

1953

George N. Anderson et al v. Marie T. Johnson and Chester N. Johnson : Brief of Appellants

Utah Supreme Court

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Young, Thatcher & Glasmann; Attorneys for Appellants;

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8001

IN THE SUPREME COURT
of the
STATE OF UTAH

GEORGE N. ANDERSON and wife,
IMOGENE T. ANDERSON, LORENZO W.
ANDERSON, heretofore known as LORENZO
W. ANDERSON, JR., and wife HAZEL
M. ANDERSON,

*Plaintiffs and
Respondents,*

vs.

MARIE T. JOHNSON and
CHESTER N. JOHNSON,

*Defendants and
Appellants.*

APPELLANTS' BRIEF

Appeal from the District Court of Cache
County, Utah

Honorable Lewis Jones, District Judge

Young, Thatcher & Glasmann
Attorneys for Appellants

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IN THE SUPREME COURT of the STATE OF UTAH

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*Plaintiffs and
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vs.

MARIE T. JOHNSON and
CHESTER N. JOHNSON,

*Defendants and
Appellants.*

APPELLANTS' BRIEF

PRELIMINARY STATEMENT

Two matters are involved in this appeal. The first relates to the claimed error on the part of the court in granting a motion for a change of venue and transferring the cause from Box Elder County, the residence of de-

fendants, to Cache County for trial. The other question involves alleged errors in the trial itself. For the sake of clarity, we are, therefore, discussing first the matters relating to the change of venue, after which we will discuss the so-called merits on appeal.

This case was filed in Box Elder County, the residence of the defendants and also the county in which the land is situated. The case was previously tried in Box Elder County and a verdict returned in favor of the defendants. On appeal to this court the verdict was reversed for the reason that the trial court incorrectly construed the so-called dead man's statute and the case was sent back for a new trial.

On July 31, 1952 the plaintiff filed a notice and motion for change of venue. The motion was supported by an affidavit signed by the plaintiffs and also an affidavit of Walter G. Mann, their attorney. Counter affidavits were filed by the defendants. Judge Jones requested Judge Jeppson of the third district to hear the motion for change of venue. Upon the conclusion of the hearing, Judge Jeppson entered an oral order granting the motion and ordering the case transferred to Cache County.

STATEMENT OF POINTS
WITH REFERENCE TO THE CHANGE OF
VENUE UPON WHICH DEFENDANTS RELY
FOR A REVERSAL OF THIS CAUSE.

Point 1. The order transferring the trial from Box Elder County to Cache County is erroneous and void because:

- A. No valid judgment was entered herein transferring said cause.
- B. The evidence does not support the judgment or minute entry, if such constitutes a valid order of judgment, granting plaintiffs' motion for change of venue.

We shall discuss these matters in the order suggested.

A. As previously noted, Judge Jones disqualified himself and requested Judge Jeppson of the third district to hear the motion, which was heard on August 12, 1952. At the conclusion of the hearing Judge Jeppson entered an oral decision granting the motion. See transcript on hearing for change of venue, Page 77. See also minute book 23, Page 95, Tr. 22. Thereafter, on August 20, 1952, Judge Jones, who had not participated in the hearing, entered a written order in the form of a judgment granting the motion and ordering the trial to be held in Cache County and directing the Clerk to transmit the files to the Clerk of said County. Tr. 23.

We contend that the written order entered by Judge Jones is a nullity. It is the same as though one judge of a district court presided at the trial of a cause and then another district judge thereafter entered and signed findings and judgment. Rule 58 (b) provides:

“Except as provided in subdivision (a) hereof and subdivision (b) (1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.”

The term "the judge" as used in this rule clearly means the judge who heard the cause. Rule 63 provides in effect that in the event of disability or disqualification of a judge before whom an action has been tried rendering him unable to perform his duties, *after a verdict is returned or findings of fact and conclusions of law are filed*, then another judge regularly sitting in or assigned to the court in which the action was tried may perform those duties, or he may grant a new trial.

It is not contended that Judge Jeppson was disqualified. The only question, therefore, is whether or not a written judgment in the form signed by Judge Jones, but which should have been signed by Judge Jeppson, was necessary in order to make the change of venue valid. We contend that such a judgment is necessary and evidently counsel for plaintiffs so construed the rules.

Rule 54 (a) defines a judgment as used in the rules to include "*a decree and any order from which an appeal lies.*"

It has been repeatedly been held by this court that an order granting or denying a motion for change of venue is an appealable order.

Buckle vs. Ogden Furniture
61 Utah, 559
216 Pac., 684

Cox vs. Dixie Power
72 Utah, 236
269 Pac., 100

Hale vs. Barker
70 Utah, 284
259 Pac., 1928

Schramm Johnson Drug Company vs. Cox
79 Utah, 276
9 P 2nd., 399

If, therefore, the order transferring the case for trial is a judgment within the definition of Rule 54, then under Rule 58 (b) it must be signed *by the judge* (meaning of course Judge Jeppson) and filed with the Clerk. It was reversible error for the files to have been transferred to Cache County without such a judgment being entered herein.

B. The evidence does not support the minute entry granting the change of venue and ordering the case transferred to Cache County for trial. Plaintiffs filed their motion pursuant to the provisions of Section 78-13-9, Subdivision (2) which provides:

“The court may, on motion, change the place of trial in the following cases: **** (2) when there is reason to believe that an impartial trial cannot be had in the county designated in the complaint.”

The motion was supported by only two affidavits:

- (a) Affidavit of the plaintiffs, and
- (b) Affidavit of counsel.

While the affidavits attempted to set forth several grounds; namely, many relatives, prior employment, etc.,

yet the court granted the order solely on the ground with reference to the subject of communism. Tr. 78. Let us then examine the evidence relating to this subject as contained in the transcript of the evidence:

Plaintiff's affidavit stated merely that the defendant, Marie T. Johnson had maliciously spread rumors that plaintiff, George N. Anderson and his wife were Communists and that said false statements had been widely scattered in Box Elder County. The affidavit of counsel merely stated that on an occasion a neighbor of Marie Johnson accosted him in a grocery store and made some disparaging remarks about him if he undertook to represent the plaintiffs.

Defendant Marie Johnson filed a counter affidavit in which, among other things, she denied positively that she had made any such charges and denied that any prejudice existed in Box Elder County against the plaintiffs to her knowledge. She further alleged that Box Elder County was the second largest county in the State of Utah; that there are approximately twenty thousand residents therein; that in her opinion no prejudice existed in Box Elder County which would prevent plaintiffs from having a fair and impartial trial. The matters set forth in plaintiff's affidavit having been denied by defendants, this then formed the issue to be heard and tried by the court. That issue was whether or not there was reason to believe that an impartial trial could not be had in Box Elder County, by reason of the alleged rumors that Plaintiff Anderson was a Communist, or sympathetic with communism.

