

1953

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

Utah Supreme Court

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Walter G. Mann and George D. Preston; Attorneys for Respondents;

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In The Supreme Court
of the
State of Utah

ED
AUG 31 1903

GEORGE N. ANDERSON and wife,
IMOGENE T. ANDERSON,
LORENZO W. ANDERSON JR.,
and wife HAZEL M. ANDERSON,
Plaintiffs and Respondents

vs.

MARIE T. JOHNSON and
CHESTER N. JOHNSON,,
Defendants and Appellants

Clerk, Supreme Court, Utah

No. 8001

RESPONDENTS' BRIEF

Appeal from the District Court of Cache County, Utah

Honorable Lewis Jones, District Judge

Walter G. Mann and George D. Preston
Attorneys for Respondents

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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. ANDERSOS,
Plaintiffs and Respondents,

vs.

MARIE T. JOHNSON and
CHESTER N. JOHNSON,
Defendants and Appellants

No. 8801

RESPONDENTS' BRIEF

PRELIMINARY STATEMENT

Mr. Young says that two matters are involved in this appeal, one of which he claims is the transfer of the cause from Box Elder County to Cache County on a motion made for a change of venue and he having treated that matter first, we shall do likewise.

We deny that the order transferring the trial from Box Elder County to Cache County is erroneous and void. We further declare that if counsel for plaintiff felt that it was unjust his remedy was appeal and had to be perfected within the statutory time after the granting of the order. Also, that when he appeared in court in Logan and proceeded to trial without objection, that he thereby waived any objection to the jurisdiction of the court and having accepted its jurisdiction is bound by its decision. Also, if conflicting affidavits are filed those in favor of the prevailing party will be taken as true and the facts therein stated will be considered as established; and if a rational inference can

be drawn in favor of the course pursued by the lower court, its action will be affirmed.

ARGUMENT ON CHANGE OF VENUE

In regard to the change of venue. The notice and motion for change of venue (Rec. 11 and 12) were served upon counsel for the defendants on the 31st of July, 1952, and with the motion were filed affidavits (Rec. 13 to 17) in support of said motion. At said hearing Mr. Young filed counter affidavits (Rec. 18 to 21). At the end of the hearing (Rec. 77) the Court said:

"The Court will take judicial knowledge of the condition of the country with reference to the use of the word "Communist". I believe that in most of our communities many Communists have been pointed out and words passed around that certain individuals are Communists. I can refer you to a number in my home town that people claim are Communists that I have never met or seen, but I know where they live and who they are, and I believe that that would prejudice a person from having a fair trial if a person on the jury thought he was a Communist, particularly where the issue involved him and some of the members of his family that they may think are not Communists, and I believe the court should protect a man and do what he can to grant a fair trial. Under the affidavits that have been filed with reference to the subject of Communism, the court is of the opinion that the motion should be granted, even in view of the hardship that has been described the motion is granted and it's ordered that the case be transferred to Logan for trial in this District. Recess court."

The Clerk made the following order for change of venue (Rec. 22) :

August Term, 1952. Tuesday, the twelfth day of August, 1952.

Hon. Joseph G. Jeppson, Presiding.

No. 6859

George N. Anderson, and
Imogene T. Anderson, et al.,
Plaintiff,

—vs—

Marie T. Johnson and Chester
N. Johnson,

Defendants

ORDER CHANGE OF VENUE

The motion for change of Venue before the court at this time. George N. Anderson of the plaintiffs present in court with counsel Walter G. Mann, Esq., and Marie T. Johnson, one of the defendants present in court with counsel L. Roy B. Young. Opening statement made to the court by counsel for plaintiff and defendant. Plaintiff counsel calls George N. Anderson, sworn and testifies is cross examined by defense counsel. Defense counsel calls Marie T. Johnson, sworn and testified is cross examined. The matter is argued and submitted to the court for decision. The motion for change of venue is granted and the case Ordered transferred to Cache County for trial. (Minute Book 23, page 95).

Thereafter counsel for plaintiff prepared a written order of change of venue to be signed by Judge Joseph G. Jeppson and delivered the original and copy to the court to be forwarded to him at which time Judge Lewis Jones made certain written notations in the order and signed the order himself (Rec. 23). On the 21st day of August, 1952, the Clerk of the District Court of Box Elder County sent to LeRoy B. Young Esq., Attorney at Law, First Security Bank Building, Ogden, Utah, a copy of said order. Consequently we have an oral order granted on the 12th of August by Judge Jeppson; a written order for the purpose of reducing said oral order to writing signed by Judge Lewis Jones on the 20th day of August and notice of it given to LeRoy B. Young on the 21st day of August.

Attorney Young cites rule 63A which reads:

DISABILITY. If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after verdict is returned or Findings of Fact and Conclusions of Law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

The record is silent why Judge Jones signed the order and a presumption arises in favor of its validity. The question might also arise, "Is it necessary to reduce the oral order to writing?" We find under Corpus Juris Vol. 67 page 206. Art. 346 the following:

"FORM AND CONTENTS:—The order may be in writ-in or oral, and it is not essential that it be signed. The order must comply with the statute, but a substantial compliance is sufficient. Mere clerical mistakes do not invalidate the order nor deprive the court to which the cause is sent of jurisdiction. The order must specify the County to which the cause is sent and show the cause for making it, but should not state the name of the Judge to try the case, nor need it fix a time for trial. The order should also show by whom it is requested, that it is supported by affidavit, and that in the court's opinion the cause for change is good."

The oral order of Judge Jeppson, mentioned above, met everyone of these requirements. Vol. 56 of American Jr. Pr. Art. 76 page 77 in regard to an order for the change of venue in effect reads as follows:

"ORDER FOR CHANGE AND EFFECT THEREOF:—A change of venue is ordinarily made by a formal order of the court designating the county to which the change is to be made, but may, for some causes at least, such as that the action was instituted in the wrong county, be made by order of the judge at chambers. An order may be effective to work a change of venue even though it does not specifically provide therefor or designate formally the county to which it is changed. It is undoubtedly the better practice to designate the county, but the omission to employ such explicit words will not work a reversal where it is entirely clear that the venue was in fact changed. The court to which change of venue is awarded is not without jurisdiction because of a clerical error in the order reciting that the venue of the cause is changed, which uses the words "court" instead of "cause". An entry nunc pro tunc of an order of change of venue at a term subsequent to that in which the order was made is proper in a case where the omission of the entry of the proper term was due to negligence in the Clerk. Although an accused has a right to be present at proceedings against him, it is not error for a court to grant a change of venue upon the request of the defendant in a felony case, in his absence."

And this same article goes on and discusses the matter. It further showing that if the parties, after the order was made, proceed to trial that they then submit to the venue and the court takes jurisdiction. Record 84 shows that the parties appeared on the 1st day of December, 1952, in the court in Logan. Mr. Young made no objection to the jurisdiction of the court, but proceeded at once to assist in the drawing of a jury for jury duty, and the case was then tried.

Mr. Young says the order is an appealable order and cites certain cases. We will agree that the order is appealable. One of the first cases in which this matter was In Re. Whitmore 35 Pac. 524. Then in the left hand column at the bottom of Page 525, it says:

"It appears that the First District Court, at Provo, made an order in this case, December 27, 1892, which reads as follows: "In this case the court on its own motion, orders, that this case to be transferred to the Third District Court, at Salt Lake City, for further proceedings." - - - - Our statute authorizes the court to change the place of trial upon its own motion, if the parties do not agree, but in that case the cause must be transferred to the nearest court. The presumption follows that the parties did not agree, and that there was good cause known by the judge for the transferring of the cause to the Third District Court."

In the Whitmore case the parties met and proceeded with their hearing through a referee, no objection being made to the jurisdiction of the court, similar to ours. Then in the middle of the page 525, in the right hand column, the court said:

"The order changing the place of trial from the First District Court was an appealable order, and, if erroneous, an appeal was the proper remedy to correct it."

Another early case on the same subject matter was Elliot vs. Whitmore et al, 37 Pac. page 461, and was determined on

the same state of facts.

Our statute Sec. 78-13-11 Utah Code Annotated 1953, reads:

“Duty of Clerk—Fees and costs—Effect on jurisdiction:—When an order is made transferring an action or proceeding for trial, the court must transmit the pleadings and papers therein to the court to which it is transferred. The costs and fees therefor and filing the papers anew must be paid by the party at whose instance the order was made; provided, that when such order is made for the reason that the cause was commenced in the wrong county, the costs of transfer and filing the papers anew shall be paid by the plaintiff in the action within ten days after making of such order, or said cause shall be dismissed for want of jurisdiction. The court to which an action or proceeding is transferred shall have and exercise the same jurisdiction as if it had been originally commenced therein.”

This section was taken from the California Code Art. No. 399, (25 Cal. Jur. Pr. Art. 45 page 913.) And the time for appeal is the statutory time to appeal any judgment, which in our case is one month, as determined in the matter of Chase vs. Superior Court et al, 99 Pac. 355. Under 25 Cal. Jur. Article 50 page 918, we have:

“APPEAL AS STAY:—Under Section 949 of the Code of Civil Procedure an appeal from an order refusing to change the place of trial, or from an order changing the place of trial, does not operate to stay proceedings in the lower court. But inasmuch as an appellate court has authority to make all orders or judgments necessary to render effectual its judgment on appeal from an order denying the change, upon a reversal of such an order it may reverse a judgment rendered in the case by the lower court, although the appellant may have appeared at the trial and contested the right of the respondent to recover.”

In other words Mr. Young cites certain rules where judgments must be signed by the judge and filed with the clerk and certain rules defining a judgment, but he failed to cite Rule 73A which is as follows:

“When an appeal is permitted from a District Court to the Supreme Court, the time in which an appeal may be taken shall be one month from the entry of the judgment appealed from unless a shorter time is provided by law, - - - ”

Then again on the question of appeal, in 25 Cal. Jur. Art. 51 page 918:

“REVIEW ON APPEAL:—All presumptions upon appeal are in favor of an order changing the place of trial. It follows that where the motion was made upon two grounds, one of which is sufficient to sustain the action of the court in granting the motion, the order will not be disturbed. And, in accordance with the general rule that the action of a trial court will be upheld where there is substantial evidence to support it, it is held that an order based upon conflicting affidavits, either in granting or refusing a change of venue, will not be disturbed. When the affidavits are conflicting those in favor of the prevailing party will be taken as true, and the facts stated therein will be considered as established; and if a rational inference can be drawn in favor of the course pursued by the lower court, its action will be affirmed.

