

1948

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

Utah Supreme Court

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Case No. 7209

IN THE SUPREME COURT of the State of Utah

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.

BRIEF OF RESPONDENT

FILED
DEC 28 1948

RAY, QUINNEY & NEBEKER,

*Attorneys for Defendant
and Respondent.*

CLERK, SUPREME COURT, UTAH

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KENNETH A. LUCKEY, and
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PANY, a corporation, as administrator
of the estate of JENNIE B. SCHANK,
Deceased,

Plaintiffs and Appellants,

vs.

LETA B. ESCHLER,

Defendant and Respondent.

Case No.
7209

STATEMENT OF FACTS

The essential inquiry here is to discover the purpose and intention of Jennie B. Schank in connection with the execution and delivery of the deeds which are the subject of this litigation. As a background against which to project such an inquiry, there must be clearly before the court all of the important facts in the relationship between grantor and grantee. The significant facts in the case are so slighted in appellants' brief that we

feel under obligation to the court and to our client to set them forth here.

At the time first referred to in the record, the several members of the Burnham family resided in Salt Lake City. They were Mrs. Burnham, the mother, three daughters and two brothers. The brothers were Wilbur and Charles L. Burnham, who are appellants in this case. The sisters were Jennie, Maritta and Sonoma Burnham. (Tr. 3, 4)

Jennie Burnham married Louis Schank. (Tr. 117, 123, 180) She and Louis established a business on lower Second Avenue in Salt Lake City. (Tr. 102, 103, 118, 119, 163, 168, 180, 214) They devoted themselves to the business and prospered in the pursuit of it. (Tr. 104, 105, 119, 181) Unfortunately, they remained childless to the end of their days. (Tr. 3) Sonoma Burnham married a man named Luckey. She became the mother of two children, Kenneth Luckey and Frances Luckey Mayo, who are appellants in this case. (Tr. 3) Maritta Burnham married a man by the name of Brazier. (Tr. 101, 102) They established their home near that of Jennie and Louis. (Tr. 102, 103, 123) Maritta became the mother of two children, a boy Melvin and a daughter called Leta, who is respondent here. (Tr. 101, 102)

When Leta was five years of age her father died and her mother was required to find work in order to support herself and children. (Tr. 102) Her work kept her away from her home from 8-00 in the morning until after

6:00 each evening. Shortly after her father's death Leta began her schooling at the Lafayette School near the home of her mother, and near the home of Mrs. Schank. (Tr. 103)

Leta went from her school in the afternoon to the home of her Aunt Jennie Schank to await her mother's return from work. (Tr. 103) The habit of going from school to the Schank home became fixed in the life of Leta, and was the beginning of a lasting companionship between Leta and her Aunt Jennie and Uncle Louis Schank. The affectionate attachment thus established continued and grew from those early beginnings to the very last day of Jennie Schank's life. Jennie Schank, being childless, found an object for her affection and devotion in the little girl. (Tr. 60, 82, 83, 84, 85, 103-107, 108, 109, 113, 114, 119, 120, 124, 125, 126, 140, 149, 150, 158, 165, 166, 167, 173, 181)

During the joint lives of Louis and Jennie Schank, both of them focused their attention and devotion and their tender care upon Leta. Louis and Jennie so far prospered that they were able to attend conventions of the National Grocers' Association at various cities in the United States far removed from Salt Lake City, and on many such trips they took Leta with them. When Leta was ten, Jennie and Louis Schank took her with them on a trip to Alaska. When she was sixteen, they took her on a three month's tour of Europe. (Tr. 85, 104, 105, 106, 107, 113, 114, 119, 120, 123, 124, 130, 131, 133, 139, 140, 148, 149, 150, 165, 166, 173, 180, 181)

In the day to day routine of life, Leta occupied the place in the hearts of both Jennie and Louis Schank which a natural child would have occupied. (Tr. 40, 59, 60, 82, 83, 104, 105, 113, 114, 116, 119, 120, 126, 173) Jennie bought new clothes for Leta and repaired old ones. (Tr. 82, 105, 125, 126, 139, 148, 173) She paid for dancing lessons and when the dancing lessons had progressed so far that Leta became expert, Jennie Schank drove her in her automobile to places of exhibition and proudly exhibited Leta as the result of her care and attention. (Tr. 100, 106, 108, 109, 124, 125, 132, 148, 173)

In 1935, Leta was married to Logan Russell Eschler and established a home of her own in Salt Lake City. That marriage, rather than weakening the bond of affection between Leta and Mrs. Schank, brought on an even stronger attachment, and the devotion of Mrs. Schank to Leta was enlarged to encompass Leta's children and her husband. In 1936, Louis Schank died. The loss of Louis strengthened the devotion of Jennie for Leta and singled out Leta more definitely than before as the natural object of Jennie's bounty. (Tr. 106, 119, 120, 126, 173)

In 1941, Leta's husband joined the armed forces and was required to report at San Louis Obispo in California. Leta and her little ones joined the husband in California, where they maintained a home in several communities during the war. During that time Mrs. Schank made frequent visits to Leta's home in California, and on many occasions Mrs. Schank put up fruit in Salt Lake City and transported it to California for the use of Leta and

children. When she was not with Leta and children in California, she wrote them at least once a week, and almost daily called Leta's mother, Maritta Brazier, to inquire if any word had come from Leta or the children. While Leta's husband, Russell, was overseas, Mrs. Schank wrote him once a week. (Tr. 52-57, 82, 83, 84, 90, 106, 107, 108, 131)

In the meantime, Mrs. Schank was not thoughtless of her mother, but except for her mother, there is no evidence that any other member of the family shared the affection and attention of Mrs. Schank with Leta. After the death of Mrs. Schank's mother in 1944, Mrs. Schank made Leta and her children the sole object of her devotion. (Tr. 45, 60, 82, 85, 86, 87, 106, 107, 108, 113, 114, 115, 116, 119, 120, 126, 130, 133, 134, 139, 140, 149, 150, 152, 154, 165, 166, 167, 173, 182)

The facts that we have recited are entirely without dispute in the record. In addition to members of the family who testified, thirteen friends of long standing who knew Mrs. Schank intimately and saw her frequently, appeared and testified as to the relationship between her and Leta. To some of the witnesses Mrs. Schank had stated specifically that the only thing she had left in life was Leta and her children. (Tr. 82, 106, 119, 120, 126, 139, 140, 173) To others she had stated that her purpose was to see to it that Leta and her children were given security. (Tr. 62, 63, 65, 88, 89, 90, 166) Others had stated that friends of both Mr. and Mrs. Schank had assumed from the relationship between them and among

them that Leta was the natural child of Jennie and Louis. (Tr. 158, 181)

Because the decisions dealing with kindred problems lay much emphasis on the relationship between grantor and grantee, it is important to bear in mind that Leta was the natural object of Mrs. Schank's affection and bounty. They were in no sense strangers. The blood relationship was that of aunt and niece, which relationship is in itself important and is in itself sufficient to make Leta a natural object of Mrs. Schank's bounty, but in this case the relationship was of a peculiar and unusual quality. All of the witnesses who had ample and constant opportunity to observe, made it plain, not only that the devotion of Mrs. Schank to Leta began while the child was small, but that it persisted to the end of Mrs. Schank's life, and when we say the end of Mrs. Schank's life, we mean to the very last day. Mrs. Schank died suddenly at the Elk's Club in Salt Lake City on the evening of March 30, 1947. That very afternoon she proudly reported to two of her friends that she had that day sent away a parcel as a gift to one of Leta's children. (Tr. 3, 149, 150, 167)

What did the record show as to Mrs. Schank's attitude to her other relatives? No witness came forward to testify that she ever spoke affectionately of any of the members of her family, with the exception of her mother, and on occasions of her sister Maritta. No claim was ever brought forth that any other member of Mrs. Schank's family shared her affection with Leta. In fact, the record is undisputed that appellants seldom visited

at her home, and that she cared little about them. (Tr. 45, 86, 87, 115, 116) It is also the undisputed evidence that Mrs. Schank held one of the appellants, Charles L. Burnham—referred to in the record as Roy Burnham—in such low esteem that she would not allow him to set foot upon her property. (Tr. 154)

It being clear that Mrs. Schank focused her devotion upon Leta and her family, and that it was her desire and intention to make substantial provision for Leta and her family, did she do anything to carry her purpose and intention into effect?

Mrs. Schank was the owner of many parcels of real estate in Salt Lake County. (Tr. 13, 14, 174) Some were unimproved, while some were improved and yielded revenue. (Tr. 17, 18, 20, 23, 24, 25, 26, 27, 28, 32, 76) As the owner of the property, she managed and maintained and preserved it. In addition to owning real estate, she owned mortgages and notes and other revenue-producing assets. (Tr. 42, 157, 162, 164, 169, 194) From time to time she did business with C. H. Dowse and his son S. W. Dowse, who maintained a real estate office on State Street in Salt Lake City. (Tr. 36, 40, 42) On the 20th day of December, 1938, Mrs. Schank called at the office of Mr. Dowse and his son, where she directed that certain deeds be prepared. In accordance with her request, Mr. S. W. Dowse prepared at least nine real estate deeds, in accordance with Mrs. Schank's directions. Each deed described a specific parcel of land in Salt Lake County. The deeds were thereafter signed by Jennie B. Schank in the presence of S. W. Dowse, and Mrs. Schank's

acknowledgment was taken by C. H. Dowse as Notary Public. C. H. Dowse was dead at the time of the trial, but S. W. Dowse was sworn and testified that the deeds were signed by Mrs. Schank in his presence. (Tr. 36, 37, 38, 39, 40)

Among the deeds made out by S. W. Dowse and signed by Mrs. Schank on that occasion were the nine deeds involved in this litigation. (Tr. 36, 37) When the deeds were made out and signed, Mrs. Schank asked that the name of the grantee be left blank. After she had signed the deeds, and after her acknowledgment had been taken by C. H. Dowse, Mrs. Schank stated that she would supply the name of the grantee in the deeds at a later time when she would see to it that the property went to the party she wanted to have it, and would not go to members of her family whom she did not care to have it. (Tr. 36, 39, 40, 45) She carried the deeds away from Mr. Dowse's office without having the name of the grantee filled in. (Tr. 47) The record is silent as to where the deeds were kept thereafter, or as to when the name of Leta B. Eschler was filled in as grantee. But the record is such as to compel the conclusion that they were filled in by or under the direction of Mrs. Schank in her lifetime.

