

1951

LaVar W. Thatcher et al v. Isabelle Merriam et al : Brief of Respondent

Utah Supreme Court

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W. Q. Van Cott; Grant H. Bagley; S. N. Cornwall; Dennis McCarthy; Clifford L. Ashton; Attorneys for Respondents;

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In the
Supreme Court of the State of Utah

LaVAR W. THATCHER, Administrator
 of the Estate of Joseph F. Livingston,
 deceased, ELLA IVORY LIVING-
 STON, GENIEL L. THATCHER,
 RUBY LIVINGSTON, an incompet-
 ent, by Ella Ivory Livingston, her
 guardian ad litem, LESLIE L.
 WRIGHT, DAVID HALL LIVING-
 STON, an infant, by Ella Ivory
 Livingston, his guardian ad litem,
Appellants,

vs.

ISABELLE MERRIAM, EDWIN N.
 ROBERTSON, Administrator of the
 Estate of Lillian Robertson, deceased
 and ELLEN COOK,

Respondents.

Case No.
 7689

FILE

AUG 11 1951

Clerk, Supreme Court,

RESPONDENT'S BRIEF

W. Q. VAN COTT,
 GRANT H. BAGLEY,
 S. N. CORNWALL,
 DENNIS McCARTHY,
 CLIFFORD L. ASHTON,
Attorneys for Respondents.

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Respondents.

Case No.
7689

RESPONDENT'S BRIEF

RESPONDENTS' STATEMENT OF FACTS

The respondents do not controvert any material parts appellants' statement of facts. But since the parties are in disagreement as to the legal effect of the written assign-

ment, the circumstances under which it was executed are material to a proper understanding of that controversy.

The assignment (Exhibit A), the vital portions of which are not set forth in appellants' statement, read as follows:

"ASSIGNMENT

"In consideration of the love and affection which I hold for the assignees herein, I, Joseph F. Livingston, of Salt Lake City, Salt Lake County, State of Utah, hereby give and assign fifty (50%) per cent of the following described property to my sister, Isabelle Mirriam, of Manti, Utah, twenty-five (25%) per cent of the following described property to my sister, Lillian Robertson, of Fountain Green, Utah, and twenty-five (25%) per cent of the following described property to my sister, Ellen Cook, of Salt Lake City, Utah, subject to the terms and conditions hereinafter set forth, said property being more particularly described as follows:

"One Deed of Trust, covering 5,260 acres of real property situate in Rio Blanco and Moffat Counties, State of Colorado, recorded in Book 100, Page 311 of Deeds of Trust, County Recorder's Office of Rio Blanco County, State of Colorado, and recorded in Book . . . , Page . . . of Deeds of Trust, County Recorder's Office of Moffat County, State of Colorado, in which instrument one Loren Dewayne Mirriam conveyed said property in trust to the undersigned, Joseph F. Livingston, to secure the payment of his promissory note made payable to the undersigned, upon which there was a balance due as of November 1st, 1947, of the sum of \$70,476.92,

which promissory note said Deed of Trust secures.

together with said promissory note, which the undersigned hereby assigns to the assignees herein in the percentages herein reserved unto them, provided, however, that the undersigned assignor hereby reserves unto himself during his lifetime all amounts becoming due on the principal of said promissory note and all amounts in excess of the amounts periodically becoming due thereon which the maker thereof under the terms of said note may choose to pay on said principal during the lifetime of the assignor herein; the interest on said principal amount to be paid as said interest shall accrue, to the assignees herein in the percentages hereinabove reserved, i.e., 50% of said interest accruing to be paid to said Isabelle Mirriam, 25% of said interest accruing to be paid to said Lillian Robertson, and 25% of said interest accruing to be paid to said Ellen Cook, the undersigned hereby authorizing the maker of said note and mortgage to make payment of the amounts herein assigned to the persons named in the percentages herein mentioned; and

“The undersigned, for the considerations herein mentioned, hereby further gives and assigns fifty (50%) per cent of the following described property to said Isabelle Mirriam, twenty-five (25%) per cent of the following described property to said Lillian Robertson, and twenty-five (25%) per cent of the following described property to said Ellen Cook, subject to the terms and conditions hereinafter set forth, said property being more particularly described as follows:

“One Chattel Mortgage on 3,100 head of ewes and 65 breeding rams, belonging to said Loren Dewayne Mirriam, grazing in the State of Colorado, which said chattel mortgage was

given to secure the note hereinabove mentioned, and which was recorded in the office of the County Recorder of Rio Blanco County, State of Colorado, in Book Filed No. 70064, Page ... of Chattel Mortgages, and which was recorded in the office of the County Recorder of Moffat County, State of Colorado, in Book ..., Page ... of Chattel Mortgages,

the assignment of said chattel mortgage and the note securing the same, which is hereby made by the undersigned, being subject to the same terms and conditions as hereinabove set forth, to-wit: reserving unto the assignor herein during his lifetime all amounts becoming due on the principal of said note and all amounts in excess of the amounts periodically becoming due thereon which the maker thereof under the terms of said note may choose to pay on said principal during the lifetime of the assignor herein, the interest on said principal amount to be paid as said interest shall accrue, to the assignees herein in the percentages hereinabove reserved, i.e., 50% of said interest accruing to be paid to said Isabelle Mirriam, 25% of said interest accruing to be paid to said Lillian Robertson, and 25% of said interest accruing to be paid to said Ellen Cook, the undersigned hereby authorizing the maker of said note and chattel mortgage to make payment of the amounts herein assigned to the persons named in the percentages hereinabove mentioned.

"IN WITNESS WHEREOF, I have hereunto set my hand at Salt Lake City, Utah, this 27th day of March, 1948.

"/s/ Joseph F. Livingston

"Signed in the Presence of:

"/s/ A. H. Anderson

"STATE OF UTAH
 "COUNTY OF SALT LAKE } ss

"Personally appeared before me, a Notary Public for the within county and state, this 27th day of March, 1948, Joseph L. Livingston, who, being first duly sworn, duly acknowledged to me that he subscribed the within and foregoing instrument.

"/s/ Fleda Hafen

"Notary Public residing at Salt
 Lake City, Utah.

"(Seal)

"My Commission Expires:

"My Commission Expires Jan. 28, 1949."

This assignment was delivered by the assignor personally, leaving it at the home of one of the assignees in the presence of all three of them (R. 53, 54, 55). Pursuant to the direction of the assignor (R. 56) the assignment was taken by the assignees to the Wasatch Chemical Plant where the notary acknowledged the execution of it (R. 56). It thereafter remained at the home of one of the assignees and her husband, Lester Cook, except while it was in the recorder's office or temporarily loaned to the appellant administrator (R. 54-7).

At the time of execution and delivery of the assignment and several years prior thereto the assignor operated an extensive livestock enterprise in western Colorado (R. 50-68). It was stipulated that his estate was appraised for inheritance tax purposes in the sum of \$902,913.37 (R. 91). Lorin DeWayne Merriam, the maker of the note, trust deed and chattel mortgage, was the nephew of the assignor (R. 68). He had been assisting the assignor for several years in the latter's livestock operations (R. 68-9). It is apparent

that the note and mortgages represent the balance of the purchase price of the mortgaged property sold by the deceased assignor to DeWayne. DeWayne's brother Dick had also been employed by the deceased for a number of years (R. 51). Mrs. Merriam, one of the assignees, was the mother of DeWayne and Dick (R. 50). She had been a widow for about ten years and supported herself since the death of her husband by working in a restaurant and doing home nursing (R. 69). She was the assignee of a 50% interest in the note and mortgages assigned (Exhibit A). She suffered a stroke and at the time of the trial was partially paralyzed (R. 45).

Mrs. Robertson, one of the assignees, was a widow and in failing health at the time the assignment was made. She died about a year and a half later (R. 46).

Mrs. Cook, the last-named assignee, was the wife of Lester Cook and lived next door to the deceased (R. 45-6). Her son Glade had also for a number of years assisted the assignor in his livestock operations (R. 51).

The deceased was survived by his widow and three daughters, two of whom were married (R. 75-6). He was 64 years old (R. 82) and in failing health (R. 82).

