

1948

Livinia Allen v. Edward F. Allen and Peggy F. Allen : Brief of Respondent

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

LIVINIA ALLEN, also known as Livinia
Smith,

Appellant,

vs.

EDWARD F. ALLEN AND PEGGY F.
ALLEN, his wife, also known as Alfred
Saunders Allen,

Respondents.

Case No.
7247

BRIEF OF RESPONDENT

ROALD A. HOGENSON, *Judge*

FILED
DEC 23 1948

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In The Supreme Court of The State of Utah

LIVINIA ALLEN, also known as Livinia
Smith,

Appellant,

vs.

Case No.

7247

EDWARD F. ALLEN AND PEGGY F.
ALLEN, his wife, also known as Alfred
Saunders Allen,

Respondents.

RESPONDENTS' BRIEF

STATEMENT

It is admitted by the parties to this controversy that on January 12, 1929 Luisa Allen made a Quit-Claim Deed to the plaintiff and defendant, Edward F. Allen, conveying the home and premises therein described. This Deed

reserved a life estate in the grantor. Luisa Allen is the mother of plaintiff and defendant, and plaintiff and defendant are half brother and sister. It is admitted that this Deed was recorded on January 16, 1929, in the County Recorder's Office of Salt Lake County. After the Deed was recorded, it was returned to Luisa Allen, it remained in her possession until May, 1947. It is also admitted that on September 12, 1946, said Luisa Allen made a Deed to the defendant, Edward F. Allen and his wife, Peggy Allen, by which she conveyed to them the same property described in the 1929 Deed, and that said Deed was also recorded in the Office of the County Recorder of Salt Lake County. The circumstances surrounding the execution of the 1946 Deed is described in the testimony, Transcript pages 237 to 241. This testimony discloses that Mr. Allen and his wife, who were temporarily employed by the Government in the Atomic Energy Plant in Tennessee, were requested by Luisa Allen to return to Salt Lake City. In a letter to Mr. Allen she requested him to return home so the property could be fixed the way she wanted it. The defendant and his wife came to Salt Lake in September, 1946, and at that time the grantor asked Mr. Allen if he wanted the property, that she was getting along in years and she would like to get it taken care of before she died. She asked Mr. Allen if he would have a deed made. At the time of this conversation, the plaintiff was in the adjoining room (T. 239). Mr. Allen called Mrs. Smith, the plaintiff, into the room with himself and his mother, and asked her if she knew what they were doing, and that his mother was making out a deed to the property and asked if it was agreeable with her, and she

said it was. The deed was signed at that time and acknowledged by the grantor over the telephone (T. 241). This same matter was testified to on Cross Examination of Mr. Allen (T. 271-273). Nothing was said by the grantor or by the plaintiff at that time about the existence of an earlier deed. Later at the request of the plaintiff, Mr. Allen did some repairs to the furnace and the home (T. 275). He received a letter from the plaintiff written to him in Tennessee in which the plaintiff said she wished Mr. Allen would return to Salt Lake because she and her husband would like to move to other quarters, and that if the Allens could return, she would like to move out of the place. In April, 1947, the Allens came to Salt Lake and because of some unpleasantness arising in the home, Mr. Allen consulted an attorney about getting possession of the property. The attorney in preparing to take steps to evict the Smiths from the home discovered of record the 1929 deed. At that time Mr. Allen discussed the matter with his mother, and she told him it was not a deed, that she had made a Will. (T. 277.) This was the first time that Mr. Allen ever knew about the existence of the 1929 Deed, and no one had ever mentioned it to him before (T. 249). The grantor said at that time that she had had it with her papers all the time and stated that it was a will and not a Deed (T. 250). The Court made a Finding (T. 105) finding No. 4, that neither the plaintiff nor the defendant had any knowledge of the execution or recording of the 1929 deed until the month of May, 1947. The Court's Finding in this respect is substantiated by the Cross Examination of Mrs. Smith (T. 187 to 189). We quote from the Transcript, as follows:

“Q. You did testify—I have written it down here—in answer to questions by Mr. Beezley that he asked you if you understood it. That was at the time it was signed. (Referring to the 1946 Deed.)

