

1958

Sheldon R. Brewster et al v. William Barlow et al : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *Brewster v. Barlow*, No. 8682 (Utah Supreme Court, 1958).
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In the Supreme Court of the State of Utah

IN THE MATTER OF THE ESTATE
OF MAUDE K. BARLOW, ALSO
KNOWN AS MAUDE KARREN
RICHARDS, AND MAUDE K.
RICHARDS, DECEASED

Case No.
8682

IN THE MATTER OF THE ESTATE
OF MAUDE KARREN RICHARDS,
DECEASED.

Case No.
8683

SHELDON R. BREWSTER, AUDREY
B. BELL, HOYT W. BREWSTER,
KYLE H. BREWSTER, AND LAEL
B. GEE,

Plaintiffs and Respondents

— vs. —

WILLIAM BARLOW, ET AL.,

Defendants and Appellants.

Case No.
8825

BRIEF OF WILLIAM BARLOW RESPONDENT IN CASE NO. 8682 AND CASE NO. 8683 AND DEFENDANT AND APPELLANT IN CASE NO. 8825

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Defendants and Appellants.

BRIEF OF WILLIAM BARLOW RESPONDENT IN CASE NO. 8682 AND CASE NO. 8683 AND DEFENDANT AND APPELLANT IN CASE NO. 8825

STATEMENT OF FACTS

Substantial agreement with the Statement of Facts contained in the Brief of Hoyt W. Brewster is expressed with the exceptions and additions hereinafter noted.

The Trial Court in Case No. 8825 by its Judgment, (8825 R. 89) found and adjudged that a marriage of Maude Karren Richards and Ben S. Brewster subsequent to the date of the execution of their agreement and reciprocal wills would not revoke either of their reciprocal wills. This belies the statement of Brewster that there was uncertainty of such marriage. Such marriage was not doubted before.

Doubt is noted as to statement that by making on September 20, 1952 another Will after her marriage to William Barlow, the Decedent named violated her agreement with Ben S. Brewster. Same is a point of law to be determined by this Court. Admission is made that Decedent did execute such Will.

In Case No. 8825, Appellant made no concession that under the facts of this particular case the agreement between the parties should be enforced. In Argument in Case No. 8683 to the Trial Court same as a principle of law had to be conceded and such reason therefor will become clear hereafter. In Case No. 8825, at the Pre-Trial thereof, (8825 R. 62) issue of law was whether Respondents were entitled to specific performance of the contract and wills. We believe that this was therefore an issue at the Pre-Trial and cannot agree with counsel for Brewster that it was not such issue.

By its Judgment in Case No. 8825 the Court specifically ordered Appellant to deliver to Respondents all proceeds he may have received from certain insurance policies (8825 R. 89) and to also deliver to Respondents all moneys in joint bank accounts with himself and

said decedent. (8825 R. 90) However, after Motion For New Trial in said case was argued by Appellant (8825 R. 91), the Trial Court inserted in said Judgment, "except as to any money contributed by William Barlow". (8825 R. 90) No evidence was taken by the Court before entering such Judgment as to the present existence of the property which the Trial Court awarded to Respondents.

Upon application of Respondents in Case No. 8825, Appellant was by Order of the Trial Court (8825 R. 14 and 15) directed not to move forward to collect and receive any proceeds of any insurance policies of decedent and in effect Appellant was directed to let every asset remain in status quo. Later, by its Judgment (8825 R. 89 and 90), Appellant was directed to deliver to Respondents that which he was heretofore restrained from obtaining. Undoubtedly, proceeds of certain insurance policies of decedent have been lost by reason of Appellant being restrained from collecting same and cannot be delivered to the Respondents. However, the Trial Court by its Judgment was not concerned with the fact that the property existed. No Findings were made by the Court and no evidence considered on whether or not the property was available.

Hoyt W. Brewster filed for Probate of Will of decedent in Case No. 8683. Practically simultaneously he filed the action, Case No. 8825, for specific performance of the Will as a contract. While his Appeals of Cases Nos. 8682 and 8683 were pending in this Court, he filed

Notice of Readiness for Trial in No. 8825. (8825 R. 56) Appellant filed Objections thereto (8825 R. 57 and 58) pointing out that No. 8825 was not at issue until it was determined by this Court which Will of decedent was to be upheld. If Will propounded by Brewster was upheld by this Court then there was no necessity for proceeding with his action of Case No. 8825. The Will of decedent would have been acted upon as such Will and not as a Contract. However, Hoyt W. Brewster, insisted upon such hearing and determination of No. 8825 and the net result of the rulings are of his own making and inconsistency.

Reservation is herewith made to state further pertinent facts hereinafter should need for same become apparent.

STATEMENT OF POINTS

POINT I.