Plaintiff George N. Anderson was then called as a witness to testify in support of his motion. He testified generally as to various and sundry towns and cities scattered throughout Box Elder County with respect to his relatives and his acquaintances generally. He inferred that because of numerous relatives and the fact that he had previously worked for the United States Government a number of years ago in the relief department, that there were people who disliked him. However, the court did not base its decision upon any of these matters but granted the motion solely on the question of alleged communistic influences. Plaintiff in his testimony in chief never even mentioned the word communism and the only time the subject was mentioned is found on Page 72 of the transcript in answer to questions propounded by the court himself, wherein, over defendants' objection, the court permitted the plaintiff to state that in talking to two of the former jurors in the trial he obtained certain information. The court asked him what the jurors told him and he answered:

“Mr. Beecher told me that he understood from what my sister was telling around town that I was a Communist. Therefore, he had no sympathy with me on the trial.”

The defendants emphatically denied that they had ever spread such rumors.

The issue which the trial court was called upon to decide was whether or not there existed in fact bias and prejudice in the minds of the citizenry of Box Elder County by reason of rumored communistic affiliations by

one of the plaintiffs which would prevent plaintiffs from having a fair and impartial trial. The evidence disclosed, and this court judicially knows, that Box Elder County is the second largest county territorily in the State of Utah. The evidence further shows, and this court judicially knows, that there are many cities and towns in Box Elder County; that the county has a population of approximately twenty thousand people disbursed over a very large area and that prospective jurors are drawn from these various towns or territories. Not one witness was called except plaintiff himself to testify, nor were there any affidavits presented from any one other than plaintiff or his counsel. If any such rumors existed there certainly was a complete lack of evidence to sustain the same. Plaintiff himself was permitted, over defendants' objections, to answer the following question:

“THE COURT: ****You can ask him about the general reputation.”

“Q. Do you feel that your reputation in Box Elder County is such that it would prejudice you for a fair trial?”

“THE COURT: I'll let him answer. I don't think it's worth much. You might ask him in detail what his reputation is. He can answer that question as to whether he thinks it would hurt him, but I don't think it's of much weight, because it's a conclusion.”

“Q. Do you think it would hurt you?”

“A. I think my reputation is both good and bad

in the county. I have held some rather high and responsible positions and I've done a lot of community organizing activities during the war which I think were beneficial and which brought a great deal of praise from people in different parts of the county; and, as I say, I've dealt with other people who definitely don't like me. I do think my reputation has deteriorated since I left here, among my close friends."

This is the first time the writer has ever participated in a motion for change of venue where affidavits have not been procured or witnesses produced from various and sundry citizens residing in various parts of the county stating facts upon which a court could draw the inference that there probably does exist a bias or prejudice among the citizens generally which would preclude the movant from having a fair trial. Can it be said that there is any substantial evidence that rumors of communistic affiliations do exist without producing any evidence from citizens or prospective jurors to the effect that such rumors are in fact circulating in and about the county? Can a plaintiff himself merely say that he doesn't believe that he can have a fair trial by reason of bias and prejudice alleged to exist in the county against him without any evidence whatsoever to support his opinion? The only reference to alleged communistic influence was the reference to what the juror Beecher is represented to have told plaintiff after the first trial, but even this juror Beecher was not called as a witness. It was at most a mere hearsay declaration on the part of the plaintiff and certainly what Beecher said did not prove in any way that there was bias

or prejudice existing in the mind of the public generally. If such a statement was made by the juror Beecher and if it is admissible in evidence, Beecher would be the proper person to call as a witness to testify to those facts or to what he knew about the matter. Nor do we think it was proper to admit this testimony. It is against public policy and an interference with the orderly conduct of trial to permit jurors to reveal what is said in a jury room.

Wheat vs. D. & R. G.
250 P. 2nd., 932

Hepworth vs. Covey Bros. Amusement Company
97 Utah, 205
91 P. 2nd., 507

But even though admissible, it amounted only to this: That a juror in explaining his verdict said he understood from what my sister was telling around town that I was a Communist. No contention was made that the matter was discussed in the jury room. From all that appears, the juror Beecher is alleged to have claimed that he had heard some rumors to the effect that the defendant had told around Brigham City, which is only a small segment of Box Elder County, that the plaintiff was a Communist. This might have disqualified Beecher as a juror if he were recalled to jury duty but it certainly fell far short of proving that there did in fact exist in Box Elder County a bias or prejudice against the plaintiff.

In fairness to the sister, Mrs. Johnson, may I again refer to the fact that she denied ever having made any such statement to any person whatsoever and I think it is

fair to assert that the sister does not believe for a minute that her brother is either affiliated with or has any communistic beliefs.

If a court can grant a motion for a change of venue on such flimsy evidence as was presented in this case, then the defendants' statutory right to be tried in the county of his or her residence might just as well be abrogated. The right of the defendants to be tried in the county of his or her residence is a very substantial right and this court has repeatedly held that the denial of this right constitutes prejudicial error. See cases above referred to.

We contend, therefore, that the granting of the motion for change of venue is not supported by any competent material evidence and also that the failure of the court to enter a written judgment both constituted reversible error in this case. We further contend that for these reasons alone this cause should be reversed and the Clerk of Cache County be directed to return the files to Box Elder County for a new trial.

APPELLANTS' BRIEF ON THE MERITS STATEMENT OF FACTS

The following facts are not disputed: Lorenzo W. Anderson, now deceased, is the Father of plaintiffs George N. Anderson and Lorenzo W. Anderson, Jr. (hereinafter referred to as "Renee") and the defendant Marie T. Johnson. His wife died in about the year 1937 and he never remarried. Except for the conveyances hereinafter referred to, he was the owner of a house and an irregular shaped

lot known as the family home in Brigham City, an irrigated farm consisting of approximately twenty eight acres at East Garland, a dry farm consisting of something in excess of four hundred acres located at Promontory, a second home hereinafter referred to as the Christensen place, and several lots in Brigham City upon which there were no buildings but which were cultivated. Prior to 1943 decedent, who was a surveyor by profession, had executed numerous deeds to all or a portion of this property either to his wife or daughter, or both, which said deeds the deceased retained in his possession. About March of 1943 deceased was living alone in the family home. His son Renee was married, had finished his law training and was then employed by the F.B.I. His family was living at South Dakota. The decedent's daughter Marie was married and then living in Salt Lake City where her husband was employed and his son George was then living in Brigham City in a home owned by him which was located on the rear end of the family lot. The decedent was then about sixty four years of age and he was in excellent health.

In about March of 1943, and apparently without consulting any members of his family, the decedent prepared three deeds in his own handwriting. One deed named Renee and his wife as grantees and described the Garland property, a building lot to the rear of the family home (the dimensions of this lot were never described in the evidence) and an undivided one-third interest in the dry farm at Promontory. The deed to George and his wife described the Christensen place and one-third of the dry farm. The deed to defendant Marie and her husband

described the family home (less the lot included in Renee's deed) and one-third interest in the dry farm. After the deceased had prepared these deeds he went to the office of his nephew, William E. Davis, a practicing attorney in Brigham City, and signed the deeds as grantor and Mr. Davis thereupon took his acknowledgment. The deceased then took the deeds and put them in what is referred to as the cubby hole or small compartment in a roll-top desk which was in his bedroom in the home where he was residing. There was no reservation of any life estate contained in the deeds, although the deceased was thoroughly familiar with conveyancing and understood the meaning and import of a life estate. The deeds were never recorded.

