

63734-7

63734-7

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

Estate of
RODGER WELLS BENSON, JR.,
Deceased.

NO. 63734-7-1
DECLARATION OF COUNSEL
ERRATA RE "ALONE"

1. Identity. I am lead counsel for appellant Rodger W. Benson, III.
2. Possible Error. I wish to draw to the court's attention a possible error in the Reply Brief. On page 27 of petitioner's Reply Brief the assertion is made that the word "alone" does not appear on page 554 of *Ah How v. Furth*, 13 Wash. 550 (1896).

A copy of *Ah How* from West Publishing is attached as Appendix A, which in fact, on page 554, omits the word "alone". However, attached as Appendix B is a photocopy of *Ah How* from the Washington Reporter that includes the word "alone."

Similarly, the West Publishing version of *Boettcher v. Busse*, 45 Wn.2d 579 (1954) attached as Appendix C quotes *Ah How* at page 582 without the word "alone" while the printed version of *Boettcher* at page 582 includes the word "alone", Appendix D.

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COURT OF APPEALS
DIVISION 1
CLERK OF COURT

Petitioner apologizes for this confusion insofar as the Reply brief claimed that the court in *Vogt v. Hovadder*, 27 Wn. App. 168, 172 (1979) misquoted *Ah How*. Curiously, the *Vogt* court in both Pacific and Washington versions includes parenthesis within the quote around the word “alone.”

West Publishing advises that the Pacific Reporter version, which it publishes, does not include the word “alone” while the Washington Reporter does. They will investigate.

3. Conclusion.

Nevertheless appellant asserts that the argument in section 2(b) of his Reply Brief that “alone” does not imply a spatial concept but rather is synonymous with “solely,” remains accurate.

I declare the foregoing to be true and accurate to the best of my knowledge under penalty of perjury.


Michael L. Olver, WSBA No. 7031

Executed this 6th day of April, 2010,
at Seattle, Washington.

CERTIFICATE OF SERVICE

I, Michelle Wimmer, hereby declare and state as follows:

1. I am over the age of majority, competent to testify and make the following statements based upon my own personal knowledge and belief.

2. I am now and at all times herein mentioned employed by the offices of Betts, Patterson & Mines, P.S. One Convention Place, Suite 1400, 701 Pike Street, Seattle, WA 98101-3927; and did on April 6, 2010 (1) cause to be filed with this court; and (2) cause to be delivered via hand delivery to respondent's counsel, Suzanne Howle, Thompson & Howle, 701 Pike Street, Suite 1400, Seattle, Washington 98101-3927, the Declaration of Counsel Errata re "Alone".

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

DATED: April 6, 2010.



Michelle Wimmer

APPENDIX A

Westlaw

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▷

Supreme Court of Washington.
 AH HOW
 v.
 FURTH ET AL.
 Jan. 27, 1896.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Ah How against Jacob Furth and Minnie G. Yesler, as administrators of the estate of Henry L. Yesler, deceased, to recover for services performed by plaintiff as a domestic in deceased's family. From a judgment for plaintiff, defendants appeal. Affirmed.

West Headnotes

Limitation of Actions 241 ↪50(2)

241 Limitation of Actions

241II Computation of Period of Limitation

241III(A) Accrual of Right of Action or Defense

241k50 Continuing Contracts

241k50(2) k. Contract of Employment or Agency in General. Most Cited Cases
 Where one is employed for an indefinite period at a specified sum per month, and continues in the service of his employer for a number of years without interruption, receiving partial payments during the time, the contract of employment will be treated as continuous, and limitations will not begin to run until the service ends.

Witnesses 410 ↪159(9)

410 Witnesses

410II Competency

410II(C) "Dead Man'S" Statutes and Rules

410k157 Subject-Matter of Testimony

410k159 Transactions or Communications Between Witness and Person Subsequently

Deceased or Incompetent

410k159(9) k. Services and Value Thereof. Most Cited Cases

In an action against an administrator for a balance due for services rendered by plaintiff for deceased, testimony of plaintiff that he worked at deceased's house, and as to the character of the work performed by him, is not testimony in relation to a "transaction had by him with, or any statement made to him by," deceased, within 2 Hill's Code, § 1646.

Witnesses 410 ↪165

410 Witnesses

410II Competency

410II(C) "Dead Man'S" Statutes and Rules

410k157 Subject-Matter of Testimony

410k165 k. Statements and Books of Account. Most Cited Cases

In an action against an administrator for a balance due for services rendered by plaintiff for deceased, the account book of plaintiff is not inadmissible on the ground that it is in effect permitting plaintiff to testify to a transaction with deceased.

****639 *550** Carr & Preston, White & Munday, and H. E. Shields, for appellants.

James Leddy, for respondent.

***551 GORDON, J.**

The appellants are the administrators of the estate of Henry L. Yesler, deceased. Respondent brought this action to recover from said estate for services performed as a domestic in the family of the deceased, between the 9th day of February, 1882, and the 1st day of December, 1891, at the agreed salary of \$60 per month. The amount of his wages for the entire term is in the complaint alleged to be \$6,760, of which amount \$4,849 was paid by said Henry ****640** L. Yesler during his lifetime. The appellants, in addition to a general denial, set up two affirmative defenses: (1) That "all claims and demands of

the plaintiff *** were by the said Henry L. Yesler fully paid, satisfied, and discharged"; and (2) that the statute of limitations has run against the claim. Upon the trial of the cause below, a jury was expressly waived, and the court made its findings of fact and conclusions of law, upon which judgment was entered for the respondent in the sum of \$1,767.47, from which judgment this appeal is taken. It is stated in the brief of appellants that "the principal legal contention is upon the question whether or not the statute of limitations had run, and the admission of certain testimony." We think that the lower court was right in finding against the appellants upon the plea of payment and discharge of said claim during the lifetime of the decedent. From a somewhat careful and painstaking examination of the entire record, we think there was but one employment and one service; that it began February 10, 1882, and ended October 1, 1891, during all of which time the employment was continuous and uninterrupted, except for the period of about five months during the year 1885, when respondent was obliged, for business reasons, to *552 make a trip to San Francisco. But he went with the intention of returning to his employment, and he did so return, and the character of his employment and contract was not affected by such interruption. The lower court found, and, we think, upon sufficient evidence, that the employment of the respondent by the said deceased was for an indefinite period, at the agreed wages of \$60 per month. It also appears that numerous partial payments were made by the said Yesler in his lifetime, some of said payments being in money direct to respondent. In other instances cash was paid by said deceased to other parties on account of respondent, for which credit was duly given. Other items of credit relate to rent of a dwelling house which was occupied by respondent for a number of years while he was engaged in such service. Henry L. Yesler died on the 16th day of December, 1892. This action was brought in February, 1894, and the last item of credit was on the 2d of October, 1891. The lower court found that at no time prior to the 2d of October, 1891, did a period of three years elapse between the dates of said pay-

