

1940

Laura Morris and Lucy Pocatello Johnson, Maude Pocatello Racehorse, Josephine Pocatello and Ray Pocatello v. Amasa L. Clark, Joseph E. Robinson, and Box Elder County : Brief of Appellants

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE STATE OF UTAH

LAURA MORRIS, Special Admin-
istratrix of the estate of Washington
Pocatello and Minnie Pocatello, his
wife, both deceased, and LUCY
POCATELLO JOHNSON, MAUD
POCATELLO RACEHORSE,
JOSEPHINE POCATELLO, and
RAY POCATELLO, Heirs of
Washington Pocatello and Minnie
Pocatello, deceased;

Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH E.
ROBINSON and BOX ELDER
COUNTY,

Defendants and Respondents.

Case
No. 6248

Brief of Appellants

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IN THE
SUPREME COURT OF THE STATE OF UTAH

LAURA MORRIS, Special Administratrix)	
of the estate of Washington Pocatello		
and Minnie Pocatello, his wife, both)	
deceased, and LUCY POCATELLO JOHNSON,		
MAUD POCATELLO RACEHORSE, JOSEPHINE)	
POCATELLO, and RAY POCATELLO, Heirs		
of Washington Pocatello and Minnie)	
Pocatello, deceased;		
)	
		CASE
Plaintiffs and Appellants,)	NO. 6248
-vs-)	
AMASA L. CLARK, JOSEPH E. ROBINSON)	
and BOX ELDER COUNTY,		
)	
Defendants and Respondents.)	

B R I E F O F A P P E L L A N T S

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Attorneys for Defendants and Respondents

STATEMENT OF THE CASE NO. 6248

For convenience the parties hereto will be referred to as they appeared in the Court below, that is, as plaintiffs and defendants.

This is an action brought by Laura Morris, Special Administratrix, and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Pocatello, as the sole and only heirs at law, of Washington Pocatello, and Minnie Pocatello, his wife, both deceased, all Indians, wards of the United States Government, residing on the Fort Hall Indian Reservation, in the State of Idaho, as plaintiffs, wherein the plaintiffs seek to quiet title in the heirs to an undivided one-third interest in the E. $\frac{1}{3}$ of the SE. $\frac{1}{4}$ of Section 12, T.11 N, R. 3. W. SLM, in Box Elder County, State of Utah, and for an accounting of the rents and profits of

the said undivided one third interest, for the years from 1925 to 1938, both years inclusive.

The action at first was brought by the heirs alone and was against the following named defendants:

A. I. Grover, and Hortense Grover, his wife, and U. F. Diteman, Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah, as defendants.

The defendants, Amasa L. Clark and Joseph E. Robinson, and Box Elder County, Utah being the only defendants served with summons, the defendant A. I. Grover, having died about the time the complaint was filed and before service was made upon him, and U. F. Diteman being a non-resident of the State of Utah, and therefore considered not a necessary defendant, the cause of action was dismissed as against the defendants A. I. Grover, and his wife, and U. F. Diteman.

The defendants, Amasa L. Clark, and Joseph E. Robinson, appeared within the statutory time and filed a demurrer, and a written demand under Section 104-44-17, Revised Statutes of Utah, 1933, that the defendants be compelled to put up a \$300.00 non-resident bond, which bond in due time was furnished, and plaintiffs filed an Amended complaint, the only defendants named in the first amended complaint were:

Amasa L. Clark, Joseph E. Robinson,
and Box Elder County, Utah.

That Box Elder County, Utah, has never made any appearance in the case, for the reason that the rights of Box Elder County, Utah, is only a right-of-way, involving about one acre, and it has always been conceded that if the plaintiffs are successful in having the undivided one-third interest

quieted in them, that if Fox Elder County should desire it, that the plaintiff's will execute a deed to said right-of-way to the County, for plaintiffs' interest in the right-of-way.

That the defendants, Amasa L. Clark and Joseph E. Robinson, filed a demurrer and motion to strike large portions of the plaintiffs' first amended complaint, and one of the grounds of demurrer was that the complaint stating that an administrator had been appointed by the District Court of the First Judicial District of the State of Utah, in the estate of Washington Pocatello, deceased, that the heirs of the estate had no capacity to sue for, or ask an accounting of the rents and profits of the land, that only the administrator could collect or sue for the rents. The court sustained the demurrer, granting plaintiffs time to amend; that

plaintiffs then secured the appointment of Laura Morris as Special Administratrix, of the estate of Washington Pocatello, and Minnie Pocatello, deceased, and a second amended complaint was filed, Laura Morris as Special Administratrix, joining with the heirs of Washington Pocatello plaintiffs having failed to state their case in two causes of action, but asked to quiet title and for an accounting of the rents and profits in one cause of action. The defendants, Amasa L. Clark and Joseph E. Robinson, again demurred and moved to strike, and moved to dismiss the cause of action, one of the grounds of demurrer being that two causes of action was improperly joined, one for quieting title and one for accounting for the rents and profits. The court, having sustained the demurrer, the plaintiffs filed the third amended complaint, and set forth the case, in two

causes of action, one for quieting title and one for accounting for the rents and profits. (Abstract 2 34.)

That the defendants, Amasa L. Clark and Joseph E. Robinson, again filed a demurrer, and motion to strike and dismiss, that the Court set the matter for hearing for the 20th day of May, 1939; that on the 20th day of May, 1939, after argument by counsel, the Court made a minute entry that said demurrer was overruled, and the motion to strike was denied, and defendants given 25 days without notice to answer, and the cause was set down for trial for September 14th, 1939, at ten o'clock, A. M. (Abstract 50)

That the defendants, Amasa L. Clark and Joseph E. Robinson, filed their answer to plaintiffs' third amended complaint, admitting the appointment of Laura Morris, and her qualification as administratrix of the

estate of Washington Pocatello, and Minnie Pocatello, deceased; admitting that Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Pocatello, are Indians and the only heirs of Washington Pocatello and Minnie Pocatello, deceased (Abstract 52); admitted that Washington Pocatello was an heir of Yaotes Owa, and of her daughter Jane, and that both Washington Pocatello, and Minnie Pocatello were deceased. (Abstract 53)

The answer also admitted all of paragraphs 4, 5, and 6 of said third amended complaint, thereby admitting the decrees of distribution and determining of heirship in the estates of Yaotes Owa, and her daughter Jane Brown. (Exhibits F & G, Abs. 239.)

The answer admitted that the eighty acres of land was, at the time of distribu-

tion under cultivation; admitted that the affidavit of W. D. Service, dated April 18th, 1917, was filed of record in Box Elder County, Utah on April 19th, 1917, which instrument described the terms and conditions of the escrow agreement. (Abstract 53 & 54.)

The answer admitted that the First National Bank of Pocatello, Idaho, delivered the said deed to U. F. Diteman, or to someone for him; that the deed on its face recited a consideration of \$3200.00, but made no allegation that the full amount was paid, but admitted that the deed was recorded on November 10th, 1919.

Answering paragraph 10 of the complaint, admitted that on November 3rd, 1919, U. F. Diteman and wife made and executed and delivered to A. I. Grover a Quit Claim for the whole of said eighty acres; that the

same was recorded on the 11th day of November, 1919, and admitted that A. I. Grover filed his affidavit and it was recorded in Box Elder County, Utah, the 20th day of February, 1920, and that a copy of said affidavit marked Exhibit "E", was a part of the complaint. (Abstract 35.)

Answering paragraph 11 of said complaint, admitted that A. I. Grover, after acquiring the Deed from U. F. Diteman, entered into the possession of said premises under date of November 3rd, 1919, and assumed the management of and rental of said premises, and collected all of the rents and profits of said property and made no accounting of same to any person to and including the year 1924, until said premises were sold to the defendants on the 25th day of March, 1925. (Abstract 56.)

Admitted all of paragraph 12 of said complaint, that the defendants have, during all of the years since 1925, collected and retained all of the rents received from said premises, making no accounting to the estate or to the minors of Washington Pocatel-lo, deceased. (Abstract No. 56.)

Answering paragraph 15, admitted that on the 3rd day of December, 1919, Charles E. Foxley filed in the probate division of the District Court a petition for Letters of Administration on the Estate of Washington Pocatello, deceased, and that after due and legal proceedings, the said Charles E. Foxley was appointed Administrator, and the Letters of Administration were on the 12th day of January, 1920, duly issued to him, and alleged that the said Charles E. Foxley never took any steps to recover any pretended

interest in said eighty acres of land; and admitted that the probaton of the estate of Washington Pocatello was never closed.

(Abstract 58.)

Answering paragraph 18 of the complaint, defendants admit that the heirs of Washington Pocatello, on or about the 1st of November, 1919, did attend the Court of the Honorable Justin D. Call, then Judge thereof, and that they had a conference with said judge and at the suggestion of said Court had a conference with Charles E. Foxley, an officer of said Court then practicing law before said Court.

(Abstract 59 & 60.)

Answering paragraph 20, of the complaint, defendants admitted they had rented the premises each year for a cash rental, but denied practically all other allegations of paragraph 20. (Abstract 61.)

Defendants admitted all of paragraph 23 of the complaint, that the description of the property as given was true.

Other than the foregoing admissions, the defendants generally denied, most all of the other allegations of the complaint. (Ab. 61).

That defendants further answered, and filed, a long separate defense, the following being most of the essential allegations of the separate and further answer: (Ab. 61)

That the defendants claimed the premises as owners in fee simple; that they purchased in absolute good faith without any notice or knowledge of any claims and matters set forth in the complaint; that they were furnished with an abstract that was approved by the Attorney General of the State of Utah, and was approved by their own attorney; that A. I. Grover, defendants predecessor, entered into possession of the property on the third day of November, 1919, and occupied them until he transferred the premises to defendants on the 12th of March, 1925; that A. I. Grover occupied and cultivated the premises, paid all of the taxes under claim of right and against all persons whomsoever, and that the defendants since the 12th day of March, 1925, did the same, and have continuously, openly

notoriously, peaceably and under claim of right claimed the premises against the heirs and the administrator and against the world, and that at no time, until the filing of this action, was any claim made by plaintiffs or anyone; that A. I. Grover and these defendants spent much time and labor and money in the improvements of said premises; (Ab. 63) (In support of such allegation the defendants offered no competent evidence at the trial) that if plaintiffs were defrauded, they should obtain redress against said parties defrauding them, and that these defendants ought not, after 20 years lapse of time, be required to defend the plaintiff's action herein; that owing to great length of time and loss of papers and death of witnesses and intervening equities, there is danger of doing injustice; that defendants knew none of the parties mentioned by the plaintiffs except A. I. Grover who is now dead; that they are advised that Albert Sailor is dead, and that U. F. Diteman is aged and a non-resident of the state, and the First National Bank of Pocatello, Idaho, is insolvent and has been liquidated, and defendants cannot obtain records from said Bank relating to the alleged Escrow Agreement; that if the Bank made an unauthorized delivery that the Administrator of the said Washington Pocatello estate, and the heirs waived the performance and ratified the delivery, and raised a presumption of ratification and are estopped to deny the delivery; that plaintiff should sue the Bank; that Charles E.

Foxley is no longer a resident of the State of Utah; that by reason of the lapse of time that defendants are unable to procure testimony to refute certain of the claims; that plaintiffs and each of them, should now be estopped by reason of laches, silence and other conduct on the part of the administrator therein, from at this time prosecuting this action. (Ab. 61 & 65.)

Then, as affirmative defense and for affirmative relief, defendants pleaded that the First Cause of action was barred by the provisions of Sections 104-2-5; 104-2-6; 104-2-19; and subdivision 3 of Section 104-2-24 of the Revised Statutes of Utah. (Ab. 66.)

That defendants, Amasa L. Clark and Joseph E. Robinson, prayed judgment; "1. That plaintiff's first cause of action be dismissed; 2. That a decree of this Court be entered declaring defendants to be the owners seized in fee of said premises and that title there to be quieted in them." (Ab. 68.)

To this separate and affirmative answer

...

the plaintiffs replied, specifically, denying each and every allegation contained in said separate answer and further pleaded that defendants had notice that their grantor had not title to the undivided one-third interest decreed to the estate of Washington Pocatello, deceased; that Charles E. Foxley had no authority or power to ratify the wrongful delivery of the deed (Ab. 80); that the only jurisdiction that the Court or the Administrator had in administration of the estate of Washington Pocatello, would be to determine the heirs and decree any real estate found to the heirs (Ab.84). That the said Probate proceedings in the Estate of Washington Pocatello was notice to the world, that no inventory had been filed, that there was a protest filed on behalf of the heirs, and that no action

was taken by the Court in the estate of Washington Peccatello, deceased, subsequent to the issuance of the Letters of Administration (Abstract 90). That this Court cannot now say to these untutored, uneducated, non-residents of the State of Utah, and Wards of the United States Government, that such a record invokes against you the Statute of Limitations and that you are guilty of laches (Abstract 91). And prayed that defendants take nothing, and that plaintiffs be given Judgment as prayed for.

On these issues the case came to trial on the 14th day of September, 1939, before the Honorable Lewis Jones, Judge, sitting in equity without a jury.

That when the case was called for Hearing that the defendants filed a supplemental answer, alleging, among other matters, that if the Court should find that

plaintiffs are wards of the Government,
that the plaintiffs are incompetent to sue,
as the suit must be maintained by the
Government; that all restrictions in the
original Patent to Yatocs Owa, have long
since expired and the said lands had
passed to the said Yatocs Owa, her heirs
and assigns forever, in fee simple,
free and clear from all jurisdiction of
the United States Government (Ab. 100).

That said defendants further, in
their supplemental answer

pleaded;

"That in the matter of the Estate
of Ar-ri-neap; on the 18th day
of December, 1918, in the matter
of the Estate of Geeump; on the
21st day of June, 1919, in the
matter of the Estate of Angichah;
and on the 23rd day of July, 1919,
in the matter of the estate of Wad-
gagee; that W. H. Ray, then the
United States Attorney General for
the State of Utah, acting under the
direction of the Attorney General

of the United States, filed in the District Court of the First Judicial District of the State of Utah, in and for Box Elder County, wherein each of the foregoing estates were then in process of administration, its petition in intervention wherein and whereby complainant sought to intervene in behalf of each and all the heirs of law of each of the aforesaid patentees; that each petition in intervention was similiar in form and each set forth substantially the same facts now pleaded in plaintiffs' third Amended Complaint, and complainant sought by said petitions to obtain an order or decree from said Court in each of said matters that petitions for distribution then pending be dismissed, and the probate proceedings be quashed, and decreeing that said Court was without jurisdiction to probate either of said estates or make distribution in accordance with the prayers of said petitions on file, or to make any order or decree affecting the title to or right of possession in said lands, or any part thereof; that upon the filing of said petition, the above named Court, on the day wherein each of said petitions were filed and entered therein its order authorizing complainant to intervene in each of said estates; that thereafter, to-wit, on the 28th day of July, 1921, the United

States Government by Hon. Charles M. Morris, its then duly appointed qualified and acting United States District Attorney for the State of Utah, under the Authority and by the direction of the Attorney General of the United States, filed with said Court in each of said estates written motions to dismiss said petitions; that thereupon said Court entered its written order dismissing each and all of said petitions and said Court thereafter entered therein its decree of distribution distributing each of said estates in accordance with the law of succession of the State of Utah, and in accordance with the petitions on file; that the defendants and their predecessor in interest learned of the foregoing proceedings before purchasing the lands herein and honestly believed that by the foregoing proceedings the United States Government had ceased to make any further claim, on behalf of the Indians similiarly situated, to the effect that they were powerless to alienate their said lands, or that the foregoing restrictions on the power of alienation of said lands had not expired, and because of the attitude of the United States Government in dismissing each and all of said petitions, and by further reason of latches on the part of these plaintiffs and the original

administrator appointed herein, these defendants and their predecessor in interest were induced and did honestly believe that no further contention would be made that said lands were not subject to alienation by said Indians and their heirs at law, and so believing and relying upon the foregoing facts, these defendants and their predecessor in interest have acquired the lands herein described as purchasers in good faith and for value and that these defendants and their predecessor in interest have cultivated said premises and have expended large sums of money for improvements placed thereon, with the consent, knowledge and acquiescence on the part of the United States Government and the heirs of the original patentee." (Ab. 100 to 103)

Plaintiffs objected to the filing of the Supplemental answer on the ground that it was immaterial, irrevelent and incompetent and not a proper defense and in no way binding upon these parties, and is not a proper record in this case, etc. (Abstract 235)

The Court overruled the objection, admitted the same to be filed, stating as follows:

"Have the record show that plaintiffs have a general denial to this supplemental answer." (Abstract 236.)

Plaintiffs contend that defendants by insisting on filing this supplemental answer are bound by that pleading, and it is an admission and confession, that the defendants Amasa L. Clark and Joseph E. Robinson, knew that the first owners of the land were Indians, and that because they were Indians, that defendants and their grantor knew there was something wrong with the title; that the said pleading is inconsistent with their first answer; that the procedure of the United States Attorney's Office in the matter of the four Indian Estates mentioned, could not have in any way influenced A. I. Grover defendants' predecessor as alleged, for the reason that the record shows A. I. Grover obtained the Washington Pocatello Deed on the 9th of November, 1919, and filed the same for record on the 10th day of November, 1919 (Exhibit K) when the Attorney General of the State of Utah

did not withdraw the petition of intervention in the other four Indian probate matters until the 28th day of July, 1921; And, as to the defendants Amasa L. Clark and Joseph E. Robinson, they bought the property on March, 12, 1925, only five years having elapsed, and if they heard about this proceeding and were governed by it, then they did have knowledge of, and must have known the title to the property was likely to be questioned by the United States Government, or the heirs who were wards of the Government and they offered no proof that either they themselves or their predecessor, expended large sums, or any sum of money for improvements thereon, and it is admitted and found that they collected all of the rentals each year. (Abstract 67-116-123.

Upon the issues herein outlined the cause was heard.

STATEMENT OF FACTS

On May 31, 1884, the United States of America issued Homestead Patent to Yaotes Owa, an Indian woman, widow of Poee Owa, to 80 acres of land in Box Elder County, Utah, described as follows, to-wit:

East half ($E\frac{1}{2}$) of the Southeast quarter ($SE\frac{1}{4}$) of Section Twelve (12), Township Eleven (11), North Range Three (3), West Salt Lake Meridian.