Mr. A. H. Anderson, who witnessed the assignment, had been associated with the deceased for a number of years in the sheep business (R. 60). He was appointed manager of the estate of the deceased by the administrator (R. 40). On November 1, Mr. Anderson endorsed on the note (Exhibit D) a payment of \$5,476.92 and also a notation that interest was paid to date. Mr. Cook testified that he received from Mr. Anderson a total of about \$8,000.00 but

that all except \$2,500.00 was returned to DeWayne Merriam (R. 84-87). This money was given to Cook by Anderson at the direction of DeWayne (R. 84).

It was stipulated that the administrator of the estate of the deceased in his inheritance tax report listed the note as a gift made by the decedent in contemplation of death (R. 90-1). The note, the trust deed and a certified copy of the chattel mortgage were found among the decedent's papers. They were taken by the administrator to the office of his attorney and thereupon delivered to the husband of one of the assignees (R. 35-38).

POINT I

THE RESERVATION BY THE DONOR OF AN INTEREST IN THE PROMISSORY NOTE DID NOT RENDER THE GIFT OF THE NOTE INVALID.

The case turns upon the meaning and effect to be given to the clause in the assignment wherein the assignor reserved to himself an interest in the promissory note.

The provisions of the assignment other than the reservation clause clearly manifest the intention of the assignor to transfer in praesenti all of his right, title and interest in the trust deed, the chattel mortgage and the promissory note secured thereby. He uses the words "hereby give and assign" which are apt words to accomplish an immediate transfer of all of the assignor's title and ownership in the note and mortgages. That the assignor intended this transfer of title and ownership in the note and mortgages to take

effect as a gift is conclusively established by his use in the assignment of the word "give" and the words "in consideration of the love and affection which I hold for the assignees herein."

That the provisions of the assignment other than the reservation clause operate as an immediate transfer of all of the assignor's title and ownership in the promissory note and the mortgages securing its payment and establish conclusively the intention of the assignor that the transfer of such title and ownership should take effect as a gift is clearly established by several decisions of this court.

See:

Reed v. Knudsen, 80 Utah 428, 15 P. (2d) 346;

Woolley v. Taylor, 45 Utah 227, 144 P. 1094;

Boyle v. Dinsdale, 45 Utah 112, 143 P. 136;

Olsen v. Scott, 61 Utah 42, 210 P. 987;

Jackson v. James, 97 Utah 41, 89 P. (2d) 235;

Greener v. Greener, ... Utah ..., 212 P. (2d) 194;

Jones v. Cook, ... Utah ..., 223 P. (2d) 423.

The question to be determined is whether this transfer by the assignor of all of his right, title and interest in the note and mortgages with the intention to effect an immediate gift thereof is qualified or revoked by the reservation clause.

Appellants apparently concede that the reservation clause does not impair or affect the gift of the interest provided for in the promissory note. Such an admission is fatal to appellant's entire case. It is fatal because it is an

admission that respondents' title to the note and mortgages vested in them immediately on delivery of the assignment. Such a concession is well advised. The reservation clause reads:

"* * * provided, however, that the undersigned assignor hereby reserves unto himself during his lifetime all amounts becoming due on the principal of said promissory note and all amounts in excess of the amounts periodically becoming due thereon which the maker thereof under the terms of said note may choose to pay on said principal during the lifetime of the assignor herein; * * *."

There is not a word in this clause that purports to qualify in any manner or respect the assignor's previously expressed intention that the transfer of title and ownership should take effect immediately as a gift. There is no expression of any intent to postpone the transfer to some future period. All that the reservation clause purports to do is to reserve to the assignor some interest in the note. The reservation of an interest in the note did not defer the effective date of the transfer to the assignees. It merely cut down or took back part of the assignor's entire title and ownership which by other provisions of the assignment had been vested in the assignees. The interest in the note which the assignor reserved was limited to a life estate. It ceased upon his death. The remaining estate in the promissory note vested not upon the expiration of this life estate but immediately upon delivery of the assignment. It is now well settled that the reservation of a life estate to the donor in the subject matter of the gift does not impair

or affect the validity of a gift of the remainder. In *Boyle v. Dinsdale*, *supra*, this court said:

“A careful reading of the evidence has convinced us that it was the manifest purpose and intention of the deceased to place the money in question in a special deposit for the use and benefit of the two respondents. That what she did and said at the time the deposit was made constituted a gift of the money to the two children named and a delivery thereof to the bank as trustee to be held by it for their use and benefit during the life of the mother, with the right on her part of having the use and benefit of the accruing interest until her death, after which the money was to be paid to them. The transaction in law, therefore, constituted a gift in praesenti of the principal, with the right of the donor to draw the accruing interest during life, and thus the full possession and enjoyment of the donees of the subject-matter of the gift was postponed until after the death of the donor. Such a gift is not invalid upon the ground that it is a testamentary disposition. See cases above cited, and also see *Wilson v. Carrico*, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213, where the principle is discussed and applied.”

In *Candee v. Connecticut Savings Bank*, 81 Conn. 372, 71 A. 555, the donor had a savings deposit in the bank. She lost her passbook. She gave the donee an order upon the bank to pay the savings account to the donee but declared at the time of delivery of this order that the account was “subject to her use of the same during her lifetime.” The court held that this reservation did not postpone the vesting of title to the savings account until the death of the donor. We quote from the opinion:

“Upon the facts found, independently of the expression, ‘use of the same for her lifetime,’ an intention to make an absolute gift is clearly shown. This expression does not make the gift conditional or uncertain, but simply postpones the day of enjoyment. She intended that the fund should at once become the property of the plaintiff, and there was no attempt to make the gift effectual after death. The elementary definition of the ‘use’ of money is the benefit or profit to be derived therefrom. Taking this whole expression together with the circumstances under which it was used, the only intelligent construction to be given to it is that the words ‘use of the same for her lifetime’ simply included the income or profit of the money in the bank. A reservation by the donor of certain proprietary rights in the subject of the gift, such as the use and enjoyment thereof, is not necessarily inconsistent with the absolute character of the gift, and gifts accompanied by such reservations have been repeatedly upheld.”

Other cases wherein it is held that a transfer of title to personal property with donative intent is a valid gift even though there are reservations of a life interest in the transferor or conditions subsequent.

Gordon v. Barr, 13 Cal. (2d) 596, 91 P. (2d) 101;

Beech v. Holland, 172 Oregon 396, 142 P. 2d 990;

Collins v. McCanless, 169 S. W. (2d) 850; 179 Tenn. 656;

Edson v. Lucas, 40 F. (2d) 398;

Eaton v. Blood, 201 Iowa 834, 208 N. W. 508;

Beatty v. Western College of Toledo, 177 Ill. 280, 52 N. E. 432;

Northern Trust Company v. Swartz, 141 N. E. 433, 309 Ill. 586;

Parker v. Mott, 181 N. C. 435, 107 S. E. 500;

Dinslage v. Stratman, 105 Neb. 274, 180 N. W. 81.

The reservation by a donor of a life interest in the subject of the gift not only does not indicate any intention to postpone the vesting of title in the donee but indicates exactly the opposite. It indicates the intention of the donor to vest immediately in the donee the remainder of the title. As pointed out by this court in *Allen v. Allen*, ... Utah ..., 204 P. (2d) 458, where the grantor in a quitclaim deed reserved a life estate in the property; "the retention of a life estate in the property covered by the deed raises a presumption that the deed is to operate immediately as a conveyance since retention of the part is indicative of an intention to divest herself of the balance presently and adds strength to the presumption of delivery arising from the record."

Appellants break down the subject matter of the gift into two parts; one, the principal provided for in the promissory note and the other the interest due on the principal, and then proceed to argue that the assignor reserved dominion and control over the principal. It is immaterial how the subject matter of the gift is broken up so long as it is recognized as appellants do that the rights in the subject matter of the gift reserved by the assignor expired upon his death.