If the plaintiff in the lower court presses the action for trial, although the defendant claims that the case is one which, under the constitution, should have been commenced in another county, he cannot successfully contend on appeal that the superior court of the county where the action was tried did not have jurisdiction.”

See the many cases cited thereunder.

It appears to the writer that Mr. Young takes this attitude in his attempt to oppose the order asking for a change of venue: That rather than appeal from that order he would go to trial without further objection and run his chance on trying to be successful. If he failed then he would drop back and say that the court did not have a right to hear the case, even though he submitted himself to its jurisdiction. And even though the statute under which he is proceeding says (Sec. 78-13-11 Utah Code Annotated 1953):

ferred shall have and exercise the same jurisdiction as if it had been originally commenced therein."

"The court to which an action or proceeding is transferred. Then the question comes up, "Can he do this?" There is a Kansas case in point being *City of Garden City vs. Heller* Sup. Court of Kansas, May 5, 1900. 60 Pac. 1060. This case was begun in Finney County of which Garden City forms a part and it was sent to Edwards County upon application for change of venue. In the right hand column page 1060 we have:

"The record does not affirmatively show that an order granting the change was made, and it is contended that the absence of a formal order defeats the jurisdiction. It does not appear that the application was made; that the files and papers in the case were thereupon transmitted to the District Court of Edwards County; that both parties appeared there, and the City submitted itself to the jurisdiction of that court; that the trial resulted in favor of the City, and the plaintiff prosecuted error and obtained a reversal. The objection that the change of venue was irregularly made came after all these steps, and was too late. While the record is silent as to the ordering of a change, "all presumptions from silence on the part of the record should be construed in favor of the regularity and validity of the proceeding of the court, and not against the regularity and validity of such proceedings." *Hunters Adm'R vs. Fergusons Adm'R* 13 Kansas 462). However, it is not necessary to rest the decision of the point upon mere presumption. When the change was made the defendant did not make a timely objection, but, instead recognized the validity of the proceedings in obtaining a change, and fully submitted itself to the jurisdiction of the court. The City asked and obtained a favorable judgment without protest or objection, and must be held to have waived the irregularity, or any question as to the proper transfer of the case." See cases cited therein.

In *Otero Canal Company vs. Fosdick*, a Colorado case found in 39 Pac. 332, where a question of change of venue came up, and on page 333 in the lower right hand column we find:

"It is, however, entirely unnecessary for us to consider the question as to whether or not the County Court erred in changing the venue to the District Court. It is sufficient, for the purpose of this case, to know that the parties entered a general appearance in the District Court, filed amended pleadings and proceeded to trial without objection, - - - "

In the matter of the J. J. Mayou Manufacturing Company vs. Consumers Oil and Refining Co., a Wyoming case found in 146 Pac. 2d 738. The action was brought in one county and plaintiff filed a motion to take the case to another county. The court ordered the change, but the clerk sent only certified copies of the proceedings. The case was tried and no objection was made to the jurisdiction of the court until on appeal. They had a statute similar to ours which stated that after the papers were transferred and filed the court had the same jurisdiction as if originally filed in that court. (See the right hand column page 750) The court held any irregularities were waived by the appearance without objection and then going to the trial. Numerous other cases are cited therein.

There is also the recent case of Daiki Otsuka vs. Balanque et al, a California case 208 P. 2d 65, which were appeals from the order denying the motion for a change of venue. This case is cited to show that the granting of a change of venue is an order which is appealable, and the time at which the appeal commences to run is the same as on any other appeal, to-wit: one month.

In regard to the affidavits and evidence offered. It is like Judge Jeppson said: The condition of the country is such that any mention of the word "Communism" is such that a person who had been charged with such a title has little chance of a fair trial. That the jury that tried the case had that before them was evident by the fact that one of the jury told the plaintiff, George N. Anderson (Rec. 72 line 7) of him being considered a communist as follows.

"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 writer, in his affidavit (Rec. 16) reports a very flagrant assertion made to him in a public place about a representation to the effect that two of the plaintiffs, George N. Anderson and wife, were "Communists." It was common talk and extremely touchy, and the court so found and consequently granted the motion.

In regard to the proposition that the evidence does not support the judgment or minute entry, we have already cited 25 Cal. Jur. Art. 51, but in closing wish to cite Vol. 56 Am. Jr. Art. 73 and that part found on page 73:

" - - - The majority rule, however seems to be that the grant or refusal of a change of venue upon a ground other than that of bringing the action in the wrong county reposes in the sound discretion of the judge presiding over the court, and that a party to an action does not comply with the statutory formalities respecting applications for a change of venue thereby become entitled to a change as a matter of right, but, on the contrary, he must satisfy the court of the actual existence of the ground alleged, as justifying the change sought. His application is addressed to the discretion of the judge, whose ruling thereon will not be disturbed by an appellate court where no abuse of discretion appears from the record - - - - "

Also Art. 74 and quoting from page 75:

"- - - - However, the more stringent rule sometimes prevails that since a change of venue is left largely to the discretion of the trial court, its ruling thereon will not be disturbed unless it appears from the facts presented that the court acted unfairly and committed a palpable abuse of a sound discretion, or as it is sometimes stated, unless it is made clearly to appear that there has been such an abuse of discretion as to amount practically to a denial of justice. - - - -".

CONCLUSION ON CHANGE OF VENUE

Consequently we contend and submit that a valid judgment or order was made in the first instance; that the evidence does support it; that the defendants having submitted them-

selves to the jurisdiction of the Cache County Court and having failed to appeal within the statutory time allowed by law from the order for change of venue, cannot now raise any question to the jurisdiction of the Cache County Court.

STATEMENT OF FACTS ON THE MERITS

Counsel for plaintiffs cannot agree with Mr. Young's statement of facts and list hereafter their statement with the appropriate references to the record. But before beginning and due to the fact that Mr. Young has intimated and implied in his brief, page 19, that Judge Jones might have found for his client when he says:

"The court (with tongue in cheek) over-ruled 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)

He didn't go on to say that while Judge Jones had his tongue in his cheek that he also said, (R. 434):

"But I can't bring myself to say that there is not a substantial conflict in the evidence. - - - I still think there was sufficient evidence there to go to the jury. - - - I also want to comment in the record in this case in view of the charge made that the jury in this case was biased and prejudiced in favor of the plaintiffs, that the court can see no evidence of this jury over here in Cache County being moved by passion and prejudice to reach the verdict that it did. On the contrary, the court feels that the jury acted without passion and prejudice in arriving at the verdict."

"I also want to say in the record, the issues raised by the parties and the arguments of the parties to the jury and the evidence didn't touch on the main issue which the jury passed on, as I see it, and that is whether there should be an equal distribution, in the background, of this estate as an inchoate matter of equitable justice between the children, and not from favoritism to one child who was able to get possession of the body of the grantor before he died and obtain certain favors. And although a hundred new trials were granted it's my opinion that no jury in Cache County or Box Elder County or any other county under those circumstances would reach a different result. It is to be noted, of

course, that in the Box Elder County trial, the court was lulled into an erroneous construction of the dead man's statute, and the two brothers were not permitted to testify to certain matters. So the order may be as indicated."

Lorenzo W. Anderson was the father of the plaintiff's, George N. Anderson and Lorenzo W. Anderson Jr., and the defendant Marie T. Johnson. He was a widower in the year 1943 and had been for many years last past and was 68 years of age (R. 242). He was the owner of the following property: A home in which he lived in Brigham City; a home in Brigham City called the Christensen place; a farm and pasture in Garland; a dry farm in Promontory, Utah, consisting of 432 acres and a building lot in Brigham City, Utah, at the back of the home in which he resided.

In March of 1943 he made out three deeds to his three children. The son George was given the Christensen place in Brigham City and an undivided one third ($1/3$) interest in Promontory. The son Lorenzo was given the Garland farm, the building lot back of the father's home and an undivided one third ($1/3$) interest in Promontory. The daughter Marie was given the father's home place and an undivided one third ($1/3$) interest in Promontory. The father retained the pasture in Garland. This covered all of the property that he then owned.

The son George first heard of these deeds shortly after they were made up. He was living in Brigham City at the time and had the father to supper. (Rec. 219). While there the father told George and his wife about the deeds and invited them back to the house. The three of them went to the house and in the front room on the table were three deeds. The father told them what each deed contained and then (Rec. 220 line 21):

"He took this deed and held it out and said, "I want you both to take it." So we reached out and both of us took the deed. He says, "Now, each of you handle it and look at it," which we did. And then he explained, he

said, "I'm giving you this deed with the understanding that I would like to have the revenues from my property as long as I live." He said, "Now you can record this deed if you want to, but I wish you wouldn't until after I die. At which time, he said, "I would like you three children to come and get your deeds together. Each of you will then know that the other was getting so that there would be no feelings." (Underlining added).

The father explained to them (Rec. 221) that the deeds would be kept in a cubby hole of the family desk. It was written in the father's handwriting and it had been witnessed and notarized. This family desk was described by Lorenzo as follows (Rec. 192. line 12) :

"A. I said it was a roller top desk with drawers on the sides, on each side. There were three drawers on the left side. My drawer was the top one, Marie's the center, George's is the bottom one. On the right side was a double drawer about that big.

Q. When you say "that big" it doesn't go into that record.

A. Approximately a foot deep. And then a smaller drawer underneath. Dad kept his protractor and drafting equipment, drawing paper and such items as that in the double drawer. Then up in the back of the desk were four little drawers. George's drawer was the one on the left, Marie's in the center, and mine was third from the left. The fourth one Dad I think used for keeping papers or letters or something in. Then over beyond these small drawers on the back of the desk was this cubby hole. There was a key that was always left in the cubby hole because when you'd close the door it wouldn't stay closed unless you locked it. So the key was left in there so we all had access to it. The key was there. We could unlock it any time we wanted to."