THE OLOGRAPHIC WILL OF DECEDENT, MAUDE K. BARLOW, DATED SEPTEMBER 20, 1952, SHOULD HAVE BEEN AND WAS PROPERLY ADMITTED TO PROBATE AS THE LAST WILL AND TESTAMENT OF DECEDENT AND WILL OF DECEDENT, DATED FEBRUARY 7, 1939, SHOULD NOT HAVE BEEN ADMITTED TO PROBATE AS THE LAST WILL AND TESTAMENT OF DECEDENT.

POINT II.

THE COURT ERRED IN ENTERING JUDGMENT, DATED DECEMBER 10, 1957, DECREERING THAT SUBSEQUENT MARRIAGE OF DECEDENT AND BEN S. BREWSTER DID NOT REVOKE THEIR AGREEMENT AND RECIPROCAL WILLS.

POINT III.

THE COURT ERRED IN SAID JUDGMENT BY DECREETING SPECIFIC PERFORMANCE OF RECIPROCAL WILL OF DECEDENT, MAUDE KARREN RICHARDS, AND AGREEMENT OF SAID DECEDENT AND BEN S. BREWSTER.

POINT IV.

THE COURT ERRED IN SAID JUDGMENT BY DECREETING THAT ALL REAL AND PERSONAL PROPERTY OF DECEDENT AT TIME OF HER DEATH BE AWARDED TO RESPONDENTS.

INTRODUCTORY STATEMENT

Before proceeding with Argument on the Points enumerated, Counsel for Appellant state that for clarity they deem it wise to firstly dispose of which of the Wills should have been admitted to probate before proceeding with the problem of enforcement of one of the Wills as a contract. Also, in the discussion of said Points answer will be made to the Points stated in Brief of Hoyt W. Brewster, et al., in so far as same require such answer.

ARGUMENT**POINT I.**

THE OLOGRAPHIC WILL OF DECEDENT, MAUDE K. BARLOW, DATED SEPTEMBER 20, 1952, SHOULD HAVE BEEN AND WAS PROPERLY ADMITTED TO PROBATE AS THE LAST WILL AND TESTAMENT OF DECEDENT AND WILL OF DECEDENT, DATED FEBRUARY 7, 1939, SHOULD NOT HAVE BEEN ADMITTED TO PROBATE AS THE LAST WILL AND TESTAMENT OF DECEDENT.

In Case No. 8683, Will of decedent, dated February 7, 1939, was offered for probate. In Case No. 8682, Will of decedent, dated September 20, 1952, and Olographic in form was offered for probate. Upon issues being joined the problem in both cases to the Trial Court was which Will should be admitted to probate as the Last Will and Testament of the decedent who despite names of Richards and Barlow was one and the same person. The Trial Court in No. 8683 entered Judgment (8683 R. 46) that Will of decedent, dated February 7, 1939 was expressly revoked by her Will of September 20, 1952 and denied admission to probate of the Will of February 7, 1939 and admitted to probate the Will of decedent dated September 20, 1952 as the Last Will and Testament of decedent. The Trial Court in No. 8682 entered Judgment (8682 R. 30 and 31) adjudging substantially the same.

This Court in the case of *In Re Howard's Estate*, 2 Utah 2d. 112, 269 P. 2d. 1049, has stated that the ultimate issue in a will contest is not to whom decedent's property should be distributed but is whether the instrument in question is the decedent's last will and testament. The Trial Court correctly followed this basic doctrine announced by this Court.

In the case of *In Re Haue's Estate*, 119 Misc. Reports, 259, 196 N. Y. S. 255, at Page 255 the Court states:

“It is now the settled law of this state that the prior mutual will cannot be admitted to probate since it is not the last will of the decedent and that a subsequent will may be admitted subject to the rights of the parties to compel a distribution of the estate under the terms of the contract made by the testator.”

Page 256: “The authorities hold that the determination of the question of whether the mutual wills were executed and constituted a contract for the distribution of the property must be determined in an action in equity.”

In the case of *In Re Burke's Estate*, Oregon, 134 P. 11, at Page 13, the Court states:

“It is no objection to the probate of a will that it violates such an agreement, or revokes a former will made in pursuance of it. While such former will is revoked as a will, it still stands as evidence of the Contract. In fact it has been held in some instances that the revoking will must first be probated before a suit to enforce specific performance of an agreement under mutual wills can be enforced.”

Appellant cites further authorities. In 69 *Corpus Juris*, Section 2720, Page 1300, it is stated:

“A mutual will like any other will is revoked by the execution of a subsequent will inconsistent therewith. So where a party to a contract or agreement for mutual wills makes a

later will, even without notice to, or the knowledge of the other party, or after the latter's death, the mutual will cannot be admitted to probate, since it is not the testator's will, and the later will may be admitted without regard to the fact that it does not comply with the agreement, but it is subject to the rights of interested persons to compel a distribution of the estate under the contract on which the mutual will was founded, their remedy being, however, in equity, and not in the probate court, which has no choice but to distribute the estate under the last will."