A. I didn’t wholly understand it.

Q. I didn’t ask you whether you understood it, but he asked you that. Do you remember your brother asking that?

A. He said, “Do you understand what I am doing?”

Q. All right. And did you answer that question?

A. Then he didn’t answer me.

Q. Then he didn’t answer you. But at that time if you had knowledge, or ever before had had any knowledge about that 1929 quit claim deed you didn’t mention a thing about it to your brother, did you?

A. You would—

Q. You didn’t at that time mention anything to him about the fact your mother had ever executed a deed before to that property?

A. Why should I? Isn’t it between mother and him, or wouldn’t it be between mother and me?

Q. If you would answer the question. I don’t want to know why. But you didn’t?

A. No.

Q. Did you ever at any time between the date of the execution of that deed and the date of your mother’s death up to the time this letter was written by Mr. Beezley ever advise him

or call his attention to the fact that such a deed had ever been executed by your mother.

A. What deed?

Q. This 1929 deed.

A. No, I didn't mention it to him.

Q. And that deed, so far as you can tell us, that 1929 deed was kept in your mother's possession from the time it was executed until it was delivered to Mr. Allen in 1947 when he came back to Salt Lake?

A. I don't know about that.

Q. You don't know where it was?

A. I don't.

Q. You know you didn't have it?

A. I know I didn't have it.

Q. And you don't know that anyone else had it?

A. No.

Q. And as far as you can tell us you had never seen it before?

A. No. I saw it at the time mother had it made out, that is all.

Q. That is the only time you ever saw it?

A. Yes.

Q. Where it was after that time you don't know?

A. No.

Q. Then you said that night after that deed, the 1946 deed, had been executed you and your mother talked it over?

A. Well, I only asked her about the quit claim deed, why she had made another one.

Q. And what did she tell you?

A. Just that Ed wanted the property.

Q. That is all she said as far as you recall?

A. Yes, that is all.

Mr. Hougaard: That is all."

PLEADINGS

The Complaint, T. pages 1 to 4, alleges in paragraphs 1, 2 and 3, the execution of the two deeds in question, which allegations are admitted by the Answer. It is also admitted in the Answer that the grantor died on July 2, 1947. The balance of the Complaint merely seeks to quiet title to the property under the 1929 Deed, and alleges that the property is not susceptible to partition, which latter fact is also admitted by the Answer. The defendants first filed an Answer and Equitable Counter-Claim (T. 7-15) to which certain motions to strike were interposed, some portions of which were granted, and subsequently an Amended Answer and Equitable Counter-Claim was filed (T. 44-51). Certain allegations were made in each Answer concerning the payment of a mortgage on the premises, interest thereon, taxes, insurance and substantial repairs and improvements. A Bill of Particulars was demanded in respect to these items, and this Bill of Particulars was filed and appears at T. pages 22 to 23.

It will appear from the Counter-Claim and the Bill of Particulars that in 1929 the home and premises in question were mortgaged to the Deseret Building Society by the grantor in the amount of \$3,000.00; that Ed-

ward F. Allen paid this mortgage and the interest thereon, amounting to the total sum of \$4,740.05, and paid taxes between 1929 and 1946 in the amount of \$1800.90, fire insurance in the amount of \$132.24; that he made substantial improvements and repairs to the home and premises amounting to \$1255.50; that he paid funeral and burial expenses amounting to \$460.00, and paid to his mother for her support while he was in Tennessee, \$20.00 per month amounting to \$602.00. These allegations of the Counter-Claim were made a part thereof for the purpose of invoking the equitable doctrine of contribution, subrogation and equitable assignment and as showing consideration for the Deed of his mother given him in 1946, and to explain the intent of the grantor in conveying the property to Mr. Allen. The only Finding made in this matter is Finding Numbers 5 and 6 (T. 105-106), where it is found that the 1946 Deed was made in consideration of financial assistance by the defendant to his mother, and that in view of the Court's other Findings, it was not necessary to find upon the other issues of the Counter-Claim.

In the Conclusions of the Court (T. 106) and the Judgment (T. 108-110) the Court determines, as a matter of law, that the Deed of January 12, 1929, is null and void; that the Deed of September 12, 1946, is good and valid and quiets the title of the defendants in and to the property in question.