ments or credits, and that "at no time did any balance of said indebtedness remain due and unpaid for a period of three years, or become barred by the statute of limitations." We think that the contract of service was a continuous one, and that the statute of limitations did not begin to run until the completion of the service,-or, in other words, until the 1st day of October, 1891. "Where services are rendered under an agreement which does not fix any certain time for payment, nor when the services shall end, the contract of employment will be treated as continuous, and the statute of limitations will not begin to run until the services are ended." *Graves v. Pemberton* (Ind. App.) 29 N. E. 177. *553 To the same effect may be cited *Knight v. Knight* (Ind. App.) 30 N. E. 421; *Carter v. Carter*, 36 Mich. 207; *Taggart v. Tevanny* (Ind. App.) 27 N. E. 511. Section 132, 2 Hill's Code, is as follows: "When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made." The legislature of this state, in enacting this provision has adopted substantially the common-law rule, and "by such payment a new date [is fixed] from which the limitation of actions thereon [on contracts] commences to run." *Creighton v. Vincent*, 10 Or. 56.

Upon the examination of the respondent as a witness, he stated that he was a cook during the year 1882. The following question was then propounded: "Tell the judge where you were cooking." This was objected to, on the ground that the witness was incompetent to testify. The court, in ruling, said: "Any transaction with Mr. Yesler, or any conversation with him, is certainly covered by the statute, but the fact of where he was engaged during a certain period, or where he was, will not come within the rule. Objection overruled to that extent." The witness then proceeded to state that between February, 1882, and October, 1891, he did the cooking, washing, and ironing at the home of the

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deceased, but did not detail any conversation between himself and the deceased. The appellants contended below, and insist here, that this testimony was improper, under section 1646, 2 Hill's Code. We think, however, that the ruling of the lower court *554 was right. The testimony of respondent that he worked at the house of the intestate, and the character of the work performed by him, was not testimony in relation to a "transaction had by him with, or any statement made to him by," such intestate. Such testimony related solely to acts of the witness, and was, we think, entirely competent. *Foggeth v. Gaffney* (S. C.) 12 S. E. 260; *Dysart v. Furrow* (Iowa) 57 N. W. 644; *Stevens v. Witter* (Iowa) 55 N. W. 535; *Lerche v. Brasher*, 104 N. Y. 157, 10 N. E. 58. For the same reason, and upon the same authorities, respondent's Exhibit A, which purported to be an account book kept by the respondent, was properly received in evidence, and its admission was not in effect permitting the plaintiff to testify to a transaction with the deceased. The judgment will be affirmed.

HOYT, C. J., and SCOTT and ANDERS, JJ., concur.

Wash. 1896.
Ah How v. Furth
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APPENDIX B

his remedy. The judgment appealed from will be reversed, and the cause remanded to the superior court with directions to sustain appellants' demurrer to the alternative writ.

HOYT, C. J., and ANDERS, DUNBAR and SCOTT, JJ.,
CONCUR.

[No. 1960. Decided January 27, 1896.]

AH HOW, Respondent, v. JACOB FURTH *et al.*, Adminis-
trators, Appellants.

STATUTE OF LIMITATIONS — WHEN BEGINS TO RUN — CONTRACT
FOR DOMESTIC SERVICES — WITNESS — COMPETENCY — TRANS-
ACTIONS WITH DECEDENT.

Where services are rendered under a contract of employ-
ment for an indefinite period, at an agreed rate of wages per
month, the contract is continuous, and the statute of limita-
tions will not begin to run until the services are ended.

Payment made upon indebtedness after the same has be-
come due fixes a new date for the running of the statute of
limitations in respect to actions thereon.

In an action to recover for services as a domestic in the
family of a decedent, testimony is admissible on the part of
plaintiff to show that he was employed in the house of the
decedent and the character of the work performed by him
there, as such testimony does not come within the prohibition
of Code Proc. § 1646, forbidding testimony of conversations
had with a deceased person.

Under such circumstances, an account book of the services
rendered, with credits, kept by the plaintiff, is admissible in
evidence.

Appeal from Superior Court, King County.— Hon.
RICHARD OSBORN, Judge. Affirmed.

Carr & Preston, White & Munday, and H. E. Shields,
for appellants.

James Leddy, for respondent.

Jan. 1896.] Opinion of the Court — GORDON, J.

The opinion of the court was delivered by

GORDON, J.— The appellants are the administrators
of the estate of Henry L. Yesler, deceased. Respond-
ent brought this action to recover from said estate for
services performed as a domestic in the family of the
deceased, between the 9th day of February, 1882, and
the 1st day of December, 1891, at the agreed salary of
\$60 per month. The amount of his wages for the en-
tire term is in the complaint alleged to be \$6,760, of
which amount \$4,849 was paid by said Henry L. Yes-
ler during his life time. The appellants, in addition
to a general denial, set up two affirmative defenses, (1)
that "all claims and demands of the plaintiff . . .
were by the said Henry L. Yesler fully paid, satisfied
and discharged;" and (2) that the statute of limita-
tions has run against the claim. Upon the trial of
the cause below, a jury was expressly waived, and the
court made its findings of fact and conclusions of law
upon which judgment was entered for the respondent
in the sum of \$1,767.47; from which judgment this
appeal is taken.

It is stated in the brief of appellants that "the
principal legal contention is upon the question whether
or not the statute of limitations had run, and the admis-
sion of certain testimony." We think that the lower
court was right in finding against the appellants upon
the plea of payment and discharge of said claim dur-
ing the life time of the decedent. From a somewhat
careful and painstaking examination of the entire rec-
ord we think there was but one employment and one
service; that it began February 10, 1882, and ended
October 1, 1891, during all of which time the employ-
ment was continuous and uninterrupted, except for the
period of about five months, during the year 1885,
when respondent was obliged for business reasons to

make a trip to San Francisco. But he went with the intention of returning to his employment, and he did so return, and the character of his employment and contract was not affected by such interruption.

The lower court found, and we think upon sufficient evidence, that the employment of the respondent by the said deceased was for an indefinite period, at the agreed wages of \$60 per month. It also appears that numerous partial payments were made by the said Yesler in his life time, some of said payments being in money direct to respondent. In other instances, cash was paid by said deceased to other parties on account of respondent, for which credit was duly given. Other items of credit relate to rent of a dwelling house which was occupied by respondent for a number of years while he was engaged in such service.