In 69 *Corpus Juris*, Section 2719, Page 1299, it is also stated:

"Joint and reciprocal wills, not founded on or embodying any contract, may like ordinary wills, be revoked at pleasure; and so, even after the death of one of the makers, and after the acceptance of the benefits under his will, the survivor may revoke his will or the joint will so far as it pertains to his property, but not, of course, so far as it pertains to, and affects the property of the decedent. Moreover, while it is said that a will executed in pursuance of an agreement for mutual wills is irrevocable, especially after the death of one of the parties to the agreement, the true rule is that a mutual will, like every other will, is, as a testamentary instrument, in its essence and by its very nature ambulatory and revocable through out the lifetime of the testator, and that it cannot be made irrevocable even by the most express covenant or terms, although as a compact it may be irre-

vocable, or enforceable notwithstanding its revocation as a will. So, no estate vests under the will of the surviving party to an agreement for mutual wills, on the ground of its irrevocability after the death of the first maker, all that vests, if anything on the death of the first of the testators is a right of action to enforce the contract against the survivor”.

In 57 *American Jurisprudence*, Section 690, Pages 465 and 466, the following is stated:

“According to sound theory, one of two testators who have made wills which are reciprocal in the circumstances that each will makes provision for the testator of the other will may revoke his will even after the death of the other testator notwithstanding the wills were drawn and executed pursuant to a contract. This does not mean that the obligation of the contract is escaped by revoking the will. * * * Therefore a later will which revokes a prior will which was jointly executed, or one of two separate wills containing reciprocal bequests, is admissible to probate, though the testator violated his contract by executing it; and a jointly executed will or one of two separate wills which are reciprocal in their provisions is not admissible to probate as the will of one of the testators who revoked it, notwithstanding the revocation was a breach of contract. Concisely stated, it is the contract and not the joint will which is irrevocable after the death of a party”.

Further, in 57 *American Jurisprudence*, Section 716, Page 485, it is stated:

“A probate court whose jurisdiction is limited to the determination of the issue whether the instrument propounded is the last will of the decedent lacks power to enforce an agreement between two testators to make wills which are mutual and reciprocal. The establishment of a trust for the purpose of enforcing a contract to make wills containing reciprocal provisions is not ordinarily within the jurisdiction of the probate or surrogate court. Generally speaking, the remedy of a person injured by the violation of a contract for the execution of wills containing reciprocal bequests and bequests to third persons effective upon the death of the surviving testator is not to be had in the contest of the probate of the will which constitutes the violation of which complaint is made, since, in the absence of a statute, the only issue on a contested probate is whether the paper propounded is ‘the last will of the decedent’. Similarly, a contract jointly to execute a single will which is reciprocal in the bequests made cannot be asserted as a ground for contesting the probate of a later revoking will”.

In *Fuller vs. Nelle*, 12 Cal. App. 2d. 576, 55 P. 2d. 1248, at Page 1250, the Court holds:

“Following the doctrine of that case, In Re Estate of Carpenter, 104 Cal. App. 33, at page 34, 285 P. 348, this Court said: ‘This court’s action was correct. A will, though it may be irrevocable as a contract, is none the less revocable as a will, and in case such will is revoked, the injured

party cannot contest the later will in the probate court on that ground or insist on the probate of the earlier will but is remitted to an independent action at law or in equity to enforce whatever rights he may have”.

Lastly, our Sister State of Idaho in the case of *Matter of Estate of Isaccson*, 285 P. 2d. 1061, at Page 1063 holds:

“Although a joint will and acceptance of benefits thereunder by the survivor may, under some circumstances, constitute an irrevocable contract, such facts do not make the joint will the irrevocable will of the survivor; and his joint will may be revoked by a later will. Furthermore, the question of whether an irrevocable contract exists is not an issue when the later will is tendered for probate. * * * The issues of whether such an irrevocable contract exists and the enforcement thereof are matters to be tried out in court of equity, and are beyond the equitable powers of the probate court in probate matters. *Dewey v. Schrieber Implement Co.* 12 Idaho 280, 85 P. 921; *Wilson v. Fackrell*, 54 Idaho 515, 34 P. 2d. 409; *Ashbarth v. Davis*, 71 Idaho 150, 227 P. 2d. 954, 32 A. L. R. 2d. 361”.

Will of decedent, same being Olographic and dated September 20, 1952, was by the Trial Court, under the authorities and cases cited, properly admitted to probate as her Last Will and Testament. Her prior Will of February 7, 1939 was properly denied probate by the

Trial Court. In filing Case No. 8825, counsel for Brewster was fully aware that the Will of decedent he propounded to the Court for admission could not be admitted as decedent's Last Will and Testament.

Under the authorities cited, Hoyt W. Brewster, had no cause of action for specific performance of the Will until the Probate Court had denied its admission to probate. If the Will propounded by him had been admitted to probate, then necessity for specific performance would have been alleviated.

It was a case of first things first and even in law logical events follow one after another. Being unable to take under the Will, Hoyt W. Brewster then was relegated to his remedy in equity for specific performance.