EXHIBITS

The Exhibits introduced in this case are as follows:
Exhibit No. 1, the Deed of January 12, 1929; Exhibit

No. 2, the Deed of September 12, 1946; Exhibit No. 3, the paid checks given by the defendant, Edward F. Allen, for the support of his mother while he was away in Tennessee, and one check to James P. Smith, the husband of the plaintiff; Exhibit No. 4, the Note paid by Mr. Allen to the Deseret Building Society; Exhibit No. 5, the Mortgage securing the above Note paid by Mr. Allen; Exhibit No. 6, the Release of the aforesaid Mortgage; Exhibit No. 7, a receipt for repairing plumbing in the home done at the request of the plaintiff and paid by Mr. Allen; Exhibit A, Photostatic copy of the January 12, 1929 Deed; Exhibit B, photostatic copy of the September 12, 1946, Deed, and, Exhibit C, a letter written by Mr. Beezley to the Allens.

FURTHER EVIDENTIARY MATTERS

We do not believe the intent of the grantor under the circumstances in this case, and in view of the decisions of this court, is important, yet, we think it helpful and perhaps material that some of the evidence be called to the Court's attention as going primarily to the intent of the grantor in the execution of the deeds in question.

There were two witnesses, old friends and acquaintances of the grantor, who testified in this cause, Mrs. Catherine Pfister and Mrs. C. M. Hirsch.

Mrs. Catherine Pfister testified (T. 304-321) as follows: She had been acquainted with the grantor for 18 years (T. 304), and had known plaintiff and defendants a long time (T. 305). She testified that Mrs. Allen never

talked about a deed, but talked about a will, and said, "I made my Will," and off and on she said that she would like to have her son have the place because he was very nice to her and he paid everything (T. 310). These conversations were had in the Allen home; that the plaintiff may or may not have been there. That in 1947, the plaintiff told the witness that she wanted to move; that she was looking for a house, and the witness told plaintiff if she found out about one she would let her know (T. 311). That the plaintiff told her she wanted to buy a small place where she would not have so much hard work to do. This was before the Allens returned from Tennessee. That during the entire twenty years that the witness knew the grantor, Mrs. Allen had never mentioned anything about a deed (T. 312). That she never talked much with Lavinia (the plaintiff) but that the grantor sometimes said she would like to fix it so the son could have it on account he took care of her all these years, paid the mortgage, put the roof on and built a garage (T. 314).

Mrs. C. M. Hirsch, testified concerning similar matters (T. pages 322 to 337, as follows:

That she and Mrs. Allen had been rather close and friendly for about 28 years or thirty years (T. 322). That about three weeks before the death of the grantor she came to her home and started to cry and said that she had hurt her boy. She told me that she had made a will and gave me to understand that the home was to be her boy's as he had supported her for many years. I tried to stop her crying. She was talking about a will and the witness told her that she was still alive and that she could

make it over again; that she was quite disturbed and said that she wanted her boy to have her home; that was the way she wanted it (T. 325). She didn't explain to me how she had hurt her boy, but she thought he might not get the home and that hurt her (T. 326). That you could never talk to her, but what she would bring in her son, and her appreciation and love for him. She was worried the last part of her life because she thought something had come up that was not right, and she didn't intend to have it, but she referred to her will (T. 326 to 327). She gave me to understand that she wouldn't have had a roof over her head if he (her son) hadn't kept it there. Mrs. Smith, shortly before the Allens returned from Tennessee, wanted to rent an apartment from me; that Ed was coming home and she would have to find another place. I told her about the neighbor across the street. She was looking for a house (T. 328).

Similar testimony appears in the Cross Examination of Mrs. Hirsch.

The following testimony by the witness, Edward F. Allen, is also pertinent to the question of the intention of the parties and what they themselves had determined should be done with the property upon the death of the grantor.