In March of 1946 Mrs. Schank made one of her many visits to Leta and her family. Leta was then living in Saratoga, California. While visiting in Saratoga, Mrs. Schank sat and talked with Leta's husband, L. Russell Eschler. She handed him an envelope which contained the deeds in this case. When she gave him the envelope she

stated that she was "giving these properties to Leta and she wanted me to hold them until after her death. She made that express request, and that—she stated that she didn't want Leta to feel any personal obligation to her while she was still living." At the time the parcel of deeds was delivered to Leta's husband, Mrs. Schank and Leta's husband discussed the husband's income and the revenue that was derived from the properties covered by the deeds. Mrs. Schank stated that it was her opinion that it would be a burden upon Leta and her husband to pay the taxes, which were in excess of the revenues on the property, and stated that she wanted to pay the taxes herself for Leta. (Tr. 60, 61, 62, 63, 64, 65)

Thereafter, Leta's husband opened the envelope containing the deeds and examined them. (Tr. 74) The deeds named Leta B. Eschler as grantee, and were in all respects complete ~~warranty~~ ^{warranty} deeds. They were in the same condition when delivered to Russell Eschler as they were when offered in evidence in the court below, except for the recording data put upon them by the Recorder of Salt Lake County. (Tr. 64, 75)

Upon her return from California, Mrs. Schank stated to the witness, Daisy Bane, that she had been visiting with Leta and that she had left some deeds with Russell. (Tr. 87, 88)

Russell Eschler placed the deeds in a briefcase with his own personal papers and said nothing about them to Leta. Approximately a year after delivering the deeds to Russell, Mrs. Schank died. Following her funeral, Russell

delivered the deeds to Leta and she placed them of record in the office of the County Recorder of Salt Lake County. (Tr. 11, 12, 64)

Following delivery of the deeds by Mrs. Schank to Leta's husband, Mrs. Schank continued to manage the property and to collect the revenues therefrom and to pay the taxes levied thereon. She discussed with certain real estate brokers the possibility of selling one or more of the parcels of land, but she never sold or encumbered the land in any way. (Tr. 49, 51, 203, 204, 221) The property covered by the nine deeds was not self-sustaining, and it was entirely consistent with the statement made by Mrs. Schank to Russell Eschler at the time of delivery that she should maintain and preserve the property by the collection of rents and the payment of taxes until Leta's enjoyment of the property should take effect, or until she was in a financial condition to carry the burden of the property. (Tr. 31, 32, 63, 65, 76)

FINDINGS OF FACT

CONCLUSIONS OF LAW

DECREE

The trial court saw and heard all of the witnesses and examined all of the documents received in evidence. He listened to the arguments of counsel, then made his findings of fact, conclusions of law and decree, quieting title to all of the parcels of land involved in this litigation in respondent Leta B. Eschler.

In substance the court found that Leta B. Eschler was the object of Mrs. Schank's love and affection, and therefore the natural object of her bounty; that on December 20, 1938, Jennie B. Schank, at the office of S. W. Dowse in Salt Lake City, signed and acknowledged each of the nine deeds involved in this case; that at various times to various persons Jennie B. Schank had made known her intention to provide for the security of Leta B. Eschler and her children. He found that some time prior to March of 1946, Jennie B. Schank completed each of the nine deeds by inserting, or causing to be inserted, in each of the same the name of Leta B. Eschler as grantee and that in the month of March, 1946, Jennie B. Schank delivered each and all of the nine deeds so completed to Russell Eschler, the husband of Leta B. Eschler, with the statement that she was giving the properties to Russell's wife Leta. He found that at the time of delivering the said deeds to Russell Eschler, Jennie B. Schank intended to and did completely and irrevocably divest herself of control and dominion over said deeds; that simultaneously with the delivery of said deeds, Jennie B. Schank informed Russell Eschler that the property described in said deeds was being given to Leta for the security and protection of Leta; that Leta should not be informed of the delivery of the deeds during the lifetime of Jennie B. Schank. He found that at the time of delivery of said deeds to Russell Eschler, Jennie B. Schank further expressed the desire that she continue to pay the taxes and expenses incident to the management and maintenance of the property, so that

the management and expense of said property would not be a burden upon Leta or her family.

Further, the court found that after delivery of the deeds, Jennie B. Schank continued in the management, control and possession of the property for the use and benefit of Leta B. Eschler; that at the time of the delivery of the deeds and thereafter until the death of Jennie B. Schank, the expense and maintenance of the properties exceeded the revenues therefrom; that Jennie B. Schank collected the rents and paid the taxes and expenses of maintenance; that after the delivery of said deeds, Jennie B. Schank from time to time made statements indicating her ownership of the property and discussed the possibility of selling one or more parcels of land with land brokers. But Jennie B. Schank never did sell or agree to sell any of the property. The court found that with reference to one parcel of land described in one of the deeds described herein, Jennie B. Schank stated that such parcel of land could not be sold until and after Jennie B. Schank had conferred with Leta and learned from Leta whether she would rather have the property or the benefits of a sale; that as to another parcel of land described in another of the said deeds, Jennie B. Schank stated that such parcel of land belonged to Leta; that Jennie B. Schank never sought to regain possession or control of any of the deeds after their delivery by her to Russell Eschler; that upon her return to Salt Lake City, after delivering the deeds to Russell, Jennie B. Schank stated to a neighbor that while in California she had delivered deeds to Russell; and that after

the death of Jennie B. Shank, Russell Eschler handed the deeds to Leta, as requested in her lifetime by Jennie B. Shank.

Further, the court found that in her lifetime, Jennie B. Shank intended that the property here involved should be the property of Leta, and that Jennie B. Shank made delivery of the deeds to carry out her intention in that respect.

And, finally the court found that the deeds involved herein were not changed or altered in any respect whatsoever after their delivery to Russell Eschler; and that the possession of said deeds by Russell Eschler was not obtained without the full knowledge and consent of Jennie B. Shank; and that the delivery of said deeds was not contrary to the intention or wishes of Jennie B. Shank.

The findings of fact made by the court were fully supported by the evidence, and any contrary findings would have been in conflict with the undisputed evidence in the record.

In harmony with its findings of fact, the court concluded as a matter of law that Jennie B. Shank did not die intestate on the 30th day of March, 1947, with respect to any of the property described in the deeds involved in this case; and that at the time of her death she was not seized in fee simple of said properties; and that plaintiffs Wilbur Burnham, Charles L. Burnham, Frances L. Mayo and Kenneth Luckey and Maritta Brazier did not

upon the death of Jennie B. Schank become the owners and entitled to possession of the said property, as tenants in common, or otherwise; and that the defendant Walker Bank & Trust Company, as administrator of the Estate of Jennie B. Schank, deceased, is not entitled to possession of said properties, or any of them, for the purpose of administration, or any other purpose at all.

The court further concluded that defendant is now entitled to possession of each of the parcels of real estate described in plaintiffs' complaint and covered by the deeds involved herein; that the plaintiffs, and each of them, have no right, title or interest in or to said properties, or any part thereof; that the complaint of plaintiffs should be dismissed.

ARGUMENT

Having made its findings of fact and conclusions of law, as above set forth, the court made and entered its order and judgment quieting title to the property described in plaintiffs' complaint and in the deeds involved herein in Leta B. Eschler.

DEEDS SIGNED AND ACKNOWLEDGED BY GRANTOR

By their pleadings, appellants attacked the right and claim of Leta B. Eschler by alleging that at no time did Jennie B. Schank make any delivery of the deeds involved, and that Jennie B. Schank did not intend that the deeds involved should be delivered to Leta B. Eschler.

Appellants further alleged that the name of the grantee

in said deeds was filled in without the knowledge or consent of the grantor, and that the said deeds are fraudulent. No evidence was produced by the appellants to substantiate any of their allegations. In their labored argument over the execution and acknowledgment of the deeds, counsel for appellants seem unwilling to grapple with the facts of the case and seek refuge in the protection of certain decisions which deal with entirely different facts. That Jennie B. Schank did sign the deeds and did acknowledge her signature is entirely beyond dispute in this case. S. W. Dowse made out the deeds at the grantor's request, and saw her sign them. In addition, he saw her acknowledge the execution of the deeds before his father who was a Notary Public. Such was Dowse's sworn testimony, and no effort was made to challenge or discredit a word he said. (Tr. 36-40)

When Jennie B. Schank left Dowse's office with the deeds, she stated that she would supply the names of the grantees, so that the property would pass to the party whom she desired to have it and avoid passage of the title to relatives whom she did not want to have the property. (Tr. 39, 40, 45) That she did supply the name of the grantee, as she stated she would do, is also left clear upon the record. (Tr. 60-65, 87, 88) Just when Mrs. Schank filled in the name of Leta B. Eschler is not disclosed.

DEEDS COMPLETE WHEN DELIVERED

But whenever or wherever Mrs. Schank supplied the name of Leta B. Eschler in each of the deeds, it is plain

that it was done before delivery of the deeds to Russell Eschler. In March, 1946, she delivered all nine of the deeds to Russell Eschler, and when the deeds were delivered they were executed and acknowledged deeds, complete in every particular, with Leta named as grantee. Such is the sworn testimony of Russell Eschler. (Tr. 60-65) The trial court saw and observed Russell Eschler upon the witness stand and believed his testimony. The court reflected that belief in positive findings of fact.

Counsel urged that Russell was not worthy of belief, because he abstracted a sheet from one of Mrs. Schank's informal books of account. Russell made no effort to conceal the fact that he carried away the page, and made no effort to deny that it was a mistake on his part to have done so. He freely admitted the mistake and restored the page to the record so that it would be before the trial court for his examination and consideration. The page removed had to do with small financial dealings between Russell Eschler and Mrs. Schank. It was lying in the buffet in Mrs. Schank's dining room after her death and was subject to examination by Frances Mayo and other hostile members of the family. Russell was annoyed at the prospect of hostile people examining the record of his dealings with Mrs. Schank and impulsively removed the page. He recognized his error and made amends by restoration of the page to the record.