At about the same time the deceased likewise prepared deeds to the various town lots wherein he conveyed the same to his grandchildren. These deeds were all recorded by the deceased at the time or shortly after their execution and thereafter the deceased would account to his grandchildren for crops grown on or produced upon their own individual lots and after deducting for taxes and tithing he would send the residue annually to each grandchild.

With respect to the other unrecorded three deeds to his sons and daughter, the deceased continued to handle the property described in said deeds in exactly the same manner as he had handled them previously. He executed a twelve year lease to Promontory to his son in law and daughter. He leased the Garland farm to a Mr. Garfield for a period of ten years and collected the rents and income therefrom. He and his brother Cephus owned ad-

joining properties at Garland and on August 22, 1948 he and Cephus entered into an agreement in writing abandoning a certain right of way and exchanging the same for a new right of way. See Exhibit "L-F", Tr. 147-149. He paid the taxes on all of the property and paid all expenses incident to the upkeep of said property. He rented the Christensen property, collected the rents therefrom, made necessary repairs for the tenant and mortgaged this property. In the making of the leases, mortgage and right of way exchange he makes no reference whatsoever to any ownership of the property other than himself. No reason is suggested as to why he would want to completely and irrevocably divest himself of all of his property.

In about 1945 the deceased approached his son in law and daughter in Salt Lake City and suggested that his tenant on Promontory did not care to renew his lease because two of the lessee's sons were then in the Army and further suggested that he was lonesome and tired of living alone and suggested that they come to Brigham City, live in the home and take care of him and that in return he would lease them Promontory. A written lease for a period of twelve years was then executed and the defendants severed their employment and moved into the family home with the deceased and leased the Promontory dry farm for twelve years.

In about 1946 the decedent suffered his first heart attack. Then later he had prostate trouble which required an operation at St. Benedict's Hospital in Ogden. Later on he suffered a stroke and for the period from August, 1946 until the latter part of 1948, the deceased was very

ill. There were times during this period when he was irrational but at other times he was completely normal. However, the nature of his illness was such that the defendants were required to constantly care for him. At times he lost control of his bowels and bladder and frequent changes of his bed were imperative. He also had to have a special diet and the task of taking care of him became very arduous. However, about the latter part of 1948 or the forepart of 1949 he began to improve and he improved steadily until very shortly before his death. He died June 22, 1949.

On or about the 24th day of July, 1947 the deceased made a will. It was prepared by the same attorney, William E. Davis, and was witnessed by deceased's brother Cephus and his brother in law, Mr. DeMars. The will was quite different from the terms of the three 1943 deeds. It provided that the defendants could purchase the Promontory farm for Ten Thousand Dollars; that this money was to go into the estate and that each male grandchild was to receive One Thousand Dollars upon becoming Eagle Scouts. The female grandchildren were to receive One Thousand Dollars each upon completion of one year of college and the balance was to go to the church for temple work. Renee was to have the irrigated farm and George, who had already received the Christensen property, was to get nothing. After the will was properly executed it was placed by the deceased with his other papers in his desk.

With respect to the Christensen property, it is admitted that George, after returning from the Navy, obtained employment with the Veterans' Administration in Salt

Lake City and was residing in a rented house at Woods Cross. This was in the year 1946 when George was transferred from Salt Lake City to the Weber College at Ogden and which necessitated the moving of his family. He tried to find suitable quarters in Ogden without success so he then discussed the matter with his father and it was decided that due to his father's physical condition George and his wife could render some assistance along with Marie, so it was decided that George should have the Christensen home immediately and, notwithstanding the fact that the 1943 deed to George included the Christensen home, the deceased made a new deed wherein he conveyed to George and his wife the Christensen home. The deceased prepared the deed and took it to Attorney Davis for acknowledgment and then he took the deed to the County Recorder and had it recorded and George and his wife then moved into the Christensen home, where they continued to live for a short time. This deed was dated November 8, 1946. See Exhibit "L-24" Tr. 228.

Shortly thereafter George decided to homestead in Idaho. He sold the Christensen home and moved to the homestead where he remained until after his father's death. His disposal of this home was displeasing to the deceased.

In February of 1949 the deceased sent for one John W. Phillips, a close friend and abstractor of long experience in Brigham City, and explained to him that he wanted him (Phillips) to make some deeds. Phillips came to the home and visited with deceased for a short time, obtained proper descriptions of the property and then returned to his office and prepared two new deeds. One

deed conveyed the Garland farm to Renee. The other deed conveyed the home and lot and the Promontory farm to Marie and her husband. These deeds were absolutely and unconditionally delivered to defendant Johnson who was instructed to record their deed and to hold Renee's deed until after the death of deceased. At the time of the execution of these deeds the deceased told Mr. Phillips that his son George had already received all he was entitled to.

The defendants retained exclusive possession of these latter deeds but neglected to record their deed until the day preceding the death of deceased when they recorded their deed and continued to retain possession of Renee's deed. After decedent's death and funeral the family met at the office of George Mason, an attorney and also a cousin of the family and, at Mason's request, defendants delivered Renee's deed to Mason. It remained in Mason's office until the time of the first trial when the deed was tendered to Renee in open court but its acceptance was refused and said deed has remained in the files of the court since that time.

In about March of 1949 and after the execution and delivery of the 1949 deeds, the deceased gathered together a stack of old deeds, including the 1943 deeds and the Will and directed Marie to burn the same as he stated they were no longer of any value and Marie thereupon and in accordance with his directions, burned said old documents.

As heretofore suggested, we think the foregoing facts are not disputed. The controversy revolves around the following questions:

1. Were the 1943 deeds ever delivered or were they purely testamentary in character and failing to comply with the statute of wills, were they void and no force or effect?
2. Were the 1949 deeds delivered by deceased during his lifetime?
3. At the time of the 1949 deeds was the decedent competent to execute the same and was their execution obtained by fraud or undue influence practiced by the defendants?

On these questions there was some conflict in the evidence as to certain facts or alleged state of facts concerning these matters. Plaintiffs filed this suit in the District Court of Box Elder County seeking to establish the validity of the 1943 deeds and to establish the invalidity of the 1949 deeds. The case was tried to the court with a jury sitting, as we understand it, in an advisory capacity. The first trial resulted in answers to special interrogatories favorable to defendants and based upon these answers the court made findings of fact and conclusions of law and entered a decree to the effect that the 1943 deeds were never delivered; that they were testamentary in character and intended as such by the deceased, and that the 1949 deeds were valid. On an appeal to this court the cause was reversed solely on the ground that the trial court misconceived and misapplied the so-called dead man's statute and the case was remanded for a new trial.

Thereafter plaintiffs applied for and were granted a change of venue to Cache County. The case was again

tried to the court with an advisory jury. The court submitted three interrogatories to the jury. The jury answered these interrogatories favorable to plaintiff and based upon these answers, the court then entered findings of fact, conclusions of law and a decree establishing the validity of the 1943 deeds and holding that the 1949 deeds were invalid. Defendants filed a motion for a judgment notwithstanding the verdict or in the alternative for a new trial. The court (with tongue in cheek) overruled these motions but stated that had he been trying the case without a jury he would have found the issues in favor of the defendants (Tr. 434). Defendants have appealed to this court.