Mr. Allen testified that on one occasion in 1940 he and his half-sister, Mrs. Smith were discussing certain painting which Mr. Allen intended to do on the interior of the home, and his sister said at that time that it did not concern her, she wasn't interested whatever because

she wanted Mr. Allen to have the property; that it was his home; that he had spent money and time in the upkeep, etc., and she did not want any part of it. (T. 231-232.) When Mr. Allen was requested by the Government to go to Tennessee, he was endeavoring to make arrangements for the care of the home and his mother. The doctor did not advise that the grantor go with Mr. Allen to Tennessee because of her age and change in climate (T. 233). He discussed the matter with Mrs. Smith relative to his going, and it was agreed that the Smiths would take over the house and take care of it to the best of their ability, and upon their return from Tennessee, they would turn it back to Mr. Allen. He agreed at that time to pay all necessary expenses in the upkeep of the home (T. 235), and the Smiths were to live in the home without the payment of rent. The Smiths thought it would be an opportunity, and they were glad to do it (T. 236).

Mrs. Peggy Allen testified concerning a conversation with Mr. and Mrs. Smith, and the grantor in 1937 or 1938. At that time Mrs. Smith said that they wanted to see that the property was fixed and made out to Mr. Allen. Mrs. Smith told her mother at that time that Mr. Allen had paid everything and she wanted him to have the property. Mr. Smith said that he did not want the Allens to feel that they were vultures waiting to come in and grab something that they had not paid a cent on or done anything about. (T. 342.) She testified that Mr. Allen came to Salt Lake from Oakridge, Tennessee about August 11, 1944, and was home about a month waiting for a van to come and pick up the Allen Furniture. (T. 346.) The

Allens were trying to make some arrangement to rent the home while they were away. Mrs. Allen talked to Mrs. Smith about the home at that time and about the Smiths living in the home while the Allens were away. She asked the Smiths how they would like to move up into their place and take care of it while they were away. That Mr. Allen had several things there that needed someone. That they could rent it to strangers, but no one would take care of it like one of their own family, and they, the Allens, would appreciate it if they would take care of it and that they could live there without the payment of rent.

As the result of this understanding the Smiths moved into the home and have remained there ever since. (T. 348). Mrs. Smith at no time made any mention to Mrs. Allen about the existence of the deed made in 1929. (T. 352.) In January, 1947, Mrs. Allen wrote Mrs. Smith that they were returning to Salt Lake. Mrs. Smith answered that they had not been able to find a house as yet, but they were looking and hoped to have a place soon. When the Allens arrived in Salt Lake they advised the Smiths that they would like to have their home because they wanted to remodel it. (T. 354.) The Smiths were then looking for a home and the Allens were waiting for them to move. At that time an unpleasant incident came up between Mr. Allen and the Smiths which gave rise to Mr. Allen consulting an attorney. (T. 355.) As a result of such incident the existence of the 1929 deed became known for the first time (T. 356). The matter of the 1929 Deed was discussed

with the grantor, and she told Mrs. Allen this was not a deed but a will (T. 357). After the death of the grantor the Allens moved away from the home because of unpleasantness with the Smiths, and until this case which had been commenced by the Smiths could be determined (T. 358).

The appellant argues only Assignments 3 and 4. These assignments were based upon the claim that the court erred in denying validity to the 1929 Deed and sustaining the validity of the 1946 Deed, and that the Court erred in admitting in evidence conversations between the deceased and respondents.

ARGUMENT

Appellant at page 6 of her Brief, referring to the January 12, 1929 Deed, uses this language:

“After the execution by Luisa Allen of said Deed, she had same recorded with the County Recorder of Salt Lake County, State of Utah, and appellant contends by virtue of this fact that such Deed was duly delivered.”

The cases cited by appellant supporting the rule that the recording of a deed by the grantor constitutes a sufficient delivery are cases arising in the State of Kansas, with the exception of two cases cited from Illinois. The cases cited from Arkansas, as we understand them, do not go to the question of delivery being sufficiently shown by mere recording of the deed. The cases at page 9 from Arkansas and Iowa do not appear to be in point.

We submit that in the great majority of jurisdictions, the mere recording of a deed by the grantor where the deed is returned to the grantor by the Recording Officer, and is thereafter held in the grantor's possession to the exclusion of the grantee or grantees, does not constitute a sufficient delivery of the deed, and the deed, because of want of delivery, is void.

The law relating to necessity of delivery of a deed and what constitutes delivery will be found stated in 16 Am. Jur. Title Deeds, Sections 110-136. In Section 111, it is said:

“An undelivered deed does not divest the grantor of, or invest the grantee with, title, even though the intent to deliver is clear and the failure to deliver due to accident.