Appellants not only make the most of Russell's removal of the page, but they in their desperation make the charge that after Mrs. Schank's death Russell Eschler stole the deeds from Mrs. Schank's safe. Only a

recognition of the utter futility of their case could lead them to any such base and groundless charge. When Mrs. Schank died, her house safe was so securely locked that it required a locksmith to open it. (Tr. 98, 107) When the safe was opened those present were Mrs. Mayo, (Tr. 97, 217, 227) one of the appellants; Leta B. Eschler, (Tr. 97) respondent; Mrs. Maritta Brazier, (Tr. 107) who is Mrs. Eschler's mother; Mrs. Daisy Bane, (Tr. 97) who was a close friend and neighbor of Mrs. Schank; and Melvin Brazier, (Tr. 97) a nephew of Mrs. Schank, and a brother of respondent. Mrs. Mayo was the one who actively examined the contents of the safe. (Tr. 98) There is no evidence that Leta B. Eschler removed, or even touched, any of the contents of the safe. Mrs. Mayo was looking for a receipt. (Tr. 98, 100, 215) When her search of the safe was completed, she was satisfied the safe contained no receipt. (Tr. 98-100, 227) A search which would satisfy her that no receipt was in the safe would certainly have disclosed to her the presence of nine deeds if they had been there. Even Mrs. Mayo saw no deeds. But Mrs. Mayo did see some documents among the contents of the safe which she was not willing to have anyone else see. In the presence of the four others, Mrs. Mayo took a document from the safe which she read and then appropriated with the statement that "No one is going to see this", and no one, as far as the record shows, ever saw the document which was removed by Mrs. Mayo.

→our imagination, as appellants have done, to conclude (Tr. 99, 100) We would not need to give free flight to

that the document abstracted by Mrs. Mayo was something most damaging to her case and equally helpful to respondent. It may have been a will leaving all of Mrs. Schank's estate to Leta. It may have been a letter making doubly clear Mrs. Schank's purpose and intention to convey the nine parcels of land involved in this case to Leta. Whatever it was, and whatever her motive in taking the paper from the safe and concealing it, certainly one in her position requires an unusual hardihood to suggest that Russell Eschler had gone into the safe in the night and stolen the deeds. There should be some evidence to sustain such a venomous charge. The trial court didn't believe that Russell Eschler stole or altered any deeds. He found to the contrary.

Not only did Russell impress the court as worthy of belief, but his testimony as to the delivery of the deeds to him was corroborated by the testimony of Daisy Bane. Mrs. Bane was a tenant of Mrs. Schank and lived in a house at the rear of Mrs. Schank's home. She was a close and confidential friend of Mrs. Schank. They visited in Mrs. Bane's home almost every day. After returning from Saratoga, California, in March of 1946, Mrs. Schank told Mrs. Bane that she had left some deeds with Russell. (Tr. 80, 81, 87, 88) Can anyone doubt that the deeds she referred to were the same deeds to which Russell Eschler referred in his testimony, and which are now before this court for review?

GRANTOR'S SUBSEQUENT CONDUCT
CONSISTENT WITH COMPLETED GIFT

Appellants point to the fact that Mrs. Schank remained in control of the property, collecting the rentals and paying the costs of maintenance and exercising other acts of dominion, and urge that those circumstances require a holding by the court that she never intended the gift to be completed in her lifetime. Under the cases which we will cite hereinafter, retention of control is a circumstance to be considered by the trier of the facts, along with all other facts in the case. Such retention is evidence upon the question of intention of the grantor, but is by no means conclusive.

In this case, retention of management by Mrs. Schank was entirely consistent with her expressed purpose at the time the deeds were delivered to respondent's husband. In March 1946, when Mrs. Schank left the deeds with Russell Eschler, she stated that the property was not self-sustaining, and that she would like to manage and maintain it so no burden would fall upon the Eschler family, while Russell was trying to re-establish himself after the war. (Tr. 63-65) An effort was made by appellants to prove that Mrs. Schank was wrong about the property not being self-sustaining. William J. Fitzpatrick, Trust Officer of Walker Bank and Trust Company, which is one of the appellants herein, was produced and sworn as a witness by appellants before the trial court. While on the witness stand, Fitzpatrick testified that he had examined the books and records of Mrs.

Schank and was familiar with the revenues and the expenses, coming from and attaching to the property in suit. He testified that the revenues were insufficient to pay the taxes and other costs of maintaining the property. (Tr. 31-32) So that Mr. Fitzpatrick, who is an appellant and who was a witness, was in full agreement with Mrs. Schank that the property was not self-sustaining. But the trial court, over the objection of defendants, allowed counsel to reopen the matter upon rebuttal and to offer in evidence, through an employee of the State Tax Commission, an individual tax return, which showed that in the year 1946 Mrs. Schank had a taxable income of \$500.00. (Ex. "O") Upon cross examination, it was made plain that Mrs. Schank's taxable income resulted from all her income, which included rentals upon the property now in suit, as well as interest upon mortgages and other investments. (Tr. 193-194) So that while it is not vital in this case, it is clear beyond dispute that the property covered by the deeds was not self-sustaining, and that Mrs. Schank knew what she was talking about when she told Russell Eschler that the care and maintenance of the property would be a burden upon Leta if she assumed management and control of it at the time the deeds were delivered. Mrs. Schank felt that by holding on to the property, Leta and her children would have security. By retaining management of the property and discharging the costs and expenses connected therewith, Mrs. Schank would relieve Leta and her family of the burden of maintaining the property or of the necessity of selling it.

One parcel of land here involved is located near Murray and was referred to upon the trial as the Murray property. Several persons sought to purchase that parcel of land from Mrs. Schank. To some of them she professed ownership of the property, but declined to sell and gave as the reason therefore that taxes upon the purchase price would be too high. The fact is she did not sell or in any way encumber any of the property after the deeds had been delivered to Russell Eschler. She was under no obligation to give any reason to any real estate broker for not selling, but she did use taxes as an excuse.

But Mrs. Schank felt under some obligation to Mr. and Mrs. Herbert A. Towers, who had expressed a desire to buy the property. She had previously told them that if she ever sold the property, she would give them the first opportunity to buy. After she had delivered the deeds to Russell Eschler, Mr. and Mrs. Towers again importuned Mrs. Schank to sell. When urged by them to sell the property, she stated to Mrs. Towers that before the property could be sold she, Mrs. Schank, would have to consult with Leta and learn from Leta whether she would prefer to keep the property, or have it sold and have the purchase price. (Tr. 175, 176, 178) This is clear evidence that Mrs. Schank, in the fall of 1946, felt that she no longer could dispose of the property without Leta's consent.

When Mrs. Schank's friend, Mrs. Tallman, suggested some disposition of a parcel of land on Second Avenue in Salt Lake City, which is covered by one of the

deeds here in question, Mrs. Schank stated to Mrs. Tallman that her wishes with respect to the final disposition of this property had already been carried out. (Tr. 165, 166, 168) In conversations with Mrs. Bane pertaining to this same property, she also stated that she would never tear down the old store which stands upon part of that property, but that she hoped some day Leta would do so and build an apartment house or duplex upon it. (Tr. 89) Mrs. Schank's handling of the property, after she had made delivery of the deeds, was not inconsistent with her purpose to give in her lifetime the title to the property to Leta. In her lifetime, Mrs. Schank made delivery of nine fully completed, executed and acknowledged deeds. This is not a case in which the deeds were completed after delivery, or in which the deeds were completed before delivery by someone not properly authorized to do so by the grantor.

Appellants, in discussing Mrs. Schank's management of the property after she had delivered the deeds, refer to the fact that the parcel of land described in one of the deeds was sold under contract. That there is no significance to such circumstance will clearly appear when it is remembered that the contract of sale was made not after, but two years before, the deeds were delivered. When she delivered the deeds, Mrs. Schank told Russell Eschler that one parcel of land was subject to contract of sale. After Mrs. Schank's death, the purchase price of

the land was paid and impounded pending a decision of this case.

Examination of the cases will show that the trial court's judgment and decree quieting title in Leta B. Eschler is sustained by most abundant authority.

GRANTOR'S INTENTION SHOULD CONTROL

By their brief, counsel for appellants would persuade the court that the all-important basic question to be determined in this case is whether Mrs. Schank observed to the letter all of the niceties of the technical rules of conveyancing. That the essentials of these rules are important matters to be considered we do not deny. However, it occurs to us that appellants from the beginning have shown a disposition to pay very slight attention to a very much more important proposition, which is: To whom did Mrs. Schank desire to give her property?

We shall never permit counsel to disregard without challenge the fact that the property was Mrs. Schank's to dispose of as she saw fit. We respectfully urge that the first duty of this court, just as it was the duty of the trial court, is to ascertain Mrs. Schank's intentions, if possible to do so, and then to pay respectful heed to her wishes. This is the recognized rule of this court, established and stated in the case of *Boyle vs. Dinsdale*, 45

Utah 112, 143 P. 136, wherein, passing upon the validity of a gift by a donor, this court said:

“* * * A delivery to a trustee is, in legal effect the same as delivery to the donee. Where, therefore, the facts are as palpably clear as they are in the case at bar that a gift was intended, and where the forms of law relating to gifts have been substantially complied with, it was the duty of the trial court, and it is our duty, to uphold and effectuate the purpose and intention of the donor, and not to defeat them by making nice distinctions or placing a forced or unnatural interpretation upon her acts or words. As pointed out by the courts, each case in which a gift is involved must, to a large extent, be controlled by its own peculiar facts and circumstances. While it is true that certain forms of law must be complied with, yet it is also true that the intention of the donor must also receive due consideration and effect, and if in making a gift he has substantially complied with the latter, and it is clear that he intended to make a gift, his intentions must prevail.”

Again, in *Helper State Bank vs. Crus*, 95 Utah 320, 81 P. 2d 359, this court said:

“* * * From the foregoing cases it is evident that the important thing is what was the intent of the donor at the time of the transactions in question. If he intended a gift, to pass a present title to the donee, then if his words and acts are sufficient to evidence that intent it is the duty of the courts to hold that such a gift has taken place, but in a case of this kind the evidence must be clear as to his intent.”

Again:

“If there was any substantial evidence from which the jury could find that John Crus gave this money to the defendant, Annie Crus, during his lifetime, then the court erred in directing a verdict for the plaintiff. * * *”

As we have already pointed out, the record in this case sustains, without any dissenting or conflicting evidence, the fact that Leta Eschler was the object of Mrs. Schank's love and affection to the absolute exclusion of the appellants. The record also conclusively demonstrates the fixed purpose of Mrs. Schank to make generous provision out of her property for Leta Eschler's security. Even the appellants in their brief make grudging admission of this fact, and state that Mrs. Schank probably wanted to provide generously for the respondent, but failed to translate her desires into effective action. Thus they say, Mrs. Schank's wishes and desires are to be thwarted so that appellants, for whom this lady had an expressed aversion, might reap the benefits which she had intended to bestow upon another, and even in the face of the further fact of an expressed determination by Mrs. Schank to prevent her property from falling into the hands of appellants, her undesirable relatives.

