

1948

Wilbur Burnham, Charles L. Burnham, Frances L. Mayo, Kenneth A. Luckey, and Walker Bank & Trust Company v. Leta B. Eschler : Brief of Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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WILBUR BURNHAM, CHARLES L.  
BURNHAM, FRANCES L. MAYO,  
KENNETH A. LUCKEY, and  
WALKER BANK & TRUST COM-  
PANY, a corporation, as administrator  
of the estate of JENNIE B. SCHANK,  
Deceased,

*Plaintiffs and Appellants,*

VS.

LETA B. ESCHLER,

*Defendant and Respondent.*

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## APPELLANT'S BRIEF

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Appeal From the District Court of the Third  
Judicial District In And For Salt Lake  
County, State of Utah

Honorable Ray Van Cott, Jr., Judge

GUSTIN & RICHARDS  
M. EARL MARSHALL  
BRENT T. LYNCH, JR.

*Attorneys for Plaintiffs  
and Appellants*

**FILED**  
OCT 14 1948

CLERK, SUPREME COURT, UTAH

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PANY, a corporation, as administrator  
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Deceased,

*Plaintiffs and Appellants,*

vs.

LETA B. ESCHLER,

*Defendant and Respondent.*

Case No.  
7209

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STATEMENT OF THE FACTS

This is an action to quiet title to nine parcels of real property of record in the name of Jennie B. Schank at the time of Mrs. Schank's death on March 30th, 1947. Mrs. Schank died intestate as to the real property. Thereafter Walker Bank & Trust Company was appointed administrator of the estate and was joined as a plaintiff in this proceeding with all of the heirs of the deceased, with the exception of Maritta B. Brazier, the mother of the defendant, Leta B. Eschler. The defendant, a niece of the deceased, claims title to the properties by reason of deeds purportedly executed by Mrs. Schank in 1938 and placed of record on April 3rd, 1947, three days after Mrs.

Schank's death. The trial court sustained the defendant's claim of ownership and from the Findings and Decree, quieting title in the defendant, this appeal is taken.

Plaintiffs, among other things, allege in their reply that the deeds were never delivered or intended to be delivered to Leta B. Eschler; that Mrs. Schank, the deceased, during her lifetime never intended to nor did she divest herself of or surrender up the title, possession, or right of possession in and to the properties in question, and that the deeds had been altered and changed as to the grantee and that such alterations and changes were not made with the consent or knowledge of Jennie B. Schank (Tr. pp. 26-28).

Deeds to each of the nine parcels of land described in the complaint were signed on the 20th day of December, 1938 in the office of S. W. Dowse in Salt Lake City, who prepared the deeds for Mrs. Schank's signature in blank as to the grantee. After the deeds were prepared, signed and acknowledged with the name of the grantee in blank, Mrs. Schank took them from the office of Mr. Dowse and never returned to have them completed as to the name of the grantee. At the time the deeds were prepared Mrs. Schank stated, in effect, that she wanted to set some of her affairs in order and to have the deeds made out so that some time in the future, when she saw fit, she could convey the properties to an individual or individuals of her choice (Tr. pp. 103-104).

The record is silent as to when or by whom the name, Leta B. Eschler, was inserted as the name of the grantee

in each of the deeds, but a casual examination of the deeds discloses that the name of the grantee was not inserted at the time the deeds were signed and acknowledged by the grantor, corroborating in that respect the witness Dowse. L. R. Eschler, the husband of the defendant, testified that the deeds were delivered to him in March of 1946 at Saratoga, California, by Mrs. Schank who was there at the time on a visit (Tr. p. 125); that at the time the deeds were delivered Mrs. Schank stated to the witness "that she was giving these properties to Leta, and that she wanted me to hold them until after her death. She made that express request, and that—she stated she didn't want Leta to feel any personal obligation to her while she was still living; that that was about the substance of it." (Tr. p. 127). Mr. Eschler testified that the deeds were in an envelope, which he believed was sealed at the time; that after Mrs. Schank left and returned home, he broke the seal, opened the envelope and examined the deeds, finding them to be in the same condition, with the exception of the recording data, that they were in at the time of their introduction in evidence (Tr. pp. 137-139).

Defendant's husband further testified that he kept the deeds in a brief case with other personal papers, and that they were constantly in his possession until he handed them to his wife, the defendant, in Salt Lake City immediately following Mrs. Schank's funeral, the day before the deeds were recorded, and that until the deeds were handed to Mrs. Eschler by the husband wit-

ness on April 2nd, 1947, Mrs. Eschler had no knowledge of their existence (Tr. pp. 128-129).

Abstracts of Title, introduced in evidence as exhibits B to I inclusive, covering respectively the first eight parcels of land described in the complaint, disclose the fee simple title to have been in Jennie B. Schank on the date of her death, March 30, 1947. The ninth parcel of land described in the complaint and the subject matter of one of the deeds executed in the office of Mr. Dowse on December 20, 1938 and included in one of the deeds said to have been delivered by Mrs. Schank to the defendant's husband in March, 1946, was sold, and a uniform real estate contract entered into by Jennie B. Schank, as seller, and Jay R. Springer and wife, as buyers, under date of April 1st, 1944 (Tr. p. 72, exhibit J).

Mrs. Schank, up to the time of her death, treated the properties as her own, as indicated by negotiations with real estate agents and others concerning the possible disposition of some or all of the properties (Tr. pp. 265-268, 269-270, 284-285), paid taxes on all of the properties (Tr. pp. 79-80), collected the rentals and income therefrom as shown by entries in books of account, exhibits L and M, made returns and paid income tax in connection therewith (Tr. pp. 258-259), and kept the properties insured against loss by fire in her name (Tr. p. 260).

Over objection as to the competency of the witness Eschler to testify to any transactions with the deceased (Tr. p. 125), he stated that Mrs. Schank felt that it would be a burden for the Eschlers to pay the taxes in

excess of revenues from the properties, and that she would pay the taxes herself for Leta; that she advised against selling any of the properties (Tr. pp. 127-129). Other testimony was to the effect that Mrs. Schank was an exceptionally good, careful and meticulous business woman (Tr. pp. 217-218); that Mrs. Eschler was a favorite relative (Tr. p. 146) and that there was one relative in particular that Mrs. Schank did not even want on the property (Tr. p. 218).

An Olographic Will was introduced in evidence, exhibit P, reading as follows:

“June 17-26

Herein is the disposal I wish of my belongings if I should meet with any casualty.