What the assignor reserved to himself was (1) the right to receive any payments made voluntarily by the maker on the principal of the note during the lifetime of the assignor, and (2) the right during his lifetime to receive the amounts becoming due on the principal of the note. Nothing was paid voluntarily by the maker on the principal during the lifetime of the assignor and hence no interest in any voluntary payments survived to the appellants. The right which he reserved to receive the amounts becoming due on the principal expired upon the death of the assignor. There was, therefore, no right, title, claim or interest in the promissory note or the mortgages that would survive the death of the assignor.

It is to be noted that the maker of the note covenanted to pay annually on the "obligation" of the note the net profits derived from the operation of the mortgaged sheep. It is clear that the assignor intended by the reservation clause to retain for himself during his lifetime the right to these net profits. It is, therefore, more accurate to define the rights reserved by the assignor as attaching to funds to be created by the maker of the note rather than to the principal of the note. But regardless of what the right reserved attached to it was a right that ceased to exist upon the assignor's death.

It is significant that the assignor did not reserve any interest in or right to the trust deed or the chattel mortgage securing the payment of the note. Had he intended to reserve anything more than a life estate in the net profits of the operation of the sheep and the payments which the maker of the note might voluntarily pay during the life-

time of the assignor, he undoubtedly would have reserved some rights in the mortgages securing the payment of the note. He reserved no rights in the mortgages because the right which he reserved in the note needed no security. We recognize that the securities follow the note, but the absolute transfer of the securities without reservation of any rights therein make positive and clear that the assignor intended by the reservation clause to retain simply the right to certain payments that might be made by the maker of the note in the lifetime of the assignor.

The circumstances surrounding the execution of the assignment corroborate the express intention of the assignor to reserve to himself only a qualified and limited interest in the note. The gift of all of the note and the security was not in any sense an unnatural disposition of the donor's property. He was fond of his sisters and had contributed to their support prior to the assignment. Two of the donees were widows and one of them at least was without any means of support. While the value of the gift is substantial, it was not large in comparison with the amount of the property owned by the donor. The sons of the donees had assisted the donor in his sheep operations for many years. The donor was 64 years old and in failing health. There is no suggestion in the record that he was importuned by anyone to make the gift. Undoubtedly the donor considered this gift not as an act of generosity but as the fulfillment of a moral obligation. It was by no means either an impulsive or ill considered donation.

The authorities relied upon by appellants do not controvert the proposition that a conveyance of the title to

personal property intended by the assignor to take effect immediately as a gift is not invalidated by a reservation of an interest in the property or by a postponement of the full use and enjoyment of the property. The controlling inquiry is the intention of the donor, and each case stands on its own facts. Where the donor has expressed his intention in a writing that is not ambiguous, there is no issue of fact concerning the donor's intention. It is a matter of law to be decided by the court.

POINT II

DELIVERY OF THE ASSIGNMENT WAS CONSTRUCTIVE DELIVERY OF THE NOTE AND MORTGAGES AND COMPLETED THE GIFT.

We recognize that some form of delivery is essential to the validity of a gift *inter vivos* of personal property. There has been considerable discussion by the courts as to the character and form of delivery that is necessary in cases such as this one wherein the donor has manifested in clear and unequivocal language his intention to make a gift. In *Gordon v. Barr*, *supra*, it is said:

“The necessity for delivery in gifts of personal property has its genesis in the archaic doctrine of seisin. Brown on Personal Property, p. 76; 20 Col. L. R. 196; 21 Ill. L. R. 341. But in spite of the obsolete and formalistic character of its origin, the requirement has salutary features which fully justify its retention in the law. It protects the property of the individual from ill-founded and fraudulent claims of gift by requiring strong concrete evidence that he really intended to part with his property. Such a precaution is especially desirable when,

as is frequently the case, the alleged donor is dead at the time the claim is asserted. Moreover, by requiring some positive act of relinquishment such as manual tradition of the subject of the gift, the significance of the donor's act is forcefully brought home to him, and he is thus protected from ill-considered or impulsive donations of his property. See Mechem, *The Requirement of Delivery in Gifts of Chattels*, 21 Ill. L. Rev. 341, 457, 568, at 348 et seq.