That said Patent was filed of record in Box Elder County, Utah on March 26, 1887; that Yaotes Owa died sometime in the latter eighties, leaving as her only heirs at law, one daughter called Jane, and a stepdaughter called Bingwa, the latter being the wife of Chief Pocatello, they being the parents of Washington Pocatello. Neither the daughter Jane or the stepdaughter Bingwa, or her son Washington Pocatello, ever asserted any claim to this eighty (80) acres of land during all

the years from the death of Yaotes Owa, and no probate proceedings were commenced until 1917 (Abstract 114). As far as known the daughter Jane died sometime in the late ninties, without issue, but the court in determining heirship to Yaotes Owa, and her daughter Jane, found that at the time Jane died, she left surviving her a spouse James Brown, who at that time was dead, but left surviving him a son named James S. Brown, the fruits of another marriage, (Exhibit E) Findings of Fact by Judge Call. That after the death of Jane Brown, neither her husband James Brown or Washington Pocatello made any claim to the 80 acres of land in question; that some years prior to 1917, this eighty acres of land with other Indian lands in the locality, was placed in good state of cultivation under some system of community interest for the Indians living

in that locality which is not material in this case, save and except as evidence that at the time the land was decreed, that the land was in a good state of cultivation, irrigated and fenced, had been farmed each year and that none of the profits from the land was ever received by Washington Pocatello or his heirs (Testimony-Lucy Pocatello Johnson (Abstract 269-274. Rep. Trans. 28-29) That in January 1917 one Albert Sailor, desiring to obtain title to this eighty acres of land, for about one fifth of its true value, believing that Washington Pocatello, an Indian, a member of Shoshoni Tribe of Indians a Ward of the United States Government, residing on the Fort Hall Indian Reservation in Idaho was the only surviving heir of Jane, the daughter of Yaotes Owa, came to the Fort Hall Reservation and located the said Washington Pocatello,

and prevailed upon him to enter into an agreement to sell to one U. F. Diteman the whole of said eighty (80) acres of land for the sum of \$3,200.00, payable \$200.00 cash, and the balance of \$3,000.00 to be paid in ten annual installments of \$300.00 on December 20th of each year until the full amount of \$3,000 would be paid; that the said Albert Sailor, took the said Washington Pocatello and Minnie Pocatello, his wife, to the First National Bank of Pocatello, Idaho, and had a warranty deed made out for the sale of the whole 80 acres of land, reciting that Washington Pocatello, the grantor, was the only surviving heir of Jane, daughter of Yaotes Owa, and had the said Washington Pocatello and Minnie Pocatello, his wife execute said deed on the 2nd day of February 1917 (Exhibit K); that after said deed was executed

the parties did place said deed in escrow with The First National Bank of Pocatello, Idaho, the said Albert Sailor, writing out the terms of the escrow agreement, on the front of a large envelope supplied by the First National Bank, the escrow depository, in which envelope the deed was placed, stating that the deed was placed in escrow, and the terms of the escrow, that \$300.00 was to be paid on the 20th day of December, 1917, and \$300.00 on the 20th day of December each year thereafter until the sum of \$3,000.00 would be paid in full, the last payment being due on December 20, 1926, and that said deed was not to be delivered until the full sum was paid, (see Exhibit H) containing photographic copies of all the escrow papers; Also see Exhibit "B", Copy of Affidavit of W. D. Service), that the said First National Bank of Pocatello, Idaho did accept the said escrow as depository thereof, and on April 19,

1917, W. D. Service, Cashier of the said First National Bank of Pocatello, Idaho, did make and execute an affidavit setting forth the terms of said escrow agreement reciting the deed was in possession of the Bank, to be delivered when all the payments were made, and Albert Sailor had the said Affidavit of W. D. Service, filed of record in Box Elder County, Utah, Recorded in Book "F" of Misc. Page 613, on the 19th day of April, 1917. (Exhibit "B") also see Philips Abstract (Defendants' Exhibit "5") which contains a true copy of said affidavit; that at the same time that Albert Sailor secured the deed and placed the same in escrow, he also secured from Washington Pocatello, a written request that one W. E. Getz of Box Elder County, Utah, be appointed Administrator of the Estate of Yaotes Owa, deceased; that subsequent thereto that W.E.

Getz was by the Judge of the District Court of Box Elder County appointed Administrator of the Estate of Yaotes Owa, deceased; that Washington Pocatello died April 27, 1917, shortly after this deed was executed and placed in escrow (Abstract 113) and before W. E. Getz was appointed Administrator of the Estate of Yaotes Owa; (Exhibit E).

That the abstract of record title of said Eighty (80) acres of land, introduced in evidence known as the Philips abstract (Defendants' Exhibit "5") the findings of Fact (Exhibit "E"). and decree made by the Court (Exhibits "F" & "G") shows that several other Indians came into the District Court of Box Elder County, during the Probate proceedings, and claimed to be heirs of Yaotes Owa and Jane Brown, her daughter; that subsequently W. E. Getz was also appointed

Administrator of the Estate of Jane Brown, and of James Brown, her husband;

That in December, 1917, when the first payment came due on the escrow agreement, that Albert Sailor sent the \$300.00 payment and then on the next day he wrote and withdrew the \$300.00 payment, stating that it looked as though Washington Pocatello was not an heir to Yaotes Owa, and instructing the Bank to return the deed to Washington Pocatello, (see letter Dec. 24th, 1917, in Exhibit "H", the escrow papers); that the depository did not return the deed; that subsequently in February, 1918, that Albert Sailor again wrote the depository, returning the first payment of \$300.00 and requesting the Bank to hold the money and deed until the final decree of the Court (see letter in Exhibit "H").

That on March 23, 1918, that Judge Justin D. Call, Judge of the District Court of Box Elder County, Utah made a decree finding that Jonie Bat Yaotes and William Hootchew were the right heirs and decreeing the 80 acres of land to them, share and share alike; that the said Justin D. Call, did later set this decree aside, and took further action in the matter.

That on the 7th day of November, 1919, that Justin D. Call, Judge of the District Court of Box Elder County, Utah made his finding of fact and conclusions of law, in both the Yaotes Owa and the Brown estates, (see Exhibit "E") finding that Jane Brown at the time of her death left no issue, but left surviving her, a spouse, James Brown, who was her legal husband at the time of her death, and James Brown left surviving him a son by another marriage, James S. Brown, and that he

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* was entitled to an undivided two-thirds interest in the 80 acres of land, and that Washington Pocatello, who was the only blood relative, being a relative by half blood of Yaotes Owa, and her daughter Jane, was entitled to an undivided one third interest in the said 80 acres of land, and on the 7th day of November, 1919, made two decrees almost identical in words and form, decreeing an undivided two thirds interest in said 80 acres of land to James S. Brown, the son of James Brown, and an undivided one-third interest to the estate of Washington Pocatello, deceased. The property is described in both decrees as the East half ($E\frac{1}{2}$) of the Southeast Quarter ($\frac{1}{4}$) of Section Twelve (12), Township Eleven (11), N. R. 3, W. S. L. M. situated in Box Elder County, Utah; that said decrees were filed of record on the 8th day of November, 1919, and recorded in Book "H", Misc. at

pages 319 and 320, records of Box Elder, County, Utah, (Exhibits "F" & "G") also see the Philips Abstract, (defendants' Exhibit "5"); that said decrees were never appealed from, and established absolute title in the estate of and in the heirs of Washington Pocatello, deceased, to an undivided one third interest in said 80 acres of land, and was so found by Judge Lewis Jones of the District Court, in his findings in this case (Finding N o. 6, Abstract 114, Trans. 0316)

That the record discloses, and more particularly the Philips Abstract (Defendants' Exhibit "5") discloses that Albert I. Grover, Defendants' grantor, for some months prior to the decrees being made and recorded in the estate of Yaotes Owa and her daughter Jane, was making a determined effort to secure possession to this 80 acres of land, he

secured agreements of sale, and deeds both quit claim and warranty from many of the other Indians who were claiming to be heirs. He executed a mortgage on the land to Johnie Bat Yaotes dated March 21, 1918, long before it was decreed as shown by the Philips abstract (Defendants' Exhibit "5"), and nine months before it was decreed, he entered into a contract with the

Utah-Idaho Sugar Company to purchase sixty shares of water right for this 80 acres of land as shown by the defendants at the trial (See Defendants' Exhibit "4") Abstract 282; that about thirty days before the District Court made and entered its decrees in the estate of Yaotes Owa and her daughter Jane, that A. I. Grover made an application to the State of Utah for a loan of \$7,500.00 on this 80 acres of land, swearing that he owned the land for over two years, and that it was at the time

in a very high state of cultivation, irrigated, and located in the most famous beet producing section of the State, and was worth \$300.00 per acre. A certified copy of the application of A. I. Grover to the State of Utah, for this loan is in evidence in this case marked (Exhibit "J") Abstract 243; that as soon as the court made its decrees in the estate of Yaotes Owa, and her daughter Jane, that A.I. Grover did on the 7th day of November secure from the Clerk of the Court a certified copy of the decree in the estate of Yaotes Owa, deceased; and the said A. I. Grover did on the 8th day of November, 1919, secure from U. F. Dite-man, a power of attorney, executed to him, A.I. Grover, giving to him full power over the escrow agreement, and authorizing the First National Bank of Pocatello, Idaho to turn over and deliver to him the deed and all the papers in escrow, in

said bank executed by Washington Pocatello and Minnie Pocatello for the east half of the south-east quarter of Section 12, Township 11, N. R. 3, W. S. L. M. (See copy Power of Attorney, Exhibit "H"); That A. I. Grover paid only \$1,000.00 to the bank on said escrow agreement, and did send to said bank the certified copy of the decree of distribution in the Yaotes Owa estate, and his power of attorney from U. F. Diteman, and the said bank the escrow depository, did on or about the 9th day of November, 1919 wrongfully and unlawfully deliver to the said A. I. Grover the deed executed by Washington Pocatello and Minnie Pocatello, for the entire premises, and the said A. I. Grover, on the 10th day of November, 1919, filed the deed of Washington Pocatello, and Minnie Pocatello of record in Box Elder County, Utah, and same was recorded in Book 15, Page 440 of the Deed records of Box Elder County; that on the 7th day of November, 1919, that

A. I. Grover secured from James S. Brown, the Indian whom the Court had decreed the other two thirds interest to, a warranty deed to U. F. Diteman as grantee for an undivided two thirds interest in the said 80 acres of land for a consideration of \$2,000 as shown by the Philips Abstract (Defendants' Exhibit "5"), and caused the same to be recorded on the 7th day of November, 1919, and it was recorded in Book 15, Page 438 of the deed record of Box Elder County, Utah; that previous thereto on the 3rd day of November 1919, four days before the property was decreed by the Court, that A. I. Grover secured a quit claim deed from U. F. Diteman for the full 80 acres of land and caused the same to be recorded on the 11th day of November, 1919, as appears in Book 15, Page 442, of the deed record of Box Elder County, Utah, all of which

instruments, the date of their making, and the date of their recording appear in the Philips abstract, relied upon by the defendants as showing good title to them in the said premises (See Philips Abstract, defendants Exhibit "5") by virtue of such transfers, and the obtaining of the Washington Pocatello deed, and filing the same for record, the said A.I. Grover did wrongfully attempt to take full possession of the entire 80 acres of land, and claim the same as his own, and proceeded to rent and manage the whole 80 acres and did for 5 full years until the 12th day of March, 1925 rent the whole of said premises at a large yearly rental, and did collect and take to himself, all of the rentals during the 5 years from 1920 to 1924, both years inclusive; that plaintiffs alleged and contended that A. I. Grover never obtained a legal title to the undivided one-third interest decreed to

the estate of Washington Pocatello, deceased, that his entry into possession of the undivided one third interest was entry as tenant in common with the heirs of the estate of Washington Pocatello, deceased.

That at the time of the final hearing before the court to determine heirship and rights of distribution of the estate of Yaotes Owa, and her daughter Jane Brown held on or about the 1st day of November, 1919, that the heirs of Washington Pocatello, deceased, came into the District Court of Box Elder County, Utah, that Judge Justin D. Call the then presiding Judge inquired of them if they knew the nature of the proceedings, or, if they had a lawyer, or knew a lawyer, or any one in the Court room, and when they told the Judge they did not know what the proceedings were about, that they had no lawyer, and did not know any

lawyer, Judge Call told them he would call a lawyer for them and the Judge called one Charles E. Foxley, a lawyer of Brigham City, then practicing before the District Court, that Charles E. Foxley came to the Court House and that Judge Call introduced him to Minnie Pocatello, and her children, and told them that Mr. Foxley would act for them as their lawyer. This fact is admitted by defendants and found by the Court (Finding 18) Abstract 132; that shortly thereafter, Foxley told the heirs of Washington Pocatello, that the hearing was over, and that they would receive one-third of the land, but did not tell them anything about the land, what it was worth, and the heirs did not know anything about what took place at the hearing, or how it was decided, Foxley just told them that the hearing was over, and asked them to come to his office with him, and again

at the office he told them it was all over that they would get one-third of the land and that they could go home, and when they asked him about the one-third interest, he told them it would be necessary to have an administrator appointed, and said something about a guardian for the two minors, that he would be appointed guardian or administrator, and that if they would sign a paper he would be appointed and that they could go home, and he would look after everything for them, that he was their lawyer, if the property was sold he would send them the money (Abstract 269-274) Testimony Lucy Pocatello Johnson. They signed the request that he be appointed administrator of the estate of Washington Pocatello, deceased and left everything in the hands of Charles E. Foxley, and after a short visit at Washaki, went home to the Reservation in Idaho, and never re-

turned to Brigham City until the date of the hearing in this case. That on the 3rd day of December, 1919, about 25 days after A. I. Grover had taken possession of the 80 acres of land that Charles E. Foxley filed petition for letters of administration on the estate of Washington Pocatello, deceased, in the District Court of Box Elder County, Utah, alleging the estate consisted of an undivided one-third interest in the east half of the southeast quarter of Section 12, Township 11, N. R. 3, WEST SLM. naming the heirs of Washington Pocatello, deceased; also stating that Albert I. Grover and U. F. Diteman claimed some interest in said estate (Exhibit "M") Abstract 246, that again on the 29th day of December, 1919, he filed an amended petition for letters of administration alleging the estate of Washington Pocatello owned all of the 80 acres of land, and listed Albert I. Grover and U. F. Diteman

as heirs of the estate of Washington Pocatello, deceased, (Exhibit "M") Probate File 355 (Abstract 246); that on the 15th day of January, 1920, that the Clerk of the Court appointed Charles E. Foxley as administrator of said estate, and issued letters of Administration to him, and on said date he qualified, and assumed the duties of administration of said estate; that as administrator he failed to file an inventory of any kind in said estate, had no appraisers appointed, but did on or about the 15th day of January 1920 secure from the Clerk of the District Court, a certified copy of his letters of Administration in the estate of Washington Pocatello, deceased, and deposited the same with the First National Bank of Pocatello, Idaho, the depository of the escrow deed, that had been delivered to A. I. Grover and

the First National Bank of Pocatello, Idaho, sent \$995.00 of the \$1,000.00 paid by A. I. Grover to the said Charles E. Foxley to Brigham City Utah; that the said Charles E. Foxley, as administrator, took no further action in the estate of Washington Pocatello, deceased, except to have notice to creditors published, until the 3rd day of March, 1921, at which time he filed in the District Court of Box Elder Co., Utah, in the matter of the estate of Washington Pocatello, deceased, a final account and Petition for Settlement thereof, showing that he had received from the First National Bank of Pocatello, Idaho, on a "Land Contract of sale by deceased and wife" \$995.00, then on Page 2, of said petition under head of General Account, he stated as follows:

"The property described in the petition for letters and described as an undivided one third interest in the estate of Yaotes Owa, or

one third of the east half of the southeast quarter of Section 12, T. 11, N.R. 3 West SLM. had been converted into cash by reason of a contract executed by Washington Pocatello ~~and wife~~ prior to the death of Washington Pocatello, and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello." (Exhibit "M") Probate File 355, (Abstract 246)

and further alleging that there was due to him C. E. Foxley, the sum of \$497.00 as an attorney fee, and costs of \$7.00 making a total of \$504.00 due the administrator, and that the balance \$490.00 was for distribution; that the Clerk of the Court did on the 3rd day of March, 1921 make an order fixing the 14th day of March, 1921 as the time for settlement of said final account, and for hearing of the said petitions for settlement and for final distribution (Exhibit "M"); that there is no record of any action having been taken by the Court on the 14th day of March, 1921; that on

August 27, 1921, there was filed in the Court an objection to the allowance of the account on behalf of the heirs of Washington Pocatello deceased, on different grounds, the first ground being that "No Inventory of the said estate has been filed in said Court"; and praying that the said account be not allowed, approved or settled as the same is rendered, and praying for such other and further order that is just; (Exhibit "M"); that on the 12th day of September, 1921, that Judge Albert A. Law, made an order in the Matter of the Estate of Washington Pocatello, deceased, that the hearing for settlement of final account and petition for final distribution having been set for this day, that a continuance was necessary, and continued the matter until the 10th day of October, 1921; that on the 10th day of October, 1921, Judge Albert A. Law, made another similar order continuing

the hearing to the 14th day of November, 1921; that on the 14th day of November, 1921, that Judge Albert A. Law made another similar order continuing the hearing to the 12th day of December, 1921; that on the 12th day of December, 1921 that Judge L. B. Wright made a similar order continuing the hearing to the 9th day of January, 1922; that on the 9th day of January, 1922, Judge Wm. M. McCrea, Presiding Judge made a similar order continuing the hearing on the Final settlement of account and petition of final distribution to the 13th day of February, 1922; all orders of Continuation shown in Exhibit "M" the Probate File No. 355, Estate of Washington Pocastello, deceased; that there was no hearing held on the 13th day of February, 1922, and no further order of Continuance was ever made, and no further action taken by the Court in any

manner whatsoever, during all of the years from the 9th day of January, 1922, in the matter of the estate of Washington Pocatello, deceased, until the present suit was filed by the heirs; that at some time unknown to the heirs of Washington Pocatello, deceased; that Charles E. Foxley, absconded from the State of Utah, and took with him the \$995.00 secured from the First National Bank of Pocatello, Idaho, or spent the same before he absconded, and no final settlement of any kind whatsoever has ever been made by the District Court of the First Judicial District of the State of Utah, in and for Box Elder County, in the estate of Washington Pocatello, deceased, (Exhibit "M").

That Albert I. Grover who secured the deed of Washington Pocatello, deceased, and filed the same for record, never lived on the 80 acres of land, and did not farm it himself, but rented

it each year for a large annual cash rental, and collected and kept for himself all of the rentals; that on January 2, 1920, within 60 days from the date he filed the Washington Pocatello deed of record, Grover mortgaged the whole premises to the State of Utah as security for a loan of \$7,000.00 (Philips Abstract, Defendants' Exhibit "5"), and later paid in full the Utah-Idaho Sugar Company for the 60 shares of water right he contracted for in March, 1919 (Defendants' Exhibit "4"); that on the 6th day of December, 1920, Davis County Bank, of Farmington, Utah, which bank both the defendants were at that time directors of, loaned A. I. Grover, \$2,500.00 taking a second mortgage on the said 80 acres of land as security for the payment of the \$2,500.00 (Philips Abstract, Defendants' Exhibit "5"); that A. I. Grover

continued to rent the land each year and collect all of the rent until the 12th day of March , 1925 at which time, nothing having been paid on the State loan, or on the loan due the Davis County Bank, and A.I. Grover being in straightened circumstances as testified to by Amasa L. Clark as follows:

Cross Examination:--

Q. At the time that Mr. Grover sold this property he was in straightened financial circumstances, wasn't he?

A. I think he was. Ab. 300.

Q. So that he was just coming out from under the deal with the State Land Board?

A. Yes, sir. He needed it. Ab. 300.

A. I. Grover approached Amasa L. Clark to take the property from him, and he deeded the property to Amasa L. Clark and Joseph E. Robinson, they taking the property as a personal investment, and paid off the State Loan, the loan to the Davis County Bank, and what back taxes were due on the property, and paid

Grover the balance of the purchase price of \$12,500.00. That the 80 acres of land at that time was worth much more than the \$12,500.00 paid by the defendants; that the 60 or 65 acres of land in cultivation on this 80 acres was of the very best land in that locality, and Amasa L. Clark testified that good land was worth at that time Two hundred to Three Hundred Dollars per acre.

Q. What was ground selling for in this vicinity of this property, other ground that you happen to know of your own knowledge?

A. At that time land, I guess, good land was worth from Two hundred to Three Hundred Dollars per acre. Ab. 300.

That the defendants took the said land over from A. I. Grover without making any examination or investigation as to whether their grantor had good title to the undivided one third interest, or whether he had any title to any of the 80 acres of land; Amasa L.

Clark who made the deal, relied on the fact that the State Land Board of Utah had loaned \$7,000.00 on the property, and therefore the title must be good, Mr. Clark testifying on cross examination:

Q. Didn't you consult the record at all yourself?

A. No, sir. I just bought from the--- I assumed that the State of Utah had passed title. I bought it with the idea that abstract shows it.

Q. You assume because the State of Utah had approved the loan, and had a Seven Thousand mortgage upon the property, that it was good title?

A. Yes, sir. Ab. 297.

That neither Amasa L. Clark or Joseph E. Robinson has ever lived on the premises, and during all of the years since 1925 have rented the premises each year for a good cash rental, and have collected all of the rentals and retained all of same to themselves each year;

Plaintiffs alleged and contended that the defendants secured no title to the undivided one third interest decreed to the estate of Washington Pocatello, deceased, from A. I. Grover, because A. I. Grover had no title to the said one third interest to convey, all of which were matters of public record, and shown in the Philips abstract, (Defendants Exhibit "5") and of which fact the defendants had full and complete notice. . .