The fact that respondent was the natural object of Mrs. Schank's bounty and generosity is of first importance in the inquiry into Mrs. Schank's actual and probable intentions with respect to her property. In all of the cases upon the subject which we have read and considered, this question has, without exception, occupied

the center of the stage. This court, and the courts of all of the other jurisdictions, have laid much stress and importance upon the relationship between the donor and donee. The courts go to great lengths to sustain gifts where the donee is the natural object of the donor's affection, and decline to sustain such gifts only when proof of non-delivery to the donee is clear and beyond dispute. On the other hand, where the donee is a stranger to the donor, the courts are much less reluctant to declare gifts invalid, and this is especially true where the natural objects of a donor's bounty will be deprived of property which they would otherwise receive.

IMPORTANCE OF GRANTOR—GRANTEE RELATIONS

The following cases illustrate the importance of the relationship between donor and donee in attempting to arrive at the donor's intention:

In *Chamberlain vs. Larsen*, 83 Utah 420, 29 P. 2d 355, this court said:

“This is not a case of a grant to a stranger where the grantor remained in possession and continued to pay taxes, etc. and we think such conduct in no respect inconsistent with a prior delivery of the deed to the grantee.”

In that case the grantor was the sister of the grantee, and it was shown that the grantor had expressed her determination to see to it that the grantee's future should be provided for and made secure.

In *Woolley vs. Taylor*, 45 Utah 227, 144 P. 1094, this court stressed the relationship existing between the grantor and the grantee. They were father and daughter. The court mentions the fact that natural bonds of affection would impel the donor to make the gift to the donee.

In *Reed vs. Knudson*, 80 Utah 428, 15 P. 2d 347, the court discusses the fact that a grandfather, grateful to the donees who had cared for many years for his grandson, and impelled by that gratitude wanted to give his donees part of the property which he had inherited from the estate of his grandson.

Again, in *Wilson vs. Wilson*, 32 Utah 169, 89 P. 443, and in *Gappmeyer vs. Wilkinson*, 53 Utah 236, 177 P. 763, where the donees were children of the donors, the court makes much of this relationship in its decision.

In *Olson vs. Scott*, 61 Utah 42, 210 P. 987, the donor was the mother of the donee, and resided with the donee, who cared for her, and in its decision this court again emphasized the fact that the donee was the natural object of the donor's bounty.

In *Columbia Trust Company vs. Anghum*, 63 Utah 353, 225 P. 1089, which involved a gift of a bank deposit from a husband to his wife, the court stresses the relationship of the donor to the donee. See also *Boyle vs. Dinsdale*, *Helper State Bank vs. Crus*, *supra*.

The following are some cases from other jurisdictions which bear upon this point. Thus *In Re Cunning-*

ham's Estate, Wash., 143 P. 2d 852, the Washington court said:

“Where the property is deeded to one the natural object of the donor’s affections a gift rather than a trust is presumed.”

In that case the donee was a favorite nephew of the donor.

The California court in the case of *Stewart vs. Silva*, 221 P. 191, said:

“If we not only disregard the testimony of the witnesses who were present at and participated in the delivery of the deed to the grantee, and also disregard the declarations made from time to time by the grantor that he intended to deed the property to the grantee and that he had deeded the property to the grantee what have we left in the evidence to overcome the presumption of delivery arising from the possession of the deed by the grantee? There is nothing substantial. The evidence of continued dealing with the property by the grantor was not necessarily in conflict with the actual situation disclosed by the evidence as offered by the defendant. The grantor was her godfather, who had brought her to this country to keep house for him. They lived together, and it was quite natural that the godfather, the grantor of the property, should continue to deal with it, pay taxes, insurance, and live upon the property with his goddaughter, the grantee, as he in fact did. This would not show that the deed was not delivered and the inferences arising therefrom of non-delivery would not be sufficient under the circumstances to overcome the prima facie case

arising from the possession of the deed by the grantee. The fact that the grantor at the time of delivery expressed a *desire* that the deed should not be recorded until after his death and intended to exercise acts of ownership thereover during his life, if we accept the testimony of the grantee that such statements were made by him at the time of delivery of the deed, would not prevent the delivery from being effective, if the grantor in fact intended to deliver the deed."

In *Roche vs. Roche*, Ill., 121 N. E. 621, the court states that where conveyances are made from a parent to his child, the law makes a stronger presumption of delivery than in cases where the bonds of natural affection are not involved.

In *White vs. Smith*, another Illinois case, 169 N. E. 817, the court recited the relationship and the affection existing between the Grantor and the Grantee, their mutual respect for each other, and the fact that the grantee was a favorite niece of the grantor.

In another California case, *DeCou vs. Howell*, 214 P. 444, where the grantee was a niece of the grantor, the close bond of affection existing between the grantor and the grantee was pointed out. It was shown that the grantee had lived with the grantor for several years during childhood, and that the grantor had expressed her intention to third persons of leaving grantee all of her property. That case is very similar to the case at bar, and points out very strongly the importance of the relationship between donor and donee which attaches to the minds of judges in deciding cases of this character.

Also, in cases where the courts have held gift deeds to be invalid, this question of the relationship between donor and donee receives much attention.

Thus in *Williams vs. Kidd*, Calif., 151 P. 1, it was pointed out by the court that the purported grantee was not the natural object of the affection and bounty of the grantor. This court, in the case of *Stanley vs. Stanley*, 97 Utah, 520, 94 P. 2d 465, cited by appellants in their brief, pointed out that although the grantor and grantee were husband and wife, they had been separated for a long period of time, and it was not natural to suppose that the grantee would be the recipient of the grantor's bounty. Many other cases could be cited illustrating the great importance of examining with care the relationship between donor and donee.

Because of the importance of the relationship existing between Mrs. Schank and respondent, great care was taken during the trial of this case to emphasize its quality and to show beyond any possibility of dispute that it was of the kind and nature to impel Mrs. Schank to make gifts of the property in question to Mrs. Eschler.

DELIVERY TO THIRD PARTY VALID

That a valid gift of real property may be made by a grantor by the delivery of a deed to a third party to be by such third party delivered to the grantee, even after the death of the grantor, is firmly rooted in the decisions. The requisites of such delivery are that it shall be unconditional and shall be made with the intention of pass-

ing to the grantee a present interest in the property. This court has spoken upon this proposition in unmistakable terms in the following cases :

In *Wilson vs. Wilson*, supra, this court said :

“ * * * The law is well settled that

“If a grantor delivers a deed to a third person absolutely as his deed, without reservation and without intending to reserve any control over the instrument, though this is not to be delivered to the grantee till the death of the grantor, the deed when delivered upon the grantor's death is valid, and takes effect from the first delivery. The deed in such case passes a present interest to be enjoyed in the future. * * * ”

And in *Gappmeyer vs. Wilkinson*, supra :

“It has been determined by this court that,

“Where a grantor delivers a deed to a third person, absolutely as his deed, without reservation, and without intending to reserve any control over the instrument, though it is not to be delivered to the grantee until after the grantor's death, the deed, when delivered, is valid and takes effect from the first delivery. * * * ”

And in *Woolley vs. Taylor*, supra :

“ * * * That a consummated and valid gift inter vivos with postponement of present enjoyment may be made cannot be doubted, if the donor makes unconditional delivery and parts with all present and future control and dominion over the property. * * * Such delivery need not be made

to the donee personally. It may be made to a third person as agent or trustee for the use of the donee. * * * It was so made here. That the trustee, the banker, was not to make delivery to the donee until the death of the donor, did not destroy the validity of the gift. * * *"

This rule is again stated in the case of *Singleton vs. Kelly*, 61 Utah 277, 212 P. 63, quoted in appellants' brief as follows:

"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'."

Many cases from other jurisdictions have announced the same rule. We shall cite but one of these. *DeCou vs. Howell*, *supra*.

The undisputed evidence in this case shows that the deeds under consideration were delivered to Russell Eschler with the accompanying statement:

“I am giving these properties to Leta.” (Tr. 62, 63)

Furthermore, there is no evidence of any retention of control over the deeds or reservation of any kind with respect thereto. The record contains not one shred of evidence that after delivery Mrs. Schank made any attempt whatsoever to regain possession of these instruments.

Before leaving this important subject, we again desire to refer to the Record and point out that the fact of delivery is indisputably proven. In the first place, when the deeds were made out in the office of the Dowse real estate firm, Mrs. Schank announced her purpose to complete and deliver the deeds at her own chosen time to the person she wished to have the property. We quote from the testimony of S. W. Dowse:

“Q. At the time the deeds were made and signed by Mrs. Schank, Mr. Dowse, will you state what conversation took place and what Mrs. Schank said with respect to these deeds.

A. Mrs. Schank requested us to make out these deeds; she said she believed that she wanted to set some of her affairs in order and that she wanted to, to have these deeds made so that at sometime or other that she saw fit she could convey the property to certain parties, or certain party, and so that it would not go to other parties that she did not want the property to go to.

- Q. Did she identify the party to whom she intended giving the deeds?
- A. I don't believe she did at that time; she identified the parties she didn't want to, that is, generally speaking, who she didn't want the properties to go to.
- Q. Did she ever express to you at any subsequent time the parties she had in mind as the ultimate grantee or beneficiary of these deeds?
- A. To my recollection, I believe she did mention it later on.
- Q. Can you remember now about when she made mention of her intention with respect to the grantee?
- A. Well, not definitely; might have been a year later or so.
- Q. It was sometime after the deeds had been signed?
- A. That's right.
- Q. What individual did she name, or individuals?
- A. She said she had a niece that she favored very much, she desired her property—well, most of her things, to go to, in case anything happened to her.
- Q. Did she name—did she give the name of the niece at that time?
- A. Well, she said her niece, Leta.” (Tr. 39, 40)
- “Q. Tell us now the substance of what Mrs. Schank said to you regarding these other relatives of hers, members of her family.
- A. Well, I don't remember the exact words, but she on several occasions made mention that

she had certain other relatives she didn't get along with very well, that they were not on very friendly terms, and anything that she might possess she didn't intend leaving them anything." (Tr. 45)

Next we have the uncontroverted evidence of Russell Eschler. He says:

"Q. Now, Mr. Eschler, let me call your attention to a particular date, and I will ask you first of all if you can remember the time when—or the date when Mrs. Schank came to visit you at Saratoga, California, the month and the year when this occurred?

A. I remember the month; I can't place a definite date in the month. I remember the year; it was in March, 1946.

Q. All right, Mr. Eschler, state whether or not—have you ever seen these instruments before? (Exhibits 1 to 9, inclusive)

A. Yes, I have; they are deeds that Mrs. Schank delivered to me at Saratoga, California when she made her visit to us there in March, 1946.