In Section 122, it is said:

“That there is no delivery of a deed sufficient to pass title where the deed is given to the grantee with the intention that it shall become operative only on the death or survival of the grantor or the grantee.

In Section 112, it is said:

“That the recording of a deed does not pass the title, but it only secures the title from being defeated by subsequent sale of the land to an innocent purchaser, and, as hereafter mentioned, recording a deed does not, of itself, operate as delivery of it.”

In Section 128, it is said:

That while delivery may be by words or acts or by both combined, and manual transmission of

the deed from the grantor to the grantee is not required, it is an indispensable feature of every delivery of a deed, whether absolute or conditional, that there be a parting with the possession of it and with all power of dominion and control over it, by the grantor, for the benefit of the grantee at the time of the delivery. There is no delivery in law where the grantor keeps the deed in his own possession with the intention of retaining it, particularly if he keeps possession of the property as well; dominion over the instrument must pass from the grantor with the intent that it shall pass to the grantee, if the latter will accept it. Where the proof fails to show that the grantor did any act by which he parted with the possession of the deed for the benefit of the grantee, the question of intent becomes immaterial."

The foregoing is the rule announced by our Supreme Court in this jurisdiction in the case of Singleton vs. Kelly, 61 Ut. 277, 212 Pac. 63. We shall not attempt to recite all of the detailed facts in the Singleton case because they will be more accurately available to the court by reading the decision. However, a deed had been given by William E. Kelly, deceased, to his brother, Thomas S. Kelly in 1914. After the deed was executed, Mr. Henroid, who prepared it, handed the deed to the decedent and in his presence the deceased then handed the deed to the grantee. Henroid was not a notary and he informed the parties that the deed must be acknowledged and recorded. A few days later, May 19, 1914, the grantor and grantee in the deed went to a notary to have it acknowledged. The deed was acknowledged by the notary and the notary then asked the deceased

whether he was turning the deed over to the Grantee, Thomas S. Kelly, then or whether he expected him to have it after his death. The deceased replied, "I mean to keep control of it while I live." Thereupon the notary prepared a letter of instruction addressed to himself and signed by the deceased as to the delivery of the deed upon the grantor's death. The question before the court was whether or not the facts showed a sufficient delivery of the deed to give it validity. This question became a matter of judicial interpretation because at a subsequent time the deceased concluded that he wanted to deed part of the property to a Mrs. Tom Redman and Mrs. Tom Redman and certain deeds were made and executed in blank in the manner indicated in the decision. The important aspect in the case in so far as it affects the case at bar is the rules of law adopted by our court in deciding the question of delivery. The lower court held that there was no sufficient delivery of the deed. On appeal the appellant contended that it is a cardinal rule that the courts will carry out the grantor's intention whenever that is possible, and that the facts in that case showed an intention on the part of the grantor in the execution and delivery of the earlier deed to make a delivery. In answering this contention the Supreme Court says on page 66 of the decision, as follows:

"Counsel for appellant say that it is a cardinal rule that Courts will carry out the grantor's intention wherever this is possible. That is true, but without any evidence of delivery it can be of no importance whatever what the intention of the

grantor in this case were. One may have an intention to convey his property to another, but unless the deed is delivered to the grantee or someone for him title cannot pass, and the undelivered deed is a nullity.”

Following the rule announced in the Singleton case, we submit that it would make no difference what the intention of the grantor may have been at the time the 1929 deed was executed or what her intention may have been at the time of recording the same. The fact remains and it is undisputed in this case that the 1929 Deed was never delivered to either of the grantees, and as found by the Court neither grantee had any knowledge whatsoever of the existence of the Deed.

Under our Statute, Section 78-3-2, Utah Code Annotated, 1943, the only effect and the only purpose in recording a deed is to import notice to all persons of the contents thereof so that all subsequent purchasers, mortgagees, or lien holders will have notice as to how the property is vested and what liens and incumbrances exist against the same. There is no testimony in this record whatever to show that by the mere recording of the deed the grantor intended thereby to make delivery, and those cases which hold, as apparently do the cases from the State of Kansas, that the recording of the deed constitutes a delivery thereof, are limited to very few jurisdictions.