The son Lorenzo first heard about the deeds in the spring of 1943 while he was working for the F.B.I. in the Western part of South Dakota, at which time the father wrote a letter to him (Rec. 86) and told him that he had deeded the property to his three children. In October of 1944 the father visited with his son Lorenzo in St. Paul at which time they discussed the deeds (Rec. 87). At that

meeting the son advised the father that he was making a mistake in deeding the property to his children without reserving a life estate but the father said he did not want a life estate and gave his reasons, and said:

"I trust you three children. I know you're not going to record the deeds until I die and that you are going to let me have the property to manage and keep the proceeds from it."

The son Lorenzo then suggested a will, but the father said he had already disposed of his property by deeds and that he did not believe in wills; he asked that the deeds be not recorded until he died. He said that Lorenzo's deed was in the cubby hole in the desk and that he had given it to Marie to give to Lorenzo.

In the fall of 1944 the son Lorenzo passed through Salt Lake City and visited his sister Marie, who was at that time quite worried about her husband being drafted into the army (Rec. 88) and asked Lorenzo if he had any objection if they went to Brigham City and ran the farms in the hope that her husband might be deferred and Lorenzo's permission was given.

It was either while Lorenzo was home on this visit, or the next, that the father introduced him to the tenant of the Garland farm (Rec. 89) and advised him that Lorenzo was the owner of it and that when Mr. Anderson died he would have to do business with Lorenzo. He also, at or about that time, told others that he was going to deed his property to his children and that he had so deeded it. (Rec. 268 and 439).

In the spring of 1945, the son Lorenzo made a visit to Brigham City and a conversation took place between him and Marie who was then living with her father (Rec. 91). At that time Marie took Lorenzo into the bedroom where the deeds were and they examined them and Marie asked Lorenzo if he wanted to take his deed with him. (Rec. 92) but

Lorenzo decided to leave it there in the desk.

In the spring of 1946 the son Lorenzo again returned to Brigham City and at that time his sister Marie told him that she was afraid that her brother George was going to try to get more than his share of the property (Rec. 94) and they decided to check the deeds again. In the reorcd page 95 line 20, we find:

"A. First of all I checked over the deeds. I checked mine carefully and then Marie said, "Will you check mine?" So I looked at hers. Then I said, "Marie, if there's any question as to the validity of these deeds we're going to have to prove delivery. Now," I said, "Dad told me he had given my deed to you to be given to me," and I said, "Now is that true?" and she said, "Yes, it is," I said, "Well, I'd like to know right now whether it's true or not. If it isn't then I'm going to talk to Dad about it so he can give my deed to me directly." She said, "Dad gave me your deed to be given to you.

She then got the deed again and handed it to him.

In September of 1946, after the father had had a heart attack, the family were all home. At that time the brother George was being transferred to Ogden, Utah, in his work. He had no place to live and the father suggested that he move into the Christensen place. It was discussed that a tenant was in the place at the time, but the father said, (Rec. 97) "You are the owner of the property and as owner you can evict this tenant under the O.P.A. regulations." He then told George to get his deed and for Lorenzo to go with him and meet the tenant, show him the deed and ask him to move. (See also testimony of Lorenzo, Rec. 225).

The tenant moved out and George and his family moved into the Christensen place. However the house needed a lot of repair and George wondered about recording his deed. His father met him at his house and they talked it over (Rec 226). His father told him:

"You can take that deed down and record it, but, Marie and Lorenzo might feel hurt if you recorded your third interest in Promontory at this time."

It was then decided between them to let the father take the old deed and make two new ones, one for the Christensen place and one for Promontory. They later met according to appointment and the father signed both deeds and Marie signed them at witness, and witnessed the delivery. (Rec. 228 line 10.):

“My wife and I were there. My father handed the two deeds to us at once. This time he never made much fuss about them. He merely passed them over. I took them and then my wife took them from me, as I remember. Passing the two deeds at the same time.”

The Christensen deed was recorded and the new deed on Promontory remained in the desk with the other two deeds and were seen from time to time by different members of the family. (Rec. 231-232-233).

In the meantime the father had more sickness and the wives of the brothers Lorenzo and George assisted in the nursing of Mr. Anderson (Rec. 99). The defendant Marie on the 16th day of July, 1947, (Rec. 101 Exhibit L-7), sent a letter to her brother Lorenzo wherein she speaks about the father being not too alert and that their brother George is trying to get some advantage. Whereupon Lorenzo telephoned his sister Marie (Rec. 103) from California and on line 28 we have:

“A. I asked Marie how Dad was and she said that his condition was getting worse all the time.

Q. What condition?

A. Well, physical and mental.

Q. Go ahead.

A. And she mentioned that George was trying to get some money to finish medical school and that he had asked Dad for some money and Dad had mentioned that he didnt have any cash on hand, that he'd either have to mortgage or sell property, and Marie said, “What shall I do?” she said, “Dad isn't alert enough to be able to handle the property,” So I said, “Marie, take the deeds down to the Recorder's Office the first thing in the morning and record them.”

Q. What deeds did you say to take down?

A. My deed and her deed.

Q. What did she say to that?

A. She said, "I'll go down the first thing in the morning and record them at the Recorder's Office."

Instead of recording the deeds as promised, Marie set about to have her father prepare a will wherein she and her husband could buy the Promontory property for \$10,000.00, even though it was worth \$30,000.00 and all within a week from the time she had reported to her brother that "Dad isn't alert enough to handle the property."

She prepared in her own handwriting (Exhibit L-1) a rough draft of the will and took it to her cousin William E. Davis, an attorney, for preparation on the 23rd day of July, 1947. On her direct testimony she denied having made any suggestions about the making of the will (Rec. 362) or being present when Attorney Davis talked with her father (Rec. 362), and on cross examination she claimed she knew nothing of what the will was to contain until after it was made (Rec. 390). When shown Exhibit L-1 she admitted it was in her handwriting, but said the date had been changed (Rec. 392-3). She even said that she had copied this exhibit after the will had been made and sent it to her brother Lorenzo (Rec. 395 lines 19 to 22), also (Rec. 196). Yet an examination of the Exhibit L-1 shows that it is an instruction written by one person to another about the property of a third person. She admitted that the attorney gave her the will to read when he brought it to the house (Rec. 399-400) and then for the first time said:

"Maybe she had been to see him about preparing it." And then finally, under cross-examination (Rec. 405) admitted she had prepared Exhibit L-1 and delivered it to the attorney for the preparation of the will. She, at the same time, to-wit July 24th, 1947, wrote her brother Lorenzo a letter (Exhibit L-2) advising him of the will, but says that she is not going to let her brother George know about it. (Rec. 403). George was to receive nothing under the terms of the

will. She therein describes her father's condition as gradually getting worse.

She did not record her deed, or her brother's deed, as promised (Rec. 407) nor did she notify her brother that she had not recorded it. (Rec. 407).

The father had another sick spell in August of 1948 and at that time the son Lorenzo returned home. (Rec. 104). The brother George had been home in the spring of the year and at that time the father hardly knew him, his health was so poor (Rec. 235). When Lorenzo was there the father was bed ridden and fell asleep while Lorenzo and Marie talked. Marie at that time took the will from a black book, (Rec. 104), at which time her brother called it to her attention that she had moved the deeds from the cubby hole and she said (Rec. 105 line 2) :

"Well, I'm keeping the deeds and the will together." She said, "George doesn't know anything about the will and I don't want him to know about it." So she says, "I'm keeping them all here in this book."

At that time Marie was told by Lorenzo that he did not believe the will was any good because the father had already disposed of his property and that the will could be contested. He then said (Rec. 106 line 2) :

"Do you still have the deeds?" "Oh, yes," she says, "They're here in the book." And she got the deeds out. That would be my deed, her deed and George's deed. I said "Marie, these deeds are good. Don't let anything happen to them." She said, "Don't worry, I won't."

Neither of the boys returned home again after the fall of 1948, until after the father's death. At that time each boy returned, the first words that they heard from Marie were, that her Dad had given to her and her husband Promontory (Rec. 238 lines 1 to 8, Rec. 107 lines 1 to 7 and Rec. 255 lines 23 to 28). A deed had been signed, Exhibit L-25, on the 7th day of February, 1949, to Promontory to Marie and her husband and also included in the deed was the home and

the lot that was to go to Lorenzo. A deed (Exhibit L-26) to the son Lorenzo to the Garland property was also made out on the same day.

These deeds were executed under rather peculiar circumstances. According to Marie her father was dressed (Rec. 372) in pants, shirt and slippers. According to J. W. Phillips, her witness, who acknowledged his signature (Rec. 316), shoes, shirt and trousers. According to the brother in law Ellis Demars, who called upon him almost daily after the first of January, 1949, until his death (Rec. 275) that he was dressed in his robe from day to day and that he did not remember of ever seeing him dressed after the first of the year. Also, according to Mari's witness, Dr. S. L. Moskowitz, from the time of his first attack in August, 1946, he was practically incapacitated until his death (Rec. 329). Also her doctor described what he meant by confusion as that a patient doesn't realize what is going on, would not know where he was or recognize his own home (Rec. 337-8). Marie admitted that he was irrational at times; that he didn't recognize his home or them and sometimes had a blank look on his face (Rec. 404). His sister Edna Demars said that at one time he lost his sight and mind and was paralyzed (Rec. 443). That he didn't recognize his home (Rec. 444). That she had come to his house where he's had his most costly books and different people were there and he said (Rec. 445):

"You can have them. You can take them home."
And we knew very well he wouldn't part with them for gold."