Henry L. Yesler died on the 16th day of December, 1892. This action was brought in February, 1894, and the last item of credit was on the 2d of October, 1891. The lower court found that at no time prior to the 2d of October, 1891, did a period of three years elapse between the dates of said payments or credits, and that "at no time did any balance of said indebtedness remain due and unpaid for a period of three years, or become barred by the statute of limitations." We think that the contract of service was a continuous one, and that the statute of limitations did not begin to run until the completion of the service; or, in other words, until the 1st day of October, 1891.

"Where services are rendered under an agreement which does not fix any certain time for payment, nor when the services shall end, the contract of employment will be treated as continuous, and the statute of limitations will not begin to run until the services are ended." *Graves v. Pemberton*, 3 Ind. App. 71 (29 N. E. 177).

To the same effect may be cited: *Knight v. Knight*, 6 Ind. App. 268 (30 N. E. 421); *Carter v. Carter*, 36 Mich. 207; *Taggart v. Tevanny*, 1 Ind. App. 339 (27 N. E. 511).

Section 132, Code Proc., is as follows:

"When any payment of principal or interest has been or shall be made upon any existing contract, whether it be a bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made."

The legislature of this state, in enacting this provision, has adopted substantially the common law rule, and "by such payment a new date (is fixed) from which the limitation of actions thereon (on contracts) commences to run." *Creighton v. Vincent*, 10 Or. 56.

Upon the examination of the respondent as a witness, he stated that he was a cook during the year 1882. The following question was then propounded: "Tell the judge where you were cooking." This was objected to on the ground that the witness was incompetent to testify. The court in ruling said: "Any transaction with Mr. Yesler or any conversation with him is certainly covered by the statute, but the fact of where he was engaged during a certain period, or where he was, will not come within the rule. Objection overruled to that extent." The witness then proceeded to state that between February, 1882, and October, 1891, he did the cooking, washing and ironing at the home of the deceased, but did not detail any conversation between himself and the deceased.

The appellants contended below and insist here, that this testimony was improper under § 1646, Code Proc. We think, however, that the ruling of the lower court

was right. The testimony of respondent that he worked at the house of the intestate and the character of the work performed by him was not testimony in relation to a "transaction had by him with, or any statement made to him by," such intestate. Such testimony related solely to acts of the witness alone, and was, we think, entirely competent. *Foggette v. Gaffney*, 33 S. C. 303 (12 S. E. 260); *Dysart v. Furrow*, 90 Iowa, 59 (57 N. W. 644); *Stevens v. Witter*, 88 Iowa, 636 (55 N. W. 535); *Lerche v. Brasher*, 104 N. Y. 157 (10 N. E. 58).

For the same reason, and upon the same authorities, respondent's exhibit A, which purported to be an account book kept by the respondent, was properly received in evidence, and its admission was not in effect permitting the plaintiff to testify to a transaction with the deceased.

The judgment will be affirmed.

HOYT, C. J., and SCOTT, ANDERS and DUNBAR, JJ.,
concur.

[No. 1919. Decided January 28, 1896.]

THE ELLENSBURGH WATER SUPPLY COMPANY, Appellant,
v. THE CITY OF ELLENSBURGH, Respondent.

MUNICIPAL CORPORATIONS — CONTRACT WITH WATER COMPANY
— CONSTRUCTION.

The provisions of an ordinance granting a franchise to furnish a city and its inhabitants with water, and providing that the city should pay a stipulated rental for a certain number of hydrants, will not render the city liable for the rent when no hydrants have actually been attached to the mains, and it does not appear that the city had ever been called upon to furnish the hydrants and direct where they should be placed.

Jan. 1896.] Opinion of the Court — GORDON, J.

Appeal from Superior Court, Kittitas County.—
HON. CARROLL B. GRAVES, Judge. Affirmed.

Alfred E. Buell, Ralph Kauffman, and Edward Pruyn, for appellant.

John B. Davidson (Graves & Wolf, of counsel), for respondent.

The opinion of the court was delivered by

GORDON, J.— The respondent is a municipal corporation organized and existing under and by virtue of the laws of this state. On the 18th of November, 1889, the council of respondent city passed, and on December 21, 1889, its mayor approved an ordinance, section one of which reads as follows:

"Section 1. The privilege of erecting and maintaining waterworks within the city of Ellensburg, is hereby granted to C. A. Sander, his heirs and assigns, for the purpose of supplying the city of Ellensburg and the inhabitants thereof, with fresh water for domestic purposes, and for fire and sewerage purposes."

Section five and six of said ordinance are as follows:

"Sec. 5. It shall be the duty of the said C. A. Sander, his heirs and assigns, and they shall be required to place and attach fire hydrants to their mains whenever they may be directed so to do by the said city of Ellensburg, and the same shall be done at the expense of the said city.

"The same shall be for the use of the city for fire and sewerage purposes, but they shall be kept in repair by the said C. A. Sander, his heirs and assigns, and he shall have the control of such hydrants, for all purposes except fire and sewerage.

"Sec. 6. It is hereby further ordained that in consideration of the said C. A. Sander, his heirs and assigns erecting and causing to be erected and maintained waterworks as aforesaid to supply the said city

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C

Supreme Court of Washington, Department 2.
 Arnold BOETTCHER, Appellant,

v.

John BUSSE, Jr., and Fred Boettcher, co-executors
 of the estate of Carl Busse, deceased, Respondents.
 No. 32899.

Nov. 26, 1954.

Action to establish an alleged oral contract to make a will in favor of plaintiff. Executors filed cross-complaint to reduce bequest to plaintiff. The Superior Court, Yakima County, Robert J. Willis, J., dismissed the action and the cross-complaint. Both plaintiff and executors appealed. The Supreme Court, Weaver, J., held that testimony of one executor as to work plaintiff performed for testator and terms of employment, was not testimony as to a transaction by plaintiff with testator, and was not a waiver of bar of dead man's statute, and that plaintiff's action to establish an alleged oral contract to make a will was not an attempt to break the terms of the will that would forfeit plaintiff's bequest under will.

Judgment affirmed.

West Headnotes

[1] Witnesses 410 ↪181

410 Witnesses

410II Competency

410II(C) "Dead Man'S" Statutes and Rules

410k181 k. Waiver of Objections. Most

Cited Cases

The bar of the dead man's statute may be waived by executor. RCW 5.60.030.