Q. Are they the deeds you mentioned this morning that you recorded in April of 1947?

A. These are the same deeds.

Q. Now, in connection with the receipt of those deeds, Mr. Eschler, tell us whether—or tell the court whether Mrs. Schank made any statements of her feelings and any statements at the time to you—at the time she delivered those deeds.

A. Well, Mrs. Schank stated to me at that time 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 that 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.

Q. State whether or not Mrs. Schank said anything about the revenues produced from these.

THE COURT: I think it is suggestive, but he may answer.

A. Yes, she made statements—as a matter of fact, we discussed my personal income at that time and the revenue derived from these properties, and she stated that it was her opinion that it would be a burden to us to pay the taxes in excess of the revenues on these properties, and she stated that she wanted to pay those taxes herself for Leta.

Q. Now, Mr. Eschler, you have examined the deeds; tell us whether the deeds, what condition the deeds were in when you received them.

A. They were in exactly the same condition that they are in now, other than the recording.

Q. Mr. Eschler, what did you do with the deeds after you received them from Mrs. ———

A. I kept them in my home. I have a brief case in which I keep all my personal papers, and they were constantly in my possession from the time Mrs. Schank delivered them to me until the time I delivered them to Mrs. Eschler after Mrs. Schank was buried.

THE COURT: Mr. Eschler, just as near as you can, give us the words Mrs. Schank said so that not stating a conclusion.

- A. 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 COURT: Did I understand this is at the time when she delivered—

- A. This is at the time when she delivered the deeds to me, yes." (Tr. 60-65)

Appellants did not produce any evidence contradicting the testimony of Russell Eschler. He was corroborated by the direct and positive testimony of Mrs. Bane, to whom Mrs. Schank reported that she had delivered deeds covering real property to Russell Eschler:

- "Q. Mrs. Bane, did Mrs. Schank ever tell you about having made any disposition of any part of her property?

A. Yes, sir.

Q. You may answer that yes or no.

A. Yes, she did.

Q. When did she make mention of the disposition of property to you?

A. When she returned from Saratoga.

Q. When was that?

A. 1946.

Q. You remember the month?

A. March.

Q. Who was present when she made this statement to you about disposing of the property?

A. I don't think there was anyone present.

Q. You and she were alone together?

A. Yes.

Q. Where were you?

A. In my home.

Q. What did she tell you at that time?

A. She told me that she had delivered certain deeds to Russell.'" (Tr. 87, 88)

We submit that the foregoing record establishes the delivery of the deeds beyond any question. But even had respondent failed to establish by evidence the delivery of these deeds from Mrs. Schank to Russel Eschler, the very fact that the deeds were found in the possession of the grantee upon the grantor's death and the further fact that she recorded them, all of which is undisputed, would have required appellants to show by competent evidence the fact of *non-delivery*. Under the decisions of this court, such a showing is sufficient to prove a *prima facie* case of valid delivery. This burden the appellants may not shift by a mere baseless attack upon the credibility of Russell Eschler unsupported by any evidence whatsoever.

In the case of *Chamberlain vs. Larsen*, *supra*, this court held that there was a presumption of valid delivery

by showing the grantee's possession of the deed after the grantor's death, even though there was no showing that grantee's possession of the deed originated before the grantor's death. This court said:

“The rule seems to be well settled that a deed duly executed and acknowledged and shown to be in the possession of the grantee is self-proving both as to the execution and delivery and that the recording of a deed is likewise evidence of delivery * * * (Citing cases) and this is true though the deed be not recorded until after the death of the grantor * * * (cases) or though there be no affirmative showing that the grantee's possession originated prior to the death of the grantor * * * (cases).”

“And not only is the burden of proving non-delivery upon the plaintiffs, but the inference of delivery arising from possession of the deed by the grantee and from the recording thereof is entitled to great and controlling weight and can only be overcome by clear and convincing evidence * * * (cases).”

“So in this jurisdiction * * * a ‘presumption of law’ is a rule of law casting the burden of proof on him against whom the presumption operates, but when the facts and circumstances are shown concerning which the presumption is indulged, the presumption ceases and the controversy is to be decided by the weight of the evidence adduced, etc. * * * tested by these principles, we think the evidence of the plaintiffs insufficient to sustain the burden of proof and establish the non-delivery of the deed in question.
* * *

This matter of the burden of proof is alluded to only because it shows how far appellants have failed to sustain their case by competent evidence.

Intention to make a gift of real estate is evidenced by the surrender of the instrument of title to the donee, or to some third party for the donee's benefit, without reservation of control over that instrument by the grantor. See *Woolley vs. Taylor*, *Wilson vs. Wilson* and *Gappmeyer vs. Wilkinson*, supra. Resort may also be made to the acts of the grantor prior to and at the time delivery is made, and even to the subsequent acts and conduct of the grantor after delivery has occurred. We shall hereafter make specific reference to the decisions on this point.

In the record of this case, all of these matters received the full consideration of the trial court. After due consideration, the trial court found that delivery of the deeds was made with the intention of giving the properties to respondent. We respectfully submit that any other finding by the trial court would have been error.

GRANTOR'S SUBSEQUENT CONDUCT NOT INCONSISTENT WITH DELIVERY

Appellants attack the findings made by the trial court that there was a delivery of the deeds with an intention to pass an immediate interest to Mrs. Eschler, upon the sole ground that the subsequent acts of Mrs. Schank, as they related to the properties, were so inconsistent and at variance with this finding as to make

the finding untenable. They ignore entirely the testimony of what preceded and what occurred at the time of delivery. They point out that Mrs. Schank continued to pay taxes, collect rents, maintain the property, report the income from it, and finally that she discussed the sale of it with various persons and made references to the property which indicated ownership. All of this subsequent conduct of Mrs. Schank, which, standing alone, might appear to be inconsistent, was fully explained by the respondent. Appellants also have asserted that no control over or possession of the property was passed on to Mrs. Eschler at the time of delivery, and consequently there could be no valid transfer of title. We shall refer to many cases in which the grantee got no control over the property, and to the fact that in some of the decisions the grantee was entirely ignorant of the existence of the deed until after the grantor was dead. In such cases, lack of possession and control has been dismissed as constituting no proof that an interest did not vest in the donee upon delivery of deeds.

These matters to which counsel refer are only evidence to be considered in arriving at the question of intention, and they have been disregarded in many cases where they have been shown to exist. The record shows that when Mrs. Schank made delivery to Eschler, she explained fully the conduct now seized upon by plaintiffs as the only substantial hope of depriving Mrs. Eschler of her property.

Furthermore, appellants completely overlook the fact that all of the acts and conduct with respect to this

property, including Mrs. Schank's declarations of ownership, can be fully and satisfactorily explained on the basis of the deeds passing title to Mrs. Eschler at the time of their delivery, with the reservation of a life estate. In *Wilson vs. Wilson*, supra, this court recognized the rule that where a deed passes irrevocably beyond the control of the grantor, a present interest may pass to the donee, with possession and enjoyment of the property postponed to a future time. The court said, quoting *Jones on Real Property*:

“* * * The deed in such case passes a present interest to be enjoyed in the future.”

In California, Oklahoma and Idaho, the courts have

held that such a transfer passes title with a life estate reserved to the grantor. See *DeCou vs. Howell*, supra, *Hinshaw vs. Hopkins*, Calif., 99 P. 2d 283, *Stewart vs. Silva*, supra, *Brant vs. Brant*, Calif., 260 P. 342, *Herman vs. Mortenson*, Calif., 164 P. 2d 551, *Kay vs. Walling*, Okla., 225 P. 385, *Cell vs. Drake, Ida.*, 100 P. 2d 949.

All of these cases hold that where a grantor delivers a deed to a third party which is not to be delivered to the grantee until after the grantor's death, the title passes subject to a life estate in the grantor. The Supreme Court of Idaho in *Cell vs. Drake*, supra, said:

“Under a well recognized line of authorities in this country, a deed to real property may be executed and placed in the hands of a depositary or escrow holder for delivery to the grantee after the death of the grantor, and constitutes a present

passage of title with a reservation of a life estate in the grantor.”

Mrs. Schank was not a lawyer and could not be expected to be familiar with the technical rules of conveyancing, but if what she did was consistent with the requirements of those rules, the court should have no difficulty in giving effect to her intentions.

A grantor may divest himself of title by delivery of a deed to a third party to be delivered after the grantor's death to the grantee. Secondly, delivery is a matter of intention, and intention at the time of delivery is controlling. *Wilson vs. Wilson*, supra, *Gappmeyer vs. Wilkinson*, supra, *Singleton vs. Kelly*, supra, *Boyle vs. Dinsdale*, supra, and *Helper State Bank vs. Crus*, supra.

If control and possession of the property after delivery of the deed is the decisive factor, then there are many cases which have wrongfully upheld gifts, because in many of them, as we have previously stated, no control or possession was turned over to the grantee. Such was the fact in *Woolley vs. Taylor*, supra, *Gappmeyer vs. Wilkinson*, supra, and *Chamberlain vs. Larsen*, supra. In *Woolley vs. Taylor*, supra, the donor endorsed certain stock certificates and gave them to his banker for delivery to his children after his death. The donees never had possession of the certificates until after the donor died, when they received them from the banker. The father took all of the dividends from the stock and exchanged the certificates for new shares issued by the company. Yet in that case, the gift was upheld.

In *Gappmeyer vs. Wilkinson*, supra, there is nothing in the record which shows that grantees, who were grantor's minor children, ever had possession or control of property, and yet the court held that a valid gift was consummated by the grantor.

In *Chamberlain vs. Larsen*, supra, there is no evidence that the grantee had any possession or control over the property prior to the death of the grantor. The evidence was that the grantee lived upon the property with the grantor, but that is all the evidence on that point. The record is conclusive upon the fact that the grantor managed and controlled the property at all times. Notwithstanding the grantee had no control over the property, the deed was declared valid.

In Re Cunningham's Estate, supra, the Washington court held specifically that a valid gift of real property inter vivos could be made and the grantor retain control, use and management of the property:

“A valid gift of the fee of real estate may be made inter vivos, donor retaining the use, management and control of the property during his lifetime * * * (Citing cases)”

Quoting further:

“This may be effected by donor delivering deed to third party for delivery to donee at donor’s death, if donor irrevocably parts with *possession of deed.* * * * ” (Citing cases)

In *DeCou vs. Howell*, supra, the grantee had no knowledge of any deed in her favor and obviously could

not have exercised control over or had possession of the property.