His brother in law Ellis Demars took him for several rides in the spring of the year, just before he died. He took him to Garland, Utah, to visit his sister in April or May of 1949 (Rec. 275). That Mr. Anderson appeared rational to begin with; that Mr. Anderson pointed ou the Garland farm and said that it was now his son Lorenzo's place (Rec. 276);

that Mr. Demars asked him if this property was the same as when he first made his deeds out and he said: "Just the same." (Rec. 277). This was after the 1949 deeds were purportedly made. That after they had been there for awhile he got a vacant stare (Rec. 277-8); that Mr. Demars had seen this same stare before the first of January, 1949. That when they started home and passed the Sugar Factory, he couldn't recognize it and said that they were going in the wrong direction. They stopped in the town of Elwood and where he and Mr. Anderson had surveyed at one time for a city water line and Mr. Anderson claimed he had never seen the place before and when the brother in law was asked to describe how he looked, he said (Rec. 278 line 30 and 279 line 1)

"Well, he still had that hazy appearance on his face. He didn't know where he was at." At another time he took him through Mantua and Dry Lake, where they had surveyed at one time together, and he saw that he was becoming confused and when he said that he didn't recognize the place, he took him home but when he got there Mr. Anderson said it was not his place and to take him home (Rec. 280). That he took him for a ride to Perry, a town three miles south of Brigham City and stopped for a drink of soda water and he did not recognize the town of Perry or the Perry Meeting House, or the surveying work that they had done around it, and Mr. Demars took him home. Mr. Demars also describes his clothing as a robe and slippers and that he had never seen him dressed otherwise since the first of the year. (Rec. 281 and 282). That he took him again to Garland and stopped in Bear River City, the place where Mr. Anderson was born, but he did not recognize it. When he got back home, he did not recognize his home (Rec. 283 and 284). He also tells about him trying to give away his valuable books and in the record at page 286, line 9, we have:

“Well, on one occasion Bishop Petersen at that time, Fred L. Petersen, he came in and he says, “I want you to take this book.” And Marie, she winked at me and I just nodded back to her and when the Bishop went out of the room we just took the book from him and turned around and put them back on his desk. His old desk was in the front bedroom at that time.”

These deeds, referred to as the 1949 deeds, were executed during that period of time when he wanted to give something away.

Marie did not advise her brother Lorenzo of any new deed executed by the father, even though she wrote him a letter a day after (Exhibit L-28). She did not record her deed until the day before the father died. Her deed is Exhibit L-25. She did not send or give the deed made by her father in 1949 in favor of Lorenzo, but instead after the funeral gave it to Attorney George M. Mason who demanded that before he give it up, that both the boys and their wives sign a Quit Claim Deed to Marie on all of the property that she got by the 1949 deeds (Rec. 121 also 240, 241) which they refused to do.

Mr. Young on page 16 of his brief and in the last of the second paragraph, said:

“His disposal of this home was displeasing to the deceased.”

The only evidence in the record regarding this is found in the record at page 419, line 27, when Marie answered,

“He was quite upset when he heard he had sold the home.”

Counsel then objected to it as not responsive to which the court ordered:

“It’s stricken and the jury is instructed to disregard it.” In this regard Marie did say in the record at page 419, that someone else had come in and told her father that George

had sold the house and that she had not told him. However when counsel produced a letter written by her (Rec. 421 and 422) (Exhibit L-36), she admitted that she had told the father of the sale of the Christensen place by George at a time when she thought that George was trying to get some advantage of her.

The 1943 deeds were burned by Marie (Rec. 256 line 28). She claimed in her direct testimony (Rec. 376-7) that the father gave them to her and told her to burn them.

The case was submitted to a jury to decide the question of delivery of the 1943 deeds, and they were also instructed to determine if the 1949 deeds were delivered and if so, if the maker had the mental capacity to make delivery of the same. (See instructions No. 1 to 15, Rec. 25 to 32). The jury returned a unanimous verdict in favor of the plaintiffs on the interrogatories submitted with its instructions (Rec. 33) and the court entered Findings of Fact and Conclusions of Law and Decree establishing the 1943 deeds.

ARGUMENT ON THE MERITS

The issues in this case raise three primary questions treated by counsel for the defendants:

1. The question of fact as to whether there was a delivery of the 1943 deeds.
2. The question of fact as to whether Mr. Anderson was competent at the time of the 1949 deeds, and
3. A question of fact as to the delivery of the 1949 deeds.

This case brings before the Court for the first time, so far as we know, Rule 39, Subsection C, Utah Code Annotated, 1953, as follows:

“Advisory Jury and Trial by Consent: In all actions not triable of right by a jury the Court upon motion or of its own initiative may try any issue with an advisory jury, or, with the consent of both parties may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.”

The action below was tried by a jury on all issues, and no parties objected to a trial by the jury; so we deem these facts to justify the statement that it was tried with the consent of both parties and that therefore the verdict, regardless of the form of the action, legal or equitable, has the same effect as if trial by jury had been a matter of right. Therefore, if there is any substantial evidence to go to the jury upon either of the three interrogatories, this Court will affirm the lower court's decision.

Assuming for the purpose of this brief that the new rules of court neither create nor abolish any jury rights, this portion of the case will be presented on the basis that there are mixed questions of law and fact and that legal as well as equitable relief has been asked. Federal Practice and Procedure, Barron and Holtzoff, Volume 2, page 607, Note 45; the text treats the rules as rules of common sense where there are both law and equitable questions raised. We submit that the question of delivery of the 1943 deeds is a legal question of fact, as is also the question for the recovery of possession of real property.

State v. Hart, 26 Utah 229, 72 P. 938. That case held that the fact that injunctive relief is sought does not deprive either party of his right to have legal issues submitted to a jury.

The cases in Utah on the question of whether or not a trial is on equitable or legal bases have a long history, practically all of them being cited in the case of Petty vs. Clark, 129 P. 2d 568. Some of the earlier cases held that where both questions of law or equity were involved, the equitable issue should be tried first, and the the Court should proceed with the trial on legal matters. (Park vs. Wilkinson, Utah 60 Pacific 945). The later cases, however, such as the Petty case, try all matters simultaneously; and the legal issues are submitted to the jury, and the Court determines the equitable relief to be applied. Some of the earlier Utah

cases cited in the Petty case, held contrary to the later cases; but it is apparent that the Petty case overruled these. See the last paragraph in the concurring opinion of Justice Wolfe.

The action at bar is an action for the recovery for specific real property, or to establish a right to real property; and the rule related to the delivery of the deed seems to be best stated in 26 C. J. S. Page 256 as follows:

“Whether a deed has been delivered and accepted ordinarily involves a mixed question of law and fact to be determined by the jury where the evidence is conflicting; but the question of what facts, if proved, amount to a delivery is a question of law.”

Therefore, in this case after the Court instructed the jury as to what acts would be necessary to constitute a delivery, it left it to the jury to ascertain whether Mr. Anderson had accomplished acts sufficient to amount to a delivery; and the jury held in favor of the plaintiff. The rule in Utah is cited with approval in the note in 117 A.L.R. Page 31c:

“Where a statutory suit to quiet title, remove cloud, or determine adverse claims to real estate is maintainable, the parties are as a general rule entitled to a jury trial if the defendant is in possession even though the statute does not affirmatively provide for trial by jury.”

Park vs. Wilkinson, Utah, 21 Utah 279, 60 Pac. 945, is cited and discussed under this annotation. At page 38 of the same annotation, it is stated that generally in most cases where the parties claim legal title and not merely an equitable title, such as a mortgage, the action is one in law; but the rule seems to be different in Federal Courts because the remedy at law is adequate and being entitled to a jury trial cannot invoke the jurisdiction of the Federal Courts. Under this heading at page 39, the Utah case of Norback vs. Board of Directors etc., 37 Pac. 2d 339 is cited with approval. In that case the action was brought to establish an easement under claim of ownership and for damages. There the Court

said:

"The primary purpose of the instant case is the establishment of an easement based upon an alleged prescriptive user. If plaintiff fails in this, his cause of action fails. The right of injunctive relief cannot come into existence until the easement has been established."

This issue the plaintiff was entitled to have tried before a jury. In analyzing that holding, it is apparent that the plaintiff was entitled to have the jury determine whether or not he had an easement; and then if he did, the Court would apply the extraordinary equitable injunctive relief. This fits exactly into the pattern that we have on this appeal, namely that we are entitled to have a jury answer the questions as to whether or not there was a delivery of the 1943 deeds. Then if there was, such a delivery, the Court may apply relief either by partition of the property among the sons and daughter, or by quieting the title in the respective parties.

See also Buckley vs. Cox et al recently decided Utah No. 7730.

The questions involved are now set out in the following three sections of our Judicial Code in Utah Code Annotated, 1953:

78-21-1. "Right to jury trial — In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract or as damages for breach of contract, or for injuries, an issue of fact may be tried by a jury, unless a jury trial is waived or a referee is ordered.

78-21-2. Jury to decide questions of fact — All questions of fact, where the trial is by jury, other than those mentioned in the next section, are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided.

78-21-3. Court to decide questions of law — All questions of law, including the admissibility of evidence, the facts preliminary to such admission, the construction of statutes and other writings, and the application of rules of evidence are to be decided by the court and all dis-

cussions of law addressed to it. Whenever the knowledge of the court is by law made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it."

There is not a great deal of difference between the old Code and the above excerpts from the Judicial Code. The Code of 1943 carried the old system of disposing of cases by including the following:

"In cases where there are issues of both law and fact, the issue of law must first be disposed of."

I do not find this provision in the present Code.

An interesting case is found in the California Court, Longley vs. Brooks, 92 P. 2d 394. This was a case where there was a claimed delivery of deeds by the defendant notwithstanding the fact that the grantor retained custody after delivery. The Court in disposing of the matter on appeal stated.

"In accordance with well-established law, it is clear that if the findings relating to the delivery of the deed to the respondent are substantially supported by the evidence, or if there is a substantial conflict in the evidence upon which the findings are made to rest, the resulting judgment may not be disturbed.

In any event, the weight to be given the testimony as to the sealing of the envelope, as well as that of all the other testimony bearing on the question of the delivery of the deed, presented a **question of fact** for determination by the trial court."

The principal difference in the Longley case and the case before this Court is that the Longley case was tried by the Court, but the Court no doubt treated the matter of the delivery as a matter of law and not of equity. On the other hand, Mr. Young assumes without argument in his brief that this is a case in equity and not at law.

Under his argument on Point 10, he states:

"As we have heretofore suggested, this being a suit in equity, 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."

In this assumption counsel is in error.

This Court held in the case of Babcock vs. Dangerfield, 94 P. 2d. 862, which was an action to try title to real property and quiet the title thereto, that the court committed reversible error because it held the case to be one of equity and the appellant was entitled to a jury and reversed the case for that reason. As a matter of fact, as held in the Babcock case, it is only necessary for the plaintiff to prove a prima facie case; and when that is proved, the case is one for the jury and it is reversible error to refuse a jury.