STATEMENT OF POINTS

- Point 1. THE ANSWER OF THE JURY TO THE FIRST INTERROGATORY IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE, OR, IN ANY EVENT, IT IS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.
- Point 2. FINDING OF FACT NUMBER FOUR MADE BY THE COURT IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE, OR, IN ANY EVENT, IS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.
- Point 3. THE ANSWER OF THE JURY TO INTERROGATORY NUMBER THREE IS NOT SUPPORTED BY ANY SUBSTANTIAL

EVIDENCE, OR, IN ANY EVENT, IS AGAINST THE GREAT WEIGHT OF THE EVIDENCE.

Point 4. CONCLUSIONS OF LAW NUMBER ONE OF THE DECREE PERTAINING TO THE VALIDITY OF THE 1943 DEEDS IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE, OR, IN ANY EVENT, IS AGAINST THE GREAT WEIGHT OF THE EVIDENCE AND IS ERRONEOUS AND AGAINST LAW.

Point 5. CONCLUSIONS OF LAW NUMBER TWO OF THE DECREE TO THE EFFECT THAT the 1949 DEEDS ARE INOPERATIVE AS CONVEYANCES AND ARE INVALID IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE, OR, IN ANY EVENT, IS AGAINST THE GREAT WEIGHT OF THE EVIDENCE AND IS ERRONEOUS AND AGAINST LAW.

Point 6. THE COURT SHOULD HAVE WITHDRAWN FROM THE JURY THE ISSUE AS TO THE DELIVERY OF THE 1943 DEEDS AND ALSO THE ISSUE AS TO MENTAL INCAPACITY OF LORENZO W. ANDERSON. THE COURT SHOULD HAVE GIVEN DEFENDANTS' REQUESTED PRE-EMPTORY INSTRUCTION NUMBER ONE FOR A DIRECTED VERDICT, HOLDING AS A MATTER OF

LAW THAT THE 1943 DEEDS WERE VOID AND THAT THE 1949 DEEDS WERE VALID.

- Point 7. THE COURT COMMITTED ERROR BOTH AS TO INSTRUCTIONS GIVEN AND IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANTS.
- Point 8. THE COURT ERRED IN ADMITTING CERTAIN EVIDENCE AND IN REJECTING EVIDENCE PROFFERED BY DEFENDANT.
- Point 9. THE COURT ERRED IN NOT ENTERING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE TO THE EFFECT THAT THE 1943 DEEDS WERE INVALID AND VOID AND SUSTAINING THE VALIDITY OF THE 1949 DEEDS.
- Point 10. THE COURT ERRED IN NOT GRANTING DEFENDANTS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY, OR, IN ANY EVENT, IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL.
- Point 11. THERE IS NO EVIDENCE TO SUPPORT THAT PART OF FINDING NUMBER 4-A, TRACT 1, NOR THAT PART OF THE DECREE WHEREIN THE COURT DE-

CREES TO PLAINTIFF LORENZO W.
ANDERSON, JR. A PART OF LOT 1,
BLOCK 68, PLAT "B" BRIGHAM CITY,
BEING A TRACT DESCRIBED AS TEN
RODS BY SIXTY-SIX FEET.

ARGUMENT

Points 1, 2, 4 and 6 all involve the one question: Is the answer of the jury to the effect that the 1943 deeds were unconditionally delivered by grantor and the finding of fact number four as made by the court, conclusion of law number one and the decree sustaining the validity of the 1943 deeds sustained by any substantial evidence? Also, if there is any substantial evidence as to delivery, does not the great weight of the evidence disprove that there was in law or in fact such a delivery? All of these points can, therefore, be grouped together.

Appellants contend that the evidence conclusively shows that the so-called 1943 deeds were invalid because:

- A. They were never delivered by the grantor during his lifetime, and
- B. They were intended as testamentary in character to take effect after death and therefore void because not in accordance with the requirement of the statute of wills.

It is our contention that this is an action in equity; that the jury was called in as advisory to the court.

Stanley vs. Stanley
97 Utah, 520
94 P. 2nd., 465

Therefore, as stated in the Stanley case:

“The scope of the review on appeal in equity cases is clearly settled in this jurisdiction. This court is authorized by the State Constitution to review the findings of the trial courts in equity cases but the findings of the trial courts on conflicting evidence will not be set aside unless it manifestly appears that the court has misapplied proven facts or made findings clearly against the weight of the evidence.”

It is our contention that the trial court either misapplied proven facts, or, in any event, made findings clearly against the weight of the evidence. We have heretofore set out the evidence which in our opinion is not disputed by either side. We shall now briefly analyze the evidence and the inferences reasonably deducible therefrom with respect to the question of the alleged delivery of these deeds.

Plaintiffs, to prove delivery, reply principally upon statements alleged to have been made by the deceased to the grantees subsequent to the execution of the deeds. No one else was present so of course there is no way to directly deny this testimony. However, in attempting to analyze the evidence, and particularly the weight of the evidence, this testimony, coming as it does from the mouth of the plaintiffs themselves, should be carefully

scrutinized. Renee does not claim that his deed was ever delivered to him personally. He contends it was delivered to Marie to be held by her. Renee testified he received a letter from his father in the Spring of 1943. At that time he was a lawyer and was employed by the F.B.I. The records in this case indicate that he very carefully preserved every letter which was written to him by his sister Marie; but, he was unable to produce this important letter from his father. His explanation for its loss is far from satisfactory, especially in view of his meticulous care in preserving all other correspondence. His training as a lawyer should suggest the importance of preserving this letter and also his special training as an investigator. He was permitted to state the substance of this letter as he now remembers it after some nine years from the time it was alleged to have been written. He testified that his father stated:

“I have deeded the property to you.” Tr. 87.

It is true deceased had signed a deed which on its face purported to deed this property to Renee. There is nothing in this letter which says or infers that the deed had been irrevocably delivered or which even intimates that it was not testamentary in character. Nor does the letter make any reference to the fact, if it was a fact, that the writer had delivered the deed to Marie for delivery to him upon death.

Much evidence was offered by Plaintiffs to show how meticulous their father was in all his business dealings. He was a surveyor by profession and had prepared many deeds. He was also an abstractor. It is very significant that with this kind of a background the deceased

made no mention of where the deed was placed or what was to be done with it. Had he delivered it to his daughter Marie to in turn deliver to Renee, it is most likely that he would have so stated in the letter. It is also very significant that for some reason he did not forward the deed itself to Renee. If the deceased intended a present unconditional delivery as contended by plaintiffs and if he had the confidence in his children that he was willing to accept the assurance that he was to have a life estate in the property (not reserved in the deed) and that they would not record the deeds until after his death, it seems pretty hard to understand why he retained the deeds in his own possession and under his own control. The answer is obvious. At that time he was making conveyances testamentary with no thought of delivering the deeds except in case of death.

Renee testified he again saw his Dad in October of 1944; that his Dad remarked he had "made deeds giving us the property." Tr. 87. It is significant that at this time Renee had never seen the deeds. So far as the evidence discloses he had never discussed the question of whether a life estate was reserved in the deeds; yet, Renee says that he said to his Dad:

"I think you are making a mistake by giving title without reserving a life estate."