Under Points VI. and VII. in his Brief, Said Brewster, cites the minority cases of *In Re Doerfer's Estate*, Colorado, 67 P. 2d. 492 and *In Re Adkin's Estate*, Kansas, 167 P. 2d. 618, but they are not reconcilable with the Authorities Appellant has heretofore quoted. Counsel for Brewster admit this. Also, point is made that Brewster was denied his Executor's Fees. Truly, this is not of import. Also, *Section 75-1-6, U. C. A. 1953* is cited and quoted for the proposition that a Probate Court can proceed in probate cases to try and determine questions of fraud committed by a testator and which was the point as to whether or not this Decedent committed fraud upon the Respondents by making the later will. This Court has from time way back held, and this

Court is aware of such holdings, that a Probate Court cannot try title to property and such questions as were raised by Case No. 8825. It would certainly be an enlargement of the Statute, *supra*, if such jurisdiction were now bestowed on Probate Courts.

The Trial Court sitting as a Probate Court properly refused to consolidate for trial and hearing Case No. 8825 with Cases Nos. 8682 and 8683. The Court properly heard as a Probate Court said Cases Nos. 8682 and 8683. Case No. 8825 followed thereafter. There is no justification for clothing the Probate Court with such jurisdiction as suggested by counsel for Brewster.

POINT II.

THE COURT ERRED IN ENTERING JUDGMENT, DATED DECEMBER 10, 1957, DECREERING THAT SUBSEQUENT MARRIAGE OF DECEDENT AND BEN S. BREWSTER DID NOT REVOKE THEIR AGREEMENT AND RECIPROCAL WILLS.

The parties to such Agreement are long past this jurisdiction so benefit of their testimony was beyond the realm of production. However, Respondents never once denied that after Ben S. Brewster and Maude Karren Richards entered in to such Agreement and made such Reciprocal Wills they were married to each other. At this late date such denial or even question of such marriage is not permissible. The Trial Court by its Judgment (8825 R. 89) found that such marriage existed.

The problem is now whether or not the Will of said decedent, dated February 7, 1939, having been properly

refused admission to probate should be considered as a binding contract on the decedent. The issue is further complicated by reason of the facts that said parties to the agreement married each other after they made such agreement and such Reciprocal Wills including said Will of decedent of February 7, 1939. Will of Ben S. Brewster, (8825 Ex. 1, R. 60) gave said decedent one-third of his property and did not mention her as his wife. Thereafter, he married her and until date of his death he made no other Will and did not make any written settlement as required by *Section 74-1-25, U. C. A. 1953*.

Section 74-1-25. U. C. A. 1953, provides as follows:

“Effect of marriage, if wife survives. If after making a will the testator marries and the wife survives him, the will is conclusively presumed to be revoked, *unless provision has been made for her either by marriage contract, or by some written settlement showing on its face the testator's intention to substitute such contract or settlement for a provision in her favor in his will, or unless she is provided for in the will or in such way as to show an intention not to make such provision; and no evidence of other facts to rebut the presumption of revocation can be received*”. (Italics ours)

The wording of said Utah Statute is clear and quite emphatic. Ben S. Brewster did not comply with it after marrying this decedent. Reason for showing such facts are that Respondents in Case No. 8825 in their Amended

Complaint (8825 R. 39) charge decedent with attempting to commit a fraud upon them. If Ben S. Brewster did not see fit to comply with the law after he married this decedent, surely this decedent had a right to make a later Will.

In Brief of Hoyt W. Brewster, under Point I., cases cited to the Trial Court by this Appellant in Memorandum submitted to said Court are cited and reviewed. Reference is made to Brief of this Appellant so submitted. (8825 R. 63 to 71) Under said Point I, counsel for Hoyt W. Brewster, urge that the Washington rule be followed and that the minority opinion of the California Court in the case of *In Re Poisl's Estate*, 280 P. 2d. 789 be adopted. The California Statute similar to 74-1-25, U. C. A. 1953. *supra*, is as follows:

“If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation can be received”.

California Probate Code, Section 70.

In all probability the Utah Statute, *supra*, was and is based upon the California Statute just quoted. In the case of *In Re Poisl's Estate*, 280 P. 2d. 789. Poisl on

December 10, 1950 made a Will leaving personal property to Emma Blackburn and referring to her by such name. He died on June 16, 1952. Emma Blackburn Poisl filed Petition to revoke probate claiming she was the wife of Poisl and that they were married on July 18, 1951. The lower court held that provision was made for her under the will by reason of the legacy to her by name and that the will was not revoked under Section 70 of the Probate Code. The Appellate Court reversed the lower Court and held that the mere naming of a woman or giving of legacy to her by name in the will, without indicating that she was the testator's prospective wife, was insufficient to prevent the revocation of the will as to her by her marriage to the testator after the execution of the will. The Court stated that the indication that a woman given a legacy by name in the will is testator's prospective wife must appear on the face of the will to prevent revocation thereof as to her by their marriage after the execution of the will and extrinsic evidence is inadmissible to show the testator's intention, at least unless there is some ambiguity, which is not created by legacy to named woman alone, though she is later married to the testator. The Court further held that a will must show the testator's contemplation of his future marriage to comply with the fundamental purpose of the statute providing that a person's marriage after making a will to one surviving the maker revokes the will as to such spouse unless she is provided for in the will. The object of the statutory provision

that a person's marriage after making a will to one surviving the maker revokes the will as to such spouse, unless she is provided for in the will or so mentioned therein as to show the testator's intention not to make such provision is to secure specific moral influence on the testamentary act of having in mind a contingent event so momentuous as marriage.