The court below adequately instructed the jury as to the question of intention of a grantor upon the delivery of a deed, stating in substance, (Instruction No. 5) with reference to the 1943 deeds, that the question of delivery is essentially the matter of the intent of the grantor; and that the question to be determined by the jury was: Did Lorenzo W. Anderson intend to personally pass the title to the property by the 1943 deeds to the grantees, and did he intend to divest himself of any right to recall these deeds?

In the Minnesota case of Exsted vs. Exsted 117 A.L.R. 599, (279 N.W. 554) the Minnesota Court laid down the rule:

“If the deed was left with the register of deeds with the intention of immediately investing title in Harry, and with the intent of relinquishing control over it, then there was a delivery of the deeds.”

North Dakota has laid down a similar rule found in Stark vs. Wannemacher. This was a case involving a conflict of evidence as to the delivery and failure of consideration of a promissory note. While the North Dakota Court does not treat at length in the question of intention, it did hold that the verdict of the jury as to the delivery was binding on the Supreme Court where there was conflict in the evidence.

Now having treated first the matter that the jury was the trier of the facts and that the Court so recognized them as the trier of the facts and amply instructed them as to

what their duties were in determining the questions of fact, and the jury having so determined that the 1943 deeds were valid and were actually delivered, let us review the cases and the evidence in this connection.

The son Lorenzo testified that his father sent him a letter to South Dakota telling him that he had prepared deeds conveying the property away (Rec. 86). That Mr. Anderson came to St. Paul in October, 1944 and again told the son Lorenzo about the deeds. That there was a considerable discussion between the father and the son at said time; the son advising him not to convey his property away unless he made a deed reserving a life estate, or to make a will. But the father gave him his reasons for not wanting a life estate and that he wanted no will because he had already disposed of his property (Rec. 87 and 88); that his son's deed was home in his desk; that he had given it to his daughter Marie to deliver to him when he returned. Later, after the father had made these statements, he introduces his son Lorenzo to a tenant by the name of Garfield and tells him that his son Lorenzo is the owner of the farm, and that after Mr. Anderson dies that he will have to deal with the son Lorenzo (Rec. 90). That when the son Lorenzo returned home in 1945, Marie, who was entrusted with his deed did get the deeds and show them to him and asked him if he wanted to take his deed home and he advises her that he would leave it in the desk for safe keeping (Rec. 91 and 92). That he returned again in 1946 and at this time the sister Marie was suspicious of her brother George and asked her brother Lorenzo to check her deed. That at that time he had a conversation with her telling her that delivery was mighty important and that his father had advised him that he had delivered his deed to Marie for him, and that he asked her at that time if that was a fact and that if it was not so, he would have to talk the matter over with his father. That she told him that the father had delivered the deed to her for Lorenzo and gave it to him at that time (Rec. 94 and 95).

That when the son Lorenzo was home in the fall of 1946 and the father was sick, that the father told Lorenzo to go with his brother George and tell the tenant of the Christensen place to get out because the home belonged to George and to take the deed along to show him. (Rec. 98). That the son Lorenzo in July 16, 1947, received a letter (Exhibit L-7) from Marie saying that the father was not too alert and that George, her brother, was trying to take advantage and what should they do. At that time Lorenzo phoned from California and told Marie to record both of their deeds at the Court House and she promised to do it for him (Rec. 101-103). That he returned again in August 1948 and at that time she showed him the will that she claimed the father had made out and that the deeds at that time had been taken out of their usual place and put in a black book where the will was, under Marie's control. That Lorenzo told Marie at that time that the deeds are good and to let nothing happen to them and she so promised (Rec. 104-106). That when Lorenzo returned for the funeral the first words from Marie were to the effect that the father had given her Promontory (Rec. 107).

The Court is invited to check the cross-examination made by Mr. Young of the son Lorenzo. He was kept on the stand for hours under a gruelling test and his testimony under all of said cross-examination strengthened and improved his direct testimony as to these facts. The brother George testifies that he heard of the deeds about the same time they were made, when the father was to his place for supper (Rec. 219). That they returned to the house and there were three deeds laying on the table. The father explained what they contained and then handed his deed to him and his wife and tells them that at that time that he is giving it to them and that all he wants is the revenue and that they could record it if they wished, but he would rather they would not, but keep it in the family desk. (Rec. 220). He

had already explained to his son George on previous occasions the necessity of parting with the deed to complete the delivery (Rec. 221 and 222). At the time the son George was about to go into the Armed Services in 1944, he talked with his father about what would happen to his interest if he died (Rec. 223) and his father said his wife would get it. And in 1946, when George decided to return to Brigham City his father tells him to get his deed and show it to the tenant who was living in the Christensen place and tell the tenant to move that it was his property (Rec. 225). That because of the fact that numerous expenses would be involved in remodeling the house he talked to his father about recording the deed and together they determined that two new deeds should be made up, one on Promontory and one on the house. He could record the one on the house at that time and the other deed would be kept back with the deed of the other brother Lorenzo and his sister Marie, and be recorded after the death of Mr. Anderson (Rec. 226). That two new deeds were made out and both delivered to him and the sister Marie witnessed them (Rec. 227). That the deed was actually handed to him and taken into his possession (Rec. 228) and the deed to the Christensen place is still in existence and was offered in as Exhibit L-24 and shows Marie appearing as a witness. That he saw this deed in the desk several times later (Rec. 231, 232 and 233). That he received a G.I. Farm in Idaho and had to sell the house in which he was living in and move to Idaho and did not again return after the fall of 1948 until the father's death. That when he returned from the funeral and met Marie, the first thing she said is that she has obtained Promontory (Rec. 238).

Again on cross-examination, Mr. Young, with all the power at his command attempted to tear that story apart. George again explained how he received the deed (Rec. 244) for the year 1943 and how the father wished that he wouldn't

record it (Rec. 246). Why the two deeds were given when he took over the Christensen place to live in (Rec. 248). On re-direct examination he was asked on page 256 of the record, if he knew what had become of the deeds and he said that Marie told him that she had burned them. Mr. Anderson's sister Edna Demars tells of a conversation with her brother, where he told her "This is the way I have divided my property" (Rec. 439). That his brother in law, Ellis Demars tells of a conversation where his brother in law, Mr. Anderson, told him that he was going to deed his property to his children (Rec. 268) and then later told him that he had so deeded the property to his children (Rec 268). Mr. Demars also told of a conversation with him (Rec. 277) that took place either in April or May of 1949, some two or three months after the purported 1949 deeds were made out, where Mr. Anderson said that his property was still the same as when he had first made his deeds out.

Then, the positive testimony of the actual delivery of the deed to George. And the actual fact of delivery to the son Lorenzo by the father to Marie and Marie to Lorenzo we have a conflict arise by Marie saying that she did not know of her father signing the deeds in March of 1943 (Rec. 346) and then saying (Rec. 347) he told her about the deed on just one occasion. That he showed it to her but never gave it to her and denies that he ever gave her Lorenzo's deed (Rec. 347). But on page 348 she says: "I was told not to record them until after he died." She admits that her brother Lorenzo came in June 1945 and looked at the deeds, but can remember of no conversation. He came again in 1946, but she can't remember any conversation (Rec. 352), but says that there was a daughter's deed there in the drawer and maybe there was a conversation about taking the daughter's deed to California, but she doesn't know (Rec. 353). She admitted that her brothers Lorenzo and George went out to the Christensen place with George's deed and

told the tenant to get out (Rec. 355) and she admitted that she was a witness on the Christensen deed, but can't remember of any other deed (Rec. 356) and then denies that she saw any delivery of the deed (Rec. 357). She admits the will of July 24, 1947 (Rec. 361) and denies that she had anything to do with the making of the will (Rec. 362). Denies that she talked with Attorney William E. Davis about any of the provisions of the will (Rec. 362) and denies that she was present when Mr. Davis and her father talked together (Rec. 362). Admits that Mr. Davis delivered the will and handed it to her to read (Rec. 363). Says her father executed the new deeds in February of 1949 and knew exactly how he was dressed that day (Rec. 372) and that his mind was alright (Rec. 372). That there were two deeds made in February of 1949, one for Lorenzo and that Lorenzo was not to get it before the father died (Rec. 373) and that her deed was hers (Rec. 373). Admits that she gave Lorenzo's deed on the Garland property signed in 1949 to Attorney George M. Mason (Rec. 374). Then on Rec. 376 she claimed the father went through the papers and got the deeds and the will and gave them to her and said to put them in the stove and burn them. On cross-examination (Rec. 390) she was asked if she knew what the will was going to contain. She alleged she did not until after it was made out and Attorney Davis brought it back. In Rec. 392 she was shown Exhibit L-1 which was an instrument in Marie's handwriting that she herself had taken to Attorney William E. Davis to show him how the will should be made and was dated July 23, 1947. She admitted that it was in her handwriting and said the date was wrong. On Rec. 393 she said it was her handwriting but the "23rd" was not and that she had copied that off the will after the will had been made up and delivered. On Rec. 394 this will was gone into piece meal, showing that it was one person writing about another

person's property for the benefit of a third person. She was asked again on Rec. 395, if she did not take that paper to Attorney Davis, but she denied it and said she thought she sent it to Lorenzo. Her evasive ability as a witness is very cleverly shown on the Rec. 397 and 398 and then in Rec. 400 she was asked why did Mr. Davis give her the will to read? Was it because she had been in to see him about it, and for the first time she started to break down and said "maybe so." She admitted a conversation (Rec. 400) over the telephone with her brother Lorenzo where she had promised to record his deed. On Rec. 405 she finally broke clear down and admitted that she had delivered Exhibit L-1 (the instructions for the will) to Attorney William E. Davis. The defendant Marie offered in Exhibit L-c being a lease purportedly dated the 22nd day of December, 1944, between her father and her husband and she acted as a witness. The plaintiffs' denied the date upon the contract and offered in their Exhibit L-2 which is a letter postmarked January 2, 1945, and talks about Marie and her husband wanting to rent property and machinery if the draft board didn't take him and telling that they have taken down the christmas tree. This was offered for the purpose of showing that any agreement was back-dated.