The home and all belongings on 2nd Ave. shall belong to my mother during her life along with \$10,000.00 Ten Thousand Dollars. One Thousand \$1,000.00 to Melvin, \$1,000.00 to Leta, \$1,000.00 to Mildred and \$2,000.00 to my sisters, Smona' & Rittie, also brothers.

Jennie B. Schank”

Exhibit A, an undated memorandum in the handwriting of Mrs. Schank, was likewise received in evidence, reading as follows:

“An *equal* division shall be made of balance among all members of *familly* *enclunding* those not mentioned in this paper Deeds to property are in safe to be completed as designated by my mother

Jennie B. Schank”



The exhibits P and A were found together in an envelope shown on the photostat exhibit P. The envelope was found in a black record book among Mrs. Schank's papers by the administrator while listing the assets of the estate (Tr. pp. 252-254).

Mrs. Eschler arrived in Salt Lake immediately after Mrs. Schank's death. Her husband arrived in Salt Lake on a Monday prior to the funeral that was held the following Wednesday. On Monday night both Mr. and Mrs. Eschler stayed alone in Mrs. Schank's home on Second Avenue. In the basement of the home was a safe containing private papers of Mrs. Schank. On Tuesday night Mr. and Mrs. Eschler stayed at the home of a relative and on Wednesday night, the night before the deeds were recorded, they again stayed alone at Mrs. Schank's home (Tr. p. 132). While the witness Eschler denied going into the safe, he admitted that while there he removed a page from one of Mrs. Schank's account books that contained information relating to personal transactions between himself and the deceased (Tr. pp. 133, 135-136). The safe, however, had been opened on Monday afternoon, before Mr. Eschler arrived in town, in the presence of Mrs. Mayo, a niece of the deceased and one of the heirs, Mrs. Eschler, the defendant, and others, who made only a superficial examination of the contents at the time (Tr. p. 281).

From the foregoing and aside from the question of the credibility of the witness Eschler, the husband of the defendant, two basic questions present themselves.

(1) whether the alleged delivery of the deeds under the circumstances was testamentary in nature or an absolute conveyance between living parties, and (2) whether, in any event, the signing of the deeds in blank as to the grantee, and no further acknowledgment or proof as to execution of the completed documents, constitutes due execution and proof of conveyance.

### STATEMENT OF ERRORS RELIED UPON

1. The court erred in admitting in evidence defendant's exhibits numbers 1 to 9 inclusive over the objection of plaintiffs that no proper foundation had been laid and that said deeds were incompetent, irrelevant and immaterial. (Original objection Tr. p. 110. Objection renewed and ruling Tr. p. 192).

2. That the judgment and decree (Tr. pp. 56-57) is contrary to law and is not supported by the evidence, or by the findings or by the conclusions of law.

3. That the conclusions of law (Tr. pp. 53-55) are not supported by the evidence or by the findings of fact.

4. That the findings of fact (Tr. pp. 48-53) are not supported by but are contrary to the evidence and particularly as the same purport to find that Jennie B. Schank completed or caused to be completed the nine deeds by inserting or causing to be inserted therein the name of Leta B. Eschler as grantee, and that the said Jennie B. Schank intended to part with and did divest herself of all control and dominion over said deeds or the property described therein.

5. Finding of fact number 2 (Tr. p. 49) is not supported by but is contrary to law and the evidence and particularly wherein it is found that the alleged affection between Jennie B. Schank and the defendant was to the exclusion of all other relatives of Jennie B. Schank, including the plaintiffs.

6. Finding of fact number 3 (Tr. p. 49) is not supported by but is contrary to law and the evidence and particularly wherein it purports to find that on the 20th day of December, 1938 Jennie B. Schank executed the nine warranty deeds covering and describing the parcels of real estate involved.

7. Finding of fact number 4 (Tr. p. 51) is not supported by but is contrary to law and the evidence, and particularly wherein it purports to find that sometime prior to the month of March, 1946 said Jennie B. Schank completed, or caused to be completed, the nine deeds aforesaid by inserting or causing to be inserted therein the name of Leta B. Eschler as grantee, and wherein it purports to find that Jennie B. Schank delivered said nine deeds and each of them to Logan Russell Eschler, husband of the defendant, in furtherance of a purpose or intention, express or otherwise, to make provision for the defendant or otherwise.

8. Finding of fact number 5 (Tr. p. 51) is not supported by but is contrary to law and the evidence, and particularly wherein it is found that Jennie B. Schank intended to part and did by said act of delivery completely and irrevocably divest herself of all control and

dominion over said deeds, and particularly wherein it is found that simultaneously or otherwise with the alleged delivery of said deeds to Logan Russell Eschler, Jennie B. Schank informed the said Eschler that the properties described in said deeds were being given by Jennie B. Schank to the defendant with the intention and purpose that defendant should have the security of the properties at all times or otherwise, and with the advice and recommendation of Jennie B. Schank that defendant should retain said properties and not sell and dispose of them; and wherein it is found that the said Jennie B. Schank requested that defendant be not informed concerning the delivery of said deeds until after the death of Jennie B. Schank, and that she, Jennie B. Schank, desired to continue the payment of taxes and expenses incident to the management of the properties described in said deeds in order that the expenses incident to their operation and management should not be burdensome to defendant or her husband, Logan Russell Eschler.

9. Finding of fact number 6 (Tr. p. 52) is contrary to law and the evidence, and particularly that portion thereof wherein it is found that after the delivery of said deeds Jennie B. Schank continued in the management, control and possession of the properties described therein and in plaintiffs' complaint for the use and benefit of defendant, and wherein it is found that Jennie B. Schank stated to third parties that she could not sell or contract to sell the so-called Murray tract or any other property without conferring with defendant to ascertain

if defendant wished to have the money from a sale thereof, or to retain said property, and that any tract belonged to the defendant and that the defendant had any control to be exercised over any of said tracts prior to or after the death of the said Jennie B. Schank; and wherein it is found that Jennie B. Schank did not request or demand or obtain the control or possession of the deeds or any of them during her lifetime, and that Logan Russell Eschler continued uninterruptedly in the control and possession of the same, and particularly where it is found that Logan Russell Eschler delivered said deeds to the defendant as requested by Jennie B. Schank.

10. Finding of fact number 8 (Tr. p. 53) is contrary to law and the evidence, and particularly that portion thereof wherein it is found that Jennie B. Schank in her lifetime intended that the property and the said deeds should be the property of Leta B. Eschler, and wherein it is found that Jennie B. Schank in her lifetime delivered said deeds to Logan Russell Eschler so that any purpose or intention in connection with such property would be carried out.