[2] Witnesses 410 ↪183.5

410 Witnesses

410II Competency

410II(C) "Dead Man'S" Statutes and Rules

410k183.5 k. Weight of Testimony Admitted and Corroboration. Most Cited Cases

(Formerly 410k1831/2)

If the bar of the dead man's statute is waived or if evidence of conversations or transactions with the deceased by parties in interest is admitted without objection, the evidence is entitled to the same credence and weight as any other evidence received. RCW 5.60.030.

[3] Witnesses 410 ↪176(3)

410 Witnesses

410II Competency

410II(C) "Dead Man'S" Statutes and Rules

410k176 Effect of Admission of Testimony of Adverse Party

410k176(3) k. Scope of Testimony in General. Most Cited Cases

In action to establish an alleged oral contract to make a will in favor of plaintiff, where executor, called by plaintiff as adverse witness, testified as to nature of plaintiff's work for testator and compensation he received, executor's testimony which was given on cross-examination by his own attorney and which did not go beyond scope of direct examination, was not testimony as to transaction by plaintiff with testator, and was not, under circumstances, a waiver by executor of bar of dead man's statute. RCW 5.60.030.

[4] Witnesses 410 ↪159(8)

410 Witnesses

410II Competency

410II(C) "Dead Man'S" Statutes and Rules

410k157 Subject-Matter of Testimony

410k159 Transactions or Communications Between Witness and Person Subsequently Deceased or Incompetent

410k159(8) k. Contracts in General.

Most Cited Cases

Under dead man's statute, court did not err when it

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rejected plaintiff's offer of proof which encompassed conversations and transactions between plaintiff and testator respecting contract to devise property to plaintiff. RCW 5.60.030.

[5] Witnesses 410 ↪ 140(9)

410 Witnesses

410II Competency

410II(C) "Dead Man'S" Statutes and Rules

410k137 Parties and Other Persons Whose Testimony Is Excluded

410k140 Persons Interested in Event

410k140(9) k. Husband and Wife.

Most Cited Cases

Where plaintiff and wife were married prior to alleged transactions between plaintiff and testator, and where property acquired in action to establish oral contract to make will would become community property of plaintiff and wife, she was a party in interest within dead man's statute, and court did not err in refusing to permit her to testify as to alleged conversations between plaintiff and testator. RCW 5.60.030.

[6] Witnesses 410 ↪ 175(1)

410 Witnesses

410II Competency

410II(C) "Dead Man'S" Statutes and Rules

410k175 Effect of Admission or Availability of Evidence on Behalf of Adverse Party in General

410k175(1) k. In General. Most Cited

Cases

Introduction by executors of a creditor's claim for one-third of testator's estate, filed by plaintiff previous to commencement of action claiming one-half of estate under alleged oral contract to make a will in his favor, was not an admission of facts set forth in creditor's claim, but was to show inconsistency of plaintiff's claim, and was not a waiver of bar of dead man's statute. RCW 5.60.030.

[7] Wills 409 ↪ 58(2)

409 Wills

409III Contracts to Devise or Bequeath

409k58 Making, Requisites, and Validity in General

409k58(2) k. Evidence of Existence of Contract. Most Cited Cases

Evidence was insufficient to establish an alleged oral contract to make a will in favor of plaintiff.

[8] Wills 409 ↪ 651

409 Wills

409VI Construction

409VI(G) Conditions and Restrictions

409k640 Validity of Conditions

409k651 k. Contest of Will or Other Litigation. Most Cited Cases

Provision in will that in event any person who was named as a beneficiary under will attempted to break terms of will, such person shall forfeit all of his interest in said estate is valid.

[9] Wills 409 ↪ 665

409 Wills

409VI Construction

409VI(G) Conditions and Restrictions

409k659 Performance or Breach

409k665 k. Breach and Effect Thereof.

Most Cited Cases

Action brought by beneficiary under will to enforce terms of alleged oral contract to devise property was based on a creditor's claim filed against testator's estate, and although allowance of such claim would change amount received by residuary legatees, it would not break terms of will and did not forfeit beneficiary's bequest under forfeiture provision of will.

***580 **369** Hawkins & Sackmann, Yakima, for appellant.

Cheney & Hutcheson, Velikanje, Velikanje & Moore, Paul M. Goode, Yakima, for respondents.

WEAVER, Justice.

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This is an action to establish an alleged oral contract to make a will in favor of plaintiff. The trial court sustained a challenge to the sufficiency of plaintiff's evidence. Plaintiff appeals from a judgment of dismissal.

All of appellant's assignments of error raise the same question: Did respondents waive the exclusionary provisions of RCW 5.60.030, Rem.Rev.Stat. § 1211, the applicable portions of which read as follows:

'* * * in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person * * * a party in interest or to the record, shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him, or in his presence, by any such deceased * * * person * * * *Provided further*, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.'

Appellant Arnold Boettcher and Fred Boettcher are brothers. They and John Busse, Jr., are nephews of Carl *581 Busse, who died October 7, 1952. Fred and John, respondents, are the co-executors of Carl Busse's estate.

Decedent made numerous bequests; among them was one to appellant for one thousand dollars. The residue of the estate is devised and bequeathed to respondents, share and share alike.

Appellant alleged in his amended complaint that decedent agreed to divide his estate equally between appellant and Fred Boettcher; that decedent's promise was in consideration of work done and to be done by appellant in the operation and management of decedent's extensive properties; that appellant performed his part of the agreement; that Fred Boettcher (who had also been employed by decedent since 1923) refused to work with appellant; that decedent then advised appellant that it would not be necessary for him 'to work further but

that the agreement with respect to sharing the estate would remain as previously agreed upon.'

From the evidence, it appears that appellant's work was not continuous; that he was paid the prevailing hourly wage (if not more) for his work; and that his employment terminated in 1941, except for one day which he worked in 1942.

Appellant argues that respondents waived the exclusionary provisions of the quoted statute (a) by certain cross-examination and (b) by introduction in evidence of appellant's original complaint and the creditor's claim filed by appellant, upon which the action is based.

Reduced to its simplest terms, the situation, upon which appellant relies to establish a waiver of the statute by cross-examination, arose as follows:

Appellant's counsel called respondent Fred Boettcher (co-executor of decedent's estate and one of the residuary legatees under the will) as *an adverse witness*. Upon examination, he testified to the time and the nature of the work done by appellant for decedent. Appellant's counsel then asked respondent:

*582 'Q. Did your uncle, Carl Busse [the decedent], pay Arnold [the appellant] for the work that he did?'