Thusly, there is no doubt that the Brewster Will was revoked since it did not comply with the Statute. Irrespective of the views of counsel for Hoyt W. Brewster, the ruling of *In Re Poisl's Estate* is controlling in Case No. 8825 and by reason of the similarity of the Utah and California Statutes there is no justification for wandering to Washington.

In the case of *In Re Scolpino's Will*, 248 N. Y. S. 634, the New York Court held that the testator's marriage after making a will effected a revocation notwithstanding the giving of a legacy therein to a person who afterward became the wife of the testator unless the manner of reference to such woman fairly warranted the view that the bequest to her is in her prospective status as his wife.

In the case of *In Re Anderson's Estate*, Arizona 131 P. 975, the Court held that under the Civil Code providing that, if after making a will the testator marries and the wife survives, the will shall be revoked, a will is revoked by the marriage of the testator after executing the will where his wife survives him and no provision is made for her in a marriage contract or in the will.

In 97 *C. J. S.* Section 1366 (d), Page 299, it is stated:

“According to some authorities, a statute providing that a will shall be deemed to be revoked by the subsequent marriage of the testator is applicable to mutual wills and the same holding has been made without reference to statute; and on the marriage of one of the parties to an agreement for mutual wills, revoking his will, the will of the other party is likewise revoked, although he has already died”.

In 69 *C. J.* Sec. 2721, Page 1300, the same statement appears substantially.

Invitation is made for entire reading of the case of *In Re Poisl's Estate*, supra. It is conclusive of the point herein. It is controlling.

In 95 *C. J. S.* Sec. 291 (2), Page 76, it is stated:

“Under a statute declaring that if, after making a will, the testator marries and the wife survives, the will shall be revoked unless she is provided for or mentioned in the manner indicated by the statute, in the absence of such provision coupled with a failure to mention her as indicated, the subsequent marriage operates as a revocation of the testator's will, and in the absence of any provision in the statute indicating that the will of the testator is revoked pro tanto, revocation by reason of the subsequent marriage of the testator is absolute and where the statute declares that no other evidence than that specified

in the statute, shall be received to rebut the presumption of revocation, except as to such evidence the presumption of revocation is conclusive”.

Therefore the conclusion must be reached that the Will of Ben S. Brewster was revoked and the ruling of the Trial Court that it was not was erroneous.

Under Points III, IV, and V, in his Brief, Hoyt W. Brewster, asserts that this Appellant is barred from questioning the validity of the Brewster Will and the probate thereof; or from contesting the said Will and that Appellant is estopped from denying the validity of such Will. However, this Appellant is not doing so. It must be noted that this decedent was charged with breach of agreement and more or less fraud in Case No. 8825. If Brewster's Will was revoked as a matter of law, then that factor must be kept in mind in the determination of whether or not this decedent breached the agreement.

POINT III.

THE COURT ERRED IN SAID JUDGMENT BY DECREETING SPECIFIC PERFORMANCE OF RECIPROCAL WILL OF DECEDENT, MAUDE KARREN RICHARDS, AND AGREEMENT OF SAID DECEDENT AND BEN S. BREWSTER.

Hoyt W. Brewster acted as Executor of the Will of Ben S. Brewster along with the decedent, Maude Karen Richards. (8825 R. 60) He, with knowledge of the marriage, propounded to the Probate Court the Will of

Ben S. Brewster which he should have known was revoked. Surely, Hoyt W. Brewster, does not approach the Courts with clean hands but he demands that he receive equity. Maude Karren Richards received and obtained from the estate of Brewster ONE THIRD thereof and no more. (8825 R. 60) Respondents now demand the whole and every wordly possession of this decedent.

The Reciprocal Will of February 7, 1939 is no favorite child of the law. In 69 *Corpus Juris*, Section 2718, Page 1299, it is stated:

“It has been observed, however, that joint, mutual, reciprocal, or double wills, while receiving judicial sanction, are nevertheless ‘no favorite children of the law’ ”.

This Court speaking in the case of *Ward vs. Ward*, 96 Utah 263, 85 P. 2d. 635, at Page 273, makes the following statement:

“Under some circumstances a will may constitute a contract that may be irrevocable; under other circumstances it may constitute a contract only, and a breach thereof might be measured in damages; or in other cases the will is revocable, ambulatory and may be amended or changed to meet the mind of the maker at any time. When the will is sought to be maintained also as a contract, there must be sufficient to satisfy the statute of frauds if the will does not do so”.