As far as the delivery of the deeds was concerned, the above is the evidence that was presented to the jury. They had been instructed by Instruction No. 12 (Rec. 31):

"You are the exclusive judges of all questions of fact of the credibility of witnesses. In judging of their credibility you have the right to take into consideration their deportment on the witness stand, their interest, if any is shown, the result of the suit, the reasonableness of their statements, their apparent frankness or candor, or want of it; their opportunities to know and understand, and their capacity to remember. You have the right to consider any fact or circumstance in evidence which in your judgment affects the credibility of any witness. If you beleve from the evi-

dence that any witness who has testified in this case has knowingly and willfully testified falsely to any material fact in this case, you may disregard the whole testimony of such witness, unless the witness is corroborated by other creditable evidence or you may give such weight to the evidence of such witness on other points as you may think it entitled to; the jury are the exclusive judges of the weight of the testimony. - - "

In this case they found the witness Marie very evasive. She denied emphatically the very important document of the preparation of the will until her back was to the wall and then turned around and admitted under oath that her former testimony was wrong. She even said that she had never told her Dad about George selling the Christensen place (Rec. 419) yet on re-cross examination and when she was shown her own letter (Exhibit L-36) she did admit that she had told her Dad that George had sold the Christensen place and that she did that when George, she thought, was trying to take some advantage of her. (Rec. 522).

Mr. Young says in his brief (page 37) :

"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."

This was the testimony of Marie alone. It is not corroborated. The Jury had watched and seen her testify and had seen her forced to change her testimony, after giving it under oath. They were the exclusive judges of her credibility and by their determination they evidently considered such statement to be of no more value than the statement first made, that she had not prepared and delivered written instructions to Attorney William E. Davis for the preparation of the father's will and then when forced with the fact that the attorney would be called, she changed her whole testimony and admitted it.

The evidence shows and is uncontradicted that in both the case of Lorenzo and George, they actually had in their own possession, the 1943 deeds that were executed by their father. There is very interesting law in this regard which is found in Chamberlin et al, vs. Larsen et al, 29. Pac. 2d 355, Utah 1934:

Sadie B. Bennett and Josephine Fortune were sisters and lived in a house and lot in Salt Lake City; the title being in Bennett. Bennett died on January 15th, 1928, and Fortune died March 1928. On January 24th, 1928, a deed was recorded to Fortune dated January 27th, 1921. In February Mrs. Fortune had an accident that disabled her and a party by the name of Larsen came to live with her and take care of her in consideration of the deed conveying the property, with Mrs. Fortune retaining a life estate.

This action was brought by the heirs of Miss Bennett to set aside the deed to Mrs. Fortune, claiming non-delivery and that Larsen had no rights.

The lower court held the non-delivery of the deed. The facts showed that Bennett and Fortune had a joint deposit box and the deed was in the box. Also that no entry slips were signed by Mrs. Fortune for admission to the box prior to Miss Bennett's death, but showed that Mrs. Fortune came to the bank with Miss Bennett occasionally. The contents of the box showed only papers of Miss Bennett but none of Mrs Fortune, other than the deed.

The deed was made by an attorney who was also a real estate man and thought both sisters were present at the time the deed was made. Mrs. Fortune could not hear because of a slight defect in hearing. At the same time the assignment of mortgage was made to Mrs. Fortune, papers and deed were given back to Miss Bennett after they were completed and the assignment kept in the box, but released two years later by Miss Bennett who had given the assignment.

Testimony after deed was made — Miss Bennett wished to sell property. The taxes were paid by Miss Bennett. Conversation between Miss Bennett and others — if Miss Bennett died first the property to go to Mrs. Fortune. Conversation with Mrs. Fortune after Miss Bennett's death, where Mrs. Fortune does not appear to know she owns property. One witness testifies that prior to Miss Bennett's death, she asked a party to go with Mrs. Fortune, if Miss Bennett died, to see that her deed was recorded. She doubted if Mrs. Fortune knew what to do.

Testimony at the time the box was opened, after the death of Miss Bennett showed that Mrs. Fortune got her deed and recognized it. This testimony was given by Larsen the defendant.

Neighbors testified that Miss Bennett told them that she had given Josie, that is Mrs. Fortune, a deed for the property and all she had to do after her death was to put it on record. (See cross examination page 360, left hand column).

In February 1928, Mrs. Fortune was injured and called the doctor and tol him she had received a deed from her sister and wanted to give the property to Larsen (see balance of statement 360 right column). The doctor got a lawyer who fixed up the papers.

See the court's statement regarding the release of the mortgage that had been assigned, page 361, where the court says:

"Nor do we think that the release of the mortgage by the record holder thereof is much, if any, evidence, of the non-delivery of the unrecorded assignment thereof, particularly in view of the relationship existing between the assignor and the assignee."

Now at the bottom of page 361 we come to the very question before this court. Both of the boys have had actual possession of their deeds and defendants admit it, but

claim non-delivery. At the bottom of page 361 we have:

“The rule seems to be well settled that a deed duly executed and acknowledged and shown to be in the possession of the grantee, is self-proving both as to execution and delivery and that the recording of a deed is likewise evidence of delivery.”

It is thus stated in Devlin on Deeds 3d ed. Art. 294 page 362:

“The possession of a deed duly executed in the hands of the grantee, is prima facie, but not conclusive evidence of its delivery. It therefore follows that he who disputes this presumption has the burden of proof and must show that there has been no delivery. And not only must this presumption be overcome, but it is held there is a strong implication that it has been delivered when it is found in the hands of the grantee that only strong evidence can refute the presumption.”

Mr. Young is now trying to shift the burden of non-delivery in such a way that he is willing to say “even if we take it for full value, that is, that they had these deeds in their hands, that doesn’t amount to anything. They must prove more because the father kept possession of the property. The deeds were in a desk that all had access to. He paid the taxes. He conveyed some other property away to grandchildren and recorded those deeds and he made a lease with one of his children.”

Now back to this case. This court should examine the left side of page 362, where a great many cases are cited in support of the above and then it enters into the proposition of “presumption” and quotes certain text writers and in this regard at the bottom of page 362 says:

“The author draws the distinction that a presumption of law is in reality a rule in some particular branch of the substantive law, a general maxim of jurisprudence, or an assumption by the court of the existence of a fact not proven in order to facilitate and expedite judicial action.”

And then a full paragraph follows, showing how the presumption comes into being and is applied and then says:

"Tested by these principles, we think the evidence of the plaintiffs insufficient to sustain the burden of proof and establish the non-delivery of the deed in question. The testimony of Mr. Fletcher who took the acknowledgment and witnessed the deed, that after taking the acknowledgment he handed the deed to Miss Bennett, did not show the non-delivery. Nor, indeed, would it have had that effect had he testified positively that he did not then see the deed delivered." *Thompson vs. McKenna*, 22 Cal. App. 129, 133 P. 512.

The statement by the grantor of her purpose in making the deed: "To take care of any future trouble in the event that Miss Bennett died before Mrs. Fortune," did not show non-delivery of the deed. *Ehrlicj vs. Tritt*, *Supra*.

Indeed, in this respect the present case is not unlike that of *Jackson vs. LaMar*, 58 Washington, 383, 108 P. 946, 948, where the court said:

"A mere statement of the grantor that he wanted his brother to have his interest in the property in case he passed on, to keep him from being annoyed by the heirs in the east, has no tendency to establish a non-delivery of the deed, or to overcome the presumption arising from its possession by the grantee."

Nor was the fact that the deed was kept until after the death of Miss Bennett in a box to which both she and Mrs. Fortune had access, any evidence of non-delivery. *Reed vs. Smith* 125. Cal 491 58 P. 139; *Le Saulnier vs. Loew* 53 Wis. 207, N.W. 145 *Wilson vs. Wilson* 32 Utah, 169, 89 Pac 643.

That the grantor, after the execution of the deed, continued to pay the taxes on the property, carried the insurance in her name and expressed to various persons a desire to sell part or all of the property is not, when the relationship existing between the grantor and the grantee is taken into consideration, inconsistent with the actual delivery of the deed. - - -. This is not a case of a grant to a stranger where the grantor remained in possession and continued to pay taxes, etc., and we think such conduct is in no respect inconsistent with a prior delivery of the deed to the grantee, and that it is no evidence of non-delivery. *Woolley vs. Taylor* 45. Utah 227 144 Pac. 1094; *White vs. Smith* *Supra*; *Stewart vs. Silva* *Supra*."

Again we find on page 364, this:

"We have in this respect considered only the evidence

tending to support the finding of non-delivery. There is in the record also evidence affirmatively tending to show delivery of the deed. We may say, in this case, as was said by the court in the *Stewart vs. Silva*, *Supra*: "The situation presented by this appeal may be summed up as follows: If the trial court dis-believed all the witnesses who testified on behalf of the defendant, with reference to the delivery of the deed, there is no evidence to overcome the presumption of delivery derived from the fact that the grantee had possession of the deed. If the trial court believed the testimony of these witnesses, it could not escape the finding of fact that the deed was delivered. In either event the finding of the trial court was erroneous."

As a consequence the Supreme Court reversed the trial court who had found that there was no delivery of the deed and directed the trial court to enter findings to the effect that there had been a delivery. Consequently we say that the evidence having shown a delivery to George and his wife and the possession of the deed by them at a certain time and the evidence having shown further, that after the father told Lorenzo that Marie would give him his deed and Marie did give it to him, the delivery was consummated and the presumption then arises that the delivery was valid and it is upon the party who claims non-delivery to prove the non-delivery and the presumption of delivery will not be refuted except on testimony that is clear and convincing, that the fact of the deed was where both parties had access to it, would not be such evidence. The fact that Mr. Anderson continued to pay taxes on the property would not be such evidence. The fact that he made a lease to one of the children to keep them out of the army would not be such evidence of non delivery. All because of the relationship which existed between the father and the children. Other cases holding this to be the law are cited under Thompson on Real Property under Art. 4120 page 572 and are as follows: *Stewart vs. Silva* 192 Cal. 405, 221 Pac. 191; *Ephraim vs. Oakland Title Insurance and Guarantee Co.*, 54 Cal. App.