The statement of facts shows no answer to this question. Counsel immediately asked:

'Q. What did he agree to pay Arnold for the work he did? A. The same as anybody else, as any other man. Q. *Well, what was it?* A. *About thirty cents an hour.*' (Italics ours.)

**370 The cross-examination of respondent Fred Boettcher by his own counsel did not go beyond the scope of the direct examination. It was confined to the time, the nature of appellant's work for decedent, and the compensation received by appellant.

Appellant was then called to testify. The trial courts

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sustained objections to questions dealing with the alleged oral contract between appellant and his deceased uncle. Objections were also sustained to similar questions propounded to appellant's wife.

[1][2] The bar of the state may be waived. Johnson v. Peterson, 1953, 43 Wash.2d 816, 264 P.2d 237, and cases cited. If the bar of the statute is waived, or, if evidence of conversations or transactions with the decedent by parties in interest is admitted without objection, the evidence is entitled to the same credence and weight as any other evidence received. In re Dand's Estate, 1952, 41 Wash.2d 158, 247 P.2d 1016.

[3] We agree with the trial court that the quoted testimony and the circumstances under which it was given did not constitute a waiver by respondents of the bar of the statute; for testimony by a party in interest, as to the performance of labor or the rendition of services for the decedent, is not prohibited under the statute as a transaction with the decedent. In Ah How v. Furth, 1896, 13 Wash. 550, 554, 43 P. 639, 640, this court said:

'The testimony of respondent that he worked at the house of the intestate, and the character of the work performed by him, was not testimony in relation to a 'transaction had by him with, or any statement made to him by' such intestate. Such testimony related solely to acts of the witness, and was, we think, entirely competent. (Citing cases.) *583 For the same reason, and upon the same authorities, respondent's Exhibit A, which purported to be an account book kept by the respondent, was properly received in evidence, and its admission was not in effect permitting the plaintiff to testify to a transaction with the deceased.'

See Sanborn v. Dentler, 1917, 97 Wash. 149, 166 P. 62, 6 A.L.R. 749; Slavin v. Ackman, 1922, 119 Wash. 48, 204 P. 816.

Evidence of the work which appellant did for decedent and the pay received for it did not tend to prove that a contract had been made, under which

decedent agreed to will property to appellant. Hence, such evidence does not constitute a waiver of the bar of the statute. See Blodgett v. Lowe, 1946, 24 Wash.2d 931, 167 P.2d 997.

[4] The trial court did not err when it rejected appellant's offer of proof which encompassed conversations and transactions between appellant and decedent.

[5] Appellant Boettcher and his wife were married prior to the alleged transactions between appellant and decedent. Any property acquired by this suit would be the community property of appellant and his wife. Under such circumstances, she is a party in interest. The trial court did not err when it refused to permit her to testify concerning the alleged conversations overheard by her. Andrews v. Andrews, 1921, 116 Wash. 513, 199 P. 981. Annotation: Dead man's statute as applicable to spouse of party disqualified from testifying. 1953, 27 A.L.R.2d 538.

[6] During cross-examination of appellant, respondent's counsel had him identify (a) his signature and verification of the original complaint in this action, to which is attached a copy of the creditor's claim filed by appellant against the estate; and (b) his signature and verification of an amended complaint. Respondent's counsel then stated:

'We offer in evidence the documents that have been referred to, that is, the original complaint, and the claim attached to it, and the amended complaint, *our purpose being to show inconsistency.*' (Italics ours.)

The pleadings were admitted in evidence without objection.

*584 The claimed inconsistency is this: The creditor's claim, upon which the original complaint is based, is for *one third* of decedent's **371 estate, or for an equal share thereof with respondents Fred C. Boettcher and John Busse, Jr. The amended complaint prays for an equal portion of the residue of

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the estate shared with respondent Fred C. Boettcher.

Appellant was not examined by respondent's counsel concerning any of the allegations appearing in the pleadings.

We cannot agree with appellant that the introduction of these pleadings constituted a waiver of the bar of the statute. They were not introduced by respondent as admissions of the facts therein set forth, but, as stated by counsel, were introduced for the purpose of showing that appellant had been inconsistent in the claim made by him.

Had respondent's counsel interrogated appellant about any conversations or transactions with decedent, alleged in the pleadings, then a different question would be presented. The situation would be analogous to that of *Levy v. Simon*, 1922, 119 Wash. 179, 205 P. 426, relied upon by appellant. Therein the administrator offered in evidence the answers given by the opposing party to certain questions asked him at a former trial. It was offered to show contradictory statements, and admissions and declarations against interest. This court said:

'Having done so, appellants were in no position to object to the introduction of the remainder of his testimony for the purpose of harmonizing and reconciling all of his testimony, if possible.' 119 Wash. at page 186, 205 P. at page 429.

The purpose of introducing the pleadings in the instant case, as the trial court said,

'* * * was not to show what the transaction had been with the deceased, but rather was for the purpose of showing that the plaintiff [appellant] on two separate occasions following the death of the deceased had taken contradictory positions as to what that transaction had been; in other words, it certainly was not offered by the defendants [respondents] for the purpose of establishing the transaction, but merely to show that he, the plaintiff [appellant], had taken inconsistent positions since

the death of deceased.'

*585 The trial court gave appellant an opportunity to explain and reconcile the alleged inconsistencies of the pleadings. However, it was not error to prohibit him from testifying concerning conversations or transactions between him and decedent.

[7] Appellant's evidence to sustain the alleged oral promise of decedent to will him a portion of his estate is not 'conclusive, definite, certain, and beyond all legitimate controversy.' *Henry v. Henry*, 1926, 138 Wash. 284, 286, 244 P. 686, 687. The judgment of dismissal is affirmed.

[8] Respondents cross-appeal from that portion of the judgment which dismisses, with prejudice, their cross-complaint praying that the bequest to appellant be reduced from \$1,000 to \$1.

Decedent's will provides

'* * * in the event any person who is named as beneficiary under this Will shall attempt to break the terms and conditions of this Will, then and in that event such person so attempting shall forfeit all of his or her interest in said estate and shall be granted the sum of One Dollar (\$1.00) and no more.'

This court has recognized the validity of such provisions. *In re Chappell's Estate*, 1923, 127 Wash. 638, 221 P. 336; see 'Provisions in a will forfeiting the share of a contesting beneficiary.' 3 Wash. Law Review 45 (1928).