11. Conclusion of law number 1 (Tr. pp. 53-54) is contrary to law and is not supported by the evidence.

12. Conclusion of law number 2 is contrary to law and is not supported by the evidence.

13. Conclusion of law number 3 is contrary to law and is not supported by the evidence.

14. Conclusion of law number 4 is contrary to law and is not supported by the evidence.

15. The court erred in overruling objections as to the competency of the witness Eschler, the husband of the defendant, to testify as to the transactions with the deceased (Tr. p. 125).

## ARGUMENT

The Assignments of Error and the various propositions involved group themselves for argument as follows :

### **1. In View Of The Showing Made In The Record The Deeds Under Which The Defendant Claims Are Void.**

Defendant's witness Dowse testified that the exhibits 1 to 9 inclusive were prepared in his office on December 20, 1938, signed by Jennie B. Schank and acknowledged by the witness' father (Tr. p. 101) with the grantee's name in blank (Tr. p. 104). The record is silent as to who inserted the name of Leta B. Eschler as grantee in the instruments or when the same was done or the circumstances, except the testimony of the defendant's husband to the effect that when he broke the seal and opened the envelope containing the deeds after the envelope had been handed to him by Mrs. Schank, the deeds bore the name of Leta B. Eschler. When the defendant offered the deeds in evidence objections were made that no foundation had been laid and that the exhibits were incompetent, irrelevant and immaterial (Tr. p. 110, 192).

Deeds executed in blank are void. This was the holding of this court in the case of *Utah State Building & Loan Ass'n v. Perkins*, 53 Utah 474, 173 P. 950. The court applied Compiled Laws of Utah 1907, Section 1974, the same as Section 33-5-1 U.C.A. 1943, Statutes of Fraud, which section is as follows :

“No estate or interest in real property, other than leases for a term not exceeding one year nor any trust or power over or concerning real property or in any manner relating thereto, shall be created granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.”

In applying the foregoing statute the court held:

“I find no authority holding a conveyance effective under similar facts as appear in this record. On the contrary, there appears to be no conflict that blank deeds or blank papers executed as these were are void and do not convey any interest or title whatever. *Southern Pine Lumber Co. v. Arnold* (Tex. Civ. App.) 139 S.W. 917; *Allen v. Allen*, 48 Minn. 462, 51 N.W. 473; 13 Cyc. 551; 8 R.C.L. 956.”

In the case of *Trout v. Taylor*, 17 P. (2d) 761 (Cal.) it was held:

“In *Jones v. Coulter*, 75 Cal. App. 540, at page 547, 243 P. 487, 490, the court held: ‘There can be no doubt as to the utter invalidity of the instruments under which appellant’s grantor, Meng, derainged his purported title. The blank deeds signed by respondent and subsequently filled out under Neilson’s direction, with Meng’s name inserted as the purported grantee, were mere nullities. According to the great weight of authority, a deed executed in blank is void and passes no title. *Wunderlin v. Cadogan*, 50 Cal. 613, and cases cited *infra*. As was said in *Whitaker v. Miller*, 83 Ill. 381: ‘There must be, in every grant, a grantor,

a grantee and a thing granted, and a deed wanting in either essential is absolutely void.' \* \* \*

In view of these authorities, the conclusion is inescapable that the deed in question was not voidable, but was void in toto; a nullity."

In *Allen v. Allen*, 51 N.W. 473 (Minn.), after holding that in every grant there must be a grantor, grantee and a thing granted and a deed wanting in either essential is invalid, the court held that parol testimony could not be received for the purpose of curing a defective deed, stating as follows:

"If it could, an error in or omission of the name of the grantor or grantee, or an error in or omission of the description of the property intended to be conveyed, could be rectified or wholly supplied with the same class of testimony in an action of this character. A legal title to real property cannot be established by parol."

This court, in the early case of *Nilson v. Hamilton*, 53 Utah 594, 174 P. 624, held a deed to be void which ran to a deceased person or to his estate, the court stating:

"We need not stop to discuss or declare that the attempted conveyance of 1876 to James L. Hamilton, who was then deceased, or to the estate of James L. Hamilton, deceased, did not convey any title to any one. There was no person in existence in law, named in the deed, authorized to receive, or who had the legal capacity to receive the title to the premises. It must therefore be concluded that these attempted conveyances of the several patentees in 1876 were mere nullities. 13 Cyc. 527; *Rixford v. Zeigler et al.*, 150 Cal. 435, 88 Pac. 1092, 119 Am. St. Rep. 229; *McInerney v.*



Beck, 10 Wash. 515, 39 Pac. 130; 1 Devlin, Deeds (3d Ed.) Section 187.”

The validity of the deeds were in question by the pleadings, by the alteration on the face of the documents themselves, and by the testimony of the witness Dowse called by the defendant. The moment it was shown that the instruments were not as on their face they purported to be, the burden rested upon the defendant to prove their due execution. When the witness Dowse testified that Mrs. Schank took the deeds from his office with no grantee named, then every presumption of due execution was destroyed and a re-execution under the authorities was required, which would mean something more than the mere physical delivery of the deeds by Mrs. Schank to the witness Eschler, which brings us to the next point.

## **2. The Defendant Failed To Sustain The Burden Of Due Execution Of The Deeds.**

In the case of *Tarpey v. Desert Salt Co.*, 5 Utah 205, 14 P. 338, the court holds that the proving of a deed, when necessary to be made, must be made in the first instance by the testimony of a subscribing witness, and that the certificate of acknowledgment is not conclusive but only prima facie evidence. In the case at bar the proof appears by the defendant's own witness that the deeds even as between the parties were not sufficient because when signed the name of the grantee was lacking. Now, what proof is there that even as between the parties the instruments were sufficient? The inference that might be said to arise from the testimony of Eschler is not sufficient and this is all there is in the record for the defendant to rely upon.

The term "conveyance" is defined by Section 78-1-1 U.C.A. 1943, and is as follows:

"The term 'conveyance' as used in this title shall be construed to embrace every instrument in writing by which any real estate, or interest in real estate, is created, aliened, mortgaged, encumbered or assigned, except wills, and leases for a term not exceeding one year."

The manner of proof of the execution of a conveyance is prescribed by Section 78-2-9 U.C.A. 1943, as follows:

"The proof of the execution of any conveyance whereby real estate is conveyed or may be affected shall be:

- (1) By the testimony of a subscribing witness, if there is one; or,
- (2) When all the subscribing witnesses are dead, or cannot be had, by evidence of the handwriting of the party, and of a subscribing witness, if there is one, given by a credible witness to each signature."