"In the light of these desiderata such vague terms as 'constructive delivery', 'symbolic delivery', and 'parting with dominion and control' take on a new aspect and become more certain and explainable. Where there has been unequivocal proof of a deliberate and well-considered donative intent on the part of the donor, many courts have been inclined to overlook the technical requirements and to hold that a 'constructive' or 'symbolic' delivery is sufficient to vest title in the donee. However, where this is allowed the evidence must clearly show an intention to part presently with some substantial attribute of ownership."

In *Greener v. Greener*, this court said:

"The most widely accepted view is that the property passes as a gift inter vivos, provided there is a donative intent and delivery. *Christensen v. Ogden State Bank*, 75 Utah 478, 286 P. 638. Recognition that actual manual delivery of a chose in action is impossible has led to a determination that relinquishment of control of the bank passbook is a legally sufficient symbolic delivery. And even where the donor retained the bank book it has been held that the delivery was sufficient, on the theory that the parties have an equal right to the book and delivery to either of the co-depositors is delivery to both. *Holt v. Bayles*, 85 Utah 364, 39 P. 2d 715. When this theory of delivery is adopted there is no

substantial difference between the operative facts necessary for a gift inter vivos and for a third party beneficiary contract, the validity of the transfer in each case hinging on intent."

The subject matter of the gift in the case before us is a chose in action evidenced by a promissory note, trust deed and chattel mortgage. The assignment was a conveyance of this chose in action and it discloses the intention of the donor that the conveyance was to take effect as a gift. The property transferred was incapable of a manual delivery. The delivery of the written assignment completed the transfer of title and fully effected the gift. The case of *Reed v. Knudsen*, supra, forecloses any question that the delivery of the assignment completed the gift. In that case the donor executed an assignment of a one-half interest in an estate of which he was the sole heir. The estate consisted of real and personal property. The assignment was without consideration and therefore could operate only as a gift. There was no pretense of a delivery of any part of the assets of the estate, the subject of the gift. This court upheld the gift after concluding that the assignment had been delivered to the donor's attorney with directions to deliver it to the donee.

In *Burkett v. Doty*, 167 P. 518, 176 Cal. 89, the facts were these: The donor executed, acknowledged and delivered to the donee an assignment of a promissory note and mortgage securing its payment. The note was payable to the donor who was also the mortgagee. The assignment recited that it was not to be placed as of record during the lifetime of the donor. The note and the mortgage remained

in the possession of the donor in a box kept by her in the vault of a bank. The assignment was without consideration. The Supreme Court held that the delivery of the assignment completed the gift of the note and mortgage. The court said:

“The assignment itself purported to transfer the notes immediately to the plaintiff. As it was duly signed, acknowledged, and delivered to the plaintiff, it constituted the strongest of evidence of the intention of the assignor to transfer the notes to the plaintiff in the manner there specified. And as the effect of that assignment, according to its terms, was to immediately transfer to the plaintiff the title and ownership of the notes, it constituted satisfactory, if not conclusive, evidence of the intent of the assignor to do that which the instrument, in law, would accomplish; that is, to divest herself of all right of dominion over the notes, and of all present right to, or control over them, and to make an immediate transfer of the title thereto. It must be remembered that, as between donor and donee, it is not necessary to the validity of a gift inter vivos, if made by a written instrument transferring the title to the donee, that the possession of the thing given be passed to the donee. The transfer of the right to its immediate possession and control, the title thereto, is sufficient, and the gift then takes effect, although the donor retains all the power of control that can arise from such possession. *Driscoll v. Driscoll*, supra; *Francoeur v. Beatty*, supra.

“The provision declaring that ‘this assignment of said mortgage is not to be placed as of record during the lifetime’ of the assignor does not purport to operate upon the notes which, of course, were not entitled to record, as such. It does not purport to operate upon the title to either the mortgage or the

notes, nor in any way to change the legal effect of the instrument as a conveyance thereof. The transfer of both was complete without such record."