[9] However, the instant case is not a will contest. It is an action to enforce the terms of an alleged oral contract to devise property. It is based upon a creditor's claim filed against decedent's estate. Although the allowance or enforcement of such a claim would-as would the allowance or enforcement of any other creditor's claim-change the amount received by the residuary legatees, it would not 'break the terms and conditions of this will,' nor would it establish appellant as a residuary legatee. The filing or enforcement of a creditor's claim, by a legatee or **372 devisee, does not in-

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voke the provision of a will forfeiting the share of a
contesting beneficiary. Wright v. Cummings, 1921,
108 Kan. 667, 196 P. 246, 14 A.L.R. 604.

*586 The trial court did not err when it dismissed
respondent's cross-complaint with prejudice.

The judgment is affirmed.

GRADY, C. J., and SCHWELLENBACH, HILL,
and DONWORTH, JJ., concur.

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APPENDIX D

and of sufficient length to extend through the room. As she stepped from the mat to go about ten feet to a customer's counter, she slipped and fell on the waxed, asphalt-tile floor adjacent to the mat. She was then seventy-five years of age.

[1] The parties agree that defendant was not an insurer of plaintiff's safety. Also, that its duty to her was to maintain its floor in reasonably safe condition for her use, considering the nature of its business and the circumstances surrounding the particular event. *Wardhaugh v. Weisfield's, Inc.*, 43 Wn. (2d) 865, 869, 264 P. (2d) 870 (1953), and case cited.

We have searched the record for evidence or reasonable inferences from the evidence which, considered most favorably to plaintiff, could sustain a verdict that defendant was negligent. We can find none.

[2, 3] Neither the fact that plaintiff slipped and fell nor the fact that the floor was waxed, of itself, establishes or permits an inference of negligence. *Kalinowski v. Y. W. C. A.*, 17 Wn. (2d) 380, 391, 135 P. (2d) 852 (1943), and cases cited. This also is true of the presence of a rubber mat over a portion of the waxed floor. Nothing more is shown in this case. The entire floor of the lobby was level. It had not received a new application of wax for eight days before plaintiff's accident. There is no evidence that an improper kind of wax was used, or that the wax used was applied improperly, or that any slippery material had accumulated on the floor where plaintiff fell. No fact is shown which would support a finding that the floor was so smooth that it actually was dangerous. See *Knopp v. Kemp & Hebert*, 193 Wash. 160, 163, 74 P. (2d) 924 (1938). There is no evidence of any unusual condition tending to show that defendant reasonably should have foreseen that one using the floor in the exercise of ordinary care would be exposed to danger. We are unwilling to agree with plaintiff's contention that substandard conduct can be established by combining and totaling acts which meet reasonable standards.

The following language from *Engdal v. Owl Drug Co.*, 183 Wash. 100, 102, 48 P. (2d) 232 (1935), is pertinent here:

"It is not the law that every accident establishes a cause of action warranting recovery by the injured party. Accidents often occur for which no one is to blame." Any verdict to the contrary, upon the evidence in this case, necessarily would rest upon the insufficient foundation of speculation and conjecture.

The judgment is affirmed.

GRADY, C. J., MALLERY, HAMLEY, and FINLEY, JJ., concur.

[No. 32899. Department Two. November 26, 1954.]

ARNOLD BOETTCHER, *Appellant*, v. JOHN BUSSE, JR., *et al.*,
*Respondents and Cross-appellants.*¹

- [1] WITNESSES—COMPETENCY—TRANSACTIONS WITH PERSONS SINCE DECEASED. The bar of RCW 5.60.030, excluding parties in interest from testifying as to transactions with a decedent, may be waived; and if the bar of the statute is waived or if evidence of conversations or transactions with the decedent by parties in interest is admitted without objection, the evidence is entitled to the same credence and weight as any other evidence received.
- [2] SAME. Testimony by a party in interest as to the performance of labor or the rendition of services for the decedent, is not prohibited under RCW 5.60.030 as a transaction with the decedent.
- [3] SAME. In an action to establish an oral contract to devise, evidence of one who was coexecutor of the decedent's estate and one of the residuary legatees under the will, as to the work which the plaintiff did for the decedent and the pay received for it, did not tend to prove that a contract had been made under which the decedent agreed to will property to the plaintiff; hence, such evidence does not constitute a waiver of the bar of the statute (RCW 5.60.030), and the trial court properly rejected the plaintiff's offer of proof which encompassed conversations and transactions between the plaintiff and the decedent.
- [4] SAME. In such an action, the trial court properly refused to permit the plaintiff's wife to testify to alleged conversations between the plaintiff and the decedent overheard by her; since any property acquired by the action would be the community property of the plaintiff and his wife, and under such circumstances she is a party in interest.
- [5] SAME. In such an action, the introduction by the defendants of the original complaint and the creditor's claim attached to it, and the

¹Reported in 277 P. (2d) 368.

[1] See 159 A. L. R. 421; 58 Am. Jur. 209.

amended complaint, did not constitute a waiver of the bar of the statute (RCW 5.60.030), where they were not introduced as admissions of the facts therein set forth, but for the purpose of showing that the plaintiff had been inconsistent in the claim made by him.

- [6] **WILLS—CONTRACTS TO DEVISE—EVIDENCE—SUFFICIENCY.** In an action to establish an oral contract to devise, held that the plaintiff's evidence was not conclusive, definite, certain, and beyond all legitimate controversy, and that the trial court properly dismissed the action.
- [7] **SAME — CONSTRUCTION — RESTRICTIONS — FORFEITURE CLAUSE — ENFORCEMENT OF CREDITOR'S CLAIM.** The filing or enforcement of a creditor's claim by a legatee or devisee does not invoke the provision of a will forfeiting the share of a contesting beneficiary.

Cross-appeals from a judgment of the superior court for Yakima county, No. 38785, Willis, J., entered December 12, 1953, upon sustaining a challenge to the sufficiency of the evidence at the close of the plaintiff's case, dismissing an action to establish an oral contract to devise. Affirmed.

Hawkins & Sackmann, for appellant.

Cheney & Hutcheson, Velikanje, Velikanje & Moore, and *Paul M. Goode*, for respondents and cross-appellants.

WEAVER, J.—This is an action to establish an alleged oral contract to make a will in favor of plaintiff. The trial court sustained a challenge to the sufficiency of plaintiff's evidence. Plaintiff appeals from a judgment of dismissal.

All of appellant's assignments of error raise the same question: Did respondents waive the exclusionary provisions of RCW 5.60.030, Rem. Rev. Stat., § 1211, the applicable portions of which read as follows:

" . . . in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person . . . a party in interest or to the record, shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him, or in his presence, by any such deceased . . . person, . . . *Provided further*, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action."