That on November 10, 1919, the date that A. I. Grover wrongfully filed the deed of Washington Pocatello, and Minnie Pocatello for record/^{when} he only paid \$1,000 for the same, the undivided one third interest in said 80 acres of land, was worth at least \$5,000.00. That said deed in the hands of A. I. Grover was void deed and passed no title to the undivided one third interest and the said A. I. Grover

entered into possession of the said premises as a tenant in common with the heirs of the estate of Washington Pocatello, deceased.

The testimony presented at the trial of the cause was composed of certified copies of instruments of record, mostly taken from the County Recorder's office of Box Elder County, Utah, marked as exhibits by both parties, and mostly all admitted without objection by either party, also oral testimony submitted by both parties.

Plaintiffs' Exhibits.

Exhibit "A". Ab. 236, Rep. Trans. P. 3.

United States Patent

Dated May 31, 1884

Filed of record March 26, 1887

United States) Land in Box Elder County, Utah
to) E $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 12, T.11 N.R.3
Yaotes Owa) SLM

Exhibit "B" Ab. 237 Rep Trans. P3

Affidavit of W. D. Service describing
Escrow Agreement. Dated April 18, 1917
Filed for record April 19, 1917.

W.D. Service, Cashier) Describing Escrow be-
First National Bank,) tween Washington Poca-
Pocatello, Idaho) tello and U.F. Ditoman
E $\frac{1}{2}$ SE $\frac{1}{4}$ S. 12, T. 11 N. R. 3
W. S. L. M.

Exhibit "C". Ab. 237 Rep Trans. P4.
Petition for Letters of Administration.
Filed March 28, 1917.
Yaotes Owa) Property E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 12,
Deceased) T. 11, N. R 3 W. SLM

Exhibit "D". Ab. 237-238
Petition for Probate of Will
James Brown, Deceased.

This Exhibit 'D' can be disregarded, the offer and acceptance was error, this is a will and pertains to the NW quarter of Section 12, it was a mistake, the Petition desired to be entered was the Petition of Administration of the Estate of Jane and James Brown, deceased, the daughter of Yaotes Owa, and for the same premises, but the petition of James Brown alone for a different piece of property was furnished by mistake, and was not discovered until the papers were all lodged with this Court. It is of no use in the record, the

Estate of Jane Brown and James Brown is included in the Findings of Fact made by Judge Call, and in decrees of distribution. Exhibit "E" Stipulation. Ab. 258

Stipulated that Mr. W. E. Getz was appointed and qualified as Administrator of the Yaotes, and James Brown and Jane Brown estate.

Exhibit "E". Ab. 238

Findings of Fact and conclusions of law, made by Judge Call. Filed Nov. 7, 1919.

Findings of Fact and)	Determining heir-
Conclusions of Law,		ship and right of
Estate of Yaotes Owa, and)	distribution.
Jane and James Brown, all		Property E $\frac{1}{2}$ SE $\frac{1}{4}$ S. 12
deceased.)	T.11, N. R.3, W. SLM

Exhibit "F" Ab. 239

Decree of Distribution.

Dated Nov. 7, 1919.

Filed Nov. 8, 1919.

Decree of Distribution)	Property E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec.12
Estate of Yaotes Owa)T.11 N.R 3, W. SLM
deceased)

Exhibit "G" Ab. 239

Decree of Distribution.

Dated Nov. 7, 1919

Filed Nov. 8, 1919

Decree of Distributi6n)Property E $\frac{1}{2}$ SE $\frac{1}{4}$
Jane and James Brown,)Sec. 12, T. 11, N.R.
both deceased.)3, W. SLM.

Exhibit "F" Ab. 241

Photographic Copies of Escrow papers.

Photographic copies as per) Envelope with
stipulation, of escrow papers) terms of Escrow
between Washington Pocatello) written on front
and Minnie Pocatello, his wife.) of same; Letter
and) Albert Sailor
U. F. Diteman, placed with the) Dec. 14, 1917, on
First National Bank of Poca-) dated Dec. 24,
tello, Idaho as Escrow Depositary) and a second l
dated Dec. 24,
1917, relative to first payment of \$300.00, lett
dated Feb. 23, 1918, returning first \$300.00
payment; and power of attorney dated Nov. 8,
1919, signed by U. F. Diteman appointing A. I.
Grover his lawful attorney in all matters
pertaining to said escrow.

This power of attorney was executed more than
18 months after Washington Pocatello died, and
the agency of the First National Bank of Poca-
tello, Idaho on behalf of Washington Pocatello
had terminated, the power of attorney author-
ized the bank to turn over to A. I. Grover the
deed and papers then held by said Bank in

escrow, at the time this power of attorney was executed and filed with the Bank, the Bank had no right or power to deliver that deed except on an order of a District Court, after having acquired proper jurisdiction of the parties and the subject matter.

The next in the record is a stipulation read by counsel for defendants stating that the papers included in Exhibit "H" was all the papers that could be found pertaining to the escrow and that there was no objection to the offering of photostatic copies of the papers as an exhibit under the stipulation.

Ab. 242.

THE COURT: They may be received Ab. 242
Exhibit "I" Ab. 243

Affidavit A. I. Grover
Dated Feb. 20, 1920
Filed of record April 10, 1920

This affidavit of A. I. Grover, defendants'

grantor, which said affidavit was filed for record and was listed in the Philips abstract, (Defondants Exhibit "5") in part reads as follows:

" That he was the owner of the land and had made application No. 3477 to the State Land Board of the State of Utah, for a loan, that the premises came through the estate of Yaotes Owa, who was the original patentee; that the Court first decreed that title to Johnie Bat Yaotes and William Hootchew, as is shown by #6 of the Abstract; that application was made to set aside said decree and for a new hearing which was granted, that the Court reversed and entered its decree as shown by item #12 of the Abstract decreeing one third of the estate to the estate of Washington Pocatello and two thirds to James S. Brown; that after the entry of the first decree wherein part of the premises was given to Johnie Bat Yaotes, that he (Grover) entered into a contract to purchase the interest of Johnie Bat Yaotes, and delivered to Johnie Bat Yaotes a mortgage for \$1500.00 also, all eging that he knew Washington Pocatello in his lifetime; that he was an Indian living on Fort Hall Indian Reservation; that during his lifetime he and wife made, executed and left in escrow a warranty deed in favor of U. F. Ditoman, which said deed was to be delivered to the said U. F. Ditoman upon the payment of the consideration mentioned in the said escrow agreement; that subsequently Washington Pocatello died and his heirs appeared as

contestants in the probate proceedings referred to in entry #12 of the abstract; that at the hearing the estate of Washington Pocatello was given one third interest and thereafter the said U. F. Diteman paid the bank the money sufficient to procure the said deed so held in escrow, and subsequently conveyed his interest to deponent as shown by entry #16 the abstract; that an administrator was appointed for the estate of Washington Pocatello, and the said administrator received and accepted the money paid by the said U. F. Diteman for the warranty deed in his favor; that the Court found against all persons except the claim of Washington Pocatello, and James Brown, which said decree became final and never was appealed from, and described the premises as the E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 12, T. 11 N. R. 3, W. SLM" 'Exhibit "I")

This affidavit is part of the Philips Abstract
(Defendants' Exhibit "5") Ab. 283.

Exhibit "J" Ab. 243

Application A.I. Grover for Loan
Dated October 11, 1919.

A.I. Grover)Application State of Utah for
)Loan \$7,000.00 Date Oct. 11,
)1919, on E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 12, T. 11
State of Utah)N. R. #3, W. SLM.

Exhibit "K" Ab. 243-244

Warranty Deed.

Dated Feb. 2, 1917, Recorded Nov. 10, 1919

Grantors)---hereby convey and
Washington Pocatello, warrant land in Box Elder
only surviving heir of) County, Utah. Description
Jane, the daughter of E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 12, T. 11, N.
Yaotos Owá and Minnie) R. 3, W. SLM
Pocatello, his wife.
to)
Grantee.
U. F. Ditoran)

This deed was given before the right of heir-
ship was determined and was placed in escrow
to be delivered only upon the payment to the
escrow depository the full sum of \$3,000.00
The said Washington Pocatello died on the 27th
day of April, 1917 (Findings by the Court, No.
3, Ab. 113) and this deed was delivered by the
escrow depository on or about Nov. 8, 1919,
more than 18 months after the death of Wash-
ington Pocatello, upon the payment of only
\$1,000.00 and the deed was for the whole of
the 80 acres of land and for an undivided one
third interest.

Exhibit "L" Ab. 244

Farm Lease.

Dated March 5, 1923

Filed for record March 21, 1923

Lessor) Lease for seasons 1923, 1924,
A. I. Grover) and 1925 for E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 12,
) T. 11, N.R. 3, W. SLM. Rental
Lessee) yearly 232 tons of beets de-
G. K. Takagaki) livered to Utah-Idaho Sugar
) Co. out of first beets produced.

Exhibit "M" Ab. 244-246

Probate File No. 355

Estate of Washington Pocatello

First Filing Petition for Administration

Dec. 3, 1919, Letters issued Jan. 15, 1920

Last Court entry Jan. 9, 1922

Estate of Washington) Letters issued to Charles
Pocatello, deceased) E. Foxley on 15th day of
) Jan. 1920
) E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 12, T. 11, N.
) R. 3, W. SLM.

Admission of File in Evidence. Ab. 246

Mr. Lowe: No objection to the introduction
of the whole record.

THE COURT: Probate 355, The estate of Wash-
ington Pocatello, the files are all received
in evidence.

This file shows that Charles E. Foxley was duly and regularly appointed Administrator of the Estate of Washington Pocatello, deceased, that he qualified, that he never filed any inventory of any kind in said estate, neither asked for or had appraisers appointed, and the record shows no appraisement was ever made, that notice to creditors were published; that on the 3rd day of April, 1921 that the said Administrator filed a so-called final account, and a petition for distribution, informing the court just what he had done as such administrator; that he had received from the First National Bank of Pocatello, Idaho, \$995.00 that was paid to said Bank on Land Contract of sale, by deceased and wife, also further alleging as follows:

"The property described in the petition for letters and described as an undivided one third interest in the estate of Yaotes Owa,

or one third of the East half of the southeast quarter of Section 12, Township 11, N. Range 3, West SLM had been converted into cash by reason of a contract executed by Washington Pocatello and wife prior to the death of Washington Pocatello, and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello. The said Administrator claiming that he was creditor of the estate, and that estate owed him \$504.00 as an attorney fee, for representing the heirs".

This File and Exhibit shows the Clerk of the Court on March 3, 1921 made an order setting a date for hearing of this final account and petition for distribution for Monday, the 14th day of March, 1921, that no hearing was held on such date, but the File shows a number of continuances, the last date set being the 13th day of February, 1922; that there was no hearing held on said date, and no further orders of continuances made, and the matter has laid unacted upon by Court from that date until the filing of the present suit.

Exhibit "N" Ab 313

Letter Date Aug. 30, 1939

This exhibit is a letter from the Utah-Idaho Sugar Company quoting the price of beets paid by the Sugar Company for the years 1920, 1921, 1922, 1923, 1924, the same being the years that A. I. Grover rented the premises and collected the rent, two of the years the premises was under the lease with G. K. Takagaki, wherein he was compelled to deliver 232 tons of beets each year (Exhibit "L") and was to prove that A. I. Grover, defendants' grantor received a very large revenue from the premises, more than sufficient to pay for the water right and all taxes or assessments that would be chargeable to the undivided one third interest.

Exhibit "C" Ab. 313

The final account and petition of Settlement of W. E. Getz, Administrator of the Estate of

Yaotes Owa, deceased, showing the 80 Acres of land was rented by the administrator for \$650.00 per year 1917.

This exhibit may not have been received in evidence, for the reason that it was stipulated by counsel for defendants that the report did so show. Quoting from the record.

"Mr. Lowe: I will stipulate with you that the report does so show," Ab. 313, Rep. Trans. 55,

Oral Testimony for Plaintiffs.

Fred A. Gross, Superintendent of the Fort Hall Indian Reservation of Fort Hall, Idaho being duly sworn by the Clerk, qualified as to his official position with the U. S. Government as Superintendent of the Fort Hall Indian Reservation, in Idaho. (Ab. 246-247) and testified in part as follows:

"a" That Washington Pocatello, and Minnie Pocatello were enrolled on the Fort Hall Indian Reservation; that they were of the Shoshoni tribe of Indians, that they were

wards of the United States Government; that there was no record that either Washington Pocatello or Minnie Pocatello had ever received a Certificate of Competency from the Government; that Washington Pocatello died on the 27th day of April, 1917; that Minnie Pocatello died on the 22nd day of May, 1927; that Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Pocatello are the only heirs of Washington Pocatello and Minnie Pocatello; that the records of births of the Fort Hall Indian Reservation records that Ray Pocatello was born in the year 1917; that he did not have the date of the month, (Ab. 250, Rep Trans. 12); that the four heirs are all living, and have so lived on the Fort Hall Indian Reservation, and at all times were and now are wards of the Government and subject to the tribal rights, rules and regulations enforced on the Fort Hall Indian Reservation, and have not at any time received a certificate of Competency from the U. S. Government; that the said heirs had talked to him many times repeatedly about the property or money they never received from their interest in this land; that he finally told them they would have to get an abstract of title, and they would have to employ an attorney to help them". (Ab. 246-252)(Rep. Trans. 10 to 14)

"b" Cross Examination of Witness Gross.

Mr. Lowe:

Q. That conversation between you and the Indians was in reference to the money they didn't get from the sale of their land?

A. Yes, sir. They said they had some land down there that was sold without getting any proceeds from it. Ab. 252-253.

Q. You never did attempt to take jurisdiction of this particular area of ground, did you?

A. No, sir. Ab. 253.

Q. You never did receive any returns from those lands for distribution, did you?

A. No, sir. Ab. 254.

Q. And these particular Indians complained to you that they didn't get any of the money for which their property was sold, and such complaints have been made to you particularly after you went into the office at Fort Hall as an official of the Indian Reservation; is that correct?

A. Yes, sir. Ab. 254

Q. These particular Indians never claimed by statements to you that they owned any land down in Box Elder County, did they?

A. Yes, it would amount to that. They claimed the land, and they never got the money for it. They claimed the land.
Ab. 254

Q. The particular complaint was that the land had been sold and that they hadn't received the proceeds of the sale?

A. I would not say just exactly which. They

complained to me about this money, and that as I recall, the land was disposed of in some manner, and they didn't get the whole proceeds for it. I would not say exactly yes or no to your question, but that is the way they discussed it with me. That is the reason they are here today, because they have insisted on that money which they did not get. Ab. 254.

Redirect examination the witness testified that the Indians, rely on the Government for all advice.

Q. Now, the heirs of Washington Pocatello, in fact, all the Indians, isn't it a fact that they come to you or to the headquarters for information on pretty near everything concerning them?

A. They come for almost everything under the sun that you can think of. They consider the agency and the superintendent's office the place for information and advice. That is very common thing. Ab. 259.

Q. They depend upon the Government and upon the agency for practically everything, do they not?

A. In the way of information and advice, they do, yes, sir. Ab. 259

Lucy Pocatello Johnson, testifying on behalf of plaintiffs. Ab. 269.

Testifying as to the Probate Court proceedings at the time the property was decreed among other things said:

"They sent us letter stating that there was a probation to be on three days at Brigham here, and we made previous to come here. It took us two days to get here, and we were here only just a little while when that probation was on. We were in the hall there, and we were excited, and we didn't know what to do, and so, well, the Judge asked if anybody was interested in this case that they were probating. We said we didn't have no lawyer. Well then the Judge said if you want a lawyer, I will appoint one. We said all right, nothing else to do. He phoned over, and called a lawyer by name of Foxley, and so he was rushed in here, for about 20 minutes, and we told him what our interests were and so he came in. We listened, and then when the court was over, why he said that we had one third of the land, of our grandfather's land and great grandfathers land, and that was all we understood and the probation was over with then. That is all I can recall of that hearing that we had met over there. Ab. 269.

Q. Then what did you do?

A. And this Foxley said, well the probation is all over. We then could go home, he said. "What is going to happen to that one third?" we said. He said "I got to appoint an administrator for that one-third of the land, and

then whenever the land is sold, why you are going to get what is coming to you. So, he said, "Well I will be the administrator for Josephine and Ray, and then I will take care of the rest," he said to us, and we signed on that. Of course, he was our lawyer. Ab. 270.

Q. Do you recall whether you ever went to Mr. Foxley's office.

A. Yes, we went over. He took us over. I don't know how many blocks over. We went down the street, and he took us into his office, and talked to us, and made us sign things. Ab. 270.

(Witness identified the signatures to the request that Charles E. Foxley be appointed Administrator of the Washington Pocatello estate. Ab. 271.)

Q. What did Foxley say, if anything, it was necessary for you to do?

A. Well, that is all he said. He said that if the land was sold, he would pay us out of it, then for the money to be paid to Josephine and Ray, pay their guardian, and if there was any money for us he would send it to Fort Hall, for it to be paid through Fort Hall. Ab. 271.

Q. Did Foxley say anything to you about whether you could go home?

A. Yes, he told us to go home now, we were through.

Q. Did he say anything about looking after your interests?

A. That is what he said. He said: "I am your lawyer, I will attend to everything for you." He said, "You just leave it in my hands," he said. Ab. 272.

Q. Do you recall how long it was before you ever heard anything about the matter after that?

A. It was soon after Father passed away. I think it was just about a year or so, when Donner was Superintendent, why, then we heard something about money coming from Brigham, Nine hundred dollars. Donner explained to us that Four hundred Dollars was to come to us heirs, and five hundred Dollars to the lawyer, so we took the money there in the office, and then my mother said "There is not enough for that land; that is our land; it looks as though that is not enough. What shall we do?" Then he said: "Well lets see the Superintendent and have the money sent back to him; we wont keep it home, we will just send it back, unless they pay us more than that Nine hundred Dollars, or we will let the land go out of ourselves; we have a right to know how the deed is to that land." So we told Donner. He said All right, "I will agree with you on that". He said "That is not enough, and so he said: "We will send the money back." That is the last I heard of the money. It was sent over to us and was sent back. It has still been standing that way, from that time on. Ab. 272-273

Q. That is all you heard about it from that time on?

A. Yes, Ab. 273

Q. But you have different times spoken to the Superintendent?

A. Well, I have talked with the Superintendent about ten years a time or two, and tried to get a foothold some way, so that we could take it up, then our Superintendent said we had to hire another lawyer before we could touch that land or the money. We were helpless, because we were Government wards. We had to have an outside lawyer. Ab. 273.

Q. I take it, that neither you nor any of your brothers or sisters ever got any of that money?

A. No, they never got any of it. (Ab. 274.)

Q. None of the money was ever paid to either one of you?

A. No, none of us ever got a cent even not a red penny, not a red penny, We never got that. (Ab. 274).

On cross examination, witness testified that she had taken the matter up with Denner when he was here some 20 or 22 years ago. (Ab. 274-275)

The foregoing is the essential part of the evidence presented by plaintiffs.

Defendants' Exhibit "1"- "2". (Ab. 278)

Photostatic copies of records on file in General Land Office of the United States Government. Homestead Entry #2400, Homestead Proof, including testimony of witnesses relating to issuing patent to Yaotes Owa, was marked for identification on behalf of defendants and as Exhibit "1", and was offered in evidence, and objected to on the part of plaintiff on the ground that they were incompetent, irrelevant and immaterial, and only cumbering the record. The exhibits were received by the Court. (Ab. 279.)

Plaintiffs contend that the said records do not either prove or disprove any of the issues in this case.