In the Tarpey case, *supra*, it is said:

"The statute points to the subscribing witnesses as the first persons to look to in such cases for proof, and the proper ones to furnish proof in the first instance of the due execution of the deed, in all cases when it is attacked, or when its validity is in any manner called into question. Besides, the statute requiring one or more witnesses to a deed increases the difficulty of making a fraudulent or forged deed, and adds to the solemnity of its execution. The signing of deeds by witnesses was not required at common law, nor was the

signing by the party required. But here we have a statute that specifies, as parts of the due execution of the deed, the signing by the party and the signing by the witnesses.”

The court, in the Tarpey case, had before it the Compiled Laws of Utah 1876, page 254, Section 1 (617), which section provides:

“That conveyances of lands, or of any estate or interest therein, may be made by deed, signed by the person from whom the estate or interest is intended to pass, being of lawful age, or by his lawful agent or attorney, and by one or more credible witnesses, and acknowledged or proved, and recorded as provided in this act.”

So far as we can determine, the statute just quoted was not carried into our statutory law by the Revised Statutes of 1898 or since that time so far as it pertains to the requirement of the signature of “one or more credible witnesses”, but for many years we have had Section 78-2-9, *supra*, setting forth the requirements of proof of the execution of a conveyance (1) by the testimony of a subscribing witness if there is one, and (2) by the evidence of the handwriting of the party given by a credible witness to the signature, and section 78-2-14 U.C.A. 1943, the material portion of which we set out in italics, the entire statute reading as follows:

*“No certificate of any such proof shall be made unless a competent and credible witness shall state on oath or affirmation that he personally knew the person whose name is subscribed thereto as a party, well knows his signature, stating his means of knowledge, and believes the name of*

*the party subscribed thereto as a party was subscribed by such person; nor unless a competent and credible witness shall in like manner state that he personally knew the person whose name is subscribed to such conveyance as a witness, well knows his signature, stating his means of knowledge, and believes the name subscribed thereto as a witness was thereto subscribed by such person."*

A further requirement is provided by Section 78-2-11 U.C.A. 1943, which provides:

*"No certificate of such proof shall be made unless such subscribing witness shall prove that the person whose name is subscribed thereto as a party is the person described in, and who executed, the same; that such person executed the conveyance, and that such person subscribed his name thereto as a witness thereof at the request of the maker of such instrument."*

Sections 78-2-14 and 78-2-11 must be construed in connection with 78-2-9, which in turn must be construed with Section 78-1-1 defining the term "conveyance", and all of the sections must be reconciled and construed with the Statute of Frauds, Section 33-5-1, requiring the deed or conveyance to be in writing, subscribed by the party making the grant or by his lawful agent thereunto authorized by writing.

To be a conveyance within the statutes relating to real estate and the statute of frauds the document must be a complete, effective instrument, meaning all of those things essential to a completed, effective conveyance and delivery as part of the execution of the same. *Words*

*and Phrases*, Permanent Edition, Volume 15, page 547. Our statutes require a written document to be subscribed by the grantor or his duly authorized agent and, as heretofore pointed out, for the document to be effective as a conveyance it must be complete as to the grantor, the grantee and the thing conveyed. The term "subscribed" means to write one's name at the end of the instrument. *Words and Phrases*, Permanent Edition, Volume 40, page 454.

The only proof in the record as to the subscribing of exhibits 1 to 9 inclusive by Jennie B. Schank comes from the testimony of defendant's witness Dowse who unequivocally stated, and it is not disputed, that when the instruments were signed there was no grantee named therein. Under those circumstances the deeds were never entitled to recording and all presumptions of due execution of an effective conveyance fall.

To make the deeds admissible in evidence under our statutes, proof would have to be made that the deeds were re-acknowledged after the name of the purported grantee had been inserted. The necessity of the acknowledgement to admit the deeds in evidence was pointed out in the case of *Murray v. Beal*, 23 Utah 548, 65 P. 726, where the court stated:

"The acknowledgment, while not necessarily a part of the deed, was a necessary ingredient in order to admit it of record, or to admit it in evidence without further proof. It had reference to the proof of execution, not to the force of the deed itself, especially when third parties were not

concerned. *Gray v. Ulrich*, 8 Kan. 112; *Devl. Deeds*, Section 464; sections 1975, 2001, *Rev. St.* 1898; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543."

To the same effect is the *Waldron v. Waller*, 64 S.E. 964 (W. Va.), where the court states:

"This is not a case like that of *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S.E. 515, and cases of that class, relied upon by plaintiff where an altered instrument is offered in evidence by a party in support of some right of action claimed by him under it. In such a case the material alteration in the instrument deprives the holder responsible for it of any executory rights or right of action thereon, and destroys its evidential force and validity.

\* \* \* The authorities we think make it clear that, although such alteration may have been with the consent of the grantors, the deed cannot operate to invest in the grantee land not covered by the original grant, without a re-delivery of the deed by them, and, if it has been acknowledged before the alteration, the deed should be again acknowledged."

The Supreme Court of the United States in the case of *Waskey v. Chambers*, 56 L. Ed. 885, 224 U.S. 564, holds:

"It never had but one witness, two being necessary to authorize the recording of a deed, and the only acknowledgment was before the alteration. Therefore it was filed without authority, was not entitled to registration, and, as we have said, had no effect as against the petitioner."

A similar expression comes from the Alabama court in the case of *Hess et al., v. Hodges*, 78 So. 85:

“The original deed from the Mizes to the complainant was also sought to be corrected; but whether this was done with appellee’s consent or the consent of her agent was disputed in the evidence. The acknowledgment, delivery, and registration of the deed from Mize to complainant having been perfected long before the interlineation in the original deed was made, the amendment of that instrument, even though made with the grantee’s consent, had no effect or operation; the instrument not having been again acknowledged or attested.”

There is only one circumstance proven in the record and that is, when Mrs. Schank signed the exhibits 1 to 9 inclusive the name of the grantee was omitted. There is no proof of a subscribing or re-execution or re-acknowledgment of the deeds at a time when, with the name of the grantee inserted, they would be effective deeds of conveyance. The instruments signed by Mrs. Schank in the office of Mr. Dowse were void and invalid for the purposes claimed by the defendant. The defendant has failed to sustain the burden of proving an effective conveyance in her favor *subscribed* by Jennie B. Schank.