How did Renee know there was no life estate reserved? His testimony fails to disclose that up to this time, either in the purported letter or in the conversation, had his Dad made any statement concerning a life estate. His statement was:

“I have deeded you the property.”

Yet, out of nowhere Renee tells his father he is making a mistake in not reserving a life estate. Renee testified further that his father said:

“I trust you three children. I know you are not going to record the deeds until I die and that you are going to let me have the property to keep the proceeds from it.” Tr. 87.

If he was so trusting, why didn't he deliver possession of the deeds to the grantees at this time? The answer is obvious. He had no intention of presently conveying the property. Notwithstanding his meticulous habits and training, if he did not want to reserve a life estate in the deed itself, as testified by Renee, Tr. 87, why didn't he have the grantees sign a separate instrument agreeing not to record the deeds until after his death and agreeing that he might enjoy the rents and income from the property during his lifetime? Such a procedure would have been very easy to have accomplished and meticulous men act meticulously on matters of such vital concern.

Renee further testified that:

“Dad told me my deed was in the home. He said he had given it to Marie to be given to me.”

The facts are that Marie was living in Salt Lake City at that time. She did not come to Brigham City to live in the family home until sometime in 1945. There is no scintilla of evidence that these deeds ever left deceased's desk. If he delivered this deed to Marie to hold, when and

how was it done? Marie denied that he had ever delivered Renee's deed to her. The facts strongly refute Renee's statement. Tr. 87-88. It is also interesting to note that Renee made two trips to Brigham City—one in June of 1945. Tr. 91-92, and again in June of 1946. On each of these occasions Renee and Marie, unbeknown to their father, went into his room, opened his desk and took out these deeds so that Renee could check them over, and, after doing so, they were put back in the father's desk. Renee did not reveal to his father the fact that he had examined the deeds. He did not discuss the matter with him. If the deed had been previously unconditionally delivered and if he had had several previous talks with his father about the same, it seems passing strange that on a visit to the family home he would not have asked his father's permission to see the deeds and discuss the matter with him in the presence of Marie.

Now with respect to George's deed: he testified he first learned about the 1943 deeds in the middle or latter part of March, 1943 (a month or more after they were executed) although he lived only a stone's throw from his father's home and saw him nearly every day. He further testified that he and his wife had the deceased over to supper nearly every night and on one evening his Dad casually mentioned that he had made some deeds and,

"wanted us to come back and take care of them."

Tr. 219.

That after dinner they went down to the house together and there were three deeds lying spread out on the desk. Tr. 220. It may seem trivial but how did those deeds get

spread out on the table. Did deceased get them out of his desk and spread them out on the table before he went up to dinner? The evidence is that they all returned together to the home and there the deeds were spread out on the table. He then testified to a sort of "laying on of hands" ceremony indulged in between Father and Son and then the Father said:

"I am giving you this deed with the understanding that I would like to have the revenues from my property as long as I live. Now you can record this deed if you want to but I wish you wouldn't until after I die. I would like you three children to come and get your deeds together. Each of you will then know what the other is getting so that there will be no feelings."

This also seems a rather strange situation. At the home deceased had stated he wanted George to come back and take care of his deed. He then shows him the deed, has him lay his hands on it and then he takes it back and puts it in his own desk. His explanation seems flimsy that:

"each of you will know what the other is getting so there will be no feelings."

when each one contends that he already knew what he was getting. If there were to be any feelings they should have arisen when they learned of the contents of the deed and not after the death of the father.

There is another significant fact in connection with George's deed which has already been referred to. In 1946 when George was returning to Brigham City to

live, his father made a deed to the Christensen place. He took the deed to the County Recorder's office and had it recorded. If George already owned the property by reason of the 1943 deeds, why should he make another deed again conveying the property to George and why did he record that deed but not record the others? Here again the answer is obvious. Deceased intended to presently give George the Christensen place. He did not consider the 1943 deeds of any value during his lifetime while the same were being held in his own possession. He, therefore, gave him a deed to the Christensen property and had it recorded because he intended to presently convey this property to George.

The only other evidence as to delivery consists of statements allegedly made to Ellis L. DeMars, a brother in law, and Edna Anderson DeMars, a sister. His alleged statement to Ellis L. DeMars to the effect that he was going to make out deeds to take care of all of his children and a later statement to the effect that he had made deeds and that George *will have* the Christensen property as well as the other add nothing to the question at issue. There is no question but what at the time these deeds were signed the deceased did intend that upon his death the property should be distributed in accordance with the terms of these deeds.

Let us now consider the evidence and reasonable inferences to be deduced therefrom, which we contend points clearly to the conclusion that these so-called 1943 deeds were never delivered by the Grantor and were intended by him to be testamentary in character. It has been frequently stated that the question of delivery re-

solves itself into a question of the intent on the part of the Grantor, and that it is a question of law or fact or both to determine the intent of the Grantor at the time of the alleged delivery. However, as the court frequently states "Actions speak louder than words," and this is particularly true when the words come from the mouths of interested parties under circumstances where it is impossible to refute the statements alleged to have been made by the Grantor by reason of his subsequent death.

What facts and inferences determinable therefrom are either admitted or are undisputed facts in this case?

1. In 1943 when the deeds were signed the Grantor was 64 years of age, living alone in his own home. He was in excellent health, self-supporting and his children were all married and living separate and apart from him. They had all received college training. These deeds, if legally delivered, would have divested the deceased of practically all of his property. There is no suggestion in the evidence as to any reasons why the deceased would at that time have intended by the signing of these deeds to completely divest himself of all of his property.

2. Notwithstanding the claimed deliveries the deeds at all times subsequent thereto were under the complete control and domination of the Grantor. He never at any time parted with the physical possession of either Rennie's or Marie's deeds, and while George claims to have had possession of his deed for a short time, yet he returned the Promontory deed, after it was claimed to have been executed in 1946, back to his father.

3. Notwithstanding the signing of the deeds, the Grantor continued to exercise complete dominion and control over the property to the same extent as he had done prior to the signing of the deeds. He remained in possession of the property, collected the rents and income therefrom, paid the taxes and upkeep for necessary repairs to the same extent as though he was still the owner of the property.

4. In addition to paying the taxes and costs of repairs for making the necessary improvements he leased the Promontory farm to Marie and her husband for a period of 12 years. This lease contains no intimation or suggestion that he was not the sole and complete owner of said property. No mention is made in the lease that he had anything less than the absolute fee.

5. Likewise he leased the Garland farm to one Garfield for a period of years under similar conditions.

6. He negotiated with his brother Cephus with respect to surrendering a right-of-way across the Garland property and accepted in lieu thereof a new right-of-way.

7. He invited and solicited the defendants to give up their employment in Salt Lake City and to come to the home and live there with him.