Appellant Arnold Boettcher and Fred Boettcher are brothers. They and John Busse, Jr., are nephews of Carl

Busse, who died October 7, 1952. Fred and John, respondents, are the coexecutors of Carl Busse's estate.

Decedent made numerous bequests; among them was one to appellant for one thousand dollars. The residue of the estate is devised and bequeathed to respondents, share and share alike.

Appellant alleged in his amended complaint that decedent agreed to divide his estate equally between appellant and Fred Boettcher; that decedent's promise was in consideration of work done and to be done by appellant in the operation and management of decedent's extensive properties; that appellant performed his part of the agreement; that Fred Boettcher (who had also been employed by decedent since 1923) refused to work with appellant; that decedent then advised appellant that it would not be necessary for him "to work further but that the agreement with respect to sharing the estate would remain as previously agreed upon."

From the evidence, it appears that appellant's work was not continuous; that he was paid the prevailing hourly wage (if not more) for his work; and that his employment terminated in 1941, except for one day which he worked in 1942.

Appellant argues that respondents waived the exclusionary provisions of the quoted statute (a) by certain cross-examination and (b) by introduction in evidence of appellant's original complaint and the creditor's claim filed by appellant, upon which the action is based.

Reduced to its simplest terms, the situation, upon which appellant relies to establish a waiver of the statute by cross-examination, arose as follows:

Appellant's counsel called respondent Fred Boettcher (coexecutor of decedent's estate and one of the residuary legatees under the will) as *an adverse witness*. Upon examination, he testified to the time and the nature of the work done by appellant for decedent. Appellant's counsel then asked respondent:

"Q Did your uncle, Carl Busse [the decedent], pay Arnold [the appellant] for the work that he did?"

The statement of facts shows no answer to this question. Counsel immediately asked:

"Q What did he agree to pay Arnold for the work he did?
A The same as anybody else, as any other man. Q Well, what was it? A About thirty cents an hour." (Italics ours.)

The cross-examination of respondent Fred Boettcher by his own counsel did not go beyond the scope of the direct examination. It was confined to the time, the nature of appellant's work for decedent, and the compensation received by appellant.

Appellant was then called to testify. The trial court sustained objections to questions dealing with the alleged oral contract between appellant and his deceased uncle. Objections were also sustained to similar questions propounded to appellant's wife.

[1] The bar of the statute may be waived. *Johnson v. Peterson*, 43 Wn. (2d) 816, 264 P. (2d) 237 (1953), and cases cited. If the bar of the statute is waived, or, if evidence of conversations or transactions with the decedent by parties in interest is admitted without objection, the evidence is entitled to the same credence and weight as any other evidence received. *In re Dand's Estate*, 41 Wn. (2d) 158, 247 P. (2d) 1016 (1952).

[2] We agree with the trial court that the quoted testimony and the circumstances under which it was given did not constitute a waiver by respondents of the bar of the statute; for testimony by a party in interest, as to the performance of labor or the rendition of services for the decedent, is not prohibited under the statute as a transaction with the decedent. In *Ah How v. Furth*, 13 Wash. 550, 554, 43 Pac. 639 (1896), this court said:

"The testimony of respondent that he worked at the house of the intestate and the character of the work performed by him was not testimony in relation to a 'transaction had by him with, or any statement made to him by,' such intestate. Such testimony related solely to acts of the witness alone, and was, we think, entirely competent. (Citing cases.)

"For the same reason, and upon the same authorities, respondent's exhibit A, which purported to be an account book kept by the respondent, was properly received in evidence, and its admission was not in effect permitting the plaintiff to testify to a transaction with the deceased."

See *Sanborn v. Dentler*, 97 Wash. 149, 166 Pac. 62, 6 A. L. R. 749 (1917); *Slavin v. Ackman*, 119 Wash. 48, 204 Pac. 816 (1922).

[3] Evidence of the work which appellant did for decedent and the pay received for it did not tend to prove that a contract had been made, under which decedent agreed to will property to appellant. Hence, such evidence does not constitute a waiver of the bar of the statute. See *Blodgett v. Lowe*, 24 Wn. (2d) 931, 167 P. (2d) 997 (1946).

The trial court did not err when it rejected appellant's offer of proof which encompassed conversations and transactions between appellant and decedent.

[4] Appellant Boettcher and his wife were married prior to the alleged transactions between appellant and decedent. Any property acquired by this suit would be the community property of appellant and his wife. Under such circumstances, she is a party in interest. The trial court did not err when it refused to permit her to testify concerning the alleged conversations overheard by her. *Andrews v. Andrews*, 116 Wash. 513, 199 Pac. 981 (1921). Annotation: Dead man's statute as applicable to spouse of party disqualified from testifying. 27 A. L. R. (2d) 538 (1953).

During cross-examination of appellant, respondents' counsel had him identify (a) his signature and verification of the original complaint in this action, to which is attached a copy of the creditor's claim filed by appellant against the estate; and (b) his signature and verification of an amended complaint. Respondents' counsel then stated:

"We offer in evidence the documents that have been referred to, that is, the original complaint, and the claim attached to it, and the amended complaint, *our purpose being to show inconsistency.*" (Italics ours.)

The pleadings were admitted in evidence without objection.

The claimed inconsistency is this: The creditor's claim, upon which the original complaint is based, is for *one third* of decedent's estate, or for an equal share thereof with respondents Fred C. Boettcher and John Busse, Jr. The amended complaint prays for an equal portion of the residue of the estate shared with respondent Fred C. Boettcher.

Appellant *was not examined* by respondents' counsel concerning any of the allegations appearing in the pleadings.

[5] We cannot agree with appellant that the introduction of these pleadings constituted a waiver of the bar of the statute. They were not introduced by respondents as admissions of the facts therein set forth, but, as stated by counsel, were introduced for the purpose of showing that appellant had been inconsistent in the claim made by him.

Had respondents' counsel interrogated appellant about any conversations or transactions with decedent, alleged in the pleadings, then a different question would be presented. The situation would be analogous to that of *Levy v. Simon*, 119 Wash. 179, 205 Pac. 426 (1922), relied upon by appellant. Therein, the administrator offered in evidence the answers given by the opposing party to certain questions asked him at a former trial. It was offered to show contradictory statements, and admissions and declarations against interest. This court said:

"Having done so, appellants were in no position to object to the introduction of the remainder of his testimony for the purpose of harmonizing and reconciling all of his testimony, if possible." (page 186)

The purpose of introducing the pleadings in the instant case, as the trial court said,

" . . . was not to show what the transaction had been with the deceased, but rather was for the purpose of showing that the plaintiff [appellant] on two separate occasions following the death of the deceased had taken contradictory positions as to what that transaction had been; in other words, it certainly was not offered by the defendants [respondents] for the purpose of establishing the transaction, but merely to show that he, the plaintiff [appellant], had taken inconsistent positions since the death of deceased."