At Page 274, this Court further says: “It

is generally held that such contracts will be closely scrutinized and strictly construed”.

Respondents are not in the position to demand that they be, without question, given specific performance of the Will and Agreement. They have no absolute right thereto. Courts are not too anxious to uphold such contracts. In the case of *Florey vs. Meeker, Oregon*, 240 P. 2d. 1177, in interpreting a joint will the Court held that the will did not preclude the surviving testator from substituting his second wife as legatee after the death of his first wife. The Court refused to enforce the Contract in favor of the legatees.

The Trial Court overlooked the foregoing law and failed to examine this will and Agreement with watchful eye. Examination of said Agreement (8825, Ex. 1, R. 60) reveals that Ben S. Brewster and Maude Karren Richards did not contract thereby NOT TO REVOKE THEIR WILLS. There was no such provision inserted in said Agreement. This decedent did not agree in writing NOT to revoke the will required of her under said agreement. This Court in the case of *Ward vs. Ward*, supra, has laid down the proposition that such instruments as we are now confronted with must satisfy the Statute of Frauds of this State and must fulfill the requirements of *Section 25-5-1, et seq., U. C. A. 1953*. This Court has not directly ruled on the proposition that such Agreement should have, to be enforceable, contained a provision not to revoke the will. However, other Courts

when met with such point have ruled that an agreement not to revoke a will must be in writing and is within the Statute of Frauds. In the case of *Carzaurang vs. Carrey*, California, 4 P. 2d. 259, the Court at Page 261 says:

“An agreement not to revoke a will already made is just as much an agreement to make a provision for another by will as an agreement to make a will devising or bequeathing property to the promisee, and in our opinion the former is just as much within the Statute as the latter”.

In the case of *Rubin vs. Irving Trust Co.*, 305 N. Y. 288, the Court in discussing Subdivision 7 of Section 31 of Personal Property Law of New York which is similar to our Statute states at Page 297 thereof:

“For the purpose of that statute there can be no difference between a contract ‘to bequeath property or to make a testamentary provision’ and a contract to refrain from altering an existing will, for wills are ineffective until the death of the testator. (See *Matter of Levin*, 302 N. Y. 5350.)”

In the case of *Matter of Levin*, 302 N. Y. 535, the Court at Page 541 says:

“Upon familiar practice a memo of a contract required by statute to be in writing must be by and of itself a complete expression of the intention of the parties without reference to parol evidence (*Stulsaft v. Mercer Tube & Mfg. Co.* 288 N. Y. 255)”.

In Case No. 8825, Appellant by his Answer to amended Complaint of Respondents (8825 R. 44) stated in his First Defense that the action of Respondents was barred by the Statute of Frauds. The Decedent not having agreed in writing to revoke her Will made pursuant to said Agreement had a right to do so and by making the Later Will she did not breach the Agreement.

Having married Ben S. Brewster after the execution of said Reciprocal Wills and Agreement, Respondent upon his death received upon the probate of his Will One-Third of his estate (8825, R. 60). Whether same was received as his widow or under the Will of Ben S. Brewster, this Decedent received only what she was lawfully entitled to. This Decedent may have, being fully mindful of her marriage to Brewster, chosen to taken under the Will instead of under Section 74-4-4, U. C. A. 1953. In either event she would receive only one-third of his estate and that is what she obtained. Under Point I, Hoyt W. Brewster, in his Brief recognizes the right of this decedent to take under *Section 74-4-4, U. C. A. 1953*. This decedent obtained as the wife of Ben S. Brewster only what she would have received as his wife on his intestacy.

Respondents' cause of action in Case No. 8825 is founded on the breach of agreement by this decedent and upon her commission of fraud upon them. The facts and the law show that Respondents have no cause of action upon such grounds.

Under Point II, in his Brief, Hoyt W. Brewster,

contends that the Contract was not revoked but since the Contract contained no provision that Decedent would not revoke the Will such Contract is not enforceable. .

The Respondents must have known of the marriage of this Decedent to their Father, Ben S. Brewster. They were parties to the Probate of his Will and they did not grant to this Decedent nothing more than the law, itself, would have granted to her. They have suffered no loss by the action of this Decedent which they now complain of.

There is a problem of consideration existing for the enforcement of this Will of decedent of February 7, 1939 and the Agreement. Let same be explored further. Both instruments should be integrated and interpreted jointly. Courts of Equity scrutinize such instruments very carefully and are not quick to enforce the same. In the case of *Klussman vs. Wessling*, 238 Ill. 568, 87 N. E. 544, the Court at Page 546 states :

“Courts of equity look with jealousy upon the evidence offered in support of such a contract, and will weigh such evidence in the most scrupulous manner. * * * Equity will not grant specific performance of such a contract if it is unconscionable, inequitable, or unjust, or unless it is founded upon an adequate, sufficient and fair consideration”.