In the case of *In re Henry Newell’s Estate*, 78 Utah 463, 5 P. (2d) 230, this court approved the following rule:

“The rule is well stated in the case of *Peters v. Lohm*, *supra*, as follows: ‘A presumption is

not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until prima facie evidence has been adduced by the opposite party; but the presumption should never be placed in the scale to be weighed as evidence. The presumption, when the opposite party has produced prima facie evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponent's prima facie evidence with evidence, and not presumptions. A presumption is not evidence of a fact, but purely a conclusion.' "

The Newell case is cited with approval in the case of *Saltas v. Affleck*, 99 Utah 65, 102 P. (2d) 493, where this court again in discussing presumptions stated:

"And the settled rule in this jurisdiction is that as soon as evidence is offered on the question the presumption ceases and does not longer exist."

The rule stated in the Newell case would be immediately apparent had the defendant, in the first instance, and before the testimony of the witness Dowse, relied upon the presumption of due execution afforded by the recording of the nine deeds and then it was shown, as by the witness Dowse, that when signed and purportedly acknowledged the deeds did not make provision for a grantee. Under those circumstances the presumption of due execution would be dissipated and the burden of going forward would be upon the person claiming under the deeds to show due execution of the completed, effec-



tive documents. We have here the unusual situation of the defendant's own proof destroying the inference or presumption that she would rely upon.

Our statutes relating to proof of the execution of a conveyance have not been satisfied by the defendant, and the burden in that regard is further accentuated by Section 104-48-16 U.C.A. 1943, which section is as follows:

“The party producing as genuine a writing which has been altered, or appears to have been altered after its execution in a part material to the question in dispute must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration does not change the meaning or language of the instrument. If he does this, he may give the writing in evidence, but not otherwise.”

Our inspection of the deeds in question show the name of Leta B. Eschler not to be by the same typewriter as the remaining portion of the instruments. This fact is also obvious from the testimony of the witness Dowse who stated that the instruments while prepared in his office were taken therefrom by Mrs. Schank without having inserted any name for that of the grantee, and that the deeds were never returned to him for that purpose.

*Words and Phrases*, Permanent Edition, Volume 3,

page 293:

“An ‘alteration’ of an instrument is an act done upon the written instrument which, without destroying its identity, changes its language or meaning. *Davis v. Campbell*, 61 N.W. 1053, 93 Iowa 524.”

Nor has the defendant complied with Section 104-48-8 U.C.A. 1943:

“Any writing may be proved either :

- (1) By any one who saw the writing executed ; or,
- (2) By evidence of the genuineness of the hand-writing of the maker ; or,
- (3) By a subscribing witness.”

From the foregoing it follows that the defendant has failed to show that the instruments under which she claims were effective deeds of conveyance, that they satisfied the State of Frauds or that they were subscribed to in writing by Jennie B. Schank. To hold otherwise would be to open the door to the vice suggested in the *Tarpey* case to the effect that when one overlooks the solemnity of execution it increases the danger of fraudulent or forged instruments. And we go further in stating that to permit the defendant to prevail on the question of due execution under the circumstances of the case at bar would be to open the door to proof of title by something short of a writing subscribed by the grantor and would permit parol evidence to suffice.

### **3. Mrs. Schank's Conduct With Reference To The Property Was Testamentary in Nature.**

In approaching the proposition now under consideration we do not want to be understood as conceding that Mrs. Schank had the conversation at Saratoga as claimed

by Eschler or that she, at any time, delivered the deeds to him. Eschler's testimony is so unnatural and his conduct, while alone with his wife in Mrs. Schank's home immediately before and after the funeral, is such as to cast grave suspicion upon his statements. He testified in effect that his "idle curiosity" (Tr. p. 141) got the best of him in March, 1946, to the extent that after Mrs. Schank left Saratoga and returned home he broke the seal on the envelope and looked at the deeds (Tr. p. 138). But he claims that he said nothing to his wife, the defendant, until a year later, April 2, 1947, and after Mrs. Schank's death and the funeral that she, his wife, was the recipient of real estate worth \$85,000.00 and upwards (Tr. p. 76). If the instruments were intended as absolute conveyances it is quite difficult to believe that Eschler would keep that information from his wife, and yet out of sheer curiosity violate the implication of a sealed envelope.

Eschler was a man of moderate circumstances, struggling with rehabilitation after service in the Armed Forces and the problems of the G.I. with a family. To our minds, *he had to say* that he made no disclosure to his wife about the deeds in order to account for the conduct and silence of both of them immediately prior to and immediately following the funeral. Mrs. Mayo testified that Mrs. Eschler was extremely anxious to examine the contents of the safety deposit box at the bank and to determine the existence of bank accounts in her favor or in favor of her children (Tr. pp. 278-

279). Mr. Eschler's testimony was necessary to account for the absence of a frank statement that Mrs. Eschler was already the recipient of her Aunt's bounty through the medium of the deeds in question. The information in that regard was not forthcoming until after the deeds had been recorded, which was the first thing that the Eschlers did on the morning following the day of the funeral and after remaining alone in Mrs. Schank's home the previous night. The deeds were recorded shortly after 10 A.M. on April 3, 1947.

The safe in Mrs. Schank's home was a receptacle for her private papers. The safe had been opened on Monday afternoon and remained open while Mr. and Mrs. Eschler stayed alone that night in the Schank home. Exhibit A, the undated memorandum in the handwriting of Mrs. Schank set forth above, states: "Deeds to property are in safe to be completed as designated by my mother." It can be argued that the deeds referred to in the memorandum were those that Mrs. Schank signed in the office of the witness Dowse, and which she took from the office in their incompleted form. The silence of both Mr. and Mrs. Eschler on the subject until after the deeds had been recorded, their desire to determine the disposition of the property up to a point and then their silence and inactivity is all explained by the proposition that the deeds were in Mrs. Schank's safe in her home until after her death and from the safe removed by either Mr. or Mrs. Eschler or both of them, and the name of the grantee inserted after death and before the documents were recorded.