379, 201 Pac. 946; Hodoian vs. Garabedian, 79 Cal. App. 762 251 Pac. 227; Patterson vs. McClenatham, 296 Ill, 475, 129 NE 767; Qwinn vs. Hobbs 83 Ind. App. 263, 141 NE 812, 141 NE 648; Partello vs. White 197 Iowa 24, 196 NW 719; Vernon vs. Vernon 211 Ky 196 277 SW 248; Mason vs. Mason 231 SW 971; Clark vs. Holmes 109 Neb 213, 190 NW 493; In Re Cragins Estate, 274 Pol 117 Atlanta 445; Heck vs. Morgan 88W. Va. 102, 106 SE 413

Mr. Young might claim, and he has definitely inferred, that the getting of the deeds by Marie and delivering them to Lorenzo on two different occasions was not a delivery by the father, and then he states that Marie has denied any delivery to her. The jury was the judge of whether or not Marie was inclined to tell the truth. The father's lips have been sealed in death, but before they were sealed he told others, the Demars, that he had divided his property. He told his son Lorenzo that he had made the deeds, conveying one third to him and that Marie had his deed and would give it to him. Lorenzo asked Marie for it and she went and got it. She knew exactly where it was and it is the province of the jury to take these facts and hold that the father had delivered the deed to Marie for her other brother. And naturally we come to this proposition, if this is a fact, that the father delivered the deed to Marie to deliver to Lorenzo, is this a good delivery? Thompson on Real Property, his permanent edition, Art. 4133 page 593, says'

"TO WHOM DELIVERY MAY BE MADE IN GENERAL.—It is not essential that the delivery be to the grantee himself. It may be made to the grantee's agent, and even to a third person who is not his agent, for the grantee's use, provided the grantee afterwards assents to the deed or receives it."

And then it cites cases from the United States and Federal Reports, two from California, one from Connecticut, seven from Illinois, five from Indiana, one from Iowa, four from

Kentucky, one from Maryland, four from Mass, two from Michigan, three from Minnesota, one from Nebraska, three from New Hampshire, one from New Jersey, six from New York, one from North Carolina, one from N. Dakota, one from Ohio, one from Oregon, two from Penn, one from South Carolina, and two from Texas and then a line of English cases.

I ask this, did Lorenzo assent to the delivery of the deed? He most certainly did, he even phoned from California and told Marie to put it on record and she promised that she would and there is no testimony in the record that at the time she told him she would put it on the record that she argued or attempted to argue with him and tell him that the father had not delivered it to her, for him, and that it was not his. But on the contrary, indulged in every cooperative measure to lead one to believe that her thinking was that it was Lorenzo's deed and that he had a right to direct what should be done with it.

Another very interesting case was Robertson et al vs. Renshaw et al, Whitney Intervenor, Supreme Court of Iowa, June 21st, 1935, 261 NW 645. The facts in this case are: That the mother who owned certain property prior to her death, went down to her lawyer and had three separate deeds made out to a part of her children and placed them in her own safety deposit box in the bank, and then told neighbors that she had conveyed her property to her children and that the children never seeing the deeds, or having them delivered to them, prior to her death, but after her death taking the keys to her box and going down and getting the deeds and recording them. Then another daughter brings this action to have the deeds set aside. The case was tried upon these facts, that is, that the deeds were in the safety deposit box and that possession of them was obtained by the

grantees, after the death of the grantor, getting them into their possession through opening he box. There was no proof of non-delivery offered by the plaintiff and the court said on page 648:

“There is considerable confusion in the pronouncement of this Court on the question of what is necessary to constitute delivery of a deed. All authorities agree that to make a warranty deed effective, a delivery is necessary. It is equally clear by all the authorities that where a deed is signed, acknowledged, and recorded, the law presumes that it has been delivered. (The recording in this case was after the death of the grantor—this notation is mine.) This presumption is, of course, a rebuttable presumption and may be overcome by any competent or satisfactory evidence to the contrary. *Stiles vs. Breed*, 151 Iowa, 86, 90, 130 NW RNW 376; *Brown vs. Johnson* Iowa 255 NW 862. The settled rule of evidence in this state is that one seeking to set aside such a deed, which is shown to have been signed, acknowledged and recorded, has the burden of showing non delivery by proof that is clear and satisfactory and this true, even though the recording is after the death of the grantor.”

There are a line of cases which are given thereafter. Then on the left hand column of page 649 they go into the premise that delivery is a matter of intent and how it may be affected, and towards the bottom of the page it says:

“In final analysis it may be said that delivery is a matter of intent and any distinct act or word by the grantor with intent to pass the title to the grantee, by transferring the deed to him or to another for his benefit is a delivery.”

In this case the presumption of delivery was with the parties who had the deed in their possession and had recorded it and that the court held that the other party, not overcoming that presumption could not prevail. This is the same as we have. We show that the deed was in the possession of our parties at different times. The presumption was not overcome by any testimony of the defendants, Johnsons; Marie

herself destroyed the deed, the father didn't. So in this case, the presumption being with us that delivery was made and the intention being clearly shown of the grantor to part with the title and the fact that he told it to neighbors, has not been overcome and the jury has so determined.

The California case of *Blackledge vs. McIntosh* 259 Pac. 770 is an interesting case for the reason that there we have a desk involved, similar to what we have in this case. The facts are, that the mother who was a widow lived with her daughter who was single and after going down and having the deeds made out to her daughter brought them home and the daughter is the one who testifies about the delivery and no one else. She testifies that the mother gave her the deeds and that she put them in a roll-top desk that was in the mother's house, in one of the drawers where they had kept other business papers. When they moved again this desk was put in "Mama's room" which has a striking similarity to the desk in question in the *Anderson vs. Johnson* case, and both had access to it until after the death of the mother. The mother told to friends and neighbors that she was going to convey the property to her daughter and that she had conveyed the property and they testified at the hearing. There was understanding between the mother that that deed should not be recorded and that the daughter could have the rents and income if she remained single. Then the court commenting upon this said, in the right hand column, page 773

"The foregoing decisions afford ample authority for the holding that any oral agreement or understanding of Mrs. McIntosh (Mother) may have had with her daughter that the deed should not be recorded until after death, and that the daughter should only have the rents and income from the property so long as she remained single and was in need of such income, is immaterial and would have no effect upon the delivery, because the

deeds were absolute in form and could not be delivered to the grantee conditionally. Delivery to her is necessarily absolute, and the instrument took effect immediately, discharged of any condition on which delivery was made, not expressed in the instruments themselves."

Again over on page 772 in the right hand column we had something in that case that is in ours, and that is this:

"The evidence in this case also shows that Mrs. McIntosh, after the execution of these deeds, paid the taxes upon the property herself, and appeared in an action involving one of the pieces of property as legal owner thereof; collected rents from some of the properties; made repairs and improvement upon another piece of property; made returns to the assessor for assessment purposes as the legal owner of the property, etc."

"All these facts, while tending to show a continuing claim of title by Mrs. McIntosh (Mother) to the property theretofore conveyed to the defendant, were merely circumstances to be weighed by the trial court against the affirmative evidence of delivery given by the defendant. These facts, taken with other facts testified to by the defendant and her witnesses, did no more than raise a conflict of evidence on the vital issues of the sufficiency of the delivery of the deeds to pass title to the defendants, and, the trial court having resolved that conflict in favor of the defendant, such finding will not be disturbed by this court where there is any substantial evidence to support it."

Again in this case the deed stayed in the possession of the grantor so to speak, by being in the deed in the same manner as it was in the Anderson case and Thompson on Real Property, Art. 4144 page 604 says:

"The fact that a deed remains in the grantor's possession will not prevail over the fact that the parties intended that it should be considered as delivered."

and they cite the following cases: Arkansas, Lee Hardware Co., vs. Johnson 132 Ark 432, 201 SW 289; Marvin vs. Simpson 23, Colorado 174, 46 Pacific 73, Illinois Prince vs. Prince 258 Ill, 304, 101 NE 608; Little vs. Eaton 267 Ill 623

108 NE 727; Balin vs. Osoba 76 Kansas 234 91 Pac. 57, Ky Higgins vs. Gose 144 Ky 123, 137 SW 1038, Mississippi, Wall vs. Wall 30 Miss. 91 64 AM. Dec. 147; Henry V. Phillips 105 Tex 459, 151 SW 533; Thatcher vs. Capecta 75 Washington, 249, 134 Pac. 923. And again in Thompson on Real Property Art. 4144 page 608, where the delivery is complete, the return of the deed to the grantor does not re-invest him with title. And besides quoting the Blackledge vs. McIntosh 259 Pac. 770 quoted above, they also quote Garrett vs. Lion Oil and Refining Company 173 Ark. 429 92 SW 405; Chestnut vs. Cobb 163, Georgie 87, 135 SW 433; Johnson vs. Fleming 301, Ill, 139, 133 NE 667; Burnett vs. Burnett 194 Ky 635, 240 SW 75; Emerson-Brandingham Implement Company vs. Cook 165 Minn 198, 306 NW 170, 43 ALR 41. And this same Art. No. 4144 in Thompson, continues with the following:

“If a deed is delivered to the grantee it takes effect from such delivery, though it be afterwards handed back to the maker for a specific purpose, for instance, for safe keeping during the grantee’s minority, to obtain a release of dower by the maker’s wife, to have it acknowledged or recorded, or to correct an informality in it; delivery is not invalidated thereby. A court of equity, on the ground of a trust, may decree a restoration of a deed, or, if the deed has been destroyed, it may decree the execution of a good and sufficient conveyance of the premises. If there has been a delivery, the grantee in trust cannot be defeated by the grantors obtaining possession of the deed in any way. Or by his state subsequent declaration that there has been no delivery. The fact that the deed was kept in a safety deposit box which both the grantor and the grantee kept their papers, did not operate to destroy its effect, if it was actually delivered by the grantor into the manual possession of the grantee.”

In 26 C. J. S. page 239, we have:

“Where the grantor reserves a life estate in the property and its possession and control, his retention of the deed is not inconsistent with the idea that a delivery was intended.”

In 26 C. J. S. 239 we have:

"The fact that, after a deed has been delivered by the grantor to the grantee, the latter returns it to the former merely for the performance of some act in connection therewith does not negative the previous delivery or operate as a surrender of the title thereby acquired. So, the delivery is not necessarily invalidated by the fact that the grantor acts as a depositary for the grantee, as where the deed is returned to him for safe-keeping, or that he has access to the place where the deed is kept, or that it is kept with his private papers."

In 26 C.J.S. page 247 we have:

"Likewise, a deed is not rendered inoperative by the fact that it is delivered under a contemporaneous agreement that it is not to be recorded until the grantor's death, (Knudson vs. Adams, 30 P. 2d 608, 137 Cal. Ap 261) or that the grantor is to retain possession of the property during his lifetime."