The trial court gave appellant an opportunity to explain and reconcile the alleged inconsistencies of the pleadings. However, it was not error to prohibit him from testifying concerning conversations or transactions between him and decedent.

[6] Appellant's evidence to sustain the alleged oral promise of decedent to will him a portion of his estate is not "conclusive, definite, certain and beyond all legitimate controversy." *Henry v. Henry*, 138 Wash. 284, 286, 244 Pac. 686 (1926). The judgment of dismissal is affirmed.

Respondents cross-appeal from that portion of the judgment which dismisses, with prejudice, their cross-complaint praying that the bequest to appellant be reduced from one thousand dollars to one dollar.

Decedent's will provides

" . . . in the event any person who is named as beneficiary under this Will shall attempt to break the terms and conditions of this Will, then and in that event such person so attempting shall forfeit all of his or her interest in said estate and shall be granted the sum of One Dollar (\$1.00) and no more."

This court has recognized the validity of such provisions. *In re Chappell's Estate*, 127 Wash. 638, 221 Pac. 336 (1923); see "Provisions in a will forfeiting the share of a contesting beneficiary." 3 Wash. L. Rev. 45 (1928).

[7] However, the instant case is not a will contest. It is an action to enforce the terms of an alleged oral contract to devise property. It is based upon a creditor's claim filed against decedent's estate. Although the allowance or enforcement of such a claim would—as would the allowance or enforcement of any other creditor's claim—change the amount received by the residuary legatees, it would not "break the terms and conditions of this will," nor would it establish appellant as a residuary legatee. The filing or enforcement of a creditor's claim, by a legatee or devisee, does not invoke the provision of a will forfeiting the share of a contesting beneficiary. *Wright v. Cummings*, 108 Kan. 667, 196 Pac. 246, 14 A. L. R. 604 (1921).

The trial court did not err when it dismissed respondents' cross-complaint with prejudice.

The judgment is affirmed.

GRADY, C. J., SCHWELLENBACH, HILL, and DONWORTH, JJ., CONCUR.

[No. 32945. Department Two. November 26, 1954.]

KENNETH G. HEIN, *Appellant*, v. CHRYSLER CORPORATION
et al., *Respondents*.¹

- [1] APPEAL AND ERROR—REVIEW—PRESUMPTIONS—DISMISSAL OR NON-SUIT—EFFECT OF EVIDENCE. On appeal from a judgment of dismissal entered upon sustaining a challenge to the sufficiency of the plaintiff's evidence in a jury case, the supreme court must accept all of the appellant's evidence as true and give him the most favorable inferences which can be drawn therefrom.
- [2] ACTION—NATURE OF ACTION—HOW DETERMINED. The true nature of a cause of action stated in a complaint must be determined by its allegations and the evidence offered in support of its prayer for relief, and not by the pleader's conclusions as to its nature nor the label he places upon it.
- [3] TORTS—INTERFERENCE WITH OR INJURIES IN CONTRACTUAL RELATIONS—PARTIES TO CONTRACT. The tort of malicious interference with contractual relations by inducing a breach of contract is a remedy created by the common law to compensate one whose contractual relations with others is interfered with by a third party; hence, such an action does not lie against one who is a party to the contract.
- [4] SAME. An action in tort by a former automobile dealer will not lie against an automobile manufacturer for malicious inducement of a breach of contractual relations between the former dealer and the manufacturer; since the manufacturer is not a third party but is one of the two parties to the contract and hence cannot be liable for inducing itself to breach the contract.
- [5] DAMAGES—GROUNDS—NATURE AND PROBABLE CONSEQUENCES OF BREACH OF CONTRACT. An automobile dealer whose contract was breached by the manufacturer is entitled to recover in his breach of contract action all of the damages which normally and naturally can be expected to flow from its breach; and where the breach of contract must necessarily cause damage to or the destruction of the business of the dealer, the consequent damages may be fully recovered by the dealer in his breach of contract action.

¹Reported in 277 P. (2d) 708.

[3] See 84 A. L. R. 43; 30 Am. Jur. 83.

- [6] JUDGMENT—MERGER AND BAR OF CAUSES OF ACTION—DISTINCT CAUSES OF ACTION FROM SAME TRANSACTION. One may not submit his claim for identical items of damage to two juries on two different legal theories and retain the benefit of the larger of the two judgments recovered in the two actions.
- [7] MASTER AND SERVANT—LIABILITY FOR INJURIES TO THIRD PERSONS—SCOPE OF EMPLOYMENT—WILLFUL AND MALICIOUS ACTS OF SERVANT. An employee who willfully and for his own purposes violates the property rights of another, by inducing a breach of contract or in some other manner, is not acting in the furtherance of his employer's business; consequently, his employer cannot be held liable under the doctrine of *respondet superior* for the employee's wrongful act.
- [8] SAME. In an action by a former automobile dealer against an automobile manufacturer and its distributor for malicious inducement of a breach of contractual relations between the former dealer and the manufacturer, the trial court properly held that the distributor was not guilty of any tort against the former dealer; it appearing that the acts complained of were committed by employees of the distributor, who, in such actions, were definitely serving their own ends and were willfully acting contrary to, and not in furtherance of, the best interests of the distributor.

Appeal from a judgment of the superior court for King county, No. 456108, Hodson, J., entered March 5, 1954, upon sustaining a challenge to the sufficiency of the evidence at the close of the plaintiff's case, dismissing an action for malicious interference with another's business. Affirmed.

Peyser, Cartano, Botzer & Chapman and *Robert A. O'Neill*, for appellant.

Bogle, Bogle & Gates and *Orlo B. Kellogg*, for respondents.

DONWORTH, J.—Plaintiff, a former retail dealer in automobiles manufactured by defendant Chrysler Corporation, brought this action to recover in tort for the allegedly malicious interference by defendants with plaintiff's business.

Prior to the trial of this action, plaintiff had obtained a judgment in the Federal court at Seattle in the amount of \$31,675.43 against defendant Chrysler Corporation in an action denominated by plaintiff as a "breach of contract" suit. In that suit, Chrysler Corporation was the sole defendant.