It will be noted by reference to the latest Kansas cases cited in Appellant's Brief, *Fooshee vs. Kasenberg*, 102 Pac. 2nd, 995, and *Carver vs. Maine*, 69 Pac. 2nd,

681, that there appear no citations from any jurisdiction, other than the Kansas Court, and it does seem to be well settled in that jurisdiction that recording of the deed constitutes a sufficient delivery thereof.

In support of the above doctrine, one case referred to by Appellant, *Miller vs. Miller* at "131 Pac. L.R.A. 1915-A, 671 Ann. Cas. 1917-A, 918", (the page in the Pacific is omitted. It is reported at page 953), is also a Kansas case.

If a deed is duly executed, and recorded, the question would always remain until established, whether by the act of recording, the Grantor intended to deliver the deed. Under the *Singleton* case, *Supra*, there must be an actual delivery before title can pass.

In Section 135, 16 Am. Jur., Title Deeds, the following is said as to the effect of recording:

"That while the fact that a deed is on record is prima facie evidence of delivery, the deposit for recording of a deed by the grantor or his agent and the actual recording thereof do not constitute delivery as a matter of law, for the question remains whether, by so doing, the grantor intended to deliver the deed. It is the intent in depositing the deed for record, not the fact that it was recorded, that has to be considered in determining from all the evidence whether the deposit was an effectual delivery. *No such intent appears where the recorder was expressly instructed that the deed was to be redelivered to the grantor, where the recording was merely to facilitate the operation of an escrow, or where the recordation of the deed was without the knowledge or assent of the grantee.*"

Also see 129 A.L.R Page 11, where there appears an annotation on the question of delivery of a deed without manual transfer or recording, and 52 A.L.R. page 1222 on the question of delivery of a deed to a third person to be delivered to grantee after Grantor's death. While the latter annotation would not seem to be in point, it is cited because of the conclusions reached by a number of the Courts on the necessity of delivery and placing a deed beyond the control of the grantor. It is said on page 1227, section "B":

"If, when the deed is handed to the depository, there is no intention on the part of the grantor of presently transferring title, but on the contrary, the grantor intends to reserve the right of dominion over the deed and the power to revoke or recall it, there is no effective delivery of the deed as a transfer of title."

While under some of the authorities, the recording of the 1929 deed would be prima facie evidence of delivery, such we believe is not the law in this state. In view of all of the evidence upon the question of the grantor's intent, we submit that it is reasonably clear that there was no intention by the mere act of recording the deed to make delivery thereof, and that the evidence negatives quite conclusively any intention on the part of the grantor to make delivery of the deed. The evidence shows quite conclusively that neither of the grantees knew of the existence or recording of the deed, and the court specifically found that neither of the grantees knew of the existence or recording of the deed. It is undisputed that the deed was in the exclusive pos-

session of the grantor from the day of its execution in January 1929 until the month of May, 1947. In the ordinary affairs of life it would seem clear that if the grantor had any intention to make delivery of the deed that sometime between January 1929 and May 1947, she would have said something to one of the grantees concerning the fact that she had made a deed, and certainly if the plaintiff had knowledge of the execution and recording of the deed at the time the second, or 1946, deed was executed, she would have called the matter to the attention of her half-brother, Edward F. Allen, and to the attention of her mother. Instead, she was called in at the time this deed was executed, made no objection to the same and said nothing whatever concerning the existence of another deed. The intention of the grantor that Edward F. Allen should have the home was made clear by the grantor during her lifetime as shown by the testimony hereinbefore set forth. She recognized that he had more than paid the value of the home by the discharge of the mortgage, interest, taxes and insurance, and by supporting his mother all during the years from 1929 until the time of her death, as well as supporting the plaintiff up to the time of her marriage in 1936. It is likewise clear from the testimony of Mrs. Pfister and Mrs. Hirsch, that she wanted her son, Edward F. Allen, to have the home; that she did not regard the 1929 Deed as anything but a will. These elderly ladies, friends of the grantor, comforted the grantor when she was disturbed about the fact that she may have made a deed, by saying that she could change this instrument because it was a will.