Defendant's Exhibit "3". (Ab. 281-282)

Letter of County Treasurer, referring to taxes on the $E\frac{1}{2}$ of $SE\frac{1}{4}$ Sec. 12, T. 11, No. R. 3, west SLM. showing the property

first taxed to Yaotes Owa in 1919. From 1920 to 1925 inclusively it was assessed in the name of A. I. Grover, and from 1925 to 1938 inclusive was assessed in the name of Amasa L. Clark and Joseph E Robinson, that all taxes during those years were paid before delinquency with the exception of 1921, 1922 and 1924, those delinquent taxes were paid or redeemed by A. I. Grover (Ab. 281-282)

It was stipulated that the letter could be received in evidence, with the understanding that plaintiffs did not admit that defendants had paid the taxes, that it was admitted in the stipulation that both A. I. Grover and the defendants had each year rented the premises and collected all the rents and retained the same. (Ab. 283)

Statement of Counsel for Defendants.

Mr. Lowe:

That is the way I have understood Mr. O'Malley's contention here, that the taxes, as he alleges were paid from the proceeds of the farm.

With that stipulation we offer defendants' Exhibit "3".

Mr. O'Malley:

With the understanding that they were paid out of the rental value of the property.

Mr. Lowe:

I do not know what the exhibits show, at least we admit that we rented the property and got some returns.

THE COURT: Exhibit "3" is received then.

Defendants' Exhibit "4"

ster from the Utah-Idaho Sugar Company in reference to a contract of purchase of 60 shares of stock right made by A. I. Grover in March, 1919, for the premises in question, and the payments made thereon. It was stipulated by plaintiff that it might be received, and was received. (Ab. 283)

Defendants' Exhibit "5" (Ab. 283)

Abstract of title known as the Philips abstract.

Mr. Lowe:

We now offer in evidence defendants' Exhibit "5", being an abstract by John W. Philips, extended by Norman Lee, as of the 28th day of March, 1925, at 10:35 A.M. being the abstract of title now held by the defendants in this action (Ab. 283)

After plaintiffs examined the abstract there was no objection to it being received and it was so received. (Ab. 284)

It is on this abstract of title, and the fact

that the State of Utah had made a loan of \$7,000.00 on the property that defendants rely on to show that the defendants were innocent purchasers for value and had notice of any defects in their grantor's title to the undivided one third interest.

Defendants in their further answer and separate defense, pleaded as follows:

"That defendants, as aforesaid claim said premises as owners in fee simple, that defendants purchased said premises in absolute good faith and without notice or knowledge of any claim or matters set out by plaintiffs in their complaint herein, except as is hereinbefore expressly admitted; that defendants were furnished with an abstract of title covering said premises which abstract had been approved by the Attorney General of the State of Utah in the making of a loan on said premises by the State of Utah, and that said abstract of title was approved by attorneys for these defendants." (Ex 61-62)

At the trial defendants offered no proof that the abstract was approved by the Attorney General of the State of Utah, or that it was

approved by attorneys for the defendants. Amasa L. Clark testified that when he purchased the land from A. I. Grover, he made no inquiries or investigation as to what title his grantor had to the undivided one-third interest decreed the estate of Washington Pocatello, deceased. Quoting from his testimony on cross examination:

Q. That has never been divided into two thirds, or one third, by a fence or anything, has it?

A. Heavens, no. Ab. 297.

Q. You knew, when you purchased the property, Mr. Clark, that it had been decreed by the Probate Court, an undivided two-thirds to one person and an undivided one-third to another person, did you not?

A. No, sir, I didn't know it. Ab. 297.

Q. You didn't consult the record at all, yourself?

A. No, sir, I just bought from the--I assumed that the State of Utah had passed title. I bought it with the idea that the abstract shows it.

Q. You assumed because the State of Utah had approved the loan, and had a seven thous-

and dollar mortgage upon the property that it was good title?

A. Yes, sir. Ab. 297-298.

By Mr. Mason:

Q. When you got this property, at the time you purchased it from Mr. Grover, you didn't go on the property at all?

A. No. Ab. 298.

Q. Of your own knowledge, you didn't know whether the land was gravelly or rough?

A. Yes, sir, I did, because I was on it just after we purchased it, yes. Ab. 298.

Q. You just went on it after you purchased it. Did you have any conversation with A. I. Grover relative to this piece of property, when you purchased it?

A. No, I can't say that I did. Ab. 298.

Q. You didn't have any conversation with him relative to the income he had received from it?

A. I think he said that it was leased under good conditions. Ab. 298.

Q. That it was a bargain, good land, under good conditions?

A. Yes, sir. Ab. 298.

Q. Did you ask him what those conditions were?

. No, sir. Ab. 299.

later he testified.)

. At the time that Mr. Grover sold this property, he was in straightened financial circumstances, wasn't he?

. I think he was. Ab. 300.

. So that he was just coming out from under the deal with the State Land Board?

. Yes, sir. He needed it. Ab. 300.

The defendant Robinson testified on direct examination that he never made any inquiry or investigation of the title.

DIRECT EXAMINATION

. You paid the consideration, in addition, as set forth in the mortgage?

. Yes, sir. Ab. 304.

. You paid some taxes, and then the balance went to Grover?

. I paid cash for my share right down. Ab. 304.

. And left it to Bishop Clark, let him finish?

. Yes, sir. Ab. 304.

To care for the straightening up of the

title?

A. Yes, sir. Ab. 304.

The evidence in the record all shows that the land was in a high state of cultivation when it was decreed on November 7th, 1919. That W. E. Getz, the administrator in the Yaotes estate, rented the eighty acres of land in 1917, for \$650.00 cash rental, so stipulated, Ab. 313, and there is no question but it rented for the same sum in 1918 and 1919. The land was worth at least \$15,000.00 when it was decreed, the court's decrees establish that fact (exhibits F and G), Ab. 239, when the Court decreed an undivided two-thirds interest to Brown, and an undivided one-third interest to the estate of Washington Pocatello, and A. I. Grover's application for a State Loan made on the 9th day of October, 1919, shows that the property at that time was in a very good state

of cultivation and had a value of \$300.00 per acre, Ab. 243 (exhibit "J"); there is not a particle of evidence that A. I. Grover ever made any improvements of any kind on the premises, and there is no competent evidence that the defendants ever made any expenditures on improvements of any kind on the premises since they obtained the same, other than the natural and regular upkeep of the premises, and there is no competent evidence that the ground was uneven, and not properly irrigated, at the time it was decreed. Quoting from the testimony of the defendants:

AMASA L. CLARK, DIRECT EXAMINATION.

- Q. What was the condition of the ground when you first procured it as to being level or otherwise? Ab. 289.
- A. Well, the parties to whom we rented it claimed that it needed a lot of work done to level it, and they asked us to buy a fresno, and they needed to do a lot of work in leveling the ground, especially on the east portion. Ab. 289.
- Q. Did you make an allowance for that?

A. Yes, sir.

Q. For those services in the rental of the property.

A. O, yes, Ab. 289.

Q. What is the condition of the land as to being level and in good condition for farming now as compared with when you first got the land.

A. It is in very much better condition.
Ab. 289.

Q. Just explain in detail, if you will, Bishop, what you mean by that?

A. We have allowed several hundred dollars for the leveling that they have done for the work in grading and scraping and leveling the ground. It is in much better condition now. Ab. 290.

That is the answer of defendant Clark in response to his counsel to explain in detail what he meant. Plaintiffs alleged and contended that the defendants are tenants in common with the plaintiffs and if they can show definite sums paid out for this work, it may be proper in adjusting the rents, but that such testimony is no evidence of ad-

verse possession against the other tenants in common.

JOSEPH E. ROBINSON, DIRECT EXAMINATION.

Q. Did you know this ground about the fall of 1919 when Mr. Grover is alleged to have purchased it?

A. I could not say. I know the territory. I had been over in that neighborhood. Ab. 302.

Q. But you hadn't paid attention to it?

A. No. Ab. 302.

Q. There was some leveling done?

A. Yes. Of course, I wasn't there every year while he had it. Then I was by there a good deal. I didn't pay so much attention to it while he owned it. After we bought the place, I was on the place. I was watching it. Ab. 303.

Q. Each and every year you have been on it, or your tenants?

A. I have been on the place there and while I go around by there, I was over-seeing it. Ab. 304-305.

Q. And you have claimed it adversely.

A. Yes, sir. Ab. 305.

Q. Under claim of right?

A. Yes, sir.

Q. You have fenced it, or kept up the fence?

A. Yes, sir. Ab. 305.

Q. What about you and Mr. Clark, have you made any improvements by way of leveling the ground?

A. Yes, sir. Ab. 306.

Q. Tell the court what you did.

A. On this one side we used a fresno, pushing down the high places, so as you could get water on it, and then fixed the ditches so as you could water it. Ab. 306.

Q. What would you say the cost of such work amounted to?

A. I would not know just what that would be. Those that did the work would know themselves what that work would be. Ab. 306.

Q. The tenants took it out of the rent?

A. Well, yes. Ab. 306.

That is the direct testimony of the defendant Joseph E. Robinson, who was over-seeing the place since the defendants purchased it, then on cross-examination on the same subject, he testified as follows:

A. In that neighborhood, I say; a good many years. Ab. 307.

Q. Had you ever been along there, paying any particular attention to that property before 1925?

A. Not particular. I may have been down there. There was another road, of course, around into Tremonton. Ab. 308.

Q. Not many times, had you?

A. No. Ab. 308.

Q. This lies down off the highway?

A. Yes. Ab. 308.

Q. You didn't have any particular reason to go down that way?

A. Not particular. Ab. 308.

Q. How much of this ground was unlevel, how many acres?

A. If you were on there, we could tell. Ab. 308.

Q. Approximately -- that will be near enough.

A. Well, I think a third of it. Ab. 308.

Q. Now, I show you here, here is Mr. Grover's application for a loan. It says he has sixty-five acres under cultivation, and then the balance is uncultivated. Now, some of this leveling has been done

on the fifteen acres?

A. What do you call the fifteen acres?

Ab. 308-309.

Q. I don't know, myself. I haven't been on the property.

A. The northeast portion there, there was a cross-irrigating ditch there, and very uneven. That was the worst part of it. The other where the buildings were, that was more level, but there was an acre or such a matter, there was just a swale in there. We had to fill that up and grade over there. Ab. 309.

Q. That was over in the northeast portion?

A. That was on the southwest corner. Ab. 309.

Q. How many acres do you think you have under cultivation at the present time?

A. Sixty acres. Ab. 309.

Q. You haven't any more than that?

A. No, sir. Ab. 309.

Q. The reason I ask, Mr. Grover's application said there was sixty-five acres under cultivation at that time. I don't know where he would get his sixty-five acres in there. As I understand it, there are two ditches that run diagonal?

A. Yes, sir. Ab. 309-310.

Q. They have been there ever since you can

remember?

A. Yes, sir. Ab. 310.

Q. And this has been under irrigation for the past twenty years?

A. Yes, sir. Ab. 310.

Q. Or twenty-five years?

A. Yes, sir. Ab. 310.

Q. Were you ever down on this property when Bishop Moroni Ward was managing it for the Indians?

A. Yes, sir. I went to see Moroni Ward about these other parties who claimed they had bought this right of way through there for this ditch, but Ward told me then he was looking after it for the Indians. They claimed they bought it, but they didn't. Ab. 310.

Q. What work have you done in repairing the fences, putting in posts and keeping up the fences?

A. Sellman has been doing all that work. Ab. 310.

That at the close of the taking of testimony, on the 14th day of September, 1939, that the court continued the hearing until the 9th day of October, 1939, to give both

parties time to file briefs and to present argument to the court; that on the 9th day of October, 1939, that counsel for both parties having filed with the court their briefs, did argue the case before the court, and on said date the court took the matter under advisement, and on the 23rd day of October, 1939, made and entered a memorandum decision, as follows:

"THE COURT:

In the case of Laura Morris, Special Administratrix, vs. Clark and Robinson, the court directs that findings and decree be prepared in favor of the defendants and against the plaintiffs, for the reason that the Court is not convinced from the record here but that the full amount of the escrow had been paid by Sailor or Diteman, or some of the other parties in interest, and for the further reason that it affirmatively appears that during the minority of these Indians, an administrator was acting, or supposed to be acting, in this jurisdiction, a fact which those Indians knew about for the reason that they went to the Superintendent at Fort Hall and requested certain things to be done; and it is my understanding that the statute of limitations will run against a minor during the time that the personal representative is acting.

"As far as the questions of notice are concerned, the mere fact that Mr. Service made an affidavit showing the terms of the escrow can't be held to mean anything in view of the fact that the very deed referred to in the escrow appears to have been subsequently recorded, showing a consideration of \$3200.00, nor does the affidavit of Grover, as shown in the abstract, give notice of any peculiarity; so findings may show that the defendants were innocent purchasers for value.

"Now, in view of the fact that I did not fix a date for rendering a decision in this matter, I will ask the reporter to make a transcription of this decision, and counsel for the defendants is requested to prepare and present to this Court not later than November 13th, 1939, after notice of counsel for plaintiff, proposed findings, conclusions of law and decree." Ab. 105 (Trans. 0312).

That the Court, on the 27th day of November, 1939, after due and regular proceedings in the matter, made and filed its Findings of Fact (Ab. 112 to 142), Conclusions of Law (Ab. 143), and Decree (Ab. 144-146, Trans. 112-146), finding, concluding and decreeing every thing in favor of the defendants and against the plaintiffs. That from the Findings of Fact, Conclusions of Law and Decree in favor of the defend-

ants and against the plaintiffs, and from the whole thereof the plaintiffs appeal to this Court on both questions of law and fact.
Ab. 157 (Trans. 0335).

QUESTIONS FOR DETERMINATION.

A. The first, most important and controlling question for determination by this Court, was, or is, the Warranty Deed, executed by Washington Pocatello, as only surviving heir of Jane, daughter of Yaotes Owa, and Minnie Pocatello, his wife, Indians, wards of the United States Government, on the 2nd day of February, 1917, for all of the $E\frac{1}{2}$ of the $SE\frac{1}{4}$ of Section 12, T. 11, N. R. 3 W., S.L.M., land in Box Elder County, Utah, to one U. F. Ditman for a consideration of \$3200.00, which said Deed was on the same date placed in escrow with the First National Bank of Pocatello, Idaho, under an escrow agreement, accepted by said Bank, the terms of said agreement being written on the front of the envelope in which the deed was placed, not to deliver said Deed until the full sum of \$3000.00, the unpaid balance of the consideration, be paid to said Bank on behalf of

the said Washington Pocatello, in payments of \$300.00 per year, on the 20th day of December each year, the last payment to be made on the 20th day of December, 1926, (exhibit "H") containing photographic copies of escrow papers), Ab. 241, and an affidavit being made by W. D. Service, Cashier of said Bank, on the 18th day of April, 1917, describing the terms of the escrow agreement, as follows:

"That said deed is now in the possession of the First National Bank of Pocatello, Idaho, and to be delivered to the said U. F. Diteman when all the following payments have been made at said Bank for and in behalf of the said Washington Pocatello, to wit: \$300.00 on December 20, 1917, and \$300.00 on December 20th of each and every year thereafter up to and including December, 1926." (Exhibit "B"),

the said affidavit being sworn to entitling it to be recorded, the same being recorded by Albert Saylor in the County Records of Box Elder County, Utah, on the 19th day of April, 1917, (exhibit "B"), (said affidavit is set forth in the Findings of the Court in this

case, finding No. 8, Ab. 118), the said Washington Pocatello, having at the time he executed said Deed, signed a request that one W. E. Getz of Box Elder County, Utah, be appointed administrator of the estate of Yaotes Owa, deceased, the District Court of Box Elder County, Utah, having on the 8th day of May, 1917, appointed W. E. Getz administrator of the estate of Yaotes Owa, deceased, and Washington Pocatello having died on the 27th day of April, 1917, and a number of other Indians having made claim as heirs of said Yaotes Owa, the District Court having, also on the 26th day of June, 1918, appointed W. E. Getz as the administrator of the estate of the daughter of Yaotes Owa, Jane, and her husband, under the title of Jane Brown and James Brown, deceased, embracing the same identical eighty acres of land, all of which facts are admitted; and, the District Court having, on November 7th, 1919,

ade its Findings of Fact and Conclusions of
aw, in both estates (exhibit "E"), finding
a substance, that the daughter Jane was
arried at the time of her death to one
ames Brown, who, at the time of his wife's
eath would inherit, as her husband, under
he laws of Utah, and that James Brown, on
is death, left surviving him a son by an-
ther marriage, named James S. Brown, living
t the time of the decree, and that James
. Brown, the son of the husband of Jane, was
ntitled to inherit two-thirds of the estate
f Yaotes Owa, and that Washington Pocatello
as as an heir of half blood, entitled to in-
erit an undivided one-third interest of the
estate (exhibit "E"), Ab. 238, and the Dis-
rict Court having, on the 7th day of Novem-
er, 1919, made two decrees, almost identi-
al in substance, one in the Yaotes Owa es-
ate, and one in the Brown estate, decree-

ing an undivided two-thirds interest, to James S. Brown, the son of the husband of the daughter Jane, and an undivided one-third interest to the estate of Washington Pocatello, deceased, both decrees being filed of record on November 8th, 1919, (exhibits "F" and "G") Ab. 239; Now, was or is that deed, executed by Washington Pocatello and Minnie Pocatello on the 2nd day of February, 1917, for the whole premises, and placed in escrow, a good and valid deed for the undivided one-third interest decreed to the estate of Washington Pocatello, deceased, after his death, in the hands of A. I. Grover, defendants' grantor, the said A. I. Grover having on the 3rd day of November, 1919, secured from U. F. Ditchman and Josie Ditchman, his wife, a Quit Claim Deed for the full eighty acres of land and who, on the 7th day of November, secured from James S. Brown and his wife, for the consideration of \$2000.00, a warranty Deed, naming U. F.

Diteman, as grantee for the undivided two-thirds interest decreed to said Brown, and the said A. I. Grover, on the 8th day of November, 1919, having secured a Power of Attorney from U. F. Diteman (exhibit "H", escrow papers), said power of attorney directing the First National Bank of Pocatello, the escrow depositary, to turn over and deliver to A. I. Grover the said Deed and other papers now held by said Bank, covering the escrow agreement, the said A. I. Grover on the 7th day of November, 1919, also securing from the Clerk of the Court of Box Elder County, a certified copy of the Decree of Distribution in the Yaotes Owa Estate, the said A. I. Grover sending the said Power of Attorney and the said certified copy of the Decree of Distribution to the First National Bank of Pocatello, Idaho, the depositary holding said deed, and paying to said Bank the depositary, only \$1000.00, just one-third of the sum

that the escrow agreement obligated U. F. Dite-
man, the grantee named in said deed, to pay to
said Bank, before the deed could be delivered,
and the bank, the depository, delivered the
Washington Pocatello Deed to A. I. Grover, when
it had only received \$1,000.00, instead of
\$3,000.00, called for under the escrow obliga-
tion. And the said A. I. Grover, filing that
Deed together with the quit claim deed of U. F.
Ditemand of Record in Box Elder County, Utah,
on the 10th day of November, 1919, and by virtue
of that deed (exhibit "K"), claimed title to the
undivided one-third interest in the said eighty
acres of land that was decreed by the District
Court on the 7th day of November, 1919, to the
estate of Washington Pocatello, deceased. The
evidence showing beyond any possibility of doubt
that it was A. I. Grover who paid only the
\$1000.00, and secured the Deed of Washington
Pocatello, deceased, and filed it for record.