8. At no time did he ever consult with the Grantees in respect to any of these matters.

9. In 1947 he executed a will which was entirely inconsistent with any idea or suggestion that he was not

then the complete owner of the property. It may be suggested by the plaintiffs that at the time this will was prepared he was mentally incompetent; however, it is clearly established that the will was prepared by a competent attorney and his own nephew, William E. Davis. This will was witnessed by his brother Cephus and also by his brother-in-law Ellis DeMars, the man who testified in this case as to his mental condition. It is inconceivable that Attorney Davis would participate in the execution of a will by an incompetent person, and it is hardly likely that a brother and brother-in-law would witness a will if in their opinion the facts were contrary to the attestation clause.

10. In 1949 he signed new deeds and, absent the question of mental capacity hereinafter to be discussed, this was the strongest kind of evidence of lack of intent to deliver the '43 deeds.

11. Rennie and Marie, on two separate occasions without consulting the Grantor, went to his desk, took out the deeds, examined them and put them back in the Grantor's desk.

12. These deeds were never recorded, although deeds to his grandchildren, which he apparently intended as a present conveyance, were all recorded by the Grantor himself.

13. In 1946 George wanted to return to Brigham City. The Grantor owned the Christensen home, which was included in the '43 deeds. He decided that he would give George the Christensen home, so he prepared at

least one new deed wherein he conveyed the Christensen home to George. He immediately took this deed to the County Recorder's Office and had it recorded, and George went into the possession of the home. Shortly after he sold the home and moved to Idaho. George testified that at the same time he executed a new deed conveying to George a one-third interest in Promontory. If he did, then he retained this deed in his exclusive possession.

14. While George claims to have had the possession of the '43 deeds for a short time prior to the execution of these second deeds in 1946, the possession was only temporary in order to permit him to eject the tenant from the Christensen home, and after this was accomplished and he got possession he returned the deed to his father.

15. When deceased learned that George had sold the Christensen property he was very much upset. If he thought that he had already deeded the home to George and if he did not want to record the deed there is no reason why he needed to make a new deed to the Christensen property. Under plaintiffs' theory George was already the absolute owner of this property.

16. He conveyed the unimproved small lots to his grandchildren. These deeds he promptly recorded. Thereafter he treated this property as belonging to the grandchildren. He accounted to them for any income, after taxes and tithing, which was derived from these lots.

17. His acts and conduct show conclusively that whenever he intended to pass immediate title he believed it necessary to record the deeds. On the other hand when

he wanted to make the deeds testamentary in character he retained the same and changed them at pleasure as subsequent conditions warranted.

18. He mortgaged the Christensen property after the execution of the '43 deeds.

We contend that in view of the foregoing the question of delivery became a question of law rather than of fact (See 26 C. J. S. page 256, Section 52).

We will first cite the Utah cases which have had occasion to discuss the question of delivery or lack of delivery.

Singleton vs. Kelly
61 Utah, 277
212 P. 63

Mower vs. Mower
64 Utah, 260
228 P. 911

First Security Trust Company vs.
Tracy Loan
96 Utah, 148
84 P2d. 414

First Security Bank of Utah,
Administrator of the estate
of Alfred Burgi, deceased vs.
Clyde Burgi, et al.
P2d.

Each of these cases discuss the question of delivery or lack of delivery.

While it is admitted that some of these acts and conducts standing alone might be consistent with an intent of immediate delivery, yet when you have the combination of all of these facts which point unerringly to a lack of intent, we contend that as a matter of law there was no intent to make a present delivery of these deeds.

It is, of course, impossible to cite the many, many cases dealing with this question; however, we shall cite a few cases from neighboring states which we think are controlling.

Fisher vs. Oliver
164 P. 801

Here the trial court found a delivery. The Supreme Court reversed the decision, which is equivalent to holding there was no evidence of delivery. The decision is based primarily on the fact that the Grantor retained possession of the deeds and was therefore in a position to destroy them at his pleasure.

Barnes vs. Spangler
25 P2d. 732

In this case the equities in favor of a delivery were very strong. The trial court held that the deeds were delivered but the appellate court reversed the trial court.

Roberts vs. McCoach
65 P2d. 289

In this case the court says "The delivery of a deed is largely a matter of intention as shown by all of the facts and circumstances. *To establish delivery it must appear that the deed passed beyond the control of the Grantor. One who executes a deed to property he owns and retains possession of the deed until his death dies in full ownership of the property.*"

Citing cases.

Hayes vs. Moffet
271 P. 433

Here the deed was placed in a can which was accessible to both Grantor and Grantee, but the court held this fact to be immaterial. In this case as in ours the Grantee claimed that the Grantor reserved a life estate by parole, but the appellate court held that such a life estate could only be created by a written instrument. The court held there was no delivery.

Butler vs. Butler
32 P2d. 54

This is an interesting case because the factual situation is somewhat comparable to our own. The Grantor first made four deeds to his four heirs. He later made a second deed. The question was whether or not the first four deeds were ever delivered. The court held they were not. The court says "It is not necessary that a delivery of a deed should be made to the Grantee himself, but it will be suf-

ficient if it is delivered to a third person for the use of the Grantee. *Such a delivery, however, will not be effectual unless it is made in such a way that the Grantor parts with all control of the instrument.*" The court then quotes from decisions of other states and then says that the above text settles the rule without qualification.

Witham vs. Witham
66 P2d. 281

In discussing the question of delivery the court says "In order to constitute a valid deed it is essential that the deed be delivered, and *to constitute a deliver ythe Grantor must part with control over it and retain no right to reclaim or recall it.* It is shown by the record that Elaine Witham, after signing the ded, retained possession of the land during the rest of his lifetime, held possession and dominion of the deed, never delivered the same to the defendant or authorized such delivery, and had the right to cancel the deed just as he had the right to change his will; and the evidence strongly shows he attempted to have the deed cancelled by directing his wife to destroy the same."

This latter statement impels us to interject one other strong bit of evidence of non-delivery. The record stands undisputed that after signing the 1949 deeds the Grantor went to his desk, went through all of his deeds and the will and directed Marie to burn the same as they were no longer of any force.

There is a comprehensive note found in 44 L. R. A. —N.S. commencing at page 528 Annotated in the case of

Butts vs. Richards
140 N. W. 1

and particularly the annotation commencing on page 536 under the heading "Evidence Not Sufficient to Overcome Presumption of Non-Delivery."

Taylor vs. Taylor
247 P. 174

is also a very good case discussing this question.

In re Cunningham
64 F2d. 296

Here the court says "The fundamental rule is that delivery is essential to the validity of a deed as the final act which consummates it, and *delivery does not take place until the deed passes out of the control of the Grantor and into the actual or constructive control of the Grantee.*"

The subject is fully and comprehensively discussed in 23 C. J. S. commencing at page 231 and extending to page 252. Appellant contends therefore that the evidence of non-delivery and of intent to make a testamentary disposition is so strong that this court should find non-delivery as a matter of law. That if we are in error, yet this being an equitable case, the evidence of non-delivery is so overwhelming that this court should hold that the finding of delivery is not sustained by the evidence.