We believe it would be difficult to analyze the testimony in this record without reaching the conclusion that it was the intention of the grantor to convey the home and premises in question to her son, Edward F. Allen, and that she always regarded the 1929 deed as a will which she could keep within her possession and change or modify the same as she saw fit. This evidence, we believe, clearly negatives, at all events, any claim that there was ever any thought on the part of the grantor of making a delivery of the 1929 deed so as to give the same legal effect.

Appellant has cited the case of *Payne vs. Henderson*, 172 N.E. 173, in support of the sufficiency of delivery of the deed in question. An examination of this case discloses that the facts are materially different from the case at bar. In that case the wife of the grantor died in 1917; the grantor died in 1925. After the death of the grantor's wife, he arranged with his granddaughter to live with him and keep house for him. He was then 75 years of age. He told his banker that he expected to take care of his grand-daughter and asked his advice about fixing his property. He was referred by the banker to his attorney. He went to his attorney's office and told the attorney that he wanted to fix a deed to his granddaughter, that his grand-daughter was coming to his home and making a home for him. The deed was drawn in May, 1919 to the grand-daughter, covering the real estate in question. After doing so, he remarked on several occasions that he had provided for Nettie (the grand-daughter). In the deed he reserved a life estate.

At a later time when his attorney was preparing his will, he said to him that there was no use of including the home place in the will as he had already deeded it to Nettie.

The testimony in the case showed without contradiction that on several occasions the grantor spoke to different persons about having made the deed for the 5-acre tract of ground to his grand-daughter and expressed his intention that she should have it. At his death the deed to the grand-daughter was found with other papers in the safety deposit box of the grantor. It was in an envelope, upon which was written in the grantor's handwriting, "To Nettie Larrance." The deed was delivered by the president of the bank to the grand-daughter and later recorded by her.

In the opinion upholding the sufficiency of delivery, the court said in effect that the main controversy in the case is whether or not there was a legal delivery of the deed executed on May 22, 1919. The law on this subject has been discussed at length in many cases presented to this Court. The adjudicated cases have established the rule that delivery is necessary to make a deed valid; that delivery is not accomplished by any particular method or ceremony. The test in each case is the intention with which the act or acts relied on as the equivalent or substitute for a formal or actual delivery were done. Stress is laid upon the grantor's intention to vest title in the grantee. Such a deed may be effective to vest title in the grantee although retained by the grantor in his possession until his death, if other circumstances do not

show a contrary intention. Where the grantor retains a life estate, it raises the presumption that the deed is to operate immediately as conveyance of the fee. We are convinced from all of the evidence presented that the grantor intended to have his deed of May 22, 1919, to his grand-daughter become effective at that time.

The principle of law announced in the foregoing case that a formal or actual delivery of a deed is not always necessary to give the deed validity so long as it is made to appear that it was the intention of the grantor to make delivery is contrary to the holding of this court in the Singleton Case, *supra*, and contrary to the direct holding of the court in that case that one may have an intention to convey his property to another but unless the deed is delivered to the grantee or someone for him, title cannot pass and the undelivered deed is a nullity. Even if the rule in the Payne Case were to prevail, still it is abundantly clear from the testimony that there was never any intention on the part of the grantor to pass title by the undelivered 1929 deed.

We have found no authority which makes any distinction between the necessity for delivery of a deed with a reservation of a life estate, and a deed without such reservation. In principle it would seem that no such distinction could be made.

In the Payne case, *supra*, it is merely held that where the grantor retains a life estate, it raises a presumption that the deed is to operate immediately. This is no different than saying that the recording of a deed

is prima facie evidence of delivery which many of the authorities hold. These conclusions are not in harmony with the decisions in the case of Singleton vs. Kelly, supra, but even if the rule were as indicated in the Payne case, the presumption or rule of prima facie evidence is dissipated by the clear import of the testimony showing the purpose and intention of the grantor in the case at bar.

This Court has had occasion to consider the legal sufficiency of a delivery of a deed in the following cases:

Mower vs. Mower, 64 U. 260, 228 Pacific 911;
 Stanley vs. Stanley, 97 U. 520, 94 Pac. 2nd, 465;
 Gappmayer vs. Wilkinson, 53 U. 236, 177 Pac. 763;
 Chamberlain vs. Larsen, 83 U. 320, 129 Pac. 2nd, 355.