Likewise in *Brant vs. Brant*, supra, the validity of deeds was upheld although the grantees knew nothing about their existence. There was no evidence that the grantee exercised any acts of control or ever had possession of the property. This plainly shows again that counsel are in error when they say that the donee must have possession and control of the property for the gift to be good.

In *Hinshaw vs. Hopkins*, Calif., supra, the grantor executed the deed and left it with her attorney to be delivered to the grantee in the event she failed to recover from an operation for cancer. At that time she told the attorney that if she recovered, the deed was to be returned to her, as she then wanted the property for herself. The deed to the grantee was held valid, though there was no evidence the grantee ever had possession or control of the property. The court quotes from *Moore vs. Trott*, Calif., 122 P. 462:

“It has long, if not always, been the rule that the delivery of an instrument is a question of intent, and that to a complete delivery no precise form of words and no particular character of act is necessary. The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another. * * *”

See also *Ratterman vs. Lodge*, 13 F. 2d 805, which involved a gift inter vivos of personal property.

In *Neely vs. Buster*, Calif., 195 P. 736, the court says that when a grantor without reservation parts with a deed intending thereby a transfer of present interest to the grantee, the gift is complete. In that case the grantee knew nothing about the execution of the deed. That being so, it would have been impossible for her to assume possession and control of the property.

In *Herman vs. Mortenson*, Calif., 164 P. 2d 551, the grantee never did obtain knowledge of the existence of a deed in her favor, but died in ignorance of its existence. It was held the gift was complete. See also *Wilkerson vs. Seib*, Calif., 127 P. 2d 904, where the grantee first learned of the deed three years after the grantor died.

In *Smith vs. Black*, Neb., 9 N.W. 2d 193, the grantees had no knowledge of deeds in their favor until after the grantor's death. The gift was held complete.

See also *Boyer vs. Hadley*, Ind., 66 N.E. 2d 903, where the grantee did not know a deed had been executed in her favor until after grantor died. Here again the gift was held complete. See also *Prosser vs. Nickolay*, Wis., 23 N.W. 2d 403, and *Cell vs. Drake*, supra, which are to the same effect.

We reiterate that Mrs. Schank's intention and desires with respect to this property lead to but one conclusion, namely, that she intended to give the property to Mrs. Eschler. The courts have carried out similar in-

tentions in the face of every one of the elements which the appellants here insist show that the gift in this case may not be upheld.

In *Wilson vs. Wilson*, supra, the evidence showed that the grantor continued in possession of the property after he had executed deeds to it. The grantees testified that they would have surrendered the deeds to the grantor upon his demand. Yet it was held those facts did not destroy the validity of the deeds.

In *Gappmeyer vs. Wilkinson*, supra, the grantor made subsequent deeds to the property, which it was held did not affect the prior gift.

In *Chamberlain vs. Larsen*, supra, the grantor continued to pay taxes and insurance and negotiated for the sale of the property and made references to it as her own, and yet the deed was held to constitute a valid gift to grantor's sister.

In *DeCou vs. Howell*, Calif., supra, it was held that a deed was a valid gift where the grantor, after making the deed, contracted to sell the property described in the deed, continued to pay the taxes upon the property, and referred to it in conversations with others as hers.

In *White vs. Smith*, Ill., supra, grantors negotiated for the sale of the land after delivery of the deed. This was held not to invalidate the gift.

In *Stewart vs. Silva*, supra, grantors continued the use of the land, the taking of the income and profits, in-

cluding leasing the land, and payment of taxes and insurance, which did not overcome the validity of the gift.

In *Brant vs. Brant*, supra, the grantor mortgaged the property after he executed a deed. He also made out subsequent deeds and a will covering the same land. The subsequent conduct of the grantor was held not to have shown an intention not to make a gift at the time the deed was delivered.

In *Wilkerson vs. Seib*, supra, the grantor after delivery of the deed continued payment of taxes, insurance, collection of rentals, all of which the court held did not show an intention not to make a gift when the deed was delivered.

In *Fender vs. Foust*, Mont., 265 P. 15, and *Wilcox vs. Hardesty*, Calif., 212 P. 633, grantors made deeds and wills subsequent to delivery of the deeds, which was likewise held not to sustain contentions that no gift had been made by the grantor.

In *Kay vs. Walling*, supra, the grantor listed the property for sale, which the court also stated did not prove that no gift had been intended by the grantor.

All of those cases show that counsels contention with respect to the controlling effect of a grantor's subsequent acts is just not the law.

Furthermore, the courts have spoken upon the relative weight to be given subsequent acts of the grantor in determining the grantor's intention at the time of de-

livery, as compared to the weight to be given to what is shown to have occurred at the time of delivery.

In *Chamberlain vs. Larsen*, supra, this court says that possession of the deed by the grantee, though not shown to have originated prior to the grantor's death, is entitled to great and controlling weight.

The case of *Roche vs. Roche*, supra, likewise is to the same effect, especially when the grantor and grantee are parent and child.

We submit that in this case we have as strong a relationship as could exist between parent and child.

In *Brant vs. Brant*, supra, the California court has expressly said that subsequent acts of the grantor are not conclusive upon the question of intention, but only furnish evidence to be weighed by the trier of the fact.

We cannot leave a discussion of this subject without reminding the court that Mrs. Schank never did sell any of the properties described in the deeds before this court. Even on the best market obtainable, she consistently and steadfastly refused to sell. The reasons which she gave for not selling are of minor importance. The fact is that she never deviated from her intent and purpose of holding all of the properties for her niece according to her expressed determination.

Furthermore, if the grantor once makes a valid delivery of a deed with the intention of passing title to the grantee, he cannot thereafter have a change of heart and

undo what has occurred by subsequent acts, calculated to divest the grantee of his title.

In *Gappmeyer vs. Wilkinson*, supra, the grantor attempted to convey the property after delivery of his deed to a third party for the benefit of his minor children. This court held his subsequent acts had no effect upon that delivery. See also *Wilcox vs. Hardesty*, supra; *Kay vs. Walling*, supra; *Cell vs. Drake*, supra.

In this case we have no such attempt being made by the grantor. Mrs. Schank never attempted to recall her deeds. She remained steadfast to her fixed purpose of maintaining the properties for the benefit of her favorite and beloved niece.

We now refer to the argument of counsel that the deeds in dispute were invalid because at the time they were signed and acknowledged by Mrs. Schank the name of the grantee was not written in.

Counsel has cited and referred to cases holding that a grantee is essential to the validity of a deed. A grantor may, however, sign and acknowledge a deed and thereafter insert the name of the grantee. Courts have held in numerous cases that this may be done. In fact, the cases have gone so far as to hold that a grantee's name may be inserted after delivery of the instrument and after its recording, and have even gone to the extent of holding that if a grantor signs a deed in blank and delivers it to a person, intending thereby to vest title in him, the person receiving it is impliedly the agent of the grantor to fill in the name of the grantee, and upon that being

done, the deed is valid. In this case, this court need not go to any such lengths to find the deeds here involved to be valid. The undisputed evidence is that they were complete when handed to Russell Eschler by Mrs. Schank. The only permissible inference is that Mrs. Schank herself completed them or had some person do it for her.

DEEDS COMPLETE BEFORE DELIVERY

In Utah, so far as we have been able to determine, there have been only two cases decided upon the question of deeds delivered in blank. One of those cases is *Beatty vs. Shelley*, 42 Utah 592, 132 P. 1160. In that case a grantor signed a deed and gave it to a trustee, with the understanding that the name of a certain grantee was to be inserted. The defendant wrongfully obtained possession of the deed, and without the knowledge, consent or permission of plaintiff inserted his own name as the grantee. It was certainly proper, in that case, for this court to decide, which it did, that the deed conveyed no title to the defendant.

And in *Utah State Building and Loan Association vs. Perkins*, 53 Utah 474, 173 P. 950, the purported grantor signed two blank deeds in which there was no description, consideration or grantee named. These deeds were subsequently completed by a grantee without the knowledge, consent or permission of the grantor. It was held under these circumstances that the deeds did not convey any title to the property described there-

in.

From other jurisdictions we have many cases involving the question of the delivery of deeds in blank. Thus in *Wright vs. Sconyers, Okla.*, 300 P. 672, the court held that where a deed is left blank as to the grantee, and delivered to a third party to fill in the name of the grantee when his identity is established, the name of the grantee may be inserted by anyone under the direction of the person authorized to fill it in, and the deed is then complete and good. The court cites the following as the correct rule:

“The modern, and as we think, the better rule, is that authority may be given by parol to insert the name of the grantee in a deed, even after delivery, and such authority may be implied from the circumstances.” (From *Gutherie vs. Field, Kan.* 116 P. 217.)

And further:

“It will thus be seen that the tendency is to uphold such deeds where the effect thereof is to carry out the intention of the grantor.”

In *Gilmore vs. Shearer, Iowa*, 197 N.W. 631, Scott and Shearer were made parties to a foreclosure suit upon the theory that they had by contract assumed and agreed to pay a mortgage. They were not named as grantees in the deed, but had accepted a deed made out in blank by the mortgagor. The name of the grantee was inserted after they had accepted delivery of the deed in blank. It was held that Scott and Shearer were liable under the covenants in the deed, even though the

deed was blank as to the name of the grantee. It was held that they could not escape liability for covenants in a deed by merely passing the deed on to a subsequent grantee and filling in such grantee's name, leaving their own names out of the instrument. The deed was held to be valid and binding.

In *Barth vs. Barth*, Wash., 143 P. 2d 542, the court had before it a deed in which the name of the grantee was left blank. It was held in that case that the deed was void. The court, however, says:

“A number of states have adopted the rule that an authority subsequently to insert the grantee's name in a deed must be in writing. In this state, however, we have followed what we think is the more reasonable rule, that a deed in which the name of the grantee is left blank but which is otherwise lawfully executed will vest title in a person whose name is subsequently inserted therein as grantee by one having authority from the grantor so to do, and that in the absence of any fraud such authority may ordinarily be inferred from the fact of possession of the deed by the person who fills in such blank. * * *” (Citing cases.)

And in *Bryant vs. Barger*, Ind., 42 N.E. 2d 429, the court held that where a deed was made by a grantor with the name of the grantee left blank, which blank was filled in before delivery to the grantee, the deed was valid. The court pointed out that a deed before delivery is inoperative, whatever its condition of completeness may be, and if completed after it has been signed and before delivery, it is valid.