Was that a valid Deed in the hands of A. I. Grover, or was it invalid and a void deed, of no force and effect, and passed no title to the undivided one-third interest of the land, decreed by the Court to the estate of Washington Pocatello, deceased, to U. F. Diteman, and through Diteman to A. I. Grover? And was it, or not, obtained by A. I. Grover wrongfully, through fraud, deceit and artful and designing chicanery on the part of A. I. Grover, thereby obtaining and securing a valuable property right from its true owners for one-fifth of its reasonable value? The learned lower court having found that the deed so delivered was valid, and was not a void deed, and passed complete title to the undivided one-third interest to U. F. Diteman, and exonerated U. F. Diteman, A. I. Grover and the depositary Bank, of any wrong, and of any knowledge of any wrong whatsoever, finding that the Bank was justified

in delivering the deed; that there was no fraud, no decoit, no connivance on the part of anyone; that the deed showed a consideration of \$3200.00; that the deed was regular on its face; that A. I. Grover had no knowledge that the full consideration was not paid by U. F. Diteman or someone for U. F. Diteman; that the plaintiffs did not prove that the full consideration was not paid to the Bank, and for that reason the Court found that the \$3200.00 recited in the deed was paid to the Bank (Findings Numbers 9, 10 & 11), and more or less particularly stressed throughout all of the court's findings to and including No. 24, Ab. 112 to 142, Trans. 0315 to 0324). The Court refusing to recognize the final account of Charles E. Foxley, the administrator whom the Court appointed in the Estate of Washington Pocatello, deceased, who reported to the Court that only \$995.00 had

been paid for the securing of that deed (exhibit "M", Probate File 355, Ab. 246), which Final Account the Court has never passed upon.

Did the lower court err in all of its specific Findings on this point is the first important question to decide in this case; all subsequent points are secondary to this question. If the lower court did not err on this point, and the deed of Washington Pocatello was a valid deed in the hands of A. I. Grover, then that settles the whole case.

B. Whether or not, it is the rule of law that when plaintiff shows that an instrument was placed in escrow not to be delivered by the escrow depositary only upon the full performance of certain conditions, and especially in the case of a deed placed in escrow, not to be delivered until the full consideration expressed in the escrow agreement is paid in full, does not the burden shift to the defendants claiming

under that deed to prove a full compliance with all the obligations, and that the deed was legally delivered? The lower Court having found that such burden was on plaintiffs in this case, (Finding Nos. 9 & 10, Ab. 119-122, Trans. 0317-0318). Memorandum decision Ab. 105, Trans. 0312, and refusing to accept the report of the administrator in the estate of Washington Pocatello, deceased, as evidence that only \$995.00 was received as payment for this deed (exhibit "M", Ab. 246.

C. Whether or not the Findings of Fact, Conclusions of Law and Judgment of the Court, in this case, in favor of the defendants and against the plaintiffs on every point in the case are contrary to the law of this case, and not supported by the facts of the case? (112-142).

D. Sufficiency of the evidence to support the Findings of Fact of the Court, on any point in

this case in favor of the defendants and against the plaintiffs?

E. Whether or not, if the deed of Washington Pocatello is an invalid deed, and did not pass title to the undivided one-third interest to U. F. Pitman and did not establish a good chain of title in A. I. Grover, did the defendants have notice when they purchased the property from A. I. Grover that the deed of Washington Pocatello had been placed in escrow; that their grantor had wrongfully obtained possession of same and placed the same of record; that said deed did not legally transfer the undivided one-third interest decreed to the Estate of Washington Pocatello and that the estate of Washington Pocatello was still in the process of probate in the District Court of Box Elder County, Utah, at the time the defendants purchased the property from A. I. Grover?

F. Whether or not, if said deed is found to

be invalid, would it even avail, in the hands of an innocent purchaser for value, unless such purchaser pleaded and proved some element of estoppel against the heirs attacking the validity of the deed?

G. Whether or not the plaintiffs' first cause of action is barred by the Statute of Limitations of the State of Utah, and particularly by the provisions of Sections 104-2-5, 104-2-6, 104-2-7, 104-2-19, and by Subdivision 3 of Section 104-2-24 of the Revised Statutes of the State of Utah, 1933, as so found by the Court, in its Finding No. 28, Ab. 142? Can the Statute of limitations against the heirs in this case be invoked, the Court never having passed upon the Final Account of its administrator in the Washington Pocatello estate, Ab. 246?

H. Whether or not the Statute of Limitations of the State of Utah can be invoked against the

plaintiffs, they being Indians, wards of the Government, living on a Reservation, under the tribal laws and regulations, under tutelage of the Government? And, whether or not Washington Pocatello and Minnie Pocatello, could make a valid Deed in the first instance without the approval of the Secretary of the Interior; and, also, are not the plaintiffs all incompetents under Section 102-13-20, Revised Codes of the State of Utah, 1933?

I. Whether or not, if A. I. Grover had no valid Deed to the undivided one-third interest decreed to the estate of Washington Pocatello, deceased, did he not enter into the possession of the premises as tenant in common with the heirs of the estate, and thereby collected the rents as a tenant in common, and was subject to an accounting of the rents to the administrator and to the Court, and that he could not convey away

the title of his co-tenants?

J. Whether or not it was fraud and conspiracy on the part of Charles E. Foxley and A. I. Grover, the said Grover obtaining the Deed by only paying \$1000.00 and the said Foxley, knowing that Grover only paid the \$1000.00, for Foxley not to file any inventory in the estate of Washington Pocatello, but so send a certified copy of his Letters of Administration to the escrow depositary and demand the \$1000.00, instead of filing an inventory and petition the court for permission to recover the undivided one-third interest?

K. Whether or not, if the deed is invalid have the defendants pleaded or offered any evidence of any elements necessary to be pleaded and proven to establish title by adverse possession, or pleaded or proven any element of estoppel against any one of the heirs of Washington Pocatello, deceased, from

bringing this action and demanding their rights from the District Court of the First Judicial District of the State of Utah, in and for Box Elder County, which said Court had for more than twenty years held the matter of the estate of Washington Pocatello, deceased, on its docket, undisposed of?

L. Whether or not, if the deed of Washington Pocatello is invalid, the premises having rented each year for a good rental, and the defendants admitting they collected all of the rents, and retained the same, did not the undivided one-third interest of the Estate of Washington Pocatello yield much more rental than paid an undivided one-third of all taxes and legal assessment, and any improvements that might have been made on the premises; that the defendants collected such rents as tenants in common, and are subject to an equitable adjustment under plaintiffs' second cause

of action?

M. Whether or not Washington Pocatello, being dead and the power of agency of the First National Bank of Pocatello, Idaho, the escrow depositary, having terminated on the death of Washington Pocatello, could A. I. Grover secure a power of Attorney from U. F. Diteman, the grantee in the Washington Pocatello deed, also secure a certified copy of the decree of the court, decreeing the premises undivided, file the same with the escrow depositary, and only pay one-third of the consideration expressed in the escrow to be paid before the deed could be delivered, and file that deed of record, and thereby cut off the right and jurisdiction of the District Court in the estate of Washington Pocatello, deceased, to pass upon the delivery of that deed, and cut off the rights of the heirs, without proceeding, under Section 7741, Revised Statutes of Utah, entitled Specific

Performance of decedents' Contracts, was it not fraud, inequitable, circumventing the Statutes of Utah, against Public Policy, depriving the heirs of a valuable property right for inadequate consideration, and the taking of their property without due process of law? The lower court having found that it was not necessary to invoke the provisions of Sec. 7741, Revised Statutes of Utah? (Finding No. 9, 1st lines; Ab. 121, Trans. 0318).

N. Whether or not Ray Pocatello, one of the plaintiffs, was not a minor, and this action was commenced within two years after he arrived at the age of majority, and no provisions of any Statute of Limitations had commenced to run against Ray Pocatello? (Ab. 250, Trans. 15).

ARGUMENT AND AUTHORITIES.

A Deed placed in "ESCROW", not to be delivered until full performance of all the conditions expressed in the escrow agreement, if delivered without the full performance of all the conditions, and payment of all obligations, is void, passes no title to the grantee named in the deed, and is not a good deed even in the hands of an innocent purchaser for value.

Authorities.

Corpus Juris lays down the rule:

"Where an instrument is deposited as an escrow, it cannot be operative until the conditions of the event stipulated upon are performed or the contingency has happened. Generally, Courts hold the grantee or obligee to a very strict compliance with the conditions imposed. That the grantee has gone into possession of the land to be conveyed does not alter the rule. A part performance has no effect on the status of the instrument. An entire performance is necessary."

C. J. Vol. 21, P. 880-881 (and numerous cases cited).

"Since the performance of the conditions or the happening of the contingency is essential to a valid delivery of an escrow by the depository to

the grantee or the obligee, it follows that a delivery before performance of the condition or the happening of the contingency is unauthorized, and if the grantee obtains possession of the instrument before such performance, he acquires no right or title thereby. Wrongful delivery by the depository does not make the deed operative; nor does it increase in any way the rights of the grantee."

C. J. Vol. 21, P. 883-834. (And numerous cases cited).

"A transfer to a subvendee of an instrument, wrongfully delivered to the grantee or obligee, confers no right or title upon him where he has notice of such delivery or is put upon inquiry regarding it. Further, although there is some authority to the contrary, according to the weight of authority the same rule applies even in the case of an innocent subvendee without notice of the conditions or event stipulated in the escrow contract, and is especially applied in cases where the escrow has been obtained or delivered through fraud. Some authorities proceed on the theory that a depository is a special agent of the depositor and therefore, his powers being limited to the conditions of the deposit, one who claims through him takes the risk of the agent exceeding his powers."

C. J. Vol. 21, P. 885-886, (and numerous cases cited).

"Generally speaking, an escrow delivered by the depository before compliance with or contrary to the conditions on which it is delivered, is inoperative. No title passes to the grantee, and with certain exceptions, a

bona fide purchaser acquires no rights against the grantor of a deed thus improperly obtained, at least unless the grantor was so negligent, careless, and inattentive of the rights of others as to estop him from claiming against such purchaser. The mere fact of any person, even the depositary himself, surreptitiously or fraudulently recording the deed or getting it recorded, does not give it efficacy, and the cloud on the grantor's title thereby created will be cancelled by a court of equity."

R. C. L. Vol. 10, P. 636, 637.

A Deed placed in escrow cannot be delivered after the death of the grantor by the depositary without an order of a court of proper jurisdiction.

"Until the performance of the condition, the title of the land to be conveyed remains in the grantor. If the grantee dies before the happening of the event or the performance of the condition, the title descends to his heirs, subject to the purchasers' equitable interest."

"It follows therefore that an escrow given to the grantee or obligee by the depositary before compliance with the conditions or before the happening of the event stipulated passes no title to the grantee or gives no right to the obligee."

CYC. Vol. 16, P. 578, 579.

The Supreme Court of Utah has repeatedly

held the foregoing principles to be the law
of the State of Utah:

Calhoun County vs. American Emigrant Co.,
93 U. S. 127, 23 L. ed., 826.

Morris vs. Blunt, 35 U. 194.

Gammon vs. Bunnell, 22 U., 421.

In a case from Box Elder County that involved Charles E. Foxley, who was the administrator appointed by the court in the matter of the estate of Washington Pocatello, the Supreme Court said:

"But even in the absence of any stipulation, the placing of the deed in escrow left it, so far as the passing of the title is concerned, precisely as if no deed had been executed. A deed placed in escrow does not become effective until the conditions upon which it is executed have been fully performed, and taking possession of the property by the purchaser, and part performance, ordinarily do not change the rule. CYC. 576, 577; Calhoun vs. American Emigrant Company, 93 U. S. 127, 23 L. Ed. 826; Burkham vs. Burk, 96 Ind. 273; Fuller vs. Hollis, 57 Ala. 457."

Foxley vs. Rich, 35 U. 162.

The Supreme Court of California in a

recent case has held:

"The law is well established that a delivery by an escrow agent contrary to the terms of a deposit in escrow is void and of no force and effect."

Greenzweight vs. Title Guaranty and Trust Company, 36 P. (2d), 186.

An example of the rigid stress that courts impose upon the fulfillment of every condition expressed to be performed before a Deed placed in escrow can be delivered is cited to this Court in the ruling of the Supreme Court of California, in a case where the Los Angeles High School District was the purchaser of the property, and the only amount involved in the condition that was not performed was the sum of \$43.55, tax adjustment. The lower court having held there was a good delivery, the Supreme Court reversed, and among other things said:

"Where a deed is placed in the hands of a third person, as an escrow, with an agreement between the grantor and grantee that it shall not be delivered to the grantee until he has complied with certain conditions, the grantee does not acquire any title to the land,

nor is he entitled to a delivery of the deed until he has strictly complied with the conditions. Dyson vs. Bradshaw, 23 Cal. 528, 536. If he does not comply with the conditions when required, or refuses to comply, the escrow holder cannot make a valid delivery of the deed to him."

In conclusion, the Court said:

"Instead of complying with the condition, which was reasonable, and with which it was fully cognizant, the respondent undertook to settle with appellants for the tax, 'outside the escrow'. It does not appear that such course was ever agreed to by appellants, or that they have ever paid the amount. It follows, therefore, that the manual transmission of the deeds by the title company to the respondent for 'acceptance and return to it' must be considered as having been made only for the purpose of putting the deeds in proper shape to be recorded. Transmission for any other purpose was at that time beyond the scope of the power and authority of the Title Company as the escrow holder. No other delivery appears to have been made or attempted. As a result, there was no delivery at all, no title passed, and the deeds never took effect. 10 Cal. Jur. p. 591, par. 15. The judgment is reversed."

Los Angeles High School Dist. vs. Quinn,
195 Cal. 377, 234 P. 313, 316.

A multitude of cases could be cited from every state in the Union, in support of the rule of law, that a deed delivered by the

escrow depositary without full compliance with all and every condition to be performed passes no title and is void.

In the case at Bar, Washington Pocatello died just shortly after his deed was placed in escrow, and long before the Court determined that he was an heir, entitled to inherit the land he had executed the deed for, and long before it was decreed to his estate. Plaintiffs pleaded and contend that even if A. I. Grover had paid the full sum of \$3000.00 to the bank, after that decree, that the bank had no right to deliver the deed, and the deed would not pass title to the property, without the proper proceeding before the District Court, under Section 7741, Revised Statutes of Utah. The learned lower court held otherwise, finding in the closing paragraph of Finding No. 9, Ab. 121, as follows:

"The Court further finds that although Washing-

ton Pocatello had title before the property was decreed to his estate, that it was unnecessary to specifically enforce the escrow agreement under the provisions of Section 7741, Revised Statutes of Utah, but the Bank, upon the payment of the consideration aforesaid, was justified in delivering the deed to the grantee therein." Finding No. 9, Ab. 121.

The Court erred in such a finding, for two reasons; first, the Court was trying to show by that finding that the full amount of the sum expressed in the escrow was paid, when the court's own record (exhibit "M") proves that only \$1000.00 was paid by Grover for the deed. Second, under the law and the decisions of the Supreme Court of Utah, when a grantor dies before the delivery of a deed placed in escrow, the title of the property passes to the heirs, and the authority of the Escrow depositary who is the agent of the grantor ceases at the time of the death. Therefore, the depositary has no right to deliver the deed even if the full amount was

paid, and the only way the grantee could enforce his rights under the escrow contract would be under the Statute of Specific Performance, so a court can decide whether the deed should be delivered or not. In the case at Bar, the depository had no power to alter a dead man's contract, and accept \$1000.00 when the contract called for \$3000.00, and pass the title that had rested in the heirs.

In a very recent case, the Supreme Court of Utah held:

"The property of a decedent passes to the heirs (in whom the title vests at the death of the private owner) subject only to administration. Even the right of possession of real property vests in the heirs during administration."

In re Cloward's Estate, 95 U. 453.

The Court of Utah has held the depository is agent of both parties.

"Depository is agent of the parties only in doing what is required of him."

Nelson vs. Ashline Jenkins Co., 66 U., 351.

In the case of Gammon vs. Bunnell, the Court of Utah said:

"The depository of an escrow is the agent of both parties and a contract so made and deposited is not revocable at the will of either party or their representatives, but may be enforced under the provisions of Section 3965, Rev. St."

Gammon vs. Bunnell, 22, 421:

Again the Court held:

"In proper cases, the probate court may direct an administrator or an executor to perform decedent's contracts."

Rogers Estate, 75 U. 290.

The Washington Pocatello deed in the hands of A. I. Grover did not even give color of title.

A deed wrongfully delivered by the escrow holder, and wrongfully obtained and recorded by the grantee, as done in the case at Bar, does not even constitute color of title.

"An instrument, although signed, is not available to prove color of title unless it has been delivered."

"A deed delivered as an escrow to be absolutely delivered on the performance of a certain act, if finally rejected by the bargainee, does not give his possession color of title."

Chastine vs. Philips, 10 S. E. 991,
33 N. C. 377.

"There is some conflict of opinion as to whether a fraudulent deed constitutes color of title. It has been held that deeds, although fraudulent on the part of the grantor, if accepted bona fide by grantee and without fraud, give color of title. Other decisions, however, maintain contrary view."

C. J. Vol. 2, p. 190.

The above rule draws a clear distinction between fraud of the grantor and fraud of the grantee, as it says: "if accepted bona fide by grantee without fraud", meaning that if there is any fraud practiced by the grantee in accepting or in obtaining the deed, it does not give color of title. Supporting this position are the following cases:

Parker vs. Salmons, 101 Ga. 160; 28 S. E. 681, 65 Am. St. Rep. 291.

Livingston vs. Perue Iron Co., 9 Wend. (N.Y.), 511.

Housey vs. Moses, 70 Tex. 42; 7 S. W. 606.

Utah cases:

"The plaintiff having shown the legal title was in him, the law presumes that he was in constructive possession, in the absence of evidence to the contrary."

Ives vs. Grange, 42 U. 608.

Gibson vs. McGurkin, 37 U. 158.

Van Wagoner vs. Whitmore, 58 U. 410.

BURDEN OF PROOF IS ON DEFENDANTS.

When it is admitted or shown that a deed was placed in escrow, to be delivered only upon full compliance or performance of the conditions expressed under which the instrument was placed in the hands of the escrow holder, and it is pleaded that the deed was wrongfully delivered without full compliance and performance of all of the conditions of the escrow agreement, then the burden falls upon the parties claiming under the deed to prove all of the conditions of the escrow agreement have been performed and that the deed was

rightfully delivered, and the lower court erred in this case in holding and finding that such burden was on the plaintiffs. (Finding No. 9, first lines, Ab. 119).

"If the party who is relying upon the conditional deposit of the instrument as an escrow proves the deposit, it is then the duty of the other party to go forward and prove the performance of the condition or the happening of the event upon which the instrument was to take effect. Where there is a question of bona fide purchaser who claims to have bought land without notice or knowledge of an escrow contract, the burden of proving all of the facts necessary to constitute a bona fide purchaser rests upon those who make the claim. A purchaser contending that a deed should relate back to the time it was placed in escrow had the burden of proving as against intervening rights, that he is otherwise unable to protect himself against loss. The burden of proving estoppel is upon him who asserts it."

Vol. 21, C. J. 894, 895.

"If there was a delivery in escrow upon conditions which were subsequently to be performed, the burden was upon the grantee to show what such conditions were and their performance."

Kavanaugh vs. Kavanaugh, 260 Ill. 179;
103 N. E. 65.

The Court of New Jersey in an early case

laid down the rule of law:

"Although the custody and possession of a complete instrument under seal by the grantee, coventee or obligee is sufficient evidence of delivery, if not overcome by proof that the grantee came improperly into possession of it in ordinary cases, yet where the proof is clear that the final transfer to the party was not to be made unless certain terms or conditions were complied with, the law puts the party claiming its benefit to the proof of compliance. The power to transfer is subject to the performance of a condition precedent, which must be proved, and is not to be inferred from unexplained possession. It is a question of agency, and the power of the special agent to do the part must be shown. Story on Agency, 126; Paley on Agency; 3 Kents Comm. 620, 4th ed."

Black vs. Shrove, 13 N. J. Equity, 455.

Judge Gilbert of the Circuit Court of Appeals, in a case involving \$60,000.00, in Seattle, Washington, among other things, said:

"The decided weight of authority seems to sustain the view that such delivery is inoperative to convey title, even in favor of an innocent purchaser without notice, unless the grantor has, by some act or conduct of his own estopped himself to deny delivery. The principle on which the doctrine rests is that the deed delivered in violation of the terms on which it was placed in escrow is not in fact delivered, and its possession by the grantee is no more effective to convey title than would be the possession of a forged or

stolen deed. Everts v Agnes, 4 Wis. 343; A.W. Borry v Anderson, 22 Ind. 36; Jackson v Lyon (Iowa) 62 N.W. 704; Whipple v Fowler (Neb) 60 N.W. 15; Smith v Bank, 32 Vt. 342; Haven v Kramer, 41 Iowa, 382; Tisher v Beckwith, 30 Wis. 55.