This Decedent after the making of the Wills and Agreements having married Ben S. Brewster and upon his

death having obtained only one third of his property and only that which she was lawfully entitled to, it is not just, equitable, conscionable and fair to enforce the Reciprocal Will and Agreement against this Decedent and her surviving husband, the Appellant herein. Respondents certainly parted with no consideration for their continuance on as beneficiaries of this Decedent's estate after the event of the marriage of their father to this Decedent and her taking of one third of the property of their father as his lawful wife.

In the case of *Bagley vs. Bagley*, Oregon, 222 P. 722, at Page 723, the Court states:

“The plaintiff's assumption, by virtue of the marriage, of the duty she was to perform under the first contract, destroyed the consideration for the promise to make the will. There then remained no consideration for any contract by which she would get anything from her husband, beyond that inured to her from the marriage. In other words, there was a complete supersession of the first contract”.

Said case is the converse of the factual situation herein but the decedent would have no right to enforce the Contract if the fact had been reversed. This being so, the heirs of Brewster are in no better position.

The position of Respondents is based upon the assertion that the Decedent committed a fraud upon them by reason of her making a Later Will in favor of this Appellant. They certainly cannot claim financial loss.

This Decedent obtained only her lawful share of the property of their father. This is not the case of a Decedent receiving benefits under the Will and then violating the Agreement. The benefits this Decedent received were those only of the surviving wife of Ben S. Brewster. This Decedent received one third of the property but Respondents now claim all of her property. Courts consider the consideration involved. In the case of *Notten vs. Mensing*, 20 Cal. App. 2d. 694, 67 P. 2d. 734, the Court in speaking on this issue says:

Page 698: "Assuming for the purposes of the decision that there was a purported agreement between Mr. and Mrs. Notten, the question arises was the agreement in the instant case one which a court of equity will enforce? In *Edson v. Parsons, supra*, the Supreme Court of New York enumerated these rules governing the Court. It then said, 'These rules require the contract to be certain and definite in all its parts; that it be mutual, and founded upon an adequate consideration and that it be establish by the clearest and most convincing evidence. In this state these rules are statutory. In *Klussman v. Wessling, supra*, the Supreme Court of Illinois stated the same rule. It there set forth the facts in that case which showed that the surviving spouse would have taken under the law what she would have taken under the will. The Court quoted from *Lord Walpole vs. Lord Orford*, 3 Vs Jr. 402. It then added 'We should hesitate, on the

evidence in this record, to hold that the consideration received by Louise Grimsell under the will of her first husband was sufficient to require the enforcement of the alleged contract as to her will of that date'. But the proportionate value of the properties of the respective parties differed only as to comparatively small sum. Whereas in this case, they differed in the proportion of a thousand to one or thereabouts. In *Haddock v. Knapp*, 171 Cal. 59, (151 Pac. 1140) the Court affirmed the judgment of the trial court in which it refused to compel the performance of a contract to exchange where the values stood as \$2800.00 to \$1400.00 because the consideration was not adequate. For this additional reason we think the trial court did not err in denying a decree in favor of the plaintiffs''.

There was no basis in fact and equity for decreeing specific performance of the Reciprocal Will of this decedent and the Agreement for the reasons hereinbefore pointed out and argued. Under Point II. of his Brief, Hoyt W. Brewster, contends that the Contract was not revoked. However, under the Authorities herein cited such Agreement is not enforceable. Primarily, before seeking equitable relief parties must suffer a wrong. Respondents have not suffered that wrong. True, they do not obtain the property of the decedent which they have coveted for years. But, other than that Respondents have suffered no wrong or injury by reason of the acts of this Decedent in leaving her property to this Appellant who was her dutiful husband for some years before her decease.

POINT IV.

THE COURT ERRED IN SAID JUDGMENT BY DECREETING THAT ALL REAL AND PERSONAL PROPERTY OF DECEDENT AT TIME OF HER DEATH BE AWARDED TO RESPONDENTS.

This Decedent and Appellant were married on August 25, 1952 (8825, R. 70) and on January 20, 1956 this Decedent expired. During such period, they being husband and wife, their respective property interests were co-mingled undoubtedly. However, the Trial Court by its Judgment (8825 R. 88-90) grants to and awards to Respondents specific performance of the reciprocal will and agreement insofar as the same applies to any and all properties described in the instruments or any and all assets of the estate of this Decedent. (8825, Paragraph 3 of Judgment, R. 89). In Paragraph 5. (a) of said Judgment, (8825, R. 89) Appellant is to deliver all proceeds from the insurance policies with West Coast Life Insurance Company, Businessmen's Assurance Company, and Reserve Life Insurance Company benefits. By Paragraph 5 (b) of said Judgment (8825 R. 90), Appellant is required to deliver to respondents all moneys in any bank account, whether held solely or jointly, in the name of decedent and specifically any and all moneys withdrawn by him from any such accounts since the death of decedent, except as to any money contributed

by Appellant. The portion thereof beginning with “except” was inserted by the Trial Court after Motion For New Trial in said case was argued by counsel for Appellant. (8825 R. 91) By Paragraph 5 (c) of said Judgment, (8825 R. 90) Respondents are awarded any and all other personal or real property of any kind or nature whatsoever and wheresoever located that are a part of the estate of Maude Karren Richards.

