minority cases cited were all from West Virginia, Virginia, Tennessee, and Michigan. The rule has later been changed by statute in the states of West Virginia, Virginia, and Tennessee, to conform with the majority point of view. See *Tiffany Real Property*, Third Edition, Vol. 1, Footnote 79, p. 83.

It appears to respondents that the cases cited by appellant represent an exceedingly small minority view and possibly a confusion by courts of cases of dissimilar fact situations with the rule of *Shelley's* case. It seems inconceivable that such reasoning could defeat the rights of specifically named beneficiaries as exist in the trust



agreement involved in this case. Such reasoning could be used to defeat the obvious intent of the settlor as it is in this case, where beneficiaries were specifically named to receive such of the estate as remained in the trust fund at settlor's death. The two gifts certainly are not inconsistent with each other inasmuch as the beneficiaries interests only existed in such property as had not been taken out of the trust at the time of the settlor's death.

Respondents reassert that they had a vested interest in the trust from the time of the creation of the trust, subject only to be defeated by a condition subsequent, revocation or amendment by both of the joint "trustors" or the survivor. Furthermore, appellant's argument could only conceivably apply to a settlor who had reserved to himself a life estate. That is not the fact in this case inasmuch as the estate reserved was for the joint lives of Henry A. Alexander and his first wife, Emily J. Alexander.

The appellant makes an argument indicating that the wife's statutory interest should attach due to the fact that the husband, at his death, had the power of disposition over the property. Such reasoning would lead to a rule of law that dower attaches to a mere right of revocation. This is certainly a far cry from a freehold estate which children of the marriage would inherit. See *17 Am. Jur.* p. 687. It is needless to say that the respondents have been unable to find any cases which go as far as to allow dower to attach to such an interest.

## POINT III.

THE TRIAL COURT CORRECTLY DENIED THE WIDOW HER STATUTORY INTEREST IN THE PROPERTY SINCE THE HUSBAND GAINED NO INTEREST IN ADDITION TO AN EQUITABLE LIFE ESTATE BY REASON OF THE CONVEYANCE BY A THIRD PARTY OF THE PROPERTY TO THE TRUSTEE.

Under Point III of appellant's brief, it is argued that the wife's statutory interest attached to the property in question by reason of the transaction whereby the original real property in the trust fund was conveyed to a third party by the trustee in exchange for the present property in the fund conveyed on the same date by the third party to the trustee. The form executed by Henry A. Alexander with respect to the new property (Ex. 3) stated that said property coming to the trustee was to be held subject to the original trust agreement, "as if the same for all intents and purposes had been deposited with you at the time of making said agreement." The evidence is uncontroverted that the legal title to the present trust property passed directly by warranty deed from Louis DeYoung and Louise S. DeYoung, grantors, to Zion's Savings Bank & Trust Company, grantee (Ex. 5). The obvious purpose of the instrument executed by Henry A. Alexander with respect to this property (Ex. 3) was to inform the trustee that this property was to be held subject to the original trust as if originally deposited in said trust.

It is difficult to ascertain the ground on which appellant relies in asserting that Henry A. Alexander at any

time had full legal and equitable title to this property. The only evidence submitted on the subject is the Warranty Deed from the DeYoungs to the Zion's Savings Bank & Trust Company.

The next ground urged by appellant is that the husband, at one time had full equitable title to this property by reason of the aforementioned transaction. The only evidence on the subject indicates a straight trade between the DeYoungs and the Bank (Exs. 3 and 4). There is no written contract alleged or proved by appellant. Respondents agree with appellant on what the law is in Utah as laid down by the case of *McNeil v. McNeil*, 61 Utah 141, 211 Pac. 988 (1922). Respondents agree that in such a situation the husband must be in a position to compel conveyance to himself under the contract before the wife's statutory interest will attach. This is a situation where equity has looked at that being done which should be done under the contract. However, there is no contract to enforce in the present case. Even if there were such a contract, to whom could the husband have compelled conveyance? Not to himself, but to another. It is generally stated that the estate to which dower attaches must be an inheritable estate, so that the children, if any, of the marriage would inherit it. 17 *Am. Jur.* 687. It seems inconceivable that there ever was an interest present which could have been inherited by children of the second marriage. It is respectfully submitted that Henry A. Alexander never, at any time,

had any interest in the trust property in question other than his interests by virtue of the trust agreement.