Corroborating our conception of the unreliability of the witness Eschler is his confession that from the bureau in Mrs. Schank's home and after her death he extracted a sheet from an account book pertaining to a trifling transaction between himself and Mrs. Eschler (Tr. p. 133-137). Mr. Eschler, an auditor, in removing a page of an account book involving his own personal account with the deceased, immediately casts suspicion upon himself. To hide evidence of his indebtedness is not consistent with the conduct of a man who in truth and good faith has in his possession for delivery to his wife deeds representing property of the value of more than \$85,000.00. Exhibit R, the page that was removed, shows an indebtedness not to exceed \$100.00. The answer is that when he took the page out of the account book he had not at that time run across the deeds. He could not give a clear story as to what he did with Exhibit R (Tr. pp. 130, 134, 136). It will be argued that what we say here as to credibility was solely within the province of the trial court which determined the proposition adversely, but it will not be ignored when this court determines that the legal equation comes solely from the lips of the witness Eschler and that the testimony and evidence with reference to intent must be clearly established by a preponderance of credible, competent evidence with the burden of so doing being that of the defendant.

To prevail, the defendant must show that Mrs. Schank intended to divest herself of title to the property at the time of the alleged delivery of the deeds to Eschler,

and that what she did was not testamentary in nature or to be the substitute of a Will. The defendant, having set forth the deeds as her affirmative defense to plaintiffs' action to quiet title, requires her to assume the burden of going forward and proving by the preponderance of the evidence a good and bona fide delivery. The rule is stated in 20 *Am. Jur.* Section 137, page 142, as follows:

"As to affirmative defenses asserted by the defendant, he is the actor and, hence, must establish the allegations of such defenses. In other words, the burden of proof in the true sense of the term is upon the defendant as to all affirmative defenses which he sets up in answer to the plaintiff's claim or cause of action, upon which issue is joined, whether they relate to the whole case or only to certain issues in the case."

The deeds were not delivered directly to the grantee but to a third party. Under those circumstances there must be something besides the mere act of delivery to evidence the intent. The rule is well stated in *Lewis v. Tinsley*, 287 N.W. 507, 124 A.L.R. 459 (S.D.), as follows:

"And in the case of *Mitchell v. Ryan*, 3 Ohio St. 377, the Ohio court said: 'If the deed be delivered to the grantee, the natural presumption is that it is for his use, and no words are necessary. But if it be handed to a stranger there is no such natural presumption; and hence, unless there be something besides the mere act of delivery to evidence the intent, it is impossible to say that the grantor designed to part with the title.'

We believe the expressions of these three different courts just quoted are sound, and that the

reasoning therein when applied to the law as it exists in this state establishes substantially the following result. A presumption of delivery arises from the mere possession of the deed by the grantee. This presumption presupposes a delivery of the deed directly from the grantor to the grantee and is based upon the fact that it is natural and reasonable to presume that, when a grantor places a deed in the possession of the grantee, it is done with the intent to convey title. However, when it is shown that the deed came into the possession of the grantee through the hands of a third person, the reason underlying the presumption has vanished, and the case stands or falls upon the evidence presented to the court. So in this case, the presumption upon which respondent relies, and upon which the trial court apparently decided this case was overcome by the showing that deeds were not turned over to the grantee by the grantor, but were delivered by the grantor to a third person. Without the presumption there is nothing in the facts to support the finding and conclusion of the trial court."

In order to support defendant's claim, she must show an absolute delivery of the instruments, coupled with the intention that the grantor be divested of the title to the property at the time of delivery. The rule is stated in *Wood v. Wood*, 87 Utah 394, 49 P. (2d) 416:

"The law with respect to gifts inter vivos was stated by this court in the case of *Holman v. Deseret Savings Bank*, 41 Utah, 340, 124 P. 765, 766, as follows: 'Gifts inter vivos have no reference to the future, and go into immediate and absolute effect. To constitute such a gift, the donor must be divested of, and the donee invested

with, the right of property in the subject matter of the gift. It must be absolute, irrevocable, without any reference to its taking place at some future period. *The donor must deliver the property, and part with all present and future dominion over it.*'' (Italics ours).

In *Singleton v. Kelly*, 61 Utah 277, 212 P. 63, this court said:

“The law here applicable is clearly stated in *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1, Ann. Cas.. 1916E, 703, from which we quote:

‘It is well settled that a person may make a conveyance of property and place it in the hands of a third party to be delivered to the grantee named in it on the death of the grantor, and that such a delivery will be effectual to pass a present title to the property to the grantee, if the intention of the grantor is to make such delivery absolute and place it beyond the power thereafter to revoke or control the deed. Where delivery is made under these circumstances and with this intention, it is fully operative and effective to vest a present title in the grantee, the grantor retaining only a life estate in the property and the third party or depositary holds the deed as a trustee for the grantee named in it. *Bury v. Young*, 98 Cal. 451, 35 Am. St. Rep. 186, 33 Pac. 338; *Moore v. Trott*, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578.

On the other hand, it is equally well settled that where a deed is deposited with a third party to be handed to the grantee on the death of the grantor, unless this is accompanied by an intention on the part of the grantor that title to the property shall thereby immediately pass to the grantee, there is no delivery of the deed and



consequently no title is transferred. *If the deed is handed to the depositary without any intention of presently transferring title, but, on the contrary, the grantor intended to reserve the right of dominion over the deed and revoke or recall it, there is no effective delivery of the deed as a transfer of title. So, too, if it be the intention of the grantor when he deposits a deed that it shall only be delivered to the grantee by the depositary after the death of the grantor, and that the title is to vest only upon such delivery after his death, then the deed is entirely inoperative as constituting an attempt by the grantor to make a testamentary disposition of this property. This may only be done by will executed as required by the law of wills of this state, and a deed, the purpose of which is intended to be testamentary, cannot be given effect'.*" (Italics ours).

In *Reed v. Knudson*, 80 Utah 428, 15 P. (2d) 347, where the question of delivery was discussed, the court held as follows:

"Where a delivery is thus made to a third person, the question whether the gift was thereby completed without actual delivery to the donee depends entirely upon whether the person to whom the property is delivered receives it as the donor's agent or as trustee for the donee. And this is to be determined from the intention of the donor, the situation and relation of the parties, the kind and character of the property, and the things said and done in regard thereto, as disclosed by the evidence. *If the property remains under the control of the donor, although in the keeping of the third person, and the latter is subject to his further direction as to its final disposition, then his*

*relation is that of an agent.* If, however, the property is delivered by the donor with intention that the present title and ownership shall pass to the donee and such intention is carried into effect by the language employed and the things done in relation thereto, then the gift is executed and the third person is a trustee for the donee.