That the delivery of an assignment transferring the title to personal property will effectuate a gift of it even though the subject of the gift is capable of manual delivery and remains in the possession of the donor is established by the following cases:

In re Fenton's Estate, 165 N. W. 463, 182 Iowa 346;

Humphry v. Ogden, 125 P. 110, 53 Col. 309;

Sponogle v. Sponogle, 151 P. 43, 86 Wash. 649;

Garrison v. Spencer, 160 P. 493, 58 Okl. 442;

Lipson v. Evans, 105 A. 312, 133 Md. 370;

Fontron v. Korzuskiewwz, 266 P. 649, 125 Kan. 725;

Sylvain v. Page, 276 P. 16, 84 Mont. 424.

None of the cases cited by appellants support the proposition that either the endorsement or actual delivery of the promissory note is indispensable to the validity of the gift of the note. In none of the cases in which appellant refers was there a delivery of a formal assignment of the subject of the gift. As has been pointed out, the basis of the law requiring delivery to effectuate the gift is that it is concrete evidence of the intention to make a gift. Here we have a formal instrument solemnly executed by the donor in which he manifests in unequivocal language his intention to make a gift. He uses the word "give", the primary

meaning of which is to transfer gratuitously. See *Baker v. Pyeatt*, 108 Ind. 61, 9 N. E. 112. He uses the words "in consideration of the love and affection" which removes any possible question that he intended the word "give" to have its usual and primary meaning. The donor also uses the word "assign", the primary meaning of which is to transfer title or ownership of property. It is the most appropriate word to effect a transfer of a chose in action. See *Commercial Discount Company v. Cowan*, . . . Cal. . . ., 116 P. (2d) 599. The delivery of the assignment is far more conclusive of the intention of Livingston to make a gift of the note than is a mere handing over to the assignee the evidence of the indebtedness which is the real subject matter of the gift. To hold in this case that manual tradition of the note is essential would amount to a total disregard of the basis of the law requiring delivery and would overrule the prior decisions of this court.

Appellants refer to and cite Section 61-1-31 of the Uniform Negotiable Instruments Act which provides that an instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof and if the instrument is payable to order it is negotiated by the endorsement of the holder completed by delivery. They say that this section of the Negotiable Instruments Act has some bearing upon the respondents' ownership of the note and mortgages.

Section 61-1-31 might have some application if this were an action against the payee or his estate, based upon an alleged endorsement of the note by the payee. No such controversy is here presented. This is a simple contest be-

tween the payee and his assignees concerning the title and ownership of the note. Appellants assert that the payee has not parted with his title or ownership in the note. The respondents assert that he did. They base their title upon the assignment which by its words of conveyance transfer to them all the payee's title to the note. They maintain that the transfer of that title was made as a gift and that the delivery of the assignment was in law a delivery of the note.

That Section 61-1-31 can give no comfort or aid to the appellants is established by *Johnson v. Beickey, et al.*, 64 Utah 43, 228 P. 189. The facts in that case were these: The defendant was the payee of a promissory note which he endorsed and delivered to the bank as collateral security for a loan. Later he executed and delivered to Machen an assignment of the promissory note. The note, however, was never endorsed or delivered to Machen but remained in the possession of the bank. Subsequent to the execution and delivery of the assignment, the plaintiff obtained a judgment against the defendant and garnished the note in the hands of the bank. A short time later the bank loan was paid off and the controversy in the action was between the plaintiff and the assignee Machen. Plaintiff claimed that the assignment to Machen and the delivery of the assignment to Machen was ineffectual to transfer the title to the note because there was no endorsement or delivery of the note to Machen. This court held that neither endorsement nor delivery of the note was at all essential to the passing of title to the note and that the delivery of the assignment vested in the assignee the title and ownership of the note.

The plaintiff relied particularly upon what is now Section 61-1-31 of the Negotiable Instruments Law. The court said:

“* * * While the Negotiable Instruments Law expressly provides that every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto, such provision is merely a legislative enactment of the common-law rule, and was not intended to abrogate or impair other well-recognized rules by which delivery would be implied, either from authority actually conferred by the maker or holder upon an agent, or from conduct which should estop them from claiming that they had not delivered or authorized the delivery of the instrument. The trial court made no finding as to whether or not the note was endorsed to the banking company, nor was such finding necessary. The transfer to the bank is not in question, and it may be assumed that the instrument was so endorsed. It might thereafter be transferred without endorsement, by delivery merely. Such delivery may be actual, or constructive, such as written evidence of the transfer intending thereby to vest the thing itself in praesenti in the assignee, but it is not essential that the delivery shall be directly to the assignee. *Stoll v. Mutual Ben. L. Ins. Co.*, 115 Wis. 558, 92 N. W. 277.