According to the reasoning offered by appellant, the wife, simply by the trade heretofore mentioned, would have a statutory dower interest not only in the property presently in the trust, but also in the property now held by the DeYoungs. This certainly would appear to be an amazing result in view of the fact that she never did have an interest in the original trust property which had been placed in the trust years before her marriage to Henry A. Alexander by Henry A. Alexander and his first wife, Emily J. Alexander.

The rule as established by the *McNeil* case is a rule determining interests under an executory contract for the sale of land. It is difficult to understand how this case and like cases could apply to the facts of the case at bar. In the case at bar, it appears that there was an instantaneous exchange of properties. An executory contract does not appear to have existed at any time.

Although it is not argued in appellant's brief, it appears to respondents that the court may consider whether or not a resulting trust could be present. It immediately occurs to respondents that such a concept would be highly incongruous in the facts of the present case, as it would present the question of having a resulting trust inconsistent with and opposed to a prior express trust.

The case of *Melenky v. Melen et al.*, 134 N.E. 822, opinion by Justice Cardozo, presents a somewhat analogous situation. In that case a widower conveyed a parcel of land to his son coupled with an oral promise to reconvey on demand. Later, the widower remarried. Subsequently, on demand, the son refused to reconvey to the father but did convey a life estate which the father accepted. It was held in that case that the father could enforce a conveyance if there was an abuse of confidence, but that this right was a chose in action and not seisin to which dower could attach.

In the case at bar it is difficult to see any possibility of seisin in the husband, but only rights to obtain property, which he did not choose to exercise.

In the case of *Phelps v. Phelps et al.*, 38 N.E. 280, the husband paid for certain lands and had them conveyed to a third party under an agreement that the husband receive all of the benefits and have full control over said lands. The court held that there was no dower in said lands, stating:

“To entitle the wife to dower, the husband must be seised either in fact or in law, of a present freehold in the premises, as well as of an estate of inheritance.”

The court held that the husband had no such estate. Also, the case of *Nash v. Kirshoff*, 208 N.W. 193, held that the purchase of property by a husband, and his

taking the conveyance in the name of another does not give the wife marital rights therein, citing *Ammundson v. Hanson*, 185 N.W. 252.

Cases holding contrary to the above-mentioned cases are cases where it has appeared that there has been fraud on the rights of the wife. There is positively no whisper of fraud in the case at bar. In the case at bar, the wife is asserting a statutory interest in property conveyed in trust by Henry A. Alexander and his first wife. The property in the trust fund, at no time reverted to Henry A. Alexander, and the second wife could not possibly have been defrauded as to property traded in exchange for property in which she, at no time had any interest. On the contrary, it appears that Henry A. Alexander was very much concerned about protecting the welfare of his second wife, should she survive him, by amending the trust so as to allow her to live in the home as long as she should desire (Ex. 2).

Because of the above reasoning and law, the respondents maintain that it is inconceivable that the second wife, Hannah Wilson Alexander, could have gained a statutory dower interest in the present trust property because of the exchange of the property originally in the trust for the property presently in the trust.

#### POINT IV.

**THE ACTIONS OF THE WIDOW SHOULD PRECLUDE HER FROM NOW ASSERTING HER STATUTORY INTEREST IN THE PROPERTY.**



The respondents further contend that Hannah Wilson Alexander, because of her conduct, should now be estopped from asserting her statutory interest in the property in question. The trust in question was established by Henry A. Alexander and his first wife, Emily J. Alexander, on January 10, 1930, said trust providing that the ultimate beneficiaries be the son and two grandchildren of said Henry A. and Emily J. Alexander. At a subsequent time, Emily J. Alexander died. Subsequent to this, on November 3, 1936, Henry A. Alexander married the present Hannah Wilson Alexander, a sister of Emily J. Alexander (R. 51). Hannah Wilson Alexander came into this marriage with her own separate property, a home located at 457 Lambourne Avenue, Salt Lake City, Utah (R. 51). On July 11, 1940, Henry A. Alexander executed an amendment to the Trust Agreement giving Hannah Wilson Alexander, should she survive him, the right to live in the home held in the trust fund, as long as she should desire, said right not to extend to a life estate but confined to personal use and occupancy.