Delivery is a matter of intent and the intent is to be arrived at from all the facts and circumstances in evidence. *Mower v. Mower*, 64 Utah 260, 228 P. 911. The Court found, and there is evidence to support it, that C. O. Christensen was duly appointed administrator of the estate of Wesley Reed Larsen, deceased, and it may reasonably be inferred that Young was the attorney for the administrator. There can be no doubt that John Reed intended to give the grantee an undivided one-half interest in the estate. This intent is shown by his acts and declarations to that effect both before and subsequent to the execution of the assignment. Intent to make a gift is not sufficient unless there was also delivery of the instrument. Although he lived seven months after the execution of the instrument and delivery thereof to Mr. Young, Reed made no attempt to control it or to withdraw it, nor did he do any act inconsistent with an intention to effectively pass it beyond his control. He delivered it to Mr. Young without restrictions or reservations and *we think the inference reasonably clear that he did not intend to reserve to himself any further control over the instrument or the property.*" (Italics ours).

In this case it will be noted that the court in holding that there was a good delivery stated: "Although he lived seven months after the execution of the instrument

and delivery thereof to Mr. Young, Reed made no attempt to control it or to withdraw it, nor did he do any act inconsistent with an intention to effectively pass it beyond his control \* \* \* he did not intend to reserve to himself any further control over the instrument *or the property.*” By these statements it is clearly shown that even though Reed had made no attempt to withdraw the instrument if he had done other acts in the exercise of the actual control of the property concerned, the court would have considered this in determining whether at the time the delivery was made he actually intended it to be irrevocable.

And in the case of *Stanley v. Stanley*, 97 Utah 520, 94 P. (2d) 465, the court clearly supports the theory that the main matter to consider in determining the intent of a grantor at the time of a delivery, is not necessarily his actions and words at the time of delivery or whether he has tried to regain possession of the instrument, *but his subsequent control over the property involved.* The court sets forth the following facts covering the question of delivery:

“With respect to the delivery of the deed, the trial court excluded evidence offered by the defendant as to the formal act of delivery as being incompetent under the provisions of Section 104-49-2, R.S.U. 1933. However, she was permitted to testify that she first saw the deed on May 19, 1906, in the testator’s hands and next saw it in her own hands after which she immediately placed it in a tin box; that when she first saw the deed the testator was removing it from his pocket, re-

marking that he had a present for her, and handed it to her, and that she paid him a dollar, requesting however, *that the deed be not recorded until after his death, and that thereafter it remained in her possession.*' (Italics ours).

From these facts it is clearly shown that at the time the delivery was made the donor stated that he was making a gift, handed the deed to the donee and that the same remained in her possession thereafter. The court, however, in ruling on the matter affirmed the lower court in its finding that there was no delivery and held as follows:

"This testimony would undoubtedly justify an inference that the deed was delivered and should be considered prima facie sufficient for that purpose. The inference is not conclusive, nor would the presumption arising from the possession of the deed by the defendant be conclusive.

Was the behavior of the testator and of the defendant subsequent to their separation inconsistent with the claim that the deed was delivered with intent to presently pass title? It is apparent that the testator thereafter exercised all of the indicia of ownership by entering into the exclusive possession of the premises, taking insurance in his own name, redeeming the property from a tax sale, mortgaging the property with the knowledge of the defendant, disposing of the property by will, collecting rents, paying taxes and assuming all expenses of upkeep, all without any protest or objection or claim by or on behalf of the defendant. In the course of these various transactions he had repeatedly stated and represented that he was the owner of the property, such state-

ments, however, being admissible only upon the question of intent to presently pass title, if in fact there had been a manual delivery.

‘Since delivery is essentially a matter of intent, which intent is to be arrived at from all the facts and surrounding circumstances, we believe the better rule is to include in those facts and circumstances declarations of the grantor both before and after the date of the deed, at least where it appears that the declarations are made fairly and in the ordinary course of life’. *Mower v. Mower*, 64 Utah 260, 228 P. 911, 914.”

We cannot see the necessity of setting forth numerous authorities from other jurisdictions to support this contention as we feel that this court has clearly established the doctrine. However, we call the court’s attention to the recent Washington case of *Puckett v. Puckett*, 185 P. (2d) 132. The court at page 133 held as follows:

“The story of Nelson Puckett, that sometime between Labor Day and September 25, 1939, his brother handed him this deed, he deposited it at 606 Pine, and later, but prior to September 25th, his brother repossessed it, seems to us to be highly improbable. In fact, it is utterly fantastic. Let us examine the record further and see whether we can find, from the conduct of both brothers, any facts to indicate such a delivery. Nelson never mentioned the deed to his son, to the doctor’s wife, or to anyone else. He never put it on record (Until after discovering it in his brother’s office). He never paid the taxes on it. He never took any produce off of it. On the other hand, the doctor continued to pay the taxes. He planted the fruit trees on it, and took the produce there-

from. He bought material for the place. He treated it as his property, and intended to go there when he retired. He was working there the day he fell and was injured, which injuries resulted in his death. On April 27, 1935, two years after the date of the deed to his brother, he filed a declaration of homestead on the place. We find nothing in the conduct of Nelson Puckett which would *indicate a taking of dominion and control over the property, and we find nothing in the conduct of the doctor which would indicate any parting with such dominion and control.*" (Italics ours).

If the only thing that was necessary in these cases was to show the handing of the deed to the third party or grantee and a statement that the grantor wanted the donee to have the property or the fact that the grantor had never during his or her lifetime requested the return of the deed, then why would any evidence of the subsequent acts of the grantor, such as expressions of ownership, the payment of taxes, or the collection of rents, etc. be admissible?

Inconsistent with the required intent to divest herself of title, Mrs. Schank did not part with the abstracts (Tr. p. 131), accepted payments on a contract of sale entered into by her in 1944 involving the ninth tract of land set forth in the complaint, collected rentals, kept meticulous accounting records with reference to the same, made capital expenditures by way of repairs and improvements, paid the taxes, insurance, upkeep, expressed a willingness to sell for a price, made returns and payment of income tax, retained possession and enclosed

the deeds in a sealed envelope. To the witness Wallace in the middle of September, 1946, she stated that she was not interested in \$30,000.00 for one of the tracts because she would have to pay a large tax but that she would sell for \$37,500.00 (Tr. p. 269), and this was before a visit to Mr. Wallace's office made for the purpose of determining how he was getting along with the sale of her property (Tr. p. 270). To the witness Moffat she stated that she owned the vacant lot on the southeast corner of 46th South and State Street, and discussed a proposition of leasing the same (Tr. p. 285). To the witness Smith she expressed her concern over taxes if she should dispose of the property (Tr. p. 266). These witnesses all testified to transactions with Mrs. Schank after the purported delivery by her to Eschler of the deeds in question.