In *Durbin vs. Bennett*, Ill., 31 F. Supp. 24, the court had before it the question of validity of two deeds conveying a one-half interest in certain oil rights. The evidence was conflicting as to whether the name of the grantee and the description was inserted in the deeds before the grantors executed them. However, both grantors testified that they signed the deeds, intending thereby to convey a one-half interest in the property and expecting the deeds would be completed as to grantee and the description by the agent to whom delivered. Held that under Illinois law the deeds were valid, though no grantee or description was inserted at the time of delivery. The court stated:

“Illinois courts have been firm in their statement that in every grant there must be a grantee, a grant and a thing granted and that omission of any of these essentials invalidates the transaction. * * * But Illinois also recognizes the rule that if the grantors execute and deliver deeds with the understanding that there shall be inserted the name of the grantee, the omission of the name is not necessarily destructive of the conveyance. As said in *Sirois vs. Sirois*, * * * ‘the fact that the grantee’s name was in neither deed at the time it was executed did not necessarily vitiate the deeds, if the authority was given to insert the name before delivery,’ and the burden of proof is upon the grantor to prove fraud to avoid validity. * * *”

In *Chestnut vs. Worley*, Okla., 23 P. 2d 196, the plaintiff had executed a deed to mineral rights in certain lands and gave the deed to his agent for the purpose

of effecting a sale of the land. The name of the grantee was left blank. The defendant subsequently purchased the mineral rights, paid for them, and was given the deed, and defendant thereupon inserted his own name as grantee. Plaintiff sought to set aside the deed on the ground that he had withdrawn the land from sale, and the agent had no authority to make it, and that plaintiff had not authorized a sale to the defendant or the insertion of defendant's name as grantee. It was held that the deed was valid. The fact that the defendant inserted his own name after the purchase at the direction of plaintiff's agent was immaterial.

And in *Strange vs. Maloney*, Okla., 61 P. 2d 725, the question was whether the defendant had assumed a certain mortgage indebtedness upon property to which he had a deed from the mortgagor in which the name of the grantee was in blank. This deed was in defendant's possession. On the effect of leaving the name of a grantee blank in a conveyance, the court said:

"In so far as the first assignment is concerned, it may be said that the general rule, amply supported by authorities, holds that an instrument purporting to be a deed in which a blank has been left for the name of a grantee, is no deed and is inoperative as a conveyance. * * * However, this court has held that while a deed executed with the name of the grantee left blank is defective and incomplete, yet if the name is inserted by the authority of the grantor, it may become valid and effective as a conveyance."

And in *Calhoun vs. Drass*, Penna., 179 Atlantic 568, an attempt was made to set aside a deed on the ground of preference. The question was raised as to the effect of this deed, assuming it was a fact, having been executed with the name of the grantee blank. The court said:

“* * * That a deed cannot exist as such without a grantee is fundamental, but the law controlling such instrument is vastly different from that covering a deed without a grantee where authority is given, to some one to insert the grantee's name. While there is a conflict of decisions as to whether that authority should be in writing or whether it may be oral, express or implied from the circumstances, a majority of jurisdictions do not require written authority to insert the grantee's name; Pennsylvania is one of the oldest of that class. An agent of the grantor may insert the name of the grantee notwithstanding such direction is verbal and many states (citing Iowa, Washington, New York and Missouri) recognize the doctrine of implied authority to insert the name of the grantee in the blank space left therefor. Our statute of frauds * * * would seem not to require written authority to insert the name of the grantee. * * *”

“* * * A valid deed may be signed, acknowledged, and delivered with the name of the grantee left blank, provided there is authority, oral or written, express or implied, in some one to fill in the blank. * * *”

And in *Edmonson vs. Waterston*, Mo., 119 S.W. 2d 318, the court had before it a case involving a deed signed in blank. It was claimed that the name of the

grantee had been inserted in the deed without the consent of the grantor. The court held the deed to be valid, and discussed the effect of a deed signed in blank as follows:

“* * * When a deed is executed and delivered in blank, with parol authority to fill the blank with the name of the grantee, the grantee whose name is afterwards, inserted takes a good title. * * * And this is true though the blank be filled in the absence of the grantor. * * *”

The case also cites *Farmers Bank vs. Worthington*, Mo., 46 S.W. 745, as follows:

“In 18 C.J. p. 188 Sec. 77 * * * we find the following: ‘A deed executed in blank is, according to the great weight of authority, void. It has, however, been decided that a deed signed in blank but filled in when delivered is valid. * * *’”

And in *Holliday vs. Clark*, another Missouri case, 110 S.W. 2d 1110, a grantor conveyed property by deed to her son, which was to be held by him for her benefit. The son immediately thereafter executed a deed to the same property back to the grantor and delivered it, in which no grantee was named. This deed was retained by the grantor but was never completed. During her last illness, the defendants obtained possession of the deed without authority and the name of one of them was inserted in the second deed after the grantor's death. The deed was held to be invalid. In speaking of the effect of the grantor's son delivering to grantor

a deed with the name of the grantee omitted, the court said:

“* * * Mrs. Holliday was at all times, at least, the beneficial owner, with the equitable title; and since she had a deed delivered to her with the grantee's name left blank, it was certainly a reasonable inference, and one which we hold, that the court was warranted in making from the circumstances of the transaction; that she had authority to complete this deed by filling in her own name and thus becoming the legal owner.
* * *”

And in *Gilbert vs. Plowman*, Iowa, 256 N.W. 746, the question of the validity of a deed executed and delivered by plaintiffs to the defendant pursuant to an agreement of purchase in which the name of the grantees was omitted from the deed was considered. The court said:

“It has long been held in this State that authority to a grantee to fill a blank in a deed is implied when the grantor delivers the deed fully executed in other respects. * * *”

And from *Hall vs. Kary*, Iowa, 110 N.W. 930:

“* * * it must be presumed that although plaintiff's deed was blank as to grantee, the intention was to vest Chamberlain with title to the property described therein, and authorize him to insert the name of a grantee as he should see fit. That a deed thus left blank as to the grantee, be-

ing otherwise fully executed, vests title in the person whose name is subsequently inserted therein by the one to whom it is delivered as a conveyance is well settled in this state. * * *

The court in that case then went on to state that the statute of frauds did not apply or prevent evidence of the transaction from being received. And finally, see *Tumansky vs. Woodruff*, Calif., 57 P. 2d 1372, in which the court said:

“* * * The escrow instructions, it will be recalled, specifically provided that the named grantees would take the deeds in their own names or in the name of their nominee. We believe that, since they accepted the deed in its blank form, they received authority from the escrow agent to insert the name of the grantee, and that the escrow agent had the power to delegate this authority. * * *

The foregoing cases clearly hold that the omission of the name of the grantee at the time of execution and acknowledgment by a grantor is not fatal to the validity of the instrument. The thing of importance is: What is the condition of the deed at the time it is delivered? If a completed instrument at that time, the deed in all respects is entitled to the same weight and to the same legal effect as though the name of the grantee had been inserted at the time the grantor signed and acknowledged

it.

TESTAMENTARY DOCUMENTS DO NOT AFFECT
RESPONDENT'S TITLE

After this case had been filed in the court below, two papers were found among the effects of Mrs. Schank at her home on Second Avenue. One purported to be an ~~olo-~~ographic will dated June 17, 1926 (Exhibit "P"). The other was a separate document and bore no date and no clue to the date of its execution (Exhibit "A"). Both documents were offered for probate in the court having jurisdiction of Mrs. Schank's estate. A hearing was had at which the probate of both documents was protested. The court admitted to probate the purported will of June 17, 1926, but rejected the undated and unidentified slip of paper. Both the will and the undated paper were offered in evidence in the court below. Over objections by respondent, both papers were received in evidence.

Neither the will nor the undated document can have any significance in this case. It will be remembered that the will is dated June 17, 1926. At that time Leta was still a child, and Jennie Schank's husband, Louis Schank, and her mother, Mrs. Burnham, still had many years to live.

Louis died in 1936 and Mrs. Burnham in 1944.

There is no doubt that as early as 1926 Mrs. Schank and her husband both were warmly attached to Leta, but Mrs. Schank's purpose to leave substantial property to Leta and thereby secure her financially did not become fixed until after the death of Louis Schank

By the time Mrs. Schank made delivery of the deeds conveying the several parcels of land to Leta, Mr. Schank and Mrs. Burnham were dead, and Leta was married and her children had come along to liven the interest and quicken the affection of Mrs. Schank. By that time, furthermore, Mrs. Schank had reached the avowed state of mind toward at least one of the appellants of such hostility as to exclude him from her property.

Certainly the will wholly fails to support any argument against the validity of the deeds, as delivered in March of 1946, or against the finding of the court below that Mrs. Schank intended to give property to Leta.

Exhibit "A" was rejected for probate because, among other reasons, it was undated and the time when it was made was left only to speculation. It could have been made before the will of 1926, or any time after up until the death of Mrs. Burnham in 1944. The only basis for any justifiable conclusion with respect to when it was made was that it was made while Mrs. Burnham was still living. It refers to certain deeds, but there is nothing in the instrument to justify the conclusion it referred to the deeds involved in this case. It may have been made shortly after the will of 1926. Such a guess is as good as any other, as the fixing of any date must result from pure guess.

It is clear upon the record, however, that Mrs. Schank was not the owner of seven of the nine properties here involved until some years after the execution of the will in 1926. (See Exhibits "B", "C", "D", "E",

“F”, “G”, “H”, and “I”.) Exhibit “E” covers a piece of property located on lower Second Avenue, the title to which was conveyed to Jennie Burnham Schank in October of 1904. Exhibit “F” covers also a piece of property located on lower Second Avenue, and it discloses that this property was conveyed to Louis Schank and Jennie B. Schank as tenants in common June 18, 1920, and was thereafter conveyed by Louis Schank to Jennie B. Schank August 13, 1931. An examination of Exhibits “B” to “I”, exclusive of Exhibits “E” and “F”, discloses that Mrs. Schank did not secure the title to any of the properties before 1931, and as to the property covered by Exhibit “F” prior to 1931, Mrs. Schank was but the owner of a one-half interest therein.

No contention was made in the court below, and none can be made here that either Exhibits “A” or “P” had any efficacy whatsoever to pass title to the properties involved in this case.

To support their argument that the deeds now under review are invalid because the name of Leta Eschler was not filled in as grantee at the time the deeds were signed, appellants grasp two of this court’s decisions and one from California and another from Minnesota, none of which supports their contention.

Appellants rely upon *Utah State Building and Loan Association vs. Perkins*, supra. The facts there are so different than those presently under review that the case can not help appellants. In the cited case, Perkins and his wife signed certain deeds. Except for the signatures

and acknowledgments, the deeds were blank. In blank form they were retained by Perkins in his own private possession. Without his knowledge or consent, they were taken from the place where he kept his private papers and the name of the grantee and the description filled in. In speaking of the controlling facts in the case, this court said:

“It is not contended by any witness that Perkins was present at the time of the delivery, or that he knew anything of the recording of the deeds until sometime afterwards. Neither is it contended by anyone that Perkins had directed, instructed or authorized anyone to fill in the descriptions or the considerations in the blank deeds.”