POINTS 2, 3 AND 5

These points 2, 3 and 5 deal with the question of whether or not there was any evidence to submit to the

jury on the question of the Grantor's alleged incompetency at the time he executed the 1949 deeds. We recognize, of course, that if the 1943 deeds were delivered then the 1949 deeds would be inoperative, and to a certain extent the question of the competency of the deceased would be immaterial; however as dealing with the question of non-delivery the competency of the deceased when he admittedly executed the 1949 deeds is very material. If, as the jury found, the deceased was incompetent when he signed the '49 deeds, then of course his signing of these deeds would be no evidence of intent as to delivery of the '43 deeds. If on the other hand he was competent when he signed the '49 deeds, then the execution of these subsequent deeds is very strong evidence of lack of intent to deliver the '43 deeds.

We contend therefore that the court was in error in submitting to the jury Interrogatory Number 3 and we contend further that the court should have granted defendants' motion to withdraw any issue of mental capacity from the jury, which motion was made at the conclusion of plaintiffs' case. (See Tr. 311 and at the conclusion of the case Tr. 426-427).

The answers of the jury to Interrogatories Number 2 and Number 3 are inconsistent. The jury answered 2 that the '49 deeds were delivered, then by answer Number 3 they found that he was mentally incompetent. Of course if the deeds were delivered he was not incompetent. We contend, however, that there is not a scintilla of evidence in this whole record which discloses that the deceased was incompetent at the time he signed the 1949 deeds.

John W. Phillips, a disinterested witness, an abstractor of years of experience in conveyancing and a long friend and associate of the family, testified positively that on the day of the execution of the '49 deeds that the deceased was in full possession of his mental faculties. His testimony is corroborated by the testimony of Dr. Moskowitz. This positive evidence cannot be disregarded or disbelieved, in the absence at least of some evidence to the contrary. We say there is absolutely no evidence which in any way disputes the evidence of Mr. Phillips and the Doctor.

The witness, Ellis DeMars, testified at considerable length concerning the mental condition of the deceased.

It is not disputed that at times during the years from '46 to '48 that the deceased had periods of incapacity, and much of the testimony of the plaintiffs related to this period of time. All witnesses agreed that the deceased improved steadily for several months prior to his death. In answer to a question Mr. Ellis stated that he could not remember dates very well, but "deceased was well and up and around in pretty good shape during the months of April and May of 1949." (Tr. 273), and that prior to April and May "he was just up and down." (Tr. 274). "That about the first of the year 1949 he was very weak and, of course, he was sitting up at times." He talked with him frequently.

Then the witness DeMars related some instances which occurred subsequent to the execution of the deed wherein he related how he took the deceased on several trips. In each instance he stated that when he came to

the house the deceased was rational but that after he had taken him for a ride the effects of the riding seemed to affect him, and he would get a funny stare, and so he would take him home. Certainly this is no evidence that he was irrational when he signed these deeds in February of 1949.

Had the court withdrawn from the jury any question of incompetency and had the court instructed the jury that there was no evidence of incompetency when he signed the '49 deeds, this fact alone might have influenced the answer of the jury on Interrogatory Number 1. Apparently for some reason the jury completely disregarded the evidence and found that when he signed the '49 deeds deceased was incompetent. Finding that to be a fact, of course, would nullify the effect of the subsequent execution of these deeds as it related to the question of whether the decedent intended to deliver the '43 deeds. Failure of the court to withdraw this issue from the jury constituted prejudicial error.

POINT 7. THE COURT COMMITTED ERROR BOTH AS TO INSTRUCTIONS GIVEN AND IN REFUSING TO INSTRUCT THE JURY AS REQUESTED BY DEFENDANT.

The court's instruction No. 1 is needless and confusing. We do not know what the court meant by the language "that a deed just passes a present interest" and when read in connection with the rest of Instruction No. 1, it seems to be more confusing than anything else and seems to minimize the effect of a deed.

In Instruction No. 2, the first interrogatory is ambiguous and uncertain, in this, that the court uses the language “were ever delivered”. The court should have added to this language “were ever delivered” the following, “either to the grantees or to some person authorized to accept delivery for the grantee”.

The balance of Instruction No. 2 may be a correct statement of the law but like to many stock instructions, it fails to tell the jury what acts or conduct they might consider in determining whether or not the grantor did in fact intend to make a present irrevocable delivery of the deed.

Defendants, by their requested Instruction No. 7, specifically outlined to the jury certain facts which, had the court given this instruction, the jury would have been told what to consider in determining whether or not there was a present intent to deliver the deeds. The court refused to give this request, or any instruction embodying the same.

In Instruction No. 3, the court, in outlining the issues, states:

“that each of the aforementioned deeds was delivered to Marie Johnson by the deceased as the agent of each of the grantees named therein.”

This is an incorrect statement of the pleadings which alleged that Renee’s deed was delivered to Marie but not George’s deed.

In Instruction No. 4, the court says:

“and the fact that one of the 1949 deeds was actually recorded one day prior to deceased’s death, while a significant fact, is not controlling on the question of delivery one way or another in this case but evidence is to be awarded such value and weight as you may deem proper.”

This we believe is an incorrect statement of the law. The fact that a deed is recorded during the lifetime of the grantor creates a presumption that the deed was delivered by the grantor and the court should have so instructed the jury. The court should have given defendants’ requested Instruction No. 9 which we believe to be a correct statement of the law.

There is no evidence to permit the giving of Instruction No. 7 with respect to the competency of the grantor when he executed the 1949 deeds. The giving of this instruction constituted prejudicial error. The court should have given defendant’s requested Instruction No. 2 and No. 4.

Point 8. THE COURT ERRED IN ADMITTING CERTAIN EVIDENCE AND IN REJECTING EVIDENCE PROFFERED BY THE DEFENDANTS.

The court, over the objection of defendants, permitted the witness Renee to relate conversations which took place between the plaintiffs and the defendants after the funeral of their father. Tr. 111-112. What was said by the alleged grantees after the death of the grantor was incompetent as it could shed no light on the question of the intent of the grantor when he signed the deeds, and

furthermore, this alleged conversation clearly related to family discussions which were in the nature of compromises. For example, the statement alleged to have been made by Mr. Johnson to the effect that he felt the farm was worth about Ten Thousand Dollars and he mentioned again that he didn't know whether he was interested in the continuing of the operation of it or not because he didn't think there was enough land to justify his farming it and that if he stayed he would like to acquire more land, certainly was incompetent and prejudicial. It was incompetent because it had nothing to do with the question of whether or not the deeds were delivered. Then the witness volunteered the statement:

“Chet said he had a good notion to leave Marie and the kids and get the Hell out of there”. Tr. 112.

While the court struck this answer, it left a marked impression upon the jury. In fact, throughout the entire testimony evidence was offered by plaintiffs which was calculated to and which did prejudice this jury.

The court permitted the plaintiffs to give statements alleged to have been made by Dr. Moskowitz. See Tr. 111-116. Certainly what Dr. Moskowitz might have said at a family discussion would not be binding upon either the plaintiffs or the defendants. It was offered by plaintiffs for the purpose of attempting to prove that Dr. Moskowitz in some way was aligned with defendants in an attempt to conceal the true facts.