"To constitute a bonafide purchaser, there must be want of notice, both at the time of the purchase and at the time of the actual payment of the purchase price. Notice before payment is equivalent to notice before contract, even though the unpaid balance is secured.****

"They had notice that Parkinson had no title. They found a deed which was in the possession of neither the grantor or the grantee, but in the hands of a depository. They knew the depository was bound to deliver the deed only upon the performance, and that he was equally bound to withhold its delivery until performance. The depository was the agent of the grantor, but he was also the agent of the grantee. His authority so far as he represented either, was not like the authority of a general agent. His agency was special, and of a single act. On procuring the delivery of the deed so held by him in escrow, the appellants were bound to know whether or not the conditions on which its delivery depended had been met. It is not sufficient that they were ignorant of the rights of the grantor, or that no special fact or circumstances came directly to their notice to suggest their rights. It was not sufficient that the depository voluntarily surrendered the deed, or stated that the terms of the escrow had been fulfilled. The circumstances that the deed was in escrow was of itself sufficient to require them to ascertain facts."*****

The burden of proving all of the facts necessary to constitute themselves innocent purchasers rest upon appellants".

Balfour v Hopkins, 93 Fed 564.

The Supreme Court of the United States has laid down the rule that a deed passes no title, when placed in escrow, if delivered without a full performance of the conditions of the escrow, and distinguished between the case of a bona fide purchaser of negotiable paper, which had been wrongfully delivered by a depositary and that of a purchaser of real estate under like conditions, and quoted with approval the language of Chief Justice Biglow in Fearing V Clark, 16 Gary, 74, as follows:

"The rule is different in regard to a deed, bond, or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party intrusted. But the law aims to secure the free circulation of negotiable paper,

and to protect the rights of persons taking it bonafide, without notice."

Provident Life and Trust Company of Philadelphia v Mercer County, 170 U. S. 593, 604, 18 Sup Ct, 788, 793, 42 L. Ed, 1156, 1162.

Time Deed placed in escrow takes effect.

It is a settled rule of law that there is no delivery of a Deed at the time it is placed in escrow and the actual delivery takes place only at the time of the full performance of all the conditions of the escrow agreement, and it is only in special instances that final delivery relates back to the delivery in escrow, and then only in cases where there has been a full performance of the conditions prescribed and no intervening rights have taken place and for the purpose of promoting justice, Corpus Juris lays down the following rule:

"It has frequently been held or broadly stated that the escrow does not take effect as a fully executed instrument until it is rightfully delivered by the depository to the grantee, obligee or payee."

"The rule that an unrecorded deed is valid between the parties thereto does not apply where the deed has been placed in escrow and has not been delivered. Intermediate rights are valid against the second delivery. The instrument takes effect in its entirety at the time it goes into effect."

"An instrument held by a third person as an escrow usually does not take effect until the performance of the condition or the second or final delivery."

Vol 21, C. J. P's 888, 889, 893.

The Supreme Court of Michigan in the following case held:

"While a deed in escrow is frequently held to relate back for the purpose of avoiding the difficulty of incapacity of the grantor, or, his death occurring before the deed is handed over by the depositor, yet, except for that formal purpose, there is no universal relation. Intermediate rights are valid against the second delivery."

Taft vs Taft, 26 N. W. 426.

In no case can deed relate back unless all the conditions are performed. The Supreme Court of Utah, has settled that question;

"There may be circumstances under which the deed placed in escrow, when all the conditions are

performed, will relate back to the time of its execution, but this is the case only when justice requires that the doctrine of relation be enforced. The title, therefore, remained in J. Y. Rich until respondent had complied with the conditions imposed upon him, namely until he had made the final payment and paid the taxes assessed against the property."

Charles E. Foxley vs J. Y. Rich, 35 Ut, 162.

In a later case the Court of Utah held:

"The controlling question is, does the evidence disclosed by the record sustain the trial Court?

- (1) This is an action in equity in which it becomes our duty to determine questions of fact as well as questions of law.
- (2) The lease to the property in question being admittedly in the plaintiff, the burden was upon the defendant to establish his equitable rights if any he had by a preponderance of the evidence."

Hargraves vs Burton, 59 Ut, 575.

In the case at Bar defendants cannot attempt to contend that the sustaining of this deed, under the circumstance it was obtained, and have it relate back to the time of its execution, would be in the promotion of justice. Therefore plaintiffs can not understand how the trial court

could find and hold that the Deed of Washington Pocatello and Minnie Pocatello his wife was not void, but was a good and valid deed, and passed title to the undivided one third interest; that the deed was not wrongfully obtained by A. I. Grover; that there was no fraud, and that the full \$3200.00 was paid to the Bank (Finding 9, 10) Abstract 119 - 122. The trial Court certainly erred in finding that the full \$3200.00 was paid to the Bank, and that the plaintiffs failed to prove that the full amount was not paid. Both plaintiffs and defendants placed in evidence the Court's own record in the probate proceedings, of the Estate of Washington Pocatello, deceased, (Exhibit "M"), Abstract 245 - 246, and it proves conclusively that all there was paid to the Bank for the Deed was \$1000.00. So in this case although the burden was not on the plaintiffs to prove this fact, nevertheless they did prove that

only \$1000.00 was paid by A. I. Grover, as it can not be disputed that it was A. I. Grover, who paid the \$1000.00, secured the deed and filed it of record.

NOTICE

Defendants Had Notice.

The affidavit of W. D. Service, Cashier of the First National Bank of Pocatello, Idaho, filed of record on the 18th day of April, 1917, told the World that the Washington Pocatello Deed to U. F. Diteman, ~~was for~~ the whole 80 acres placed in escrow and then in the possession of the said Bank, to be delivered to the said U. F. Diteman, when all the following payments shall have been made at said bank for and in behalf of the said Washington Pocatello, to-wit: \$300.00 on Dec. 20, of each and every year thereafter up to and including Dec. 20, 1926. (Exhibit "B"), (defendants exhibit "5", the Philips Abstract), and it was

admitted by the defendants, and found by the trial Court, (Finding No. 8), Abstract 118, that this instrument was filed of record, and that said escrow agreement was entered into before Washington Pocatello had acquired any title to the premises through the probate proceedings and that said Washington Pocatello had never occupied the land. (Finding No. 11), Abstract 118.

Was that not notice to the defendants, who purchased this property five years after it was decreed, to determine whether that Deed had been properly delivered, or, whether it was a good and valid deed or not, before they took the property off the hands of A. I. Grover?

The State of Utah had at that time, and has today the following statute: Section 78-3-2, 1933, Section 4900, 1917.

"Every conveyance, or instrument in writing affecting real estate, executed, acknowledged

or proved, and certified in the manner prescribed by this title, and every patent to lands within this state duly executed and verified according to law and every judgment, order or decree of any court of record in this state, or a copy thereof, required by law to be recorded in the office of the county recorder for record, impart to all persons the contents thereof, and subsequent purchasers, mortgagees and lien holders shall be deemed to purchase and take with notice."

Plaintiffs call this court's attention to the Affidavit (Exhibit "I"), Abstract 243, made and filed by A. I. Grover, on the 10th day of February, 1920, just three months after he had filed the Washington Pocatello, Deed of record, and we again quote the portion of that affidavit, that we say was binding on the defendants, and was notice to anyone giving the matter any kind of careful consideration, to determine whether that escrow agreement had been fully complied with:

Quote "That I was acquainted with Washington Pocatello in his lifetime and knew his family; that he was an Indian residing at Fort Hall, Idaho; that during his lifetime he and wife made,

executed and left in escrow a Warranty Deed in favor of U. F. Diteman which said deed was to be delivered to the said U. F. Diteman upon the payment of the consideration mentioned in the said escrow agreement; that subsequently the said Washington Pocatello died his heirs appeared as contestants in the probate proceedings referred to in entry #12 of the abstract; that in said hearing the estate of the said Washington Pocatello was given a one-third interest in said premises and thereafter the said U. F. Diteman paid to the bank the money sufficient to procure the said warranty deed so held in escrow and procured the said deed and subsequently conveyed his interest to deponent as shown by entry #16 of the abstract and thereafter an administrator was appointed for the estate of the said Washington Pocatello and the said administrator received and accepted the money paid by the said U. F. Diteman for the Warranty Deed in his favor from the said Washington Pocatello, and his wife."

We have underscored the most essential parts of the quotation, from the affidavit, and ask this court to analyze the same, as we hold that the affidavit was very artfully drawn by who ever did compose the affidavit, he was very careful not to say that only \$1000.00 was paid, and was careful not to say the full amount was paid, so as A. I. Grover could not be

charged with perjury, so they artfully used the term "paid to the bank the money sufficient to procure the said warranty deed." While the affidavit did not state the amount that was paid, yet the affidavit did tell the world, where anyone could find out for himself, just what sum was paid to procure the deed, when affiant went on and said; "and thereafter an administrator was appointed for the estate of the said Washington Pocatello and the said administrator received and accepted the money paid by the said U. F. Diteman for the Warranty Deed in his favor from the said Washington Pocatello and his wife." That affidavit is and was a part of the Philips Abstract (defendants exhibit "5"), on which defendants rely as showing good title in their grantor A. I. Grover, and that defendants had no notice that the full amount was not paid. When defendants grantors in his affidavit said,

"U. F. Diteman paid to the Bank the money sufficient to procure the said Warranty Deed" that placed the burden upon the defendants to determine what was the amount paid and who determined the sufficiency, defendants certainly knew that U. F. Diteman or A. I. Grover could not legally determine that one third of the amount was sufficient. That affidavit told the defendants just where they could discover how much A. I. Grover paid to obtain the Washington Pocatello Deed, and if the defendants went to the District Court of Box Elder County, Utah, and asked for the probate file No. 355, (Exhibit "M"), in the estate of Washington Pocatello, deceased, they would have found that the administrator mentioned in said affidavit, had received, and reported that there was only \$995.00 paid by their grantor A. I. Grover for that deed. A court should be bound by and accept as true its own record. In the face of the statute

and the affidavit of W. D. Service, and the affidavit of A. I. Grover, the defendants grantor, the trial court erred in finding, as it did find, in Finding 13, Abstract 125, "that the defendants were innocent purchasers for value, that at the time they purchased they believed that A. I. Grover was the owner in fee simple, knew of no claim that A. I. Grover had fraudulently and wrongfully obtained said deed, did not know that the Quit Claim Deed from U. F. Diteman, and his wife, conveyed no title to the undivided one-third interest; that said defendants had no knowledge or notice of any fraudulent acts of A. I. Grover and of U. F. Diteman; that they did not know that said undivided one-third interest had not been properly probated or legally transferred from the estate of Washington Pocatello; that the defendants have collected all of the rents since March 1925 but do not hold the same as co-tenants with the

heirs of Washington Pocatello, under a constructive trust or otherwise except as owners thereof." Abstract 125.

Plaintiffs believe that we need not go outside the State of Utah for authority that the defendants in this case had both actual and constructive notice, that the deed had been placed in escrow not to be delivered until \$3000.00 had been paid into the Bank, and that the deed was wrongfully delivered when only \$1000.00 was paid on the escrow agreement.

The Supreme Court of the United States while Utah was still a territory held:

"In this country, differing in that respect from the doctrine maintained by the English court, it is universally held that the registration of a conveyance operates as constructive notice to all subsequent purchasers of any estate, legal or equitable, in the same property. The reasoning upon which this doctrine is founded is the obvious policy of the registrative Acts, the duty of the buyer of property purchasing under such circumstances, the means of which search are within his power, and the danger of letting in parole proof of notice or want of notice of the actual existence

of the conveyance. Story Eq. Jur., Sec. 403."

Neslin vs Wells Fargo and Company, 104 U. S., 428; 26 L. Ed. 802.

"Recordation of instruments pertaining to property is notice to the world."

Jones Mining Company vs Cardiff Mining and Milling Company, 56 Ut, 449.

The Supreme Court of Utah in a more recent case said:

"Irrespective of whether the index is considered essential to complete recording or not the rule is that it will be sufficient if enough is disclosed by the index to put an ordinarily prudent examiner upon inquiry. 1 Jones on Mortgages, 910; 23 R. C. L. 193; 5 Thompson on Real Property, 152-153, Section 4126; 41 C. J. 568, (mortgages); 91 Am. Dec. 109, note; Warvelle on Abstracts, 73."

Boyer vs Pahvant Mercantile and Investment Company 76 Ut, 1.

Other Authorities.

"Any instrument effecting title which is properly recorded is absolute notice to everyone subsequently dealing with the title, irrespective of whether such person has examined the records, or even had an opportunity to make any examination."

Field vs Campbell, 164 Ind. 389; 72 N. E. 260,
108

Am St. Rp, 301.

Wade on Notice 2d Ed, sec 97.

Webb vs John Hancock Life Insurance Co, (1904),
162 Ind 616; 69 N. E. 1006; 66 L. R. A. 632.

Mc Pherson vs Rollins 107 N. Y. 316; 1 Am
St Rep. 826; 14 N. E. 411.

"Whatever is "notice" enough to excite attention
and put a reasonable prudent person on his
guard and calls for inquiry might have led.
When a person has sufficient information to
lead him to a fact, he shall be deemed to be
conversant with it."

Wapa Oil & Development Co vs McBride (Okla),
201 Pac, 984.

Means of knowledge as notice generally:

"Whatever fairly puts a person on inquiry is
sufficient notice, where the means of knowledge
are at hand; and if he omits to inquire, he is
then chargeable with all facts which by a
proper inquiry, he might have ascertained.
This, in effect, means that notice of facts
which would lead an ordinarily prudent man to
make an examination which, if made, would
disclose the existence of such other facts
is sufficient notice of such other facts. A
person has no right to shut his eyes or his ears
to avoid information, and then say that he had
no notice; he does wrong not to heed the
"signs and signals" seen by him. It will not
do to remain wilfully ignorant of a thing

readily ascertainable. It has been said that want of actual knowledge in such a case is a species of fraud. The rule has sometimes been said to be that whatever puts a man on inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. It has also been said that whatever inquiry is a duty, the person bound to make it is effected with knowledge of all which he would have discovered had he performed the duty. Means of knowledge with the duty of using them are, in equity, equivalent to knowledge itself. Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge."

R. C. L. Vol, 20, Sec 7, P 346-347: and cases cited.

Counsel for plaintiffs has quoted so much of the foregoing law on notice, so as this Court will have that law before it, for the reason that we are going to point out that in our judgment the learned trial court, thoughtlessly, not intentionally, made wrong and inconsistent findings, and if counsel for defendants through zeal and anxiety to draw findings, exonerating his clients, who were bankers, men of business

affairs, who had been dealing for years in mortgages, purchases of property, and undoubtedly examining titles, and abstracts, and being familiar with the laws governing such transactions, from all notice, or knowledge, and from the duty imposed upon them by law to know the condition of the title to the lands they were purchasing, and the trial Court thoughtlessly, accepted such findings and signed them, and made them the courts findings, we feel it is the duty of counsel for the plaintiffs who are ignorant, untutored Indians, to point out to this Court the inconsistency and wrong in the trial court's findings. In Finding No. 9, (Abstract 119), the court wrongfully found:

"That the plaintiffs offered no evidence at the trial of said cause to the effect that U. F. Diteman, Grantee in said Warranty Deed on escrow with the First National Bank of Pocatello, Idaho, himself, or with one A. I. Grover, wrongfully, unlawfully, corruptedly and intentionally, with the intent to defraud

the estate of Washington Pocatello and the heirs of the Estate of Washington Pocatello, paid to said Escrow Holder only \$1000.00 on the purchase price of \$3200.00 named in said Deed and Escrow Agreement and wrongfully and unlawfully procured from said depository the said Warranty Deed; that said plaintiffs offered no testimony to the effect that said depository bank did unlawfully, wrongfully and contrary to the express terms and obligations of said Escrow Agreement, accept \$1000.00 and deliver to said U. F. Diteman and A. I. Grover the said Deed; that the plaintiffs offered no testimony that at the time of the delivery of said deed that said U. F. Diteman and A. I. Grover and said depository bank, all had knowledge that Washington Pocatello was dead for more than a year previous to the delivery of said Deed and that no administrator had been appointed for said estate and that by reason of the failure to offer evidence on said points heretofore set out in this paragraph, the Court finds against the same; the Court further finds that said Warranty Deed was by the First National Bank of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and that the said Deed which on its face recited a consideration of \$3200.00 was regularly filed for record in the office of the County Recorder of Box Elder County, Utah, on November 10th, 1919, at 4:00 P. M., in Book 15 of deeds at page 440; that the said U. F. Diteman and A. I. Grover, or either of them, did not unlawfully, illegally or for the purpose of cheating or defrauding the estate of Washington Pocatello and his heirs out of said property, file the said Deed

for record in said Box Elder County, Utah, but that said Deed was regularly filed for record and recorded; that the said A. I. Grover, by the recording of said Deed, did not attempt to take from the estate a valuable property right; that the said A. I. Grover did from November, 1919, claim ownership of said lands; that said Deed was not void but was a valid deed and passes title to the undivided one-third interest of said property to U. F. Diteman; that the depository bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of \$3200.00 and from the evidence in the case the Court finds that said \$3200.00 recited in the Deed was paid to said Escrow Holder and the transaction with said Bank was not fraudulent; the Court further finds that although Washington Pocatello had title before the property was decreed to his estate, that it was unnecessary to specifically enforce the Escrow Agreement under the provisions of Section 7741, Revised Statutes of Utah, but the Bank, upon payment of the consideration aforesaid, was justified in delivering said Deed to the Grantee therein."

Plaintiffs do not hesitate to say, that such a finding, in the face of the evidence and record of this case, and in the face of the law of the case, that all and each and every finding is error. The Courts own Probate Record, File 335, Estate of Washington Pocatello, deceased,

(Exhibit "M"), proves that each and every finding is error, on the part of the Court.

In Finding No. 13, Abstract 125, among other things the trial court found:

"That Amasa L. Clark and Joseph E. Robinson were innocent purchasers for value*****; that at the time they purchased, that said defendants had no knowledge or notice of any fraudulent acts of A. I. Grover and U. F. Diteman; *****that they did not know that said undivided one-third interest had not been properly probated or legally transferred from the estate of Washington Pocatello."

Then in Finding No 15, Abstract 126, the Court Finds:

"That on the 12th day of January, 1920 that Charles E. Foxley was appointed administrator; and that the said Charles E. Foxley as administrator and as the legally appointed representative of the heirs of said estate failed to take any legal steps to recover the alleged undivided one-third interest; *****that the said Charles E. Foxley was appointed at the request of said heirs of Washington Pocatello and said heirs at all times knew that the said Charles E. Foxley as such administrator represented them and the estate of Washington Pocatello; *****and the court finds that the proceedings in the estate of Washington Pocatello were regular in so far as administered and that from January 12th, 1920,

the date of the appointment of the said Charles E. Foxley, to the date of the filing of complaint herein, the said Charles E. Foxley was the duly appointed, qualified and acting administrator of said Washington Pocatello, deceased, and represented said estate and the heirs of said estate." Abstract 127 - 128.

Then in Finding 16, Abstract 129, the trial Court finds:

"That the defendants Amasa L. Clark and Joseph E. Robinson at the time they purchased said eighty acres of land from A. I. Grover had no knowledge on notice that Charles E. Foxley had been appointed administrator of the estate of Washington Pocatello, deceased."