The case of Merritt vs. Rey, 104 Cal App 702, 286 Pacific 510 and on page 512 in the right hand column we have:

"There is now in America no legal obstruction to the conveying of title to real property which is to be enjoyed by the grantee only at the death of the grantor. Under such circumstances the grantor will be regarded as presently conveying the title subject to the reservation of a life estate therein. Section 767, Civ. Code; Ripperdan vs. Weldy, 149 Cal 667, 674, 87 P. 276; 1 Tiffany on Real Property (2nd Ed) p, 551, Art. 159. While oral testimony is admissible for the purpose of determining the intent with which the grantor relinquished her custody of the deed (Williams vs. Kidd, 170 Cal. 631, 151 P. 1, Ann, Cas 1916E, 703; Holoian vs. Garabedian, 79 Cal. Ap 762, 769, 251 P. 227), after the delivery of the deed has been adequately shown, the grantee takes the title free from all conditions which are not expressed therein (Mowry vs. Heney, 86 Cal. App 475, 483, 259 P. 770; Weldon vs. Lawrence, 76 Cal. App. 530, 535, 245 P. 451). While it was, therefore, proper to consider the reservation by the grantor of the use and benefits derived from the property during her lifetime in order to determine whether she intended to presently pass the title to the grantee, this situation is not necessarily in conflict with the theory of an absolute conveyance of title, and is insufficient upon to

upset the findings of the court to the effect that title did not pass to the respondent. Nor is the fact that the grantor assumed the right to subsequently mortgage this property upon several occasions inconsistent with the absolute transfer of the title. There was no legal obstacle to the grantor mortgaging her life interest."

In the case of *McCarthy vs. Security Trust*, 188 Cal 229, 204 P. 818, left hand column and on page 820, we have:

"The oral request of the grantor that a deed be not recorded until after her death does not defeat a delivery otherwise effective."

In *Drummond vs. Drummond*, 39 Cal. Ap. 2d 418, 103 P. 217. Here the grantor executed and recorded deeds to children without delivery of them. Held manual delivery of a deed to grantee not essential to passing title, but delivery and acceptance of a deed may be manifested by the declaration, acts and conduct of the parties. The Court then went on to say on page 228 in the left hand column:

"When the execution and delivery of a deed with the intention of thereby conveying title to the grantee is satisfactorily established, neither the subsequent collection of rental therefrom the mortgaging of the property without the knowledge or consent of the grantee, nor the attempt to convey it to another person, will vitiate the title of the grantee."

See also *Longley vs. Brooks*, Cal. 92 P. 2d 394. See the left hand column on page 398 where the court quotes the testimony relied on by it. There the grantor kept the deed and exercised control over the property during her lifetime as if it was still hers. The grantor, deceased, paid the taxes during her lifetime and rented the property to other parties and collected the rents and attended to other business matters relating to the property.

See also, *Shaver vs. Canfield*, Cal 70 P. 2d 507. In this case we have several interesting facts. The deeds were retained in a steel box in grantor's room and under his control. The

grantor passed the deeds to the grantee, and then kept them himself in his own box. This is similar to the incident of "laying on of hands" as we have in our case. The only testimony in the Shaver case is by the grantee and her witnesses. See the observations of the court as to decided cases at the top of right column on page 509. See also the Brandt case, Brandt vs. Brandt, 260 P. 2d 342. This is a very instructive case because there the question arose about testimony purporting to quote the deceased as having said "that he was going to 'leave' his property to the grantee to avoid probate." The same contention was there made as is made by Mr. Young i. e., that this was therefore an attempted testamentary devise. In the right hand column, page 343, the grantor, after execution of deeds in question made five different mortgages on the same property and even made a subsequent deed of the same property to the same grantee. The court upheld the deeds.

In order to show that other states hold the same as California, we turn to Oklahoma, Dimler vs Dimler, 32 P. 2d 876. This case was between a father and daughter and the facts are a striking example when compared to ours. The father went to an attorney and told him to prepare a deed in his daughter's name and that he was "going to deed" the property to his daughter. Then he took the deed home and told her about it and that "it was for her eighteenth birthday." He claimed that he put the deed in a box to which they both had access. She claimed that he passed the deed to her and she put it in the box to which they both had access (his box). Both claimed that it was to be held until his death before recording. She got the deed when she went away to school without his knowledge and recorded it. He did not find it out until he went to have the property mortgaged and only then found that the deed had been recorded. He

brought an action to set aside the deed. The court held the evidence sufficient to sustain the deed. In that case there was not even the evidence of a sister like Mrs. Demars, who told "how he had conveyed his property." This is not meant to be literal, but to impress the court with the fact that she positively testified in the past tense.

Another case that bears on the question of "laying on of hands", which Mr. Young uses in such an odd manner is a Kansas case of *Foresman vs. Foresman* 175 P. 983. Here the grantor made a deed to his son, put it in his hand and immediately took it back to keep himself until he died. See the testimony of the wife, left column page 986, where she testified that her husband had told her that he had given the son the deed. Actually the husband let the son have it in his hand and then took it back. There is no more force in this than the statement made by Mr. Anderson to Mrs. Demars, not as much in fact, because Mr. Anderson explained in detail the proportions in which he had conveyed his property. He told Lorenzo in the Midwest that he had conveyed his property and Lorenzo advised him against this method and tried to get him to make deeds with a life estate retained. The father insisted on his own method. The Kansas Court upheld the deeds.

A very recent and interesting case involving the destruction of a deed by the grantor where he had possession of it, and on sufficiency of the evidence, is found in *Chaffee vs. Sorensen*, Cal. 236 P 2d. 851. The only evidence of delivery was that grantor told his attorney to make a deed and "give it Alice." He signed the deed and said "there." Later he got the deed among some other papers and destroyed the deed. It seems that the destruction was not intended but the court said:

"If he had expressly requested it the legal situation would not be altered. Re-delivery of a deed to the gran-

tor does not amount to a re-conveyance of title, even though it is delivered with the intent that the grantor cancel it."

The California case said another very striking thing, which perhaps all of us have overlooked in this case:

"Inasmuch as Chaffee was making a gift of his interest in the property to his daughter we do not expect to find the presence of the same formalities as if it had been a transaction in which one person was selling property to another for a cash consideration."

We believe that the above statement is certainly applicable to ours, both as to the statement made to George when the deceased had George and his wife take and handle the deeds to signify delivery and to Lorenzo in the east.

We want to call the Court's attention at this point to the fact that Marie has testified that her father told her to destroy the 1943 deeds. Marie and her husband and their lawyer all contend that Mr. Anderson was mentally competent at this time. If their contention is correct why did not the deceased destroy them himself? The obvious answer is that they had already been delivered and Mr. Anderson knew this to be the fact many years before and furthermore, the jury found him to be incompetent at that time and if he did tell Marie to destroy the deeds, he was not cognizant of his direction. We do not believe he told Marie to destroy them. If he had done so in his right mind and not under duress or undue influence, he certainly would have either told his sons what he had done, or told Marie to do so. Everyone that has had anything to do with this case has been impressed with the fairness of Mr. Anderson. Even when we give Marie the benefit of any doubts in this case, we find that when she went to Attorney William E. Davis to get him to draw a will, with directions in Marie's own handwriting (there is nothing here to indicate that Mr.

Anderson gave any directions), we find that he only gave the Johnsons the right to buy Promontory. He did not give it to them. But this was not good enough for Marie and she kept working on "her project" of a continual whittling down of the boy's interests until she got her father to sign the final and concluding "coup de grace."

CONCLUSION

In conclusion we say:

1. That whether or not the 1943 deeds were delivered by the father to the children is a legal question. The jury having resolved this question in favor of the plaintiffs, it then becomes the duty of this court on appeal to determine whether or not the decision made by the trial court and jury finds support in evidence. If there is competent credible evidence to support the finding made by the trial court and jury, those findings should stand. (Words used from *Buckey vs. Cox*, No. 7730 in green sheets).

2. That the great weight of the evidence is that the 1943 deeds were delivered.

3. That the undisputed evidence is, that the deeds were actually in the possession of the grantees, the plaintiff's herein, after they were executed. That a legal presumption then arises from the fact of said possession that a delivery has been consummated. That the burden of proving that no delivery has taken place is then upon the party who might deny delivery. That said proof must be clear and convincing. That the defendants have offered no evidence whatsoever to overcome this presumption.

4. That after the jury determined that there had been a delivery of the 1943 deeds to the plaintiff's by their answer to interrogatory No. 1, the answers to interrogatories

2 and 3 were of no value to the court, but the court having failed to advise them that they need not answer interrogatories numbers 2 and 3, if their answers to No. 1 was "Yes" no error was committed when they so answered No. 2 by saying that a delivery of the 1949 deeds had taken place and then answered No. 3 by saying that he was not competent to make said delivery and execute said deeds at said time for the reasons:

a. That the evidence shows conclusively that from the time of his first sickness he progressively deteriorated in both mind and body until his death.

b. That at or about the time of the making of the 1949 deeds he was trying to give away his valuable books, books that he loved better than gold, and that the family humored him by passing the books to the party that he might try to give them to, while in his sight, and then take them away from the party after he was out of the sight of the father.

c. That the daughter Marie had him dressed up special for the execution of the deeds for the benefit of the party who was called in to acknowledge them.

d. That previous to the time of the execution of the 1949 deeds at said time and up to his death he would not recognize places or people, including his family or home, and would develop a vacant expression. That when he was not like this and appeared to be normal he acted abnormal by wanting to give valuable property away as mentioned in "b" above.

e. That he told his relatives after the execution of the 1949 deeds that his property was still divided in the same manner as if it was by the execution and delivery of the 1943 deeds.

f. That the jury believing that interrogatories numbered 2 and 3 had to be answered could not from the evi-

dence find otherwise than that the father signed and parted with the deeds, but that he was incompetent and did not know the effect of his act at the time. This was unnecessary after they had determined that there had been an actual execution and delivery of the 1943 deeds.

5. That this court should affirm the findings of the jury as well as the findings of fact, conclusions of law and judgment and decree, entered pursuant thereto and grant plaintiffs' and respondents' their costs herein.

Respectfully submitted,

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and respondents.