The court also permitted the plaintiffs to relate

alleged statements made by George N. Mason in the presence of the plaintiffs and the defendants. The evidence shows that George N. Mason was a cousin of the parties; that the plaintiffs suggesting a meeting at his office for the purpose of attempting to settle and compromise their differences. What George N. Mason may have said in this meeting was incompetent and it was only offered for the purpose of attempting to prejudice the jury. See also Tr. 196.

The court permitted the plaintiff to cross examine the defendant Johnson with respect to the value of the home property. Tr. 412-415. This was also incompetent and highly prejudicial. The plaintiffs had put on expert witnesses as to the value of the property. Their evidence was not disputed. The purpose of the cross examination was calculated to prejudice the jury against the defendants.

Over the objection of the defendants the court permitted the plaintiff to introduce in evidence plaintiffs' Exhibit "L-5". It was claimed by plaintiffs' counsel that it was offered to impeach the doctor. If offered for that purpose, it certainly should have been offered in connection with the cross examination of Dr. Moskowitz so that he would have an opportunity of explaining the same, but, instead of that, after the doctor is released and not available, this Exhibit is introduced upon the statement of counsel that it impeached the testimony of the doctor. This was certainly improper and was highly prejudicial. The Exhibit itself was improper as no proper foundation had been laid for the introduction of the certificate.

Point 9. THE COURT ERRED IN NOT ENTERING FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE TO THE EFFECT THAT THE 1943 DEEDS WERE INVALID AND VOID AND SUSTAINING THE VALIDITY OF THE 1949 DEEDS.

We have heretofore discussed Point Nine but we desire to make this further observation: It is our position that the court should have held as a matter of law that the 1943 deeds were undelivered and were testamentary in character and therefore invalid, and had the court so ruled, then it is our position that there was no evidence to submit to the jury, nor was there any evidence to sustain findings and judgment decreeing the 1949 deeds to be invalid.

Point 10. THE COURT ERRED IN NOT GRANTING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OF THE JURY, OR, IN ANY EVENT, IN DENYING DEFENDANTS' MOTION FOR A NEW TRIAL.

This raises a most interesting situation. As we have heretofore suggested, this being an equity suit, this court has the duty to review the evidence and to determine whether or not the findings are clearly against the weight of the evidence. The same duty evolves upon the trial court. When a motion for judgment notwithstanding the verdict was filed, it became the duty of the court to search the record and if the Judge is of the opinion that the verdict is clearly and palpably against the weight of the evidence, then the court should grant the motion, or, in any event, grant the motion for a new trial. See the following Utah cases:

Valiotis vs. Utah-Apex Mining Company
55, Utah, 151
184 Pac., 802

King vs. Utah Power and Railway Company
Utah
212 P. 2nd., 692

Jenson vs. Logan City
89 Utah, 347
57 P. 2nd., 708

Utah State National Bank vs. Livingston
69 Utah, 784
254 Pac., 781

Thompson vs. Owen Livestock Company
74 Utah, 1
276 Pac. 651

Greco vs. Gentile
88 Utah, 255
53 P. 2nd, 1155

Bowers vs. Gray
99 Utah, 336
106 P. 2nd., 765

Saltas vs. Affleck
99 Utah, 381
105 P. 2nd., 176

Crellin vs. Thomas
Utah
247 P. 2nd., 264

The trial court, in denying the motions, said:

“If this were a trial to the court only, the court would have not hesitation in directing findings in favor of the girl Marie. There is no doubt in my mind from what experience I have had where I sit without a jury such would be the finding.”
Tr. 434.

This is equivalent to saying that the trial court in his own mind had no doubt but what the verdict of the jury was wrong but the jury had found otherwise and he felt compelled to follow the verdict of the jury. The court completely overlooked the fact that the jury was merely advisory to the court and that the court was under the duty to make findings in accord with the greater weight of the evidence and he certainly failed to follow the admonition of this court as set out in the Valiotis case which reads as follows:

“It is undoubtedly true, as counsel for appellant contend, that the trial judge may and should set aside a verdict for insufficiency of the evidence and grant a new trial, whenever in his judgment the verdict is clearly and palpably against the weight of the evidence. *Not to do so would be an abuse of his discretion.*”

In the light of the court's own statement, we submit that it was a clear abuse of his discretion on the part of the trial court to deny plaintiff's motion for a new trial when the court clearly felt that the overwhelming weight of the evidence was against this verdict.

Point 11. THERE IS NO EVIDENCE TO SUPPORT THAT PART OF FINDING NUMBER 4-A, TRACT 1, NOR THAT PART OF THE DECREE WHEREIN THE COURT DECREES TO PLAINTIFF LORENZO W. ANDERSON, JR. A PART OF LOT 1, BLOCK 68, PLAT "B" BRIGHAM CITY, BEING A TRACT DESCRIBED AS TEN RODS BY SIXTY SIX FEET.

In finding number 4-A, Tract 1., the court finds that the deceased executed a warranty deed to plaintiffs Lorenzo W. Anderson and wife to the following described property located in Box Elder County, Utah:

Tract 1. Beginning at the Southeast Corner of Lot 1, Block 68, Plat "B", Brigham City Survey, and running thence West 10 Rods; thence North 66 feet; thence East 10 Rods; thence South 66 feet, more or less to the place of beginning

and in the decree the court adjudged them to be the owners of this property. We have searched this record in vain for any evidence upon which the court could base this finding and judgment. The evidence of the plaintiff was that there was included in the 1943 deeds a building lot. However, the size and dimensions of this lot were never mentioned. While of course we cannot introduce evidence at this late date, yet, for the purpose of argument only, may I suggest that if this description is sustained, the West line of Renee's property will pass completely through the center of one of the buildings on the lot conveyed to the defendant Marie. The mere fact that the deed conveyed a building lot in the Southeast corner of

the lot does not justify the court, in the absence of any evidence, to arbitrarily quiet title to a tract of land ten rods in depth by four rods in width. We challenge counsel for respondents to point out any evidence in this voluminous record from which the court could make such a finding or decree.

CONCLUSION

Summarizing, appellants contend:

1. That the granting of the motion for a change of venue was prejudicial to the rights of the defendants and constituted reversible error.
2. That the evidence discloses as a matter of law that the 1943 deeds were never delivered, but, on the contrary, that they were intended to be merely testamentary in character.
3. That if there is any evidence to go to the jury as to delivery, it manifestly appears that the trial court has misapplied proven facts or has made findings clearly against the weight of the evidence in this case.
4. That if the 1943 deeds were invalid, this court should reverse the trial court with instructions to enter a decree validating the 1949 deeds for the following reasons:
 - (A) That the evidence of delivery of these deeds together with the recordation of Marie's deed prior to death is conclusively established.

- (B) There is no evidence that the deceased at the time he executed the 1949 deeds was mentally incompetent.

On this question of mental incompetency, we shall content ourselves by citing the leading Utah case,

In re: Hansen's Will
50 Utah, 207
167 Pac. 256

Second Appeal:
52 Utah, 554
177 Pac. 982

In re: Hansen's Estate
87 Utah, 580
52 P. 2nd., 1103

- (C) That in any event the decree awarding plaintiff Renee a lot specifically described as being sixty six feet by ten rods cannot be sustained because there is no evidence to support said finding and decree.

Respectfully submitted,

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