The the Court in Finding No. 17, Abstract 130 - 131 finds:

"The Court finds that on December 3rd, 1919, when Petition for Letters of Administration was filed in the Estate of Washington Pocatello, deceased, that Ray Pocatello, was then of the age of seven years, and all of the heirs of Washington Pocatello were older than Ray, and at the time the filing of the Petition herein Ray Pocatello was of the age of twenty-six years; that the plaintiffs all knew of the fact that Charles E. Foxley was appointed administrator of said estate during all times from January 12th, 1920, to the date of filing their complaint herein, and during all of said times these plaintiffs and Charles E. Foxley as administrator of said estate knew that A. I. Grover and these defendants claimed said eighty acres of land and all times had constructive knowledge that the said Deed of Washington Pocatello and Winnie Pocatello, his wife, placed in escrow with the First National Bank of Pocatello, Idaho, had

been delivered and had been regularly recorded and that all of the plaintiffs herein knew all of the facts complained of in their complaint herein at all times after on or about November 1, 1919 when Minnie Pocatello and her children appeared in open Court as set out in Paragraph 18 of Plaintiffs' complaint as will more fully hereinafter appear".

Counsel for plaintiffs does not hesitate to say, that here are findings made by trial court upon whom the Constitution and the Laws of the State of Utah imposes a duty to protect the estates of deceased persons, and preserve the estate for the heirs, which duty the Court itself failed to perform, and exonerating the defendants both bankers and business men, and their grantor, and the escrow depository, and upon whom the law places a duty, from all notice and of all wrong both actual and constructive, and then turns around in almost the same breath, and charges the plaintiffs, ignorant and untutored Indians, upon whom no duty is placed by law in this case, with constructive

notice of everything and of negligence and latches notwithstanding the fact that the Court selected Charles E. Foxley for the plaintiffs as a fit person and the court subsequently appointed Foxley administrator of their father's estate. If plaintiffs did have constructive notice that Charles E. Foxley was appointed administrator, the law did not impose any duty upon them whatsoever, but the law did, and does impose a duty upon the District Court that appointed the administrator to see that the administration of the estate was rightfully and honestly administered, and the law did and does impose upon the defendants the duty to know and ascertain that when A.I. Grover sold them the premises, that he had good title to the plaintiffs' interest in the property, that he was attempting to convey.

In the case of Gaffmayer v Wilkinson, the Supreme Court of Utah said:

"It is not necessary in this case, as we view the record to determine what the effect of the section might be upon the interests of the plaintiffs, as we are convinced the weight of the testimony is against the finding of the Court that the Wilkinsons were purchasers in good faith without notice, but that the record shows that they knew or had such notice of the interests of the plaintiff as would put any reasonable person upon inquiry to ascertain what that interest was" Gaffmayer v Wilkinson 53, Ut.236.

ESTOPPEL * DEFENDANTS NEITHER PLEADED OR
PROVED ANY ELEMENT OF ESTOPPEL:

The Court found in the last part of Finding No. 27 Ab 141-142 that plaintiffs are estopped to deny the delivery of the deed or the validity of the same we quote the court's findings.

"that if the First National Bank of Pocatello Idaho, escrow holder, made any unauthorized delivery of said deed then the administrator of said Washington Pocatello estate and the heirs of said estate, by their acts, waived the performance of the conditions and ratified such delivery, and by said subsequent acts raised a presumption of ratification of said delivery and are now estopped to deny the validity of said delivery; that the plaintiffs' are now estopped by reason of laches, silence and other conduct on their part and on the part of the administrator herein, as heretofore found, from at this time prosecuting this action".
Ab. 141-142.

How can the District Court of Box Elder County, Utah, make such a finding, in the face of its own probate court record in the estate of Washington Pocatello, deceased? The full Probate Court file No. 355 (Exhibit "M") was received in evidence by the Court. We quote from the evidence:

THE COURT: Probate 355, the Estate of Washington Pocatello the files are all received in evidence" Ab. 246. In that Probate File there is no inventory, but filed in the District Court in a final Account and Petition for Settlement thereof, and the Administrator tells the Court in that so-called Final Account that he received from the First National Bank of Pocatello, Idaho, on a, "Land Contract of sale by deceased and wife, amount \$995.00," on the next page under heading General Account, the administrator gives a brief description of the property as follows:

"The property described in the petition for letters and described as an undivided one third interest in the estate of Yaotes Owa or one third of the east half of the southeast quarter of Section 12, T. 11 N. R. 3, West SLM had been converted into cash by reason of a contract executed by Washington Pocatello and wife prior to the death of Washington Pocatello and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello."

And in the same instrument was a prayer that reads as follows:"

"Wherefore petitioner prays that this account be allowed, approved and settled."

Following in the same file, is a Petition for Distribution, in the Matter of the Estate of Washington Pocatello, deceased, stating that he was appointed Administrator on the 12th day of January, 1920, and qualified on the 15th day of January, 1920; that on the 5th day of June, 1920 he published notice to creditors, and the said petition contains a prayer as follows:

Therefore, your petitioner prays, that the administration of said estate may be brought to a close and that he may be discharged from his trust as such administrator. That after due notice and proceedings had, the estate remaining in the hands of your petitioner as aforesaid may be distributed to the said parties entitled thereto, as aforesaid, to-wit: One third or two sixths to the widow, Minnie Pocatello, and one-sixth to each of the children, to-wit: Lucy Pocatello Matsaw, Maud Pocatello Dan, Josephine and Ray Pocatello, or such other order or further order may be made as is meet in the premises." Dated March 3, 1921 "(Exhibit "M") Probate File 355.

The same file in evidence contains an Order made by P. Russell Wright, Clerk of the District Court on the 3rd day of March, 1921, ordering that Monday the 14th day of March, 1921 at ten o'clock A. M. of said day and Court Room in the Courthouse of Brigham City, County of Box Elder, State of Utah, as the time and place for the settlement of the account and the hearing on said petition and final distribution, same file contains an objection filed on the 27th day of August, 1921 to the allowing of the account of Charles E. Foxley

Administrator, one of the objections was:

"That no inventory of the estate has been filed in said Court": The file shows the matter was continued from time to time, the last time set for a hearing being the 13th day of February, 1922, and not a hearing or a thing was done by the District Court in the matter of the Estate of Washington Pocatello, deceased, from that day on until the present action was filed. If as the Court said in its finding: "The First National Bank of Pocatello, the Escrow holder, made an unauthorized delivery of said Deed" then no title passed and the title has remained all the years in the heirs of the estate of Washington Pocatello, and the administration of the estate of Washington Pocatello, deceased, is still in the hands of the Court that made the finding. The Administrator although he did something illegal, and that he had no right or power to do, yet he did report to the District

Court that appointed him just what he had done, and asked the Court to either approve or disapprove what he had done.

The Court had jurisdiction, and there it has been let lie all the years, if there is latches in this matter the latches is on the part of the District Court of the First Judicial District of the State of Utah, in and for Box Elder County, and can not be charged to either the Administrator or the heirs.

Then how can the Court find that the plaintiffs are estopped by their own latches and the latches of the Administrator, when the latches is chargeable to the Court solely?

PROBATE COURT PROCEEDINGS ARE INDIVISIBLE

Probate Proceedings of decedent estates are indivisible, the District Court of Box Elder County assumed jurisdiction of the Estate of Washington Pocatello, deceased, on the 15th day

of January, 1920, when it issued letters of Administration on the estate to Charles E. Foxley and the District Court had never acted upon the reports of the Administrator and never made an order of any kind except orders of continuing of hearings, and has never closed the estate, and it is still pending in the District Court.

The Supreme Court of Utah has held:

Of What use are constitutional provisions respecting the rights of property if they may be disregarded by the Courts") Wheelright v Roman 50 U. 10.

General Rule as to continuing jurisdiction:

"In general, It is well settled and established as a general rule, that jurisdiction once acquired is not defeated by subsequent events, even though they are such character as would have prevented jurisdiction in the first instance.
C. J. Vol. 15, p 822

The Supreme Court of Utah has held:

"A court having conferred upon it jurisdiction may not divest itself of jurisdiction not depending on facts, by an erroneous decision on matters of law that it has no jurisdiction."

Griffin Co. v Howell, 38 Ut. 357.

Jurisdiction can not be divested:

"The fact that a cause was passed over from term to term without judgment having been rendered on the finding of any order of the court continuing the cause did not divest the Court of jurisdiction either of the subject matter of the action or of the person or the parties."

Seiberling v Newlon, 16 Ind. 374; 43 N.E.151.

The Supreme Court of Washington in a recent case held:

"When a probate court administering an estate has once obtained jurisdiction of the res all presumptions and intentments are in favor of the regularity and validity of proceedings".

In Re Upton Estate 92 Pac 2nd 210

"That executor was derelict in commencing action to quiet title, and that the Court did not require him to deliver possession of realty to devisee within statutory time, did not deprive executor of his right to maintain action to quiet title."

Kern v Robertson, 12 Pac 2d 565, 92 Mont. 283

A recent case of the Supreme Court of Utah, that is almost four square with the case at Bar is:

The Court said:

"Inasmuch as the Petersons had no right or authority to give a mortgage on the property of the estate, Dives by virtue of the mortgage acquired no right, title or interest therein".

Worley et al v Peterson 80 U. 27.

In the case at Bar the Bank, the depository of the escrow having no right or authority to deliver the Washington Pocatello deed, A. I.

Grover acquired no right, title or interest in the undivided one-third interest belonging to the heirs of Washington Pocatello, deceased.

The fact that Charles E. Foxley, the administrator of the estate did accept the \$995.00 from the Bank could not act as a ratification, for the reason that he had no power to ratify the delivery of the deed, and he did not attempt to do so, he reported to the Court what he had done, and the Court was the only one that had the power to ratify or disprove, and the Court never acted. The acts of Foxley had no effect

on A. I. Grover because Grover had obtained the deed and claimed the premises almost two months before Foxley was appointed Administrator. And Foxley's acts could not have influenced the defendants, for the reason that Foxley's final account reported that only \$1,000 had been paid for the Washington Pocatello deed, and the report had not been acted upon by the Court.

For definition of "Estoppel" we need go no further than the recent decision of this Court in the Case of I. X. L. Stores v Success Markets wherein the Court defined Estoppel as follows:

"The estoppel here relied upon is known as equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is, that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of positions is sternly forbidden. This remedy is always applied so as to promote the ends of justice. It is only used for protection and can not be used as a weapon of assault.

Dickerson v Colgrove 100 U.S. 570, 25 LEd 618.

Malloy v City of Chicago, 369 Ill. 97, 15
N. E. 2d 861."

"Was the change of position sufficient to warrant the application of the doctrine of equitable estoppel or would its application in the present case be more in the nature of a sword cutting off the rights of the lessor who has served the lessee with power and is now attempting to obtain payment?"

I.X.L. Stores Co. v Success Markets, Decided Dec. 28, 1939, reported in advanced sheets. 97 Pac. 2nd 577, not yet printed in Utah reports.

In the case at bar, is not the finding of the trial court (finding 27) (Ab. - 141) a sword in the hands of the trial court, cutting off the rights of those heirs to have the Court do its duty, in the estate of Washington Pocatello, deceased, because the Courts own record (Exhibit "M") Probate File 355 shows that Charles E. Foxley the administrator, placed his acts in the hands of the Court for decision, and his act could not be construed in any way as a ratification until the Court passes upon it. And the defendants had notice that the Court had not

acted upon the report of Charles E. Foxley, the administrator.

"An executor or administrator is an officer of the Court and occupies a fiduciary relation toward all parties having any interest in the estate."

Van Dyke v Conkey et al (Cal) 96 P. 2d, 343.

It is a Court's highest duty to see that the administrator properly administers the estates of deceased persons. And, it was specially the Trial Court's duty to hear and pass upon the Final Account and Petition for Distribution of Charles E. Foxley.

The Supreme Court of Nebraska recently has held:

"There is no higher nor more solemn obligation of the courts than to see to it that the estates which undergo administration are carefully guarded and preserved especially where the interest of minor heirs are affected."

In re Love Estate (Neb) 286 N. W. 38(6-19-39)

STATUTE OF LIMITATIONS
and
CO-TENANCY

Ordinarily the statute of Limitations can not be invoked in actions to quiet title. The decrees of distribution made by the Court in the estate of Yaotes Owa, and Jane Brown, decreed title in an undivided one third interest in the premises, to the estate and heirs of Washington Pocatello, deceased (Exhibits "F&G"), and the title passed directly to the heirs, and it is the very highest monument of title, and in this case the court found in Finding No. 6, Ab. 114, that the said decrees were made on the 7th day of November, 1919, and filed of record, and that in such decree an undivided one third interest was decreed to the estate of Washington Pocatello, deceased, therefore the plaintiffs had the highest monument of title, to an undivided one third interest in the property decreed.

"A decree of distribution is undoubtedly muniment of title of the highest value."

Lilenkemp v Superior Court (Cal) 93 Pac 2d 1008.

Estate of Gairard, 36 Cal. 277. 21 C.J.P. 529

There can be no question as to the superior title that the plaintiffs had in this undivided one-third interest, before and after the decrees of the Court (Exhibits "F & G") and no one could divest them of that title, but themselves or the District Court of Box Elder County, Utah. It certainly can not be rightfully held that A. I. Grover could divest the heirs of the title to his own advantage and receive a valid title to the undivided one third interest. By the decrees of the Court, James S. Brown and the heirs of the estate of Washington Pocatello, deceased became tenants in common under Section 78-1.5, Revised Statutes of Utah, 1933. (Sec. 4873, 1917.).

If Grover obtained a legal title from Brown for Brown's interest his possession was possession

of a tenant in common with plaintiffs, and he could not convey to defendants any greater estate than he had, and he conveyed as a tenant in common, and the defendants continued as tenants in common, and the statute of limitations could not run against their co-tenants under the circumstances in this case. We first cite the decisions of Utah:

Hatch v Hatch 46 U. 116
Garner v Donaldson, 67 U. 553
Rocky Mountain Stud Farm v Lunt
46 U. 299
Wilcock v Baker 65 U. 435

The Supreme Court of Texas has recently held:

"One co-tenant may not, however, convey or otherwise encumber the share of his co-tenant. He is not a partner, with the general power to represent the firm, nor is he an agent merely because of his co-tenancy." Cohen v Treasurer Land Co. et al 137 S.W. 2d 806

The statute of limitations did not run against the plaintiffs in this case for the reason that during all of the years the matter was in the hands of the court undisposed of, a court can not

acquire jurisdiction of an estate, by appointing an administrator, and then when the administrator files an account and petition for distribution with the Court and requests the court to either approve or disapprove the administrator's act, then neglect and refuse to pass upon it, and then the same Court hold that the Statute of Limitations, has run against the heirs of the estate. We believe the Supreme Court of Utah has settled that question in the case of Baker v Goodman, and we quote considerable from the decision, for the reason the case is four-square with the case at bar, only that was an action of ejectment, and this is an action to quiet title; the Court said:

"The question presented to the court upon appeal is; Has the statute of limitations barred plaintiff from recovery of possession of the land in controversy, or any part thereof, and is defendant rightfully entitled to his decree quieting title therein?

"The defendant contends that the statute of limitations was set in motion on the 2nd day of July, 1907, at the time he entered into possession of the land in controversy, when and while the administrator was acting, and that nothing has occurred to suspend its running. As to this our statutes prescribed the manner in which estates must be probated. The statutes were not complied with in the case at bar.

"No inventory was filed, and the administrator was discharged prior to the expiration of the time for the presentation of claims, on the theory that there was no property belonging to the estate. Therefore the Court never acquired jurisdiction of the property in controversy. The record shows that Bremerton took an interest in the appointment of an administrator of the said estate because his mother was holding a mortgage, and that after the mortgage had been sold to Goodman, he filed his petition for discharge as an administrator. In other words, when the purpose for which he sought appointment had been accomplished, he asked for, and was granted his discharge, without filing an inventory or taking any steps to protect the interest of the heirs. The law does not contemplate that the administrator can be appointed and be discharged without performing any of the duties that he is required to perform with reference to the property of the estate and by the mere act of his appointment set in motion the statute of limitations, to the injury of those interested in the estate."

Baker v Goodman 57 U. 349

Then on rehearing the Court said:

"This court held, and reiterates, in order to avoid any possible misunderstanding, that the defendant is chargeable with the reasonable rental value of the land during the period of his possession."

In the case at bar, the plaintiffs did not plead or prove any date or period when the Statutes of Limitations began to run, or any act on the part of plaintiffs that set the statute in motion.

The Trial Court did say in its finding 27, Ab. 141 "that if the Bank made an unauthorized delivery of said Deed, that the administrator of said Washington Pocatello estate and the heirs of said estate, waived the performance of the conditions and ratified said delivery", Ab. 141-142. The administrator could not waive the conditions, and further more the administrator did not attempt to waive anything, he made a report of just what he had done (exhibit "M") (Probate File 355), in the Washington Pocatello estate, to the Court,

and requested the court's action on the matter,

If the Court had performed its duty the matter would have been settled at that time, the question of ratification of the delivery of that deed is still in the hands of the court, and is being litigated in this action.

Plaintiffs were incompetent during all the years under the law of Utah, as well as under the laws of the United States.

Plaintiffs were at all times and now are incompetent persons under Section 102-13-20, Revised Statutes of Utah, 1933 (CL. 17, 7818); if that Statute does not embrace Indians and especially the plaintiffs in this case, then it has no purpose in the Code of Probate Procedure of the State of Utah. The District Judge who decreed the property recognized their incompetency and, ignorance of the procedure and thereby selected for them an Attorney to represent them, and it was

the Court's duty to protect their interests.

Another reason why the Statute of Limitations can not be invoked against the plaintiffs they are Indians, Wards of the Government. The Law of the United States --- the Supreme Law of the land provides when and how the Statute of Limitations can apply to its Indian Wards. By the Act of Congress May 31, 1902, Congress provided that the Statute of Limitations of a state could only be applied where a deed had been approved by the Secretary of the Interior. We quote the Statute.

"In all actions brought in any State Court or United States Court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession of rents or profits of lands patented in sovereignty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situated shall be held to apply, and it shall be a complete defense to such action that the same has not been

brought within the time prescribed by the statutes of said State, the same as if such action had been brought for the recovery of land patented to other than members of any tribe of Indians.'

Act of Congress, May 31, 1902, c. 946, 32 Stat. 284; U. S. Code Compact Edition, Sec. 347.

In this case at Bar, it is admitted that the plaintiffs are Indians, wards of the government, and that the deed of Washington Pocatello and Minnie Pocatello was not approved by the Secretary of the Interior; and it is a settled rule that any State Statute of Limitations does not run against the Government. It has recently been laid down by the Circuit Court of Appeals that the Government can bring an action at any time on behalf of its wards. In this case, it cannot be asserted that the Government could not have brought this action, and if it did, no Statute of Limitations could be invoked. Now, when the

Government never acted, then the Ward had a right to act, and when the Ward did, it has the right to the same protection, as if the Government had brought the suit. In a very recent case from Utah, United States vs. Corp. of the President of the Church of Jesus Christ of Latter Day Saints, et al, decided January 11, 1939, involving similar lands in Box Elder County, Judge Bratton of the Federal Circuit of Appeals, said:

"(11.13) The defense of limitations interposed under a statute of the State of Utah is not available in a case of this kind, instituted by the United States for the enforcement of the rights of its Indian wards. United States vs. Minnesota, 270 U. S. 181, 46 S. Ct. 298, 70 L. Ed. 539; Board of Com'rs of Caldo County vs. United States, 10 Cir., 87 Fed. 2d 55. The plea of laches based upon lapse of time is likewise unavailable. United States vs. Insley, 130 U. S. 263, 9 S. Ct. 485, 32 L. Ed. 968; Board of Com'rs of Caldo County, vs. United States, Supra. The only basis of fact for plea of estoppel is that the United States Attorney for Utah filed petitions for intervention in probate proceedings of the estates of four of the entrymen in which substantially the same facts set forth in the bill in this case were pleaded; and the petitions were dismissed

without prejudice. That is not enough to estop the government from asserting here rights of its Indian wards in relation to the trust nature of their lands."

U. S. vs. Corp. L. D. S. et al, 101 Fed. 2d, 156.

In the case of the United States vs. the State of Minnesota, Justice Van Devanter said:

"And it also is settled that state statutes of limitations neither bind or have any application to the United States when suing to enforce a public right or to protect interests of its Indian Wards; United States vs Thompson, 98 U. S. 486, 25 L. Ed. 194; United States vs. Nashville, C. & St. L. R. Co. 118 U. S. pp. 125, 126, 30 L. Ed. 83, 6 Sup. Ct. Rep. 1006; Chesapeake & D. Canal Co. vs. United States, 250 U. S. 123, 125, 63 L. Ed. 889, 891, 39 Sup. Ct. Rep. 407.