In the Meyer case, it was held that there was no sufficient evidence of delivery and that a deed found in the grantor's possession at the time of his death is presumed not to have been delivered.

In the Stanley case, it was also held that the evidence failed to sufficiently show delivery of the deed, and this, despite the fact that the widow of the deceased grantor had testified that it was delivered to her, the Court stating that the acts and conduct of the plaintiff in that case, following her alleged knowledge of the deed, were such as to show quite conclusively that the grantor had no intention of delivering the deed.

The Gappmayer case Supra, involved written instructions for the delivery of the deed upon the death of the grantor.

In the Chamberlain case, the Court held the delivery of the deed to have been sufficiently shown.

The appellant has cited and has quoted at length on page 11 of his brief from the case of Sheppick vs. Sheppick. This case was decided by Utah Court on January 31, 1914. It has nothing whatever to do with the sufficiency of delivery of a deed. It is probably cited because of its possible application to other phases of the defendant's Answer and Counter Claim.

EDWARD F. ALLEN AND PEGGY ALLEN WERE NOT INCOMPETENT WITNESSES

At page 13 of appellant brief, it is claimed that the Court improperly permitted Edward F. Allen to testify to certain conversation had with the deceased grantor and have cited the case of Mawson vs. Gray, 78 U. 542, 6 Pac. (2nd) 57.

Edward F. Allen and Peggy Allen defended this action as grantees under the 1946 deed and not as heirs of the deceased. Under such circumstances, as we understand the law, they were not incompetent witnesses. It seems to us that this matter was determined by the decision of this Court in the case of Grieve vs. Howard, 54 U. 225, 180 Pac. 423, where it is said that in an action by an administrator to set aside a deed of his intestate, the defendant, defending as grantee and not as heir

could not object to plaintiff's testimony on the ground that it was prohibited by the provisions of our statute as being testimony equally within the knowledge of the witness and the deceased, such statute being inapplicable in view of the relation of the parties. There is no interest in either the plaintiff or the defendant which is adverse to the interest of the deceased person or her estate.

In the Stanley case, *supra*, it was held:

“That declarations of the grantor before and after the date of a deed, at least where it appears that the declarations were made fairly and in the ordinary course of life, can be considered in determining whether a deed was delivered with intent to presently pass title.”

It was said by this court in the case of *Maxfield vs. Sansbury*, 110 Utah 280, 172 Pac. 2nd, 122, that:

The statutes' sole purpose is to prevent the proving by false testimony of claims against the estate of a deceased person. That the testimony must pertain to the transaction with the deceased involved in a law suit or to a statement made by deceased with reference to that transaction, and be equally within the knowledge of both, and that the disqualification of a witness extends only to those suing or opposing the executor or administrator and to witnesses whose interests are in the claim urged against the estate.

Most of the conversations testified to were conversations had with the deceased in the presence of the plaintiff.

Assuming that one or more conversations with the

deceased would have rendered either of the defendants incompetent to testify because of the prohibition of the statute, yet there were other conversations between the deceased and other persons which clearly show the intent of the grantor and whose testimony admittedly does not come within the prohibition of the statute.

Furthermore, we think there was no sufficient objection to the testimony of either of the defendants. The objections made, as will appear from the record, were either to the competency or the materiality of the testimony and not the competency of the witness, or a general objection that the testimony was not competent under the Dead Man's Statute, T. 225, 228, 239, and in some instances no objection was made at all, and later objections to the testimony were waived because the plaintiff herself testified in regard to these conversations.

A party desiring the protection of the statute must make a proper and seasonable objection to the competency of the witness because it is the witness and not the preferred testimony which is incompetent; therefore, the objection must be specifically directed to the incompetency of the witness and not to the proffered testimony. *Obradovich vs. Walker Brothers Bankers*, 80 Utah 587, 16 Pac. 2nd, 212.

We respectfully submit that the judgment of the lower Court should be affirmed.

Respectfully submitted,

A. H. HOUGAARD,

A. W. HOUGAARD,

Attorneys for Respondents