“Turning to the authorities cited by appellant, we find that they do not change or modify the general rules with reference to the transfer or negotiation of negotiable instruments.

“ “Assignment” of bills and notes is often referred to as including endorsement, but as used herein the term is confined to a transfer without endorsement. *Like an ordinary chose in action, a bill or note may be transferred by assignment or by mere delivery with the usual*

incidents of such a transfer, *and this rule is not changed by the negotiable instrument law.*
 * * * It may be formal or informal; * * *
 it may be by *a separate instrument*, or in the absence of a statute to the contrary, by parol.'
 (Italics ours.) 8 Cyc. p. 383.

"And in the case of O'Connor v. Slatter, 48 Wash. 493, 93 Pac. 1078, the court held:

" 'No doubt a promissory note may be transferred without endorsement, the same as any other article of personal property, either under our statute or independent of statute.'

" 'Assignment' and 'endorsement,' as applied to negotiable instruments, are not synonymous terms. An endorsement is not merely a transfer of title, but a new and substantive contract by which the endorser becomes a party to the instrument and liable, on certain conditions, for its payment. An assignment means a transfer of the title. It neither includes nor implies becoming in any way a party to the payment, or responsible for the insolvency or default of the maker."

POINT III

ANY ERROR COMMITTED BY THE TRIAL COURT IN PERMITTING ISABELLE MERRIAM TO BE A WITNESS AND TESTIFY IN THIS CASE WAS HARMLESS.

Without question Isabelle Merriam was competent to testify to any material matter with the possible exception of the delivery of the assignment by the deceased and statements made by him at the time of such delivery. For the purpose of this case it may be conceded that her testimony with respect to the delivery of the assignment by the de-

ceased and statements made by him at that time was erroneously received. However, the delivery of the assignment and the statements made by the deceased at the time were testified to by the witness Cook who was to no extent disqualified from testifying to such matters. *Mower v. Mower*, 64 U. 260, 228 P. 911; *Olson v. Scott*, 61 U. 42, 210 P. 987; *Burnham v. Tschler*, ... U. ..., 208 P. (2d) 96; *Gene v. Harper*, ... U. ..., 222 P. (2d) 571. There was no conflict in the evidence whatever on the issue of delivery of the assignment. On the contrary the only evidence produced by the appellants touching the issue of delivery was in corroboration of the respondents' evidence. The appellants do not upon this appeal question the sufficiency of the evidence to support the finding of the court that the assignment was delivered by the deceased to the assignees. The case was tried by the court without a jury. It is presumed that the trial court disregarded any incompetent testimony admitted. Such being the state of the record, any error committed by the trial court in permitting Mrs. Merriam to testify was harmless and could have no effect upon the outcome of the trial. See *Baird v. Upper Irrig. Co.*, 70 U. 57, 257 P. 1060; *Cook v. Jones*, ... U. ..., 206 P. (2d) 630; *Olson v. Scott*, *supra*.

SUMMARY

In conclusion the respondents submit that the assignment (Exhibit A) assigned and transferred to respondents all of the assignor's right, title and interest in the promissory note and the mortgages securing its payment; that the assignor's intention that such transfer of ownership should operate as a gift is established beyond a reasonable doubt; that the assignor reserved to himself only the right during his lifetime to receive certain payments that might be made by the maker of the note; that the reservation of such right or limited interest in the note did not defer or postpone the gift to respondents; that the delivery of the assignment operated as a constructive delivery of the note and mortgages and the failure of the donor to endorse the note or manually deliver it to the donees did not impair or affect the validity of the gift; that no prejudicial error was committed by the trial court in ruling upon the testimony of Mrs. Merriam; and that the judgment appealed from is right and should be affirmed.

Respectfully submitted,

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