Mrs. Schank's conduct with reference to the property and the statements that she made to her friends and neighbors are inconsistent with the idea of having already, through her negotiation with Eschler, divested herself of title and future interest in the property. Her acts, statements and conduct at the most are consistent with a testamentary desire or wish that Mrs. Eschler be made the recipient of the properties. While it might be said that Mrs. Schank's disposition to give the properties to Mrs. Eschler at some future date and probably after death is quite well reflected in the record, nevertheless the record does not disclose the proof of intent to presently divest herself of her properties to the exclu-

sion of any future or further dominion or control over the same. All that can be said for defendant's position is that the wish or desire expressed by Mrs. Schank was never in a legal fashion carried out or consummated. The conduct of Mrs. Schank is inherently opposed to the testimony of the witness Eschler and his testimony as to the transactions with the deceased brings us to the next point involved.

#### **4. The Witness Eschler Was Incompetent To Testify To Transactions With The Deceased.**

Subdivision (3) of Section 104-49-2 U.C.A. 1943 provides:

“The following persons cannot be witnesses:  
 (3) A party to any civil action, suit or proceeding, and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person derives his interest or title or any part thereof, when the adverse party in such action, suit or proceeding claims or opposes, sues or defends, as guardian of an insane or incompetent person, or as the executor or administrator, heir, legatee or devisee of any deceased person, or as guardian, assignee or grantee, directly or remotely, of such heir, legatee or devisee, as to any statement by, or transaction with, such deceased, insane or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent or deceased person, unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing or defending, in such action, suit or proceeding.”



The competency of the witness Eschler to testify was objected to on the ground of the above statute and on the further ground that his testimony would be in violation of the Statute of Frauds (Tr. pp. 125-127). That Eschler is "directly interested in the event" of the action is evidenced by his own testimony found at Transcript page 129. The witness stated:

"I recall she said she wanted Leta to have the security of those properties at all times, and she stated that she didn't want us to—that is, she advised against our selling any of them immediately, that she thought the security lay in our retention of them and it was for that reason that she suggested that she pay the taxes, inasmuch as my income would not support my family and support additional costs on these properties."

The purport of the testimony is carried into the findings of fact, particularly finding number 5 (Tr. p. 52) where it is found that "said Jennie B. Schank further expressed the desire that she continue the payment of taxes and expenses incident to the management of the property described in said deeds in order that the expenses incident to their operation and management should not be burdensome to defendant or her husband, Logan Russell Eschler."

In *Mower v. Mower*, 64 Utah 260, 228 P. 911, this court held that the mere relationship of husband and wife does not make the husband such an interested party in the event of a suit as to preclude him from testifying in favor of his wife, but in the case at bar the interest is beyond that of the relationship.

The disqualifying interest was defined in the case of *In re Van Alstine's Estate*, 26 Utah 193, 72 P. 942, as follows:

“By the express terms of said subdivision, the disqualification of persons as witnesses on the ground of interest is limited to such as have a direct interest in the event of the ‘civil action, suit, or proceeding.’ Unless, therefore, Mrs. Van Alstine has such an interest, she was not disqualified as a witness. To be directly interested is the same thing as having a direct interest. A direct interest is the opposite of an indirect interest, and excludes the idea of contingency. A direct interest is defined in Winfield’s Words and Phrases, p. 195, as follows: ‘A direct interest is one which is certain, and not contingent or doubtful.’ In Black’s Law Dictionary it is defined as follows: ‘A direct interest, such as would render the interested party incompetent to testify in regard to the matter, is an interest which is certain and not contingent or doubtful’.”

The purpose of the statute is stated in *Miller v. Livingstone*, 31 Utah 415, 88 P. 338, as follows:

“The statute in this regard is intended to protect the estates of deceased persons from assaults, ‘and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or impair the estate, and does not relate to the relative rights of the heirs or devisees as to the distribution of an estate in a proceeding by which the estate itself is in no event to be reduced or impaired’.”

In *Maxfield v. Sainsbury*, 110 Utah 280, 172 P. (2d) 122, the court held that “It is the interest in the claim

which is adverse—not the adverse testimony that disqualifies him”, and again “the interest of the witness must be in the claim urged adversely to the estate.”

Eschler, as the head of the family unit, was the one upon whom the cost of maintaining the properties would fall as his testimony recognizes and, therefore, he is directly interested in the transaction testified to. The effect of his testimony would be to diminish the estate of the deceased thus, under the authorities above mentioned, making him incompetent as a witness to any matter of fact whatever which must have been equally within his knowledge and the knowledge of the deceased.

## CONCLUSION

The foregoing arguments cover all of the assignments of error and disclose, we believe, a situation where the motive to fabricate cannot be overlooked. The testimony of the witness Eschler in the attempt to show a valid delivery is not only unworthy of belief but is inconsistent with the conduct of Mrs. Schank, both before and after the alleged delivery. Mrs. Schank was certainly careful enough in her business transactions not to have conveyed by warranty deed property which was already under contract to be sold to third parties (the Springer transaction). Mrs. Schank had a purpose in not parting with the abstracts of title because with the abstracts of title she could deal with the properties as against unrecorded deeds. Her account with Eschler, the evidence of which he attempted to hide, shows her disposition to

require him to account for small items and transactions, inconsistent with the thought that the witness expressed when he said that Mrs. Schank did not want to burden him with the cost of maintaining the properties. Mrs. Schank was tax conscious. As the abstracts disclose her titles in the main came from her deceased husband by deeds recorded after his death. (Mr. Schank died in 1937 Tr. p. 112). The memorandum, exhibit A, discloses the same disposition of avoiding, if possible, inheritance and gift taxes on her estate. Mrs. Schank at all times held herself out to be the owner of the properties, occupying one piece as a home at the time of her death and collecting and making income tax returns from the rents and profits of others. Transactions of this nature should be closely screened, and the circumstances of each case should be closely scrutinized to determine the intent of the alleged donor where a gift is claimed.

Gifts of real property can openly and lawfully be made, and where a gift is intended there is no reason why the record of the donor should not be just as complete and just as unequivocal as when a conveyance for consideration is made. The same formality of execution and subscribing should be required. The conduct of Mrs. Schank fell short of a gift and at the most discloses a testamentary desire never fulfilled or consummated in

legal contemplation. The judgment and decree of the trial court should be reversed.

Respectfully submitted,

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