On September 9, 1941, Hannah Wilson Alexander conveyed her home at 457 Lambourne Avenue to her son, Henry Wilson, and his wife, Gertrude Wilson, as joint tenants and to the survivor (R. 51).

Henry A. Alexander died in June of 1943 (R. 46). After his death, Hannah Wilson Alexander continued to live in the home which is the subject matter of the trust, until May of 1952 (R. 46) or approximately nine

years. In May of 1952 Hannah Wilson Alexander moved out of this home and the beneficiaries made a demand on the trustee to distribute the trust fund (R. 40). It appears from these facts that Henry A. Alexander intended to fully provide for the welfare of his second wife, Hannah, consistent with the terms of the trust and ultimate gift to his son and grandchildren by his first marriage. Consistent to this scheme of things, Hannah Wilson Alexander subsequently conveyed her separate property, the home at 457 Lambourne Avenue, to her son by a prior marriage. After the death of Henry A. Alexander, Hannah Wilson Alexander accepted the benefits provided by the amendment to the trust and lived in the home in the trust fund for approximately nine years. Now, at this time, she asserts that the trust was invalid and never existed. If this be the fact, she has deprived the son and grandchildren of Henry A. Alexander from property they would have inherited, for a period of approximately nine years. The respondents assert that this inconsistent conduct on the part of appellant has worked greatly to their disadvantage and therefore she should be estopped from now asserting her statutory dower interest. It is believed that an analogy can be made to the following statement at 17 *Am. Jur.* 735:

“Another class of estoppel arises where a woman accepts a provision under a will and, in the same will, a gift is made to others which is manifestly intended to carry a title free of encumbrance. In this case, on the principle that one



cannot claim under and at the same time against a will and by analogy to the case of a devise by the husband in lieu of dower, she is estopped to claim dower in derogation of the other gift."

In a Utah case, *In re Kjar's Estate*, 220 Pac. 501, 62 Utah 427, it was held that a husband's conveyance of all his property in anticipation of death to his wife and other members of his family, in the absence of evidence to the contrary, will be presumed to have been made with her consent and will operate as a relinquishment of her one-third statutory interest.

It is submitted that the amendment to the trust operating to give Hannah Wilson Alexander a home to live in for the rest of her life if she desired, her subsequent conveyance of her own home to her son by a prior marriage, her subsequent acceptance of the use of the home for nine years and now her assertion that there was no trust, all fit together to show a scheme of things whereby a wife has relinquished any statutory right she would have in the home.

The age and physical condition of Hannah Wilson Alexander (R. 27, R. 46) when viewed in the light of the facts stated, tend strongly to an inference that her claim was not really urged by herself but by her son who will inherit whatever property she receives.

Because of the above facts it is believed that appellant should be estopped from now asserting a statutory one-third interest in the property in question.

## CONCLUSION

On the basis of the facts and the clear law on the subject, looking at the case as a whole, it is clear that there is nothing more than an intervivos trust which vested estates in the beneficiaries prior to the marriage of the settlor and the appellant. After this marriage, there was a simple exchange of one property for another with titles passing direct. As a result of the above transactions, the statutory one-third interest never attached to the property and the beneficiaries are now entitled to their shares as provided in the trust agreement.

Therefore, the Decree of the trial court was correct and should be sustained.

Respectfully submitted,

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Received ..... copies of the within Brief of  
Respondents this ..... day of .....,  
A.D. 1953.

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*Counsel for Defendant and Appellant*