U. S. vs. Minnesota, 207 U. S. 181; 46 S. Ct. 298; 70 L. Ed. 539.

In another recent case, United States vs. Brookfield Fisheries, involving the right of the Indians to fish in the gorge of the Columbia River, around Celila Falls, decided August 23, 1938, the Circuit Court

of Appeals held:

"The defendants strongly urge that the doctrine of laches and estoppel should be applied to defeat recovery, since the rights of the Indians have not been urged for fifty years. Such rules have no application to the United States in their sovereign capacity; nor should they be applied to the government in the attempt to carry out its solemn engagement with conquered peoples."

United States vs. Brookfield Fisheries,
24 Fed. Sup. 712.

It may be contended that this rule does not apply to the Indians themselves, only to the Government; that would be a harsh rule. In this case, the plaintiffs were not alone wards of the Government, they were also wards of the District Court of Box Elder County, Utah, all the years that the Court failed, refused, and neglected to perform its duty toward them and their estate, and the Government has failed, refused and neglected to perform its duty to protect their interest; now, if the District Court can say to them,

"You have no standing in this court because

neither this court or the Government has done its duty, and you are chargeable with latches because you did not act for yourselves", it is a new brand of Justice in our commonwealth.

But leaving to one side the question of those plaintiffs being Indians, wards of the Government, could the statute of limitations be imposed against any citizen, even of high intelligence, in this case? There is no duty or compulsion upon any heir to come in and compel the District Court to do its duty.

Corpus Juris lays down the following rule:

"That ordinarily an heir is not bound to do any act to vest in him the title and possession of the lands he inherits, as the title vests in him by operation of law on the death of the intestate, but he may relinquish his rights by an express waiver or release, or by estoppel, although transactions of this kind are not favored by the Courts, and many of them in particular cases have been held insufficient to bar the right of the heir of

the distributee."

18 C. J. 867.

The Supreme Court of West Virginia rendered a decision on November 28th, 1939, sustaining that rule which applies to every question in this case at Bar, unless the Deed from Washington Pocatello is held to be a valid Deed and passed title to the undivided one-third interest, wherein the court said:

"Consequently the resultant query: Where is the title in fee? The answer, obviously, is that it rests where it was placed by deed in the year 1900, upon the death of the ancestor, Thomas Stepp, Sr., save only as the same may have been affected by conveyances executed since that date. ****

"By no affirmative act did Charlottee divest herself of title, nor did any action of hers mislead others to their prejudice. The fact that she did not assert ownership of the one-thirteenth interest does not operate to deprive her of title thereto. In such circumstances, estoppel does not arise, 16 Am. Jur., P. 921, 18 Corpus Juris, P. 867."

Millard vs. Stepp, 5 S. E. (2d) 815 (decided November 28, 1939).

In the case at Bar, the Deed of Washing-

ton Pocatello, deceased, being invalid, void and of no effect in the hands of A. I. Grover, where did fee simple title to the undivided one-third interest rest during all the years? It rested in the heirs of Washington Pocatello, deceased, and the estate of Washington Pocatello, deceased, has rested during all the years in the hands and on the docket of the District Court of Box Elder County, Utah, and in the hands of the court's officer, the administrator, with no inventory or appraisement made or filed, and the estate still unsettled and not closed.

Can Indians, Wards of the Government,
make a valid Deed? The question whether Washington Pocatello and Minnie Pocatello, being Indians, wards of the Government, having received no Certificate of Competency from the Government, could make a valid Deed in the first instance, while a controlling

question in this case, for the reason that all other questions and points raised are just as applicable to white citizens of the United States as they are applicable to the Indians in this case; however, we raise that point, and quote United States Statutes on that Point. Congress on March 3rd, 1871, passed an Act that is still the supreme law over the whole United States:

"No agreement shall be made by any person with any tribe of Indians, or individual Indians, not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or prospective, or for the granting or procuring any privilege to him, or any other person, in consideration of services for said Indians, relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other monies, claims, demands, or things, under laws or treaties with the United States, or official acts of any officer thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First: Such Agreement shall be in writing, and a duplicate of it delivered to each party.

Second: It shall be executed before a judge

of a court of record, and bear the approval of the Secretary of the Interior of Indian Affairs endorsed upon it."

(There are a number of other provisions contained in the act that we have omitted, but quote the last Section of the Act.)

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

Act of Congress, March 3, 1871, c. 120, sec. 3, 16 Stat. 570, U. S. Code, Compact Edition, Sec. 81.

The land involved in the Washington Pocatello Deed was inherited land, and Congress passed another Act on May 27th, 1902, which provides as follows:

"The adult heirs of a deceased Indian to whom a trust or other patent containing

restrictions upon alienation has been or shall be issued for lands allotted to him, may sell and convey the lands inherited from such decedent, but in case of minor heirs their interest shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved, shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. *****

Act of Congress, May 27th, 1902, c. 888, Sec. 7, 32 Stat. 275; U. S. Code Compact Edition, Sec. 379.

So as the Court will not be confused over the "restriction" provision that appears in most allotments, and is mentioned in all the Acts of Congress, it is conceded, that in the case at Bar, the twenty-year restriction incorporated in the patent to Yaotes Owa, (exhibit "A") Abstract 237, was error on the part of the Department of the Interior, as that twenty-year restriction at that time applied only to the Winnabago Indians of Wisconsin, but the Interior Department for some

time erroneously entered the restriction in all Indian Patents, until the Courts held it error. The Patent issued to Yaotes Owa would be subject to a five-year restriction, but whether that had expired before she died is most impossible of positive proof, and plaintiffs' contention that Washington Pocatello^{and Minnie Pocatello} could not execute a valid deed rests solely on their own individual incompetency, and not upon any restriction running with the land, or any incompetency applicable to the ancestor Yaotes Owa, or her daughter Jane.

Congress again in 1907 passed an Act directly pertaining to all noncompetent Indians, as follows:

"Any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty, or who may have any interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and

under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest under the Supervision of the Commissioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee simple patent had been issued to the allottee."

Act of Congress, March 1st, 1907, c2285, 34 Stat. 1018. U. S. Code, Compact Edition, Sec. 405.

The Federal Courts have repeatedly held that a restricted Indian can not convey property by his individual deed.

"Restricted Indians cannot transfer property prior to the termination of their restrictions."

"The plaintiffs undertake to avoid this inescapable conclusion from the authorities, by claiming that restricted Indians cannot by any device transfer property prior to the termination of their restrictions. This is settled Law."

Staley vs Espenlaub, et al., 36 Fed. 2d, 91.
Goodman vs Buffalo (8C. C. A.); 162 Fed. 817.
Shelden vs Dunbar, 40 Kan. 346; 19 P. 901.
Beck vs Floumoy, 65 Fed. 30.

The Supreme Court of the United States

in the case of Wiggan vs Connelley, decided in 1896 holds:

"This treaty of 1867 introduced a new limitation upon the alienability of lands patented to a minor* allottee, that is, the limit of minority. And such limits must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right to add with the consent of the tribe, a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the nation and of the tribe, and they could agree for still further protection, a protection which no individual was at liberty to challenge."

Wiggan vs Connelley, 163 U. S. 56: 16 Sup. Ct. 914; 41 L. Ed. 69.

It will be contended that this land, was not on a Reservation and was not under control of the Government, plaintiffs can not see how that alters the law or the power of the restricted Indian individual. Washington Pocatello and Minnie Pocatello were, at the time they executed the deed, February 2nd,

1917, wards of the government and restricted, see testimony of Superintendent Gross, Abstract 248 - 250, and Washington Pocatello inherited the land from an Indian ancestor. A lawyer cannot go on the reservation and contract with noncompetent Indians for legal service, a man cannot go on the reservation and contract with them for goods, wares or merchandise, they can not contract to buy their cattle or horses, then how could Albert Saylor go on the Reservation and get a valid Deed from Washington Pocatello, for \$3200, for 80 acres of land that at that time was worth between \$15,000 and \$20,000, when he had not expended one cent in improving and developing the ground. The beneficence of the laws restricting the right of the Indian to contract, cannot be better exemplified, than by this very transaction. The artful designing white man stealing from the Indian valuable

property rights. The land was developed under some community project by the L. D. S. Church; the Government had given the land to to the Indian Ancestor, Mr. Saylor comes along determined to secure it for about one-fifth ~~its~~ value; he dies and A. I. Grover secures a power of attorney from U. F. Diteman, and goes ahead and obtains that deed for about one-fifth the value. The defendants voluntary come in and take it off the hands of Grover, with full notice that it had belonged to Indians, and made no investigation to see how their grantor had obtained title to the property.

All of the remaining questions, the fraud and conspiracy of Grover and Foxley the administrator, plaintiffs believe is shown and proved by the evidence and record showing their acts and conduct, by Grover of only paying the \$1000.00, and by Foxley

the administrator by attempting to accept it as shown by exhibit "11". If the deed was invalid, the record shows that defendants did not either plead or prove any elements to establish adverse possession, or estoppel, that defendants possession was that of tenants in common, and not adverse possession. If the deed was invalid, it is conceded that the premises have rented each year for a good annual rental, and in that event it cannot be rightly contended, that the defendants paid the taxes on the undivided one-third interest from their own money; but on the other hand, plaintiffs paid the taxes.

Statute of Limitations could not be invoked against Ray Pocatello.

Ray Pocatello was born in 1917, as so testified to from the record of Indian Reservation, Abstract 250, though first complaint

in his action was filed on the 12th day of September, 1938, so it was commenced long before the two years had expired after the minor came of age, and the finding of the Court that Ray Pocatello, was of the age of twenty-six years at the time of the filing of this action, was erroneous, (Finding 17) Abstract 131.

Conclusion: This is an action to quiet title, the defendants Amasa L. Clark and Joseph E. Robinson, answered and asked for affirmative relief, that title be quieted in them to the undivided one-third interest decreed to the estate of Washington Pocatello, deceased. The Supreme Court of Utah has by a long line of well defined decisions, held that in actions to quiet title where both parties ask the Court to quiet title in them, that each party must stand on his own title and cannot rely on any weakness in his

adversaries chain, or proof of title, and has also held by the same long line of well defined decisions, that all the plaintiff has to do is to prove prima facie that he has title, which was done in this case and found by the court in finding No. 6, Abstract 114, and then the burden is in defendant to prove his title.

We quote from a recent decision:

" The court was in error in granting the motion for a nonsuit on the evidence before it. While it is true that in an action to quiet title the plaintiff must succeed by virtue of the strength of his own title rather than the weakness of defendants title, nevertheless, all the plaintiff need do is to prove prima facie that he has title which, if not overcome by defendant is sufficient. (Citing cases)***** Ordinarily, a plaintiff in a quiet title action must rely on the strength of his own title and not upon the weakness of his opponents case. On the other hand, it is only necessary for him to make out a prima facie case in order to put the defendant upon his proof. Davis vs Crump, 162 Cal. 513, 123 P. 294. It is only necessary for a plaintiff to go back to the patentee when he is relying exclusively upon a paper title and is not in possession."

Babcock vs Dangerfield et al. (decided Oct. 17, 1939) 94 Pac, 2d, 862. Ut_____.

In the case at bar, plaintiffs proved record title from the patentee to the Decree of the District Court, decreeing to the estate of Washington Pocatello, deceased, an undivided one-third interest which vested title in plaintiffs to said interest, and it was admitted that the Deed of Washington Pocatello, was executed long before the property was decreed, and that his Deed was placed in escrow, and while the burden was not on the plaintiffs but was on the defendants to prove that such deed was lawfully delivered, the plaintiffs did prove, (exhibit "M"), Abstract 242 - 246, that the Bank delivered the deed to A. I. Grover, when he only paid \$1000.00, or one-third of the sum to be paid before the deed could be delivered, that such deed was invalid, wholly void, and passed no title; we submit a very recent authority.

The Supreme Court of Michigan, in a case

decided on the 5th day of September, 1939, lays down the law supported by a mass of authority, that is decisive in the case at Bar. Wherein the Court said:

" It appears that the deed was conditioned upon the performance of certain additional acts by the grantees, none of which was done. Delivery of a Deed is essential to pass title; its whole object is to indicate the grantors intent to give effect to the instrument. (Citing 7 decision of Michigans Supreme Court). It is a question of intent whether the delivery of a deed to a third person to be later delivered to the grantee is effective. (Citing three Michigan decisions).

"The intent of the grantor to convey an interest is an essential element of an effective delivery." *Wilcox vs Wilcox* 283 Mich, 313, 278 N. W. 79.

"The burden of proving delivery of a deed is upon the parties claiming under it." (Citing Michigan Decisions).

"The general rule is that a deed delivered to a third person to be ~~by~~ him delivered to the grantee upon the happening of some event in the future, which may or may not happen, does not pass the title to the land until such event occurs and then ~~only~~ from that time. (Citing Cases).

" If the circumstance be such as to indicate a conditional rather than an absolute delivery,

then no title passes until the condition be fulfilled. The character of the delivery must be determined by the acts or the words of one of the parties, or both. (Citing Cases).

" A deed delivered to a third person in escrow to be delivered to the grantee only on condition of the latter paying a sum of money or performing some obligation, is of no force until such condition is fulfilled.

" There was no delivery of the deed in question, nor was there any apparent consideration; therefore Plaintiff is not entitled to the relief sought."

Noakes vs Noakes 287 N. W. 445. (Mich.)

Every recent case from California lays down the rule that probate proceedings are indivisible, and the matter is in the hands of the court from the appointment of the administrator until the administrator is discharged and the estate closed.

" The administration of an estate is one indivisible judicial proceeding from the order appointing the administrator until his discharge, Wood vs Roach, 125 Cal. App. 631, 17 Pac. 2d, 170. While sitting in probate, the superior court may determine

the validity of a contract whereby it is claimed a spouse has been divested of all interest in the estate. Estate of Cover, 188 Cal. 133 204 P. 583; Estate of Warner, 6 Cal. App. 361 P. 191.

IN RE Dobins' Estate, 92 Pac, 2d, 1051.

The Deed of Washington Pocatello and Minnie Pocatello was void and of no force and effect in the hands of A. I. Grover and the title for the undivided one-third interest rested during all the years in the plaintiffs the heirs of Washington Pocatello, deceased, and the matter of the estate of Washington Pocatello, deceased, has reposed in the District Court of Box Elder County during all the years since the 12th day of January 1920, to the present day, the said court has had jurisdiction of the matter during all the years, and still has jurisdiction over the estate, and all of the courts findings wherein it found against the plaintiffs and in favor of the defendants is error, and contrary to the evidence and law of

the case.

It is no defense for the defendants to cry out that they should not be disturbed after so many years, because the District Court did not perform its duty in the estate of Washington Pocatello, deceased. The defendants had notice that for more than 5 years before they bought the property that the court had taken jurisdiction of the Estate of Washington Pocatello, deceased, and had notice that the administrator, Charles E. Foxley, had made a report to the court that only \$995.00 had been received by him for the Washington Pocatello estate, and that the court had not acted, and the estate was not closed. They did not have to buy the premises, they bought it for speculation, without even examining the title. It is no defense that the State of Utah had made a loan of \$7000.00 on the premises to A. I. Grover

just shortly after he had secured the deeds to the premises by only paying \$3000.00 for the full 80 acres, that should have been a warning to them that A. I. Grover fraudulently secured title to the premises. They had notice that this land was patented to a full blood Indian, and the Court had decreed it to full blood Indians, and that they were wards of the Government. The Philips Abstract (Exhibit "5") that defendants rely upon, told them all those facts.

Albert I. Grover, having obtained no legal title to the undivided one-third interest of the estate of Washington Pocatello, deceased, entered upon the premises as a tenant in common with the heirs of the estate of Washington Pocatello, deceased, and he could not sell, transfer, or dispose of the heirs interest in that estate. The Supreme Court of California

in very recent decision said:

" It is well settled that 'a tenant in common property has the right to dispose of his own undivided share, but he may not sell the whole property, nor any portion thereof, except his own, and if he undertakes to dispose of any larger interest his co-owners are not bound thereby.'" 7 Cal. Jur., p. 357. This well-recognized rule was applied in Callahan vs Martin, supra, where it was held that the attempted conveyance of the entire fee by Gonzales did not convey the interest of his co-tenant Martin. We therefore conclude that the deed from the United States Oil and Royalties Company to Gonzales only conveyed to that grantee the interest of the grantor in the leased land which was only 'sixty percent (60%) of the oil produced and saved from the said land.' It could not and did not convey the interest of plaintiffs who were then tenants in common with that grantor."

" The lawful possession of one co-tenant is the possession of all co-tenants." Payne vs Calahan, 99 P. 2d, 1050. (2-28-1940).

The Supreme Court of Oklahoma in a very recent case held:

" The mere possession of a tenant in common, no matter how full and complete, does not operate as an ouster of his co-tenant, nor amount to adverse possession against the claim of his co-tenant. The possession of a co-tenant is constructively the possession for the other. He simply held possession,

and, of course, being in possession took the profits and paid the taxes."
Keller vs McNeir (Okla.) 86 P. 2d, 1004,
(Jan. 17, 1939).

The case at Bar is a case in equity, and this court must pass on the facts as well as the law of the case, we quote from a decision of this court.

" But, as stated in the beginning, this is a case in equity in which we are required to determine the facts as well as the law, and in which we are not bound by the findings of the trial court, if in our opinion they are clearly against the weight of the evidence."

H argraves vs Burton, 59. U. 575.

CONSTRUCTIVE TRUST

A. I. Grover having obtained the deed wrongfully, the deed passing no title to the undivided one-third interest of the plaintiffs, Grover took possession as tennant in common with the heirs of the estate of Washington Pocatello, deceased, and thereby a constructive trust was created and has extended throughout

all of the years, first as between A. I. Grover, and the plaintiffs, and after the transfer by Grover to the defendants a trust was created between Amasa L. Clark and Joseph E. Robinson and those plaintiffs, which exists until the present day.

Authorities.

" It is a well settled general rule that if one person obtains the legal title to property, not only by fraud or by violation of confidence of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which belongs to another, equity carries out its theory of a double ownership, equitable and legal, by imposing a constructive trust upon the property in favor of the one who is considered in equity as the beneficial owner."

R.C.L. Vol 26, Sec. 83, p. 1236.
CY C Vol, 39 p. 172.

The Supreme Court of Utah has by a long line of well defined decisions held that where a person obtains title to property wrongfully or as joint owner or as co-tenants, that a constructive or resulting trust arises

by operation of law. The following decision is among the number:

Haight vs Parsons, 11 U. 51.
Rogers vs Donnellan 11 U. 108.

Chambers vs Emery 13 U. 48.
Wheelwright vs Roman 50 U. 10.

The Supreme Court of Utah has also held that the Statute of limitations does not commence to run in favor of a trustee until he has repudiated the trust.

" Statute of limitations does not commence to run against a trustee until he denies the trust, or asserts an adverse title ."

Schenick vs Wicks, 23 U. 576.
Crowfoot vs Thacher 19. U. 212.
Anderson vs Cercome 54. U. 345.

Grover could not wrongfully obtain that deed, as he did, and file it of record, and start the statute of limitations running, the period of the statutes had not expired when he conveyed the premises, he had no title to convey for the undivided one-third interest,

the defendants obtained no title, so they took as trustees, and they neither pleaded nor proved any act of theirs that would start the statute running, and besides during all the years the property was in the custody of the Court.

Therefore, plaintiffs contend that all of the findings of the court, wherein it found in most every particular against the plaintiffs and in favor of the defendants Amasa L. Clark and Joseph E. Robinson, were not supported by any testimony or law of the case, but on the other hand, all of said findings are contrary to the evidence, record and law of the case, and are erroneous, and that the decree should be reversed.

Respectfully Submitted.

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