

1959

# Harold C. Fuller v. First Security Bank of Utah : Brief of Appellant

Utah Supreme Court

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Karl V. King; Attorney for Defendant and Appellant;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

— FILED

SEP 21 1959

HAROLD C. FULLER,

*Plaintiff and Respondent,* Clerk, Supreme Court, Utah

vs.

FIRST SECURITY BANK OF UTAH, N. A.,  
EXECUTOR OF THE ESTATE OF FAE  
L. FULLER, deceased,

*Defendant and Appellant.*

No.  
9086

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BRIEF OF APPELLANT

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KARL V. KING

*Attorney for Defendant  
and Appellant*

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## BRIEF OF APPELLANT

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### STATEMENT OF THE CASE

This is an appeal from the Findings of Fact, Conclusions of Law and Judgment and the overruling of defendant's Motion for a New Trial by the Honorable Ray VanCott Jr., one of the judges of the District Court of Salt Lake County. This is a suit in equity to set aside a deed and quiet title in plaintiff. The issues were joined as shown by the Pretrial Order as follows:

## PRETRIAL ORDER

After a discussion between the Court and counsel, the contentions of the parties are stated as follows:

### PLAINTIFF'S CONTENTIONS:

1. The plaintiff contends that the plaintiff and the deceased, Fae L. Fuller, were husband and wife prior to her death on approximately the 29th day of September, 1958.

2. That marital difficulties had led them to consider the possibility of a divorce. Negotiations had been entered into through the attorney of Fae L. Fuller, Frank E. Moss, and as part of the negotiations it was contemplated that there would be a division of the property of the parties. The property consisted of the following as far as this case is concerned: two apartment houses, one located on B Street and one on 2nd South Street in Salt Lake City, Utah.

Plaintiff contends that he was to deed to the said Fae L. Fuller the apartment house on B Street.

3. The plaintiff visited the office of Frank E. Moss to read and consider the divorce papers that had been prepared by him as attorney for Fae L. Fuller. At that time he signed the deed conveying the property at 105 B Street to Fae L. Fuller and leaving it with Frank E. Moss.

4. It is the contention of the plaintiff that the signing and delivery of the deed to Frank E. Moss was conditional, to-wit:

The transfer was not to be completed until a divorce had been obtained.

5. Prior to the time of any divorce being obtained, the said

lae L. Fuller died. The plaintiff, therefore, claims that the deed may be withdrawn and the Court should order the reconveyance of the property from the deceased through her administrator to the plaintiff.

### DEFENDANT'S CONTENTIONS:

1. Defendant contends that Fae L. Fuller at the time of her death was in possession of property and was managing and operating that apartment house.

2. That it was an unconditional, good and valid delivery of the deed to Fae L. Fuller.

The pleadings are merged in the pretrial order and the issues will be as framed herein, and without further amendment unless written objections are filed within five days from the date of this order.

The case is set for non-jury trial, March 24, 1959 at ten o'clock A.M.

Dated at Salt Lake City, Utah, this 19th day of March, 1959.

ALDON J. ANDERSON

District Judge

### STATEMENT OF FACTS

The Appellant herewith submits a condensation of the material evidence, tending to support the position of the respective parties. The evidence will be given in the order in which it occurs in the transcript and as introduced at the trial.

The first witness called was the plaintiff, HAROLD C. FULLER, who testified on direct examination that the First Security Bank is the administrator of the estate of his wife, Fae L. Fuller. That in the summer of 1957 he had occasion to visit the office of Frank E. Moss, an attorney in Salt Lake City, in respect to the property involved in this law suit. That Frank E. Moss had been his attorney for several years. "My wife and I had talked over a divorce and she had gone to see Mr. Moss and we figured out what she wanted in the way of money and the property on B Street, she wanted the property and so much a week on the divorce deal." (Record 9)

Mr. Fuller then testified that Mr. Moss called him and he went to his office and they talked over the divorce.

(Record 10)

13 "Q. That was the summer of 1957?

14 A. Yes. And then we made a divorce settlement and I  
15 agreed to the property deal, but not the weekly amount, and  
16 I didn't sign the papers at that time on account of we hadn't  
17 worked it out."

Mr. Fuller then testified that he paid Mr. Moss as his attorney and that prior to this time he had never been Mrs. Fuller's attorney. (Record 10). That Mr. Moss was the only lawyer involved.

(Record 11)

20 "A. He wanted me to give her the B Street property and  
21 so much a week and I was agreeable to the B Street property  
22 but I wasn't agreeable to setting an amount on a weekly deal  
23 because I didn't know what I would make. I agreed to give  
24 her whatever I could give her and that was why I didn't sign  
25 the papers at that time."



At the time of the discussion the property was held in joint tenancy. (Record 11). That documents were prepared and Mr. Fuller saw these documents in Judge Moss' office at his desk.

(Record 12)

11 "Q. Now did you execute a deed at that time to the B Street  
12 property?

13 A. No. It was later, after I talked to Fae, considerable  
14 after that, trying to get her to release this definite amount  
15 per week that she wanted so that we could leave it open so I  
16 could give her whatever I could make or borrow, whatever the  
17 case would be, because our business was in bad shape at the  
18 time."

20 "A. Later on we got together."

(Record 13)

8 "Q. Now did you sign any document at that time?

9 A. I signed when Mrs. Fuller and I got together on this.  
10 She finally reached a point where she was going to go through  
11 and trust me to pay her what I could and I went up and signed  
12 this deed with Mr. Moss.