Contrast those facts with the ones now before the court. Here the grantor delivered the deeds which she had completed in every particular.

In *Nilson v. Hamilton*, 53 Utah 594, 174 P. 624, this court considered a deed in which the named grantee was dead at the time of execution. This court ruled that the deed conveyed nothing to the dead man's estate, because there was no grantee in existence at the time of delivery. In the case now under review, deeds which were fully completed, executed and acknowledged named the grantee who was alive at the time of delivery.

From other jurisdictions appellants cite *Trout v. Taylor*, 17 P. (2d) 761, (Cal.), and *Allen v. Allen*, 51 N.W. 473, (Minn.). The controlling facts in both of those cases are such as to deprive them of any persuasive force here.

In the California case, those who relied upon the deeds defrauded an ancient woman into signing and acknowledging a deed. She thought when she signed and delivered the deed that a certain corporation was named as grantee. Unknown to her, no grantee was named in the deed. But after the deed was delivered, the names of certain individuals were filled in as grantees, without the grantor's knowledge or consent. Here the deeds were delivered by the grantor with respondent named as grantee.

In the Minnesota case, the deed named no grantee whatever. Parole evidence that one of the grantors in the deed should have been named as grantee was held not admissable. The case is clearly not in point.

PROOF ESTABLISHES DUE EXECUTION OF DEEDS

Appellants claim there is insufficient proof in the record of the execution of the deeds. But they do not deny that S. W. Dowse, who was in all respects a competent witness was sworn and testified upon the trial that he was acquainted with Mrs. Schank, the grantee, and that he saw her sign the deeds, and saw her acknowledge the deeds before a notary public. No effort was made to discredit Dowse's testimony. Dowse furnished all of the proof of execution which the statute required. Appellants cite the case of *Tarpey v. Deseret Salt Company*, 5 Utah 205, 14 P. 338. That case construed a statute which was not in force at any time pertinent to the present inquiry. Prior to 1898 the statute provided for subscrib-

ing witnesses to deeds, but there was no such requirement in 1938, or at any time since then. .

In *Murray v. Beal*, 23 Utah 548, 65 P. 726, this court ruled that a purported corporate acknowledgment to a deed was defective. Notwithstanding the absence of an acknowledgment, the deed was held to be admissible, and that "as between the parties, and all persons who had actual knowledge of it, a deed does not require acknowledgment to render it valid." Neither *Tarpey v. Salt Company*, nor *Murray v. Beal* is applicable in this case.

In *Waskey v. Chambers*, 56 L. Ed. 885, 224 U.S. 564, the Supreme Court of the United States had before it facts unlike those here involved. The owner of a mining claim deeded a portion of it to one Chambers. Thereafter, by agreement of the parties the deed was altered to change the estate conveyed to a one-half interest. The statute involved required two witnesses to qualify the deed for recordation. Only one witness signed the deed, and the court ruled that the deed was not qualified for recordation. Mrs. Schank's deed required no witnesses, and no change was made in the deeds after their delivery.

Wood v. Wood, 87 Utah 394, 49 P. (2d) 416, confirms the rule that the court must give effect to the grantor's intention. In the Wood case this court emphasized that Mrs. Wood had made neither an "actual or symbolical delivery" of the subject of the gift. Mrs. Wood was alive and testified to her intentions, and was corroborated by the cashier of the bank. In the case

under review, it was made clear that Mrs. Schank intended to make the gift, and she made irrevocable delivery of the muniments of title pursuant to that intention.

In *Singleton v. Kelly*, supra, this court felt itself bound by the findings and decisions of the trial court that upon all of the evidence the grantor had never made delivery of the deed, but had on the contrary left written instructions with the third person depository that he, the grantor, should be at liberty to withdraw the deed at such time as he might elect. It was not so with Mrs. Schank. She made irrevocable delivery of fully completed deeds, and when she did so she said, "I am giving these properties to Leta."

Reed v. Knudson, supra, rules that delivery is a matter of intention and intent is to be arrived at from all of the facts and circumstances in evidence. All of the facts and circumstances irresistibly led the trial court to the conclusion that Jennie B. Schank intended to and did make the gift to Leta B. Eschler, the one person in the world upon whom her affection and interest was focused. This court upheld the delivery in *Reed v. Knudson*, because the evidence there, just as it does here, showed that when the grantor left the instrument of grant with the third person, it was the grantor's intention to relinquish all further control of the instrument and have it take effect at that time.

This court in *Stanley v. Stanley*, supra, dealt with facts far different than those in the case of Mrs. Schank.

Stanley and his wife were estranged, and there was hostility between them. The wife had invested the husband's savings over a long period in certain parcels of land. They separated, and some of the property was in the wife's name, but the piece involved in the case was in his name. She was not the object of his affection or solicitude. He held and kept the piece of property, not for her benefit, but in antagonism to any claim she might have. When he died, she filed an ancient will for probate and listed the disputed property as belonging to her husband's estate. Mrs. Schank, on the other hand, delivered the deeds now under review pursuant to an oft-repeated purpose to insure Leta's security. And when she delivered the deeds, she expressed the desire and intention to look after and maintain the property for Leta, because the property was not self-sustaining. Mrs. Schank's conduct and statements were in full harmony with her purpose, as expressed at the time of delivery, and in full harmony with respondent's contentions. Irrevocable delivery of the deeds and subsequent care and preservation of the property by Mrs. Schank were in harmony with the relationship which existed between her and Leta from Leta's infancy to the last day of Mrs. Schank's life.

RUSSELL ESCHLER A COMPETENT WITNESS

Russell Eschler married Leta in 1935. Before the deeds had been delivered to him in March of 1946, he had gained the confidence and respect of Mrs. Schank. Because he was Leta's husband, Mrs. Schank was con-

cerned for his welfare, and because he conducted himself as she had hoped he would, she liked him. But the gift of properties was to Leta, and not to him. Any interest he had in the transaction was in law, an indirect, as distinguished from a direct interest.

A husband who is devoted to his wife will naturally be interested in her welfare. But this court has squarely held that the interest of a husband as such does not disqualify him as a witness in litigation between his wife and the estate of a deceased person.

Olson v. Scott, supra, was a suit between Olive Scott and the administrator of her mother's estate. If Olive Scott sustained her claim, she would be the owner of two bank deposits. If she failed the money would be part of the estate. Olive's husband testified to statements made by deceased that the money was Olive's. This court ruled that he was "entirely competent" to so testify. *Olson v. Scott* is the law of this state so far as our research has disclosed, and is a complete answer to appellants' contention.

Appellants cite *Mower v. Mower*, 64 Utah 260, 228 P. 911. This court in that case reaffirmed its ruling in *Olson v. Scott*, supra, that "a husband was entirely competent to testify" in behalf of his wife in such a case as this. Appellants would create an exception to the well-settled rule in order to support their contention that there is something in the case we are now presenting which takes it out of the general rule. They say that if Mrs. Schank had not managed the property and paid the

taxes and expenses thereof, a burden would have fallen upon Russell Eschler, and that therefore Russell Eschler acquired a direct interest in the result of the lawsuit. But Russell's interest in the matter was indirect, as was that of the husband in *Olson v. Scott*, supra, and as was that of the children in *Mower v. Mower*, supra. Russell could have paid the taxes, or not as he might elect, or Leta could have sold such part of the property as was non-productive.

In re Van Alstine's Estate, 26 Utah 193, 72 P. 942, is relied upon by appellants. The case supports the position of respondent. It was urged in the *Van Alstine* case that the guardian ad litem of minor protestants was incompetent, because in the event of her failure to successfully prosecute the action she might be chargeable with court costs. Any interest she might have had was like Russell Eschler's, an indirect interest.

There is a strange angle to appellants' contention that Russell Eschler had an interest which rendered him incompetent. They say he might have been burdened by the payment of taxes if Mrs. Schank had not assumed that burden. In the first place, Mrs. Schank did assume the burden of the taxes. In the second place, if Russell Eschler acquired an interest based upon the possibility of his acquiring a tax burden, then his interest would have aligned him against the interest of his wife.

Finally, upon the subject of Russell Eschler's incompetency, appellants cite *Maxfield v. Sainsbury*, 110 Utah 280, 172 P. (2d) 122, which case in turn makes refer-

ence to Mr. Justice Wolfe's learned article upon the "dead man's statute." Nothing in that case detracts from the ruling of *Olson v. Scott*, *supra*, and *Mower v. Mower*, *supra*, that a husband, not a party to the action, is "entirely competent," to testify in behalf of his wife, who is a party to the action, concerning conversations had with the deceased.

A person not a party to the action is not incompetent by force of the statute unless he has a "direct" interest adverse to the estate. The word "direct" can not be written out of the statute, and this court has unequivocally ruled that a husband related to the case, as Russell Eschler is related to the case now under review, does not have a "direct" interest, such as to disqualify him.

CONCLUSION

Mrs. Schank's life was ended suddenly and without warning on the evening of March 30, 1947. Up until that very day her interest and devotion had been so focused upon her niece Leta that those familiar with the relationship might well have expected her to leave all of her property of every kind to Leta. Apparently, she had not got around to the disposition of her entire estate. But she had completed gifts to Leta of the parcels of land involved in this case.

As in all such cases, it is the concern of the courts to discover the true intention of the grantor and to give effect to that intention, unless there is some insuperable obstacle in the way. Here the intention and purpose of

the grantor is in all respects clear. She intended to provide security for Leta and her children. That she executed the deeds—signed and acknowledged them—in the presence of S. W. Dowse was proven without conflict. That she completed the deeds by supplying the name of Leta as grantee, and thereafter delivered them unconditionally to Russell Eschler for Leta was likewise proved without conflict.

Mrs. Schank's continued management of the property, including collection of rentals, payment of taxes and insurance, was not inconsistent with the gift, but was in confirmation of it. She made the gift to Leta for Leta's future security and continued in control of the property only to protect the gift and fortify its purpose.

As it is, substantial property will pass from Mrs. Schank to persons who were not embraced within her affections, and who were not the objects of her bounty. To strike down the gift of property to Leta would completely frustrate the long fixed and clearly expressed purpose and intention of the grantor.

It is respectfully submitted that upon the facts and the law, the judgment of the trial court must be affirmed.

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