The Trial Court took no evidence as to the existence of the property, whether real or personal, which it decreed to Respondents. No concern was given as to the fact that Appellant by Order of the Court (8825 R. 14 and 15) was directed not to collect and receive any insurance policies of decedent. Appellant obeyed this Order but yet he is required to deliver the proceeds of policies of insurance which he was ordered heretofore not to collect. Further, there will of necessity be some further litigation in said Case No. 8825 to determine which property belongs to whom. Appellant cannot be required to surrender his own hard earned dollars to Respondents which he with full confidence in his wife, the Decedent, placed in their joint account. The Judgment is unconscionable, unjust and inequitable upon that score.

The Agreement, (8825 Ex. 1, R. 60) refers to Decedent as owning West Coast Life Insurance Policy, Businessmen’s Assurance Policy, Savings Accounts in Walker Bank and Trust Company, First Security Bank

and Trust Company, and Zion's Savings Bank and Trust Company, A Home and Household Furniture situated therein located at 1346 Thornton Avenue, Salt Lake City, Utah, certain mining stock in Vanadium Company and certain personal belongings. Said Agreement specifically lists the property of the decedent, Maude Karen Richards. The Reciprocal Will of decedent, (8825, Ex. 1, R. 60) itemizes the same property of said decedent as set forth in said Agreement. If the Trial Court was correct in decreeing specific performance of such Reciprocal Will and Agreement, then its Judgment should have been confined to the specific items, if properly shown to have been in existence, of property, real and personal, as listed in the Reciprocal Will and Agreement.

There is no general carry all clause whereby decedent agrees to give Respondent all of her real and personal property owned by her at the time of her decease. Respondents demand and insist that they are entitled to and should receive all property of this Decedent and even that property acquired after the making of the Reciprocal Will and Agreement and that property acquired by Decedent with this Appellant. In 97 C. J. S. Section 1368, Page 323, it is stated:

“The makers of a joint and mutual will, or of mutual wills, have the right and power to provide that all of the property owned by the survivor at his death shall pass under and be bound by the terms of their will, but such effect shall

not be given to mutual wills unless the intention to do so is set forth in the will by very plain, specific and unambiguous language. In the absence of such clearly expressed intention, after acquired property owned by the survivor in his or her individual right is held not to pass, but under other authority, while the terms of the will may not be overlooked in considering the question as to such after acquired property, it is essentially the terms of the contract which control”.

Assuming that Decedent had, after making such Will and Agreement, entered the millionaire class or that she had entered the destitute class, then what property should be covered and subjected to the Judgment of the Court which decrees specific performance of the Reciprocal Will and Agreement? The only property is that specified in the Will and Agreement and nothing more. If when enforcement time arrives the property exists then the beneficiaries take. If it does not exist then they do not take. They are in no better class than the usual beneficiaries under a Last Will and Testament. However, the Trial Court by its Judgment herein has made these Respondents preferred to all others.

Under the doctrines of *Klussman vs. Wessling*, supra, and *Notten vs. Mensing*, supra, Respondents are not entitled to specific performance of this Reciprocal Will and Agreement. The Decedent was not unjustly

enriched at the loss of Respondents since she as the wife of Ben S. Brewster received only what the law would have given her. However, Respondents stand to be unjustly enriched at the expense of this Appellant. Appellant is truly an innocent by-stander to the whole transactions between this Decedent, Ben S. Brewster and the Respondents. Yet, Appellant is subjected to having his property given to perfect strangers. Respondents are strangers to him and they were certainly not the heirs at law of the Decedent. The parties to, including the Respondents, the transactions desired that same be hush hush but said Agreement and Will must be thoroughly examined and this Appellant as the innocent party must be protected in his rights.

CONCLUSION

Each and every Point argued in Brief of Hoyt W. Brewster, has been answered herein or shown to be not applicable.

In these cases as consolidated loquaciousness has been avoided by counsel for both Respondents and Appellant and this is commendable in view of the far reaching effect of the issues.

In Cases 8682 and 8683, the Trial Court properly ruled and the effect thereof was that the Last Will and Testament of this decedent, same being the Olographic

Will, dated September 20, 1952, was admitted to probate. In said Cases, under the law and the facts, the Trial Court must be upheld in its rulings and judgments.

In Case No. 8825, under the facts and the law, the Judgment of the Trial Court decreeing specific performance should be reversed and the cause remanded to the Trial Court with directions to dismiss the action brought by Respondents with prejudice and upon its merits. However, if there be justification determined by this Court for the Trial Court decreeing specific performance, then the cause should be remanded by this Court to the Trial Court with directions to limit such specific performance to the items of property, if in existence, as specified in the Agreement and to free the property of this Appellant completely from the effect of such Judgment decreeing specific performance in favor of Respondents.

Respectfully Submitted,

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