13 Q. Now did you see other documents at the time you signed  
14 the deed in Mr. Moss' office?

15 A. No. I seen those before and I just suppose it was the  
16 same setup there and they would have to be changed, the  
17 amount had not been changed on there and Mrs. Fuller and I  
18 agreed to it."

Mr. Moss was not present at the time Mr. Fuller signed the deed. That he left the deed with Mr. Moss' secretary. Mr. Fuller then testified that the divorce plan was never consummated. (Record 13). That her death intervened.

(Record 14)

6 "Q. Now was the execution of this deed a part of the divorce  
7 proceedings that you were negotiating on?"

12 "A. It was a part of the divorce from the very start. The  
13 B Street property was a gift to her for the divorce, in  
14 consideration of the divorce."

On Cross-examination Mr. Fuller testified Mr. Moss sent him  
a bill and "was paid for the work he did in this case."

Exhibit 1, the deed to the B Street property, was introduced  
in evidence and Mr. Fuller acknowledged that it was his signature.

(Record 15).

Mr. Fuller testified, "I talked to Mr. Moss once." (Record 16).  
Mr. Fuller testified that he saw the complaint in Mr. Moss' office  
but never received a copy and was never asked to and never did  
sign a waiver. (Record 18). He then testified, (Record 18)

18 "Q. Now who was it that telephoned you and told you to come  
19 in and sign some papers?

20 A. Oh I don't recall. I believe it was Mr. Moss that talked  
21 to me first, or it was his secretary, and I know I went down  
22 and looked over the papers and it was all okeh but the amount  
23 of the weekly money she was to receive and that I wouldn't  
24 agree to, so I didn't sign any papers.

25 Q. Now isn't it a fact that Mrs. Fuller told you that a deed  
26 had been prepared and that you were going to go down and sign  
27 the deed?

28 A. I don't remember any such thing as that.

29 Q. Your recollection is that you were called by Mr. Moss' office?

30 A. I don't think so. When I signed the deed I went down

(Record 19)

1 there and we had gotten pretty near together on this money  
2 thing. She finally agreed to go along with me on the thing  
3 because always in the past I had given her the money all I  
4 could give her and she was pretty well sold on the idea. She  
5 didn't need so much a week anyway. At that time when we had  
6 reached the point where she felt I would take care of her I  
7 went down and signed the deed on this divorce thing and she  
8 never did get down to sign the rest of the papers, but we had  
9 it straightened out. It was that she would be safe in trusting  
10 me to pay this money."

At the time that he signed the deed he did not see Mr. Moss  
and the only person he talked to was the secretary of Mr. Moss.

(Record 20)

4 "Q. Do you recall now whether any documents of any kind were  
5 submitted to you at the time you signed the deed?

6 A. It seems to me that there were and I told her that was the  
7 only one I would sign at the time."

Mr. Fuller testified that his wife died September 29, 1958.

(Record 21)

14 "Q. This property involved here, will you describe it to His  
15 Honor so he knows the property that is involved, the property  
16 covered by this deed so he knows what it is?

17 A. It is a five-unit apartment and four small apartments and  
18 a basement apartment on the north corner of B Street and 2nd  
19 Avenue; a kind of big yellow house that sits back in all  
20 those trees."

29 "Q. Now between November 15, 1957, the date the deed was  
30 signed and up until the time of Fae L. Fuller's death on  
(Record 22)

1 September 29, 1958, to whom did the tenants pay the rent?

2 A. They always paid the rent to Mrs. Fuller; always.

3 Q. You mean from the very beginning?

4 A. She collected the rent. She was a good bookkeeper and  
5 we left the rent to her from the very start.

6 Q. Has she always done that?

7 A. She has always collected the rent."

(Record 23)

10 "Q. Did you use the B Street property as an asset?

11 A. Yes. It is used as an asset and I listed it.

12 Q. Did you use the B Street property as an asset when you  
13 got the loan?

14 A. Yes, I used it."

Exhibits 2, 3, and 4 are letters which Mr. Fuller wrote to his  
daughter, Mrs. Linnea Bentley, the sole beneficiary of Fae L. Fuller's  
Will. (Record 23)

(Record 25)

10 "Q. Well now didn't you advise your daughter that she had  
11 received a valuable piece of property if she handled it  
12 correctly?

13 A. Well I knew that they weren't paying their first mort-  
14 gage off and that is what they had to do if they took the  
15 property and I outlined that that is what they had to do.  
16 There is no question about that.

17 Q. And at that time you considered it your property, did

18 you not?

19 A. Well I probably considered I had been taken for a ride.  
20 I didn't think there was anything I could do about it until  
21 I talked to Gordon. I told my daughter at the time it was  
22 a terrible thing to happen and she said, 'Well, Dad, it is  
23 your property. I don't want it.' At that time I figured  
24 that in some way she was going to give it to me but at any  
25 rate I talked to Gordon and we got into this deal."

(Record 26)

13 "Q. Now in whose name was the telephone number at this  
14 apartment house?

15 A. It was Fae L. Fuller just recently because I had to have  
16 a phone at the other property. It is confusing to have two  
17 phones in the name of Harold Fuller Company and I asked how  
18 to do it and they said you would have to use another phone.

19 Q. Was the phone always in her name?

20 A. No, it was in both of ours.

21 Q. Well was she managing the property up at B Street?

22 A. She always managed the property. She managed it from  
23 the day we took it over except that I did the work when I was  
24 home."

Mr. Fuller testified that Mrs. Fuller was the plaintiff in the divorce action and that Mr. Moss represented Mrs. Fuller but "he was sort of a go-between to settle this thing." (Record 27)

(Record 28)

9 "Q. Well on this divorce proceedings Mr. Moss was acting as  
10 her attorney, wasn't he?

11 A. Right."

Redirect Examination:

- 27 "Q. And you didn't authorize him, or anybody else, to  
28 deliver this deed to Fae L. Fuller until this divorce was  
29 over, did you?  
30 A. I did not, no."

Mr. Fuller testified that in 1959, he discussed the matter of his rights with Mr. Hyde and he had no idea what his rights were until Mr. Hyde told him. (Record 29)

- 25 "Q. And you had considered that you had lost the property,  
26 hadn't you?  
27 A. That is the truth.  
28 Q. Was it ever your intention to give this property away  
29 unless the divorce went through?  
30 A. It never was."

(Record 30)

- 16 "Q. And did you ever tell her that it was your intention  
17 to give this property except on the condition of the divorce  
18 A. No."

Re-Cross Examination:

Mr. Fuller testified that for 15 years he had been endeavoring to obtain a divorce and as a result of the death of his wife, he was a free man.

Direct Examination:

Plaintiff then called as his witness, PHYLLIS D. PORTER.  
(Record 31)

Mrs. Porter testified that during the time negotiations were

underway between Mr. and Mrs. Fuller for divorce, she was employed by Frank E. Moss as his secretary. (Record 32)

Exhibits 5 and 6, the original complaint and waiver in the divorce action (taken from Mr. Moss' files by Mrs. Porter), were introduced in evidence. (Record 32)

That Mrs. Porter talked to Mrs. Fuller at different times during the period of the divorce negotiations but no reference was ever made to the B Street property. (Record 32) That she did not know there was any difference between the Fullers on the amount of alimony. (Record 33)

(Records 33 and 34)

30 "Q. Did Mr. Moss tell you to preserve this file and to bring  
1 it into Court and to show it to him if he ever asked for it?

2 A. I don't think he ever expected it to be brought into  
3 Court. I don't think he expected any actions. It was  
4 mentioned, well he simply told me to take the files home and  
5 to keep them in case there was ever any need for them, that  
6 they would be more accessible."

Exhibit 8 was offered which were notes made by Mr. Moss. The Court refused to admit exhibit 8 as hearsay. (Record 34)

Exhibit 7, a copy of a letter from Mr. Moss' files, was introduced in evidence. (Record 35)

(Records 35 and 36)

23 "A. Well Mrs. Fuller called and said that she was deferring  
24 action until later, or until the next year so as to give Mr.  
25 Fuller an opportunity to conduct his business with the help  
26 of the property.

27 Q. And do you know whether or not the divorce action was  
28 stayed as suggested?

29 A. She asked that it be held in abeyance until Spring at  
30 least.

1 Q. And nothing further was done?

2 A. Nothing further was done.

3 Q. And then she died?

4 A. Yes. Everything went along just as it was and she didn't  
5 tell us to make any further move and so things just stayed in  
6 abeyance until her death."

Mr. Moss sent a bill to Mr. Fuller on the paper work and the  
time spent in the interview and Mr. Fuller paid the bill. (Record  
36)

Cross-Examination:

Mrs. Porter testified that when Mr. Fuller came in to sign the  
deed, she was alone in the office. That she had no conversation  
with him. That he was not shown any of the papers in the file.  
(Record 36) That he did not give any instructions concerning  
what was to be done with that deed. That the office kept two files,  
one marked Divorce File and one marked Will File. That the deed  
was placed in the Will File. Mrs. Porter identified her signature  
as the Notary to the deed. (Record 37)

(Records 37 and 38)

26 "Q. So that all that occurred on that occasion was Mr. Fuller  
27 came in and signed the deed?

28 A. That's right.

29 Q. And there was practically no conversation?

30 A. As I recall he said, 'I understand you have a paper here



1 for me to sign.' I said, 'Yes,' pulled out the paper and he  
2 signed it, and that was it.

3 Q. Did you say a paper, or a deed?

4 A. Now that I can't say. I don't know just what I called it.

5 Q. But nothing further occurred?

6 A. That's right.

7 Q. You notarized it and placed it in the file?

8 A. While he was standing there I notarized it."

Re-Direct Examination:

Pre-trial order corrected substituting the name of Frank E. Moss for James P. Cowley. (Record 38)

FORREST W. FULLER, called as a witness on behalf of the plaintiff.

Direct Examination:

Mr. Fuller testified that he was named as executor in the will of Fae L. Fuller and that he is Fae L. Fuller's son. That he declined to act as executor by reason of the differences that existed over the property. That his father, Mr. Fuller, never asked him to record any deed or document. That he received the Will and Deed from Mr. Cowley in the office of Moss and Cowley. He delivered the will to Mr. Hyde, who delivered them to Mr. King. (Record 39)

Cross-Examination:

Forrest Fuller testified that his mother died September 29, 1958. At sometime between the 7th or 10th of October some week or 10 days after his mother died, he received the deed and will and 4 or 5 days thereafter, he recorded the deed. That while he had the deed and will in his possession, he did not discuss them with his

father. (Record 40) That he discussed the will and the deed with his sister, Mrs. Bentley, after the funeral. (Record 41)

Forrest W. Fuller was made defendant's witness and on direct examination testified as follows:

That he is an attorney and represented his father as such. That some years ago he officed with Gordon Hyde and Moss but never with Cowley. That at various times Gordon Hyde represented his father. (Record 43) That Mr. Hyde represented his father in the Lyric Theatre case and he represented his father in a plumbing case. (Record 44)

(Records 45 and 46)

9 "Q. Mr. Fuller, will you describe to His Honor the circum-  
10 stances surrounding the recording of the deed?"

13 A. As I stated, the deed was given to me with the will. This  
14 is the first I knew that the deed had not been recorded and  
15 this is the first time I saw the deed and it was attached to  
16 the papers I received from Moss & Cowley and this was some  
17 several days after the funeral."

The only papers he received were the will and the deed.

26 "Q. And then what occurred after you received the will and  
27 deed?

28 A. I was quite undecided as to what to do and I discussed  
29 the matter with Bentley."

8 "A. And finally I decided that it was my duty to record the  
9 deed and did so."

The will was identified by Salt Lake County District Court No. 41671.

The Court sustained an objection of plaintiff and refused to admit the will in evidence. (Record 47)

HAROLD C. FULLER recalled for further re-cross examination. Mr. Fuller was shown Exhibit 4 and cross-examined as follows:  
(Records 49 and 50)

9 "Q. 'Now my house is coming along, but very slow.' What house  
10 are you referring to?

11 A. 902 2nd South.

12 Q. 'I almost went under because I needed it as an asset to  
13 get the loan. I needed it but I got it without it but I  
14 never will know how.'

15 A. That's right."

18 "Q. Isn't it a fact you got the loan, that you got the loan  
19 without using the house?

20 A. I got the loan without using the house the way I wanted  
21 to use it."

2 "A. The only conversation I ever remember was when Linnea  
3 said, 'Dad, I don't want your house.' "

(Records 51 and 52)

Re-direct Examination:

28 "Q. Now you had been told by others, had you not, that  
29 because this deed had been executed prior to her death that  
30 you had lost the property?

1 A. That's right.

2 Q. You consulted me to find out if that was the legal effect,  
3 isn't that true?

4 A. That's right.

5 Q. Until I advised you, you did not know there was any other

6 possibility, did you?

7 A. That's right."

Plaintiff rests.

Defendant offered as an Exhibit the inventory and appraisal in the estate of Fae L. Fuller. Plaintiff objected and the objection was sustained. (Record 53)

FRANK L. MOSS called as a witness for defendant.  
(Records 54 and 55)

Direct Examination:

That he is a practicing attorney and a member of the Utah State Bar. That prior to 1957 he had a partnership with Mr. Hyde. That the partnership was terminated in August, 1955. That while he was in partnership with Mr. Hyde the firm represented Mr. Fuller. That he never personally represented Mr. Fuller and in 1957, he was employed by Fae L. Fuller to represent her in a divorce action. (Record 54) That as part of the discussion a deed was prepared for a certain property and was executed. That he discussed the deed with Mrs. Fuller on 2 or 3 occasions. That he only discussed the deed with Mr. Fuller by telephone. (Record 55)

Voir dire examination by Mr. Hyde. (Record 56)

11 "Q. Also I show you Exhibit 7 for the purpose of refreshing  
12 your memory in connection with this matter.

13 A. Well these tend to refresh my memory of the approximate  
14 time of the conversation, which would be in late 1957; some  
15 time prior to November of 1957.

16 Q. And do you recall what was said in that conversation?

17 A. In substance the conversation had to do with Mrs. Fuller's

18 actions for a divorce and a discussion regarding an apartment  
19 house and Mr. Fuller's statement to me that he was willing as  
20 part of this proceeding that the apartment house be deeded  
21 over to her, be hers entirely.

22 Q. And you were not present when the deed was executed?

23 A. No, I don't believe I was. I don't recall it.

24 Q. Now after that, in connection with the deed, did you  
25 ever receive any instructions from anyone concerning this  
26 deed?

27 A. Well the only instructions I received were from Mrs.  
28 Fuller, that I was to hold all the papers and everything  
29 surrounding this case because she had agreed to postpone any  
30 further action until her husband had made some financial

(Record 57)

1 arrangements, other financial arrangements."

Continue Direct Examination by Mr. King.

2 "Q. Now were you at any time acting as agent for Mr. Fuller?"

7 "A. I didn't ever act at Mr. Fuller's instructions or ever  
8 consider that I represented him at all. I received all of my  
9 instructions from Mrs. Fuller."

Cross-examination:

Mr. Moss testified he talked with Mr. Fuller one time about  
domestic problems. It is possible that Mr. Fuller had stated to him  
"at various times he had asked Mrs. Fuller for a divorce."

27 "Q. And in order to obtain this he was willing to give it to  
28 her, this property, as a divorce settlement, isn't that  
29 essentially what he told you?

30 A. Well he did say that he was going to, willing to convey

(Record 58

1 the property to her; that it basically should be hers because  
2 of her need for income.

3 Q. In the divorce settlement?

4 A. Well I didn't understand it was to be for the divorce  
5 settlement."

The complaint was executed the 13th day of November, 1957, and the deed was signed the 15th day of November, 1957. In the complaint there was a prayer for the property. That Mrs. Fuller called and said she wanted to delay the divorce (Record 58) and she asked Mr. Moss to keep everything in the file until the following year when she would get in touch with him.

Mr. Moss did not recall that Mr. Fuller was represented in the proceedings. That he didn't ever talk with an attorney. That it was his understanding that Mr. Fuller was urging the action more than Mrs. Fuller when she came to him and asked him to represent her. She said that her husband had urged her to come to him.

That Mr. Moss had known Mr. Fuller and that his son, Forrest, had officed with Mr. Hyde and Mr. Moss. That the firm had represented Mr. Fuller and that Mr. Hyde divided the fees with Mr. Moss. That Mr. Moss at the request of Mrs. Fuller had sent a bill for \$35.00 and it was paid. (Record 59)

Mr. Moss testified that it was customary in divorce cases to collect fees from defendants and he was successful in doing so.

Mr. Moss testified that he never represented Mr. Fuller after August of 1955. (Record 60)

Mr. Moss testified that if there had been a contest in the divorce

he might have "considered longer because I had known Mr. Fuller before and he had been represented by the firm. Yes. I understood that there wasn't any conflict with them about getting the divorce. There were conflicts that led up to that decision." That the drawing of the papers was merely a mechanical matter to effect their joint intent. (Record 61)

In response to a question by the Court, Mr. Moss testified that the deed was made in his office by his stenographer under his direction

(Record 61)

29 "THE COURT: There was one statement you made here  
30 just prior to the time you looked at this complaint and the

(Record 62)

1 deed. I believe it was something to the effect that the deed  
2 was not given as a settlement in this divorce. What is your  
3 statement about that now, after having read the complaint  
4 wherein there is a prayer for the apartment house and some  
5 reference made to it? Do you want that statement to stand  
6 or - - "

11 "A. As I can recall it now, and it is not carefully clear to  
12 my mind, that when she came to me asking about the divorce  
13 she told me that they had discussed the property and that she  
14 was to have the apartment house and then we discussed about  
15 that would permit her to get enough income from the apartment  
16 house so that it wouldn't be necessary for him to pay alimony  
17 after a period of time when the income rentals would be able  
18 to support her and on the basis of that discussion I advised,  
19 I think the advice came from me that the title to the apart-

20 ment house should be in her name so that she would have a  
21 right to receive the income from it, and as a result of that  
22 the deed was drawn. And I think that is the time when I  
23 had the phone conversation which resulted in Mr. Fuller's  
24 coming to the office and executing the deed.

25 THE COURT: Well, is it your understanding from  
26 your conversation with these persons that this deed was  
27 executed as a part of this divorce proceeding and settlement  
28 of her property rights in that divorce?

29 A. Well the two coincided, Judge, and I am sure that this  
30 deed grew out of this whole conversation. However, I under-

(Record 63)

1 stand that he had executed the deed and given it to her for  
2 the property.

3 THE COURT: For what reason?

4 A. Preparatory to the divorce.

5 THE COURT: I see.

6 MR. HYDE: And in consideration of her agreement  
7 to divorce him, isn't that true?

8 A. At least in part, yes."

12 "MR. KING: Mr. Moss, the purpose of this deed was  
13 to turn over the apartment house over to her so she would  
14 have an immediate income was it not?

15 MR. HYDE: Now just a minute. I object to this as  
16 leading. This is counsel's witness.

17 THE COURT: Oh, I think he has already answered  
18 your question, Mr. King. He has just now told us why the deed  
19 was given so that she would have an income in the future at  
20 least.

21 MR. KING: Well that is the very point, Your Honor.



22 When was this to provide her with an income?  
23 MR. HYDE: Now I submit that that issue is one for  
24 the Court to determine."

(Record 64)

6 "A. Well I didn't ever have a discussion when both of them  
7 were present, but in my discussion with Mrs. Fuller she - -

8 MR. HYDE: Just a moment, Your Honor. I'm going to  
9 object to that as hearsay:

10 THE COURT: The objection will be overruled:

11 A. She explained that she was living in an apartment, one of  
12 the apartments in the building and was receiving some income  
13 at that time from rental being paid by others."

27 "MR. KING: "Why wasn't the deed recorded?

28 A. The deed was not recorded because Mrs. Fuller called me  
29 and said, 'Hold everything in abeyance. Hold all of the  
30 papers, because of money problems I have agreed to let this

(Record 65)

1 go over to next summer,' and it had something to do with the  
2 loan that was already in existence on the building."

## STATEMENT OF APPELLANT'S POINTS

### I.

It is the position of the defendant and appellant that there was a good and valid delivery of the deed to the B Street property. This is based upon the facts which demonstrate his INTENT at the TIME of the DELIVERY of the DEED to transfer title to his wife in order to provide her, Fae L. Fuller, with a permanent income and

as a part of temporary alimony pending the divorce. His acts and statements indicate this until the point when, under the advice of his attorney, he changed his position but then it was too late as a matter of law.

## II.

That the Findings of Fact and Conclusions of Law made and entered by the Court are not supported by the evidence and that the Court should have signed the Findings of Fact, Conclusions of Law and Judgment submitted by the defendant as they are supported by the evidence. The Court should have sustained defendant's objections to plaintiff's Findings of Fact, Conclusions of Law and Judgment.

## III.

That a new trial should have been granted and defendant afforded an opportunity to introduce newly discovered evidence which was material and supported the position of defendant, which evidence was not discovered until after the trial. Though defendant exercised diligence, he was unable to locate the witnesses prior to the trial.

## IV.

The Court erred in sustaining an objection to the admission of the Fae L. Fuller Will.

## V.

The Court erred in sustaining an objection to the admission of the Inventory in the Fae L. Fuller estate.

## ARGUMENT

### POINT 1.

IT IS THE POSITION OF THE DEFENDANT AND APPELLANT THAT THERE WAS A GOOD AND VALID DELIVERY OF THE DEED TO THE B STREET PROPERTY. THIS IS BASED UPON THE FACTS WHICH DEMONSTRATE HIS INTENT AT THE TIME OF THE DELIVERY OF THE DEED TO TRANSFER TITLE TO HIS WIFE IN ORDER TO PROVIDE HER, FAE L. FULLER, WITH A PERMANENT INCOME AND AS A PART OF TEMPORARY ALIMONY PENDING THE DIVORCE. HIS ACTS AND STATEMENTS INDICATE THIS UNTIL THE POINT WHEN, UNDER THE ADVICE OF HIS ATTORNEY. HE CHANGED HIS POSITION BUT THEN IT WAS TOO LATE AS A MATTER OF LAW.

This case had a simple and ordinary beginning. For 15 years (Rec. 30) plaintiff had wanted a divorce and finally his wife concluded to give him a divorce and consulted an attorney, Frank Moss. They discussed the problem and a complaint and waiver were prepared. Neither was ever executed or filed. The parties, however, separated and plaintiff executed a deed on November 15, 1957, to one of their two apartment houses, to-wit the one at 105 B Street. The Defendant and Appellant's position is that the deed was delivered and possession was given to the property unconditionally to provide Mrs. Fuller with an income. Mrs. Fuller died September 29, 1958, after willing the property to her daughter. Plaintiff and Respondent, after consulting an attorney, filed this action in early 1959, contending he delivered the deed conditionally and that the delivery was contingent on his wife's securing a divorce. Mr. Fuller is the only one who testified as to any such contin-

gent and conditional delivery of the deed. Plaintiff's testimony then comes too late and is self-serving, immaterial, incompetent and irrelevant on the issue of what his intent was at the time he signed and delivered the deed and left it in the hands of Mrs. Fuller's attorney. (Rec. 18-19) The legal question is quite simple. What was Mr. Fuller's intention when he signed and left the deed in a third party's hands? (Rec. 19) We can only determine Plaintiff-Respondent's intention from his own actions and statements prior to his change of heart and prior to his change of position. (Rec. 25) His actions and attitude in relation to the deed and property are shown by the following:

1. His wife had the phone at the B Street apartment house changed into her name after Mr. Fuller deeded the property to her. (Rec. 26)

2. Fac L. Fuller managed the property on B Street and collected the rents, paid the bills, and made payments on the mortgage but she did not in any way have anything to do with collection of rents or take any part in the management of the property on Second South Street. After Mr. Fuller deeded the property he exercised no control over it.

3. All instructions to Mr. Moss came from Mrs. Fuller (Rec. 56) and he represented her and not Mr. Fuller. If the deed was given contingent on a divorce, why was it given before the matter went to Court? Mr. Moss gives us the answers to the question of his employment and the reason the deed was given before the divorce.

(Record 56)

"2. 'Q. Now were you at any time acting as agent for Mr.

3 Fuller?'

7 'A. I didn't ever act at Mr. Fuller's instructions  
8 or ever consider that I represented him at all. I  
9 received all of my instructions from Mrs. Fuller.'

Cross-examination: (Records 57 and 58)

27 'Q. And in order to obtain this he was willing to  
28 give it to her, this property, as a divorce settle-  
29 ment, isn't that essentially what he told you?'

30 'A. Well he did say that he was going to, willing to  
1 convey the property to her; that it basically should  
2 be hers because of her need for income.

3 Q. In the divorce settlement?

4 A. Well I didn't understand it was to be for the  
5 divorce settlement.' "

The Court tried to settle the question and questioned Mr. Moss  
as follows:

(Records 61 and 62)

"29 'THE COURT: There was one statement you made here  
30 just prior to the time you looked at this complaint and the  
1 deed. I believe it was something to the effect that the deed  
2 was not given as a settlement in this divorce. What is your  
3 statement about that now, after having read the complaint  
4 wherein there is a prayer for the apartment house and some  
5 reference made to it? Do you want that statement to stand  
6 or - - '

11 'A. As I can recall it now, and it is not carefully clear to  
12 my mind, that when she came to me asking about the divorce  
13 she told me that they had discussed the property and that she

14 was to have the apartment house and then we discussed about  
15 that would permit her to get enough income from the apartment  
16 house so that it wouldn't be necessary for him to pay alimony  
17 after a period of time when the income rentals would be able  
18 to support her and on the basis of that discussion I advised,  
19 I think the advice came from me that the title to the apart-  
20 ment house should be in her name so that she would have a  
21 right to receive the income from it, and as a result of that  
22 the deed was drawn. And I think that is the time when I  
23 had the phone conversation which resulted in Mr. Fuller's  
24 coming to the office and executing the deed.

25 THE COURT: Well, is it your understanding from  
26 your conversation with these persons that this deed was  
27 executed as a part of this divorce proceeding and settlement of  
28 her property rights in that divorce?

29 Well the two coincided, Judge, and I am sure that this  
30 deed drew out of the whole conversation. However, I under-

(Record 63)

1 stand that he had executed the deed and given it to her for  
2 the property.

3 THE COURT: For what reason?

4 A. Preparatory to the divorce.

5 THE COURT: I see.

6 MR. HYDE: And in consideration of her agreement  
7 to divorce him, isn't that true?

8 A. At least in part, yes.'

12 'MR. KING: Mr. Moss, the purpose of this deed was  
13 to turn over the apartment house over to her so she would  
14 have an immediate income, was it not?

15 MR. HYDE: Now just a minute. I object to this as  
16 leading. This is counsel's witness.  
17 THE COURT: Oh, I think he has already answered  
18 your question, Mr. King. He has just now told us why the deed  
19 was given so that she would have an income in the future at  
20 least.  
21 MR. KING: Well that is the very point, Your Honor.  
22 When was this to provide her with an income?  
23 MR. HYDE: Now I submit that that issue is one for  
24 the Court to determine.'

(Record 64)

6 'A. Well I didn't ever have a discussion when both of them  
7 were present, but in my discussion with Mrs. Fuller she - -  
8 MR. HYDE: Just a moment, Your Honor. I'm going to  
9 object to that as hearsay.  
10 THE COURT: The objection will be overruled.  
11 A. She explained that she was living in an apartment, one of  
12 the apartments in the building and was receiving some income  
13 at that time from rental being paid by others.' "

4. After the death of Mrs. Fuller, the conduct of Mr. Fuller showed clearly that he did not consider the property his but that of his daughter. He wrote her as follows:

Exhibit 2

"I DON'T WANT TO WRITE A LETTER—BUT I FEEL I SHOULD give you one or two facts.

1—THIS HOUSE COULD BE WORTH MONEY ONLY IF SOME ONE WILL KEEP THE BILLS PAID AND KEEP THE PROPERTY IN GOOD CANDITION.

2—YOU COULD HAVE IT ALL PAID OFF IN LESS THAN TEN YEARS AND THE LAND AND HOUSE SHOULD BE WORTH ABOUT 35 TO 40 THOUSAND DOLLARS.

3—YOU WILL NOT BE ABLE TO TAKE ANYTHING OUT OF IT ANY SOONER THAN TEN YEARS UNLESS YOU SELL IT — AND BECAUSE OF THE LARGE PAYMENTS EACH MONTH IT IS HARD TO SELL.

4—YOU MAY EVEN HAVE TO PUT MONEY INTO IT EACH MONTH AS I HAVE HAD TO DO TO GET IT PAID FOR.”

### Exhibit 3

“Inclosed are papers that should go to your attorney as the Water, Gas and Lights and so on must be paid.”

“The Gas & Lights are differnt if they turn these off your people will all move out and that is what can happen.

“Better get a check to the gas co.  
Dad”

In exhibit 4 Plaintiff gives his daughter an accounting on the apartment house and states, “I have stayed in the apt at 105 b and have keep the walks cleaned and did some work on the apts as it was needed. I do not have my place ready as yet and as soon as I do I will get out—Sooner if any one wants me to.”

“I DONT KNOW HOW TO TELL YOU ANY PLANER TO PAY THE BILLS ON TIME, OR SELL IT OUT FOR NOTHING BUT DONT MESS UP A DEAL THAT YOUR MOTHER AND I PAID IN \$22,000.00 OVER AND ABOVE THE MTG ON”



The conduct of Mr. Fuller, after signing and leaving the deed at the attorney's office and until he saw his attorney, clearly indicates that he considered the deed delivered and binding. This evidence obviously shows that his intent was to make a valid unconditional delivery of the deed. His subsequent change of mind can not alter or change what is an accomplished fact. In support of this proposition we submit the following authorities:

Gappmayer v. Wilkenson, 53 Utah 236, 177 P 763, quoting from pp. 765 and 766.

"(1-3) It has been determined by this court that "where a grantor delivers a deed to a third person, absolutely as his deed, without reservation, and without intending to reserve any control over the instrument, though it is not to be delivered to the grantee until the grantor's death, the deed, when delivered, is valid and takes effect from the first delivery"; also that if, after such delivery, the deeds are repossessed by the grantor or destroyed, the grantor does not thereby revest himself with title. *Wilson v. Wilson*, 32 Utah, 176, 177, 89 Pac. 643."

"It is true that the subsequent acts of the defendant Nelson are not consistent with this construction, but it is apparent that that was the intent of the parties at that time, and any act or transaction afterwards was a subsequent thought. As determined by this court in the case of *Wilson v. Wilson*, supra, the rights of the plaintiffs became fixed by the acts of the parties at this date, and the defendant Nelson could not revest himself of any interest or title in the property, by his subsequent acts."

*Wilson v. Wilson*, 32 Utah 169, 89 P 643, quoting from pp. 645-646.

"After the deeds had been unconditionally delivered to Peter, they passed beyond the dominion and control of the grantors. After that Peter could have taken them home,

deposited them in the bank box, or, for that matter, he could even have placed them in his father's private desk. When an absolute delivery had been made, the fact that Peter thereafter placed the deeds in the bank box to which the deceased had access, and in which the firm papers were kept, gave the grantor no authority to recall the deeds or to control their custody. If under such circumstances the deceased had taken the deeds, or if he even had destroyed them, he would not thereby have revested himself with title. The character of the delivery is not affected by the fact that the deeds after delivery were placed where the grantor equally with grantee had access to them. *Le Saulnier v. Loew*, 53 Wis. 207, 10 N. W. 145; *Rogers v. Rogers*, 53 Wis. 36, 10 N. W. 2, 40 Am. Rep. 756; *Reed v. Smith*, 125 Cal. 491, 58 Pac. 139."

The California case of *Lavelly v. Nonemaker*, 298 P 976, gives an excellent statement of the law in relation to conditional delivery and the dangers in such transactions, quoting from page 978.

"(4, 5) The circumstances of the case at bar are not such as to take it out of the general rule. Neither the deed nor the asserted *oral* agreement either expressly or impliedly refers to the defendant's promise to care for the plaintiff as a condition affecting the validity of the deed, and the trial court has not found that it is such a condition. True, such promise constituted the sole and only consideration for the transfer, but in this particular the situation is not unlike that where a conveyance is made solely in reliance upon the grantee's written promise to pay an agreed purchase price, or to subsequently render certain legal services, the breach of each of which promises it has been held gives rise only to an action for damages. *Lawrence v. Gayetty*, *supra*; *Hartman v. Reed*, 50 Cal. 485. The case of *Schott v. Schott*, 168 Cal. 342, 345, 346, 143 P. 595, presented a state of facts somewhat similar to those involved in this case. It is therein declared, in substance, that where the grantor accepts the verbal promise of the grantee for support without any

agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance, in the absence of fraud, the grantor has no right to rescind or to have the deed set aside, but his only remedy for breach of the grantee's personal covenant is an action for damages. The following appearing in *James v. James*, 80 Cal. App. 185, 197, 215 P. 666, 671, is pertinent: 'In the case at bar, there was no condition expressed in the instrument, and in law, it was not delivered conditionally. There was at best only an oral promise on the part of the grantee of something to be done by her at a subsequent time. \* \* \* Hence, if an instrument is delivered to the grantee as the present deed of the grantor it becomes freed from any condition not expressed in the deed itself, and operates by vesting title immediately without any reference to the performance of the conditions, although such result may be contrary to the express stipulation of the parties. Apart from the elementary rule interdicting the modification or varying of the vital terms of a writing by parol, any attempt to restrict or enlarge the scope or effect of an instrument transferring real property by an oral stipulation is prohibited by the statute of frauds. Hence, whether a deed, when delivered, shall take effect absolutely, or upon the performance of some condition not expressed therein, cannot be determined by parol evidence. Any condition qualifying the delivery must be inserted in the deed itself, or else the deed must not be delivered to the grantee.' "

"Conditions subsequent are not favored, for they tend to destroy estates. *White v. Hendley*, 35 Cal. App. 267, 271, 169 P. 710. While defendant's promise to care for her father was the sole and only consideration for the conveyance to her, we cannot say on the record now before us that the faithful performance of such promise is or was intended by the parties to be a condition subsequent, upon the breach of which there should be a failure of defendant's title. On the contrary, such promise constituted but a personal cove-

nant, the breach of which gives rise only to a cause of action for damages. To hold that a vendor of real property could, for a failure to pay the purchase money or other consideration, repudiate his deed and recover the land, would render real estate titles dangerously uncertain, and would result in the most serious consequences. *Lawrence v. Gayetty*, *supra*."

*Norby v. Pister*, 250 P 2nd 633, a California case, quoting from p. 634.

"(1-3) The grant deed from defendants to plaintiff covering the property involved was unconditional, unaffected by fraud in its inception, conveyed title, and is not subject to rescission on account of a failure of consideration. *Borden v. Boyvin*, 55 Cal. App. 2d 432, 436, 130 P. 2d 718; *Abel v. O'Hearn*, 97 Cal. App. 2d 747, 758, 218 P.2d 827; *Williams v. Reich*, 123 Cal. App. 128, 131, 10 P. 2d 1030. As was said in *Lavelly v. Nonemaker*, 212 Cal. 380, 383, 298 P. 976, 977:"

The case then quotes the portion of *Lavelly v. Nonemaker* as quoted above.

Quoting further from *Norby v. Pister*.

"(4) Where, as here, the installation of the pipe lines was not made a condition of transfer of title, plaintiff's remedy, if any, was an action for damages for breach of contract. *Johnson v. Clark*, 7 Cal. 2d 529, 533, 61 P2d 767."

In *re Hume's Estate*, 272 P. 2d 999, quoting from p. 1002, this is a Montana case which quotes C.J.S.

"(7-9) As a general rule, a delivery of a deed must be absolute and unconditional, unless it is in escrow. Further as appears in the (30) C.J.S. title Escrows pp 7, also 21 C.J., p. 873 note 96 p. 878 note 31, a delivery in escrow may be made only to a third person not a party to the transaction, and there can be no such delivery to the grantee upon a condition not expressed in the instrument. Accordingly, while there is some authority to the contrary, it is

generally held that the delivery to the grantee of a deed absolute on its face will pass complete title to him regardless of any condition or contingency on which its operative effect is made to depend \* \* \* ."

In the case at bar, the position of plaintiff is that the delivery of the deed is based upon the promise of the wife that she would obtain a divorce. I did not find a case based upon a promise to obtain a divorce, but there is a California case based upon a promise to marry. This case is *Williams v. Reich*, 10 P.2d 1030, quoting from pages 1031 and 1032.

"It has been repeatedly held that, in the absence of fraud, a conveyance of real estate, fully executed on the part of the grantor, cannot be set aside for a failure of consideration on the sole ground that the promises and agreements, not amounting to conditions subsequent, which induced its execution, and which by the terms of the contract under which the deed is made were not to be performed until after its execution, have not been performed. *Lawrence v. Gayetty*, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29; *Schott v. Schott*, 168 Cal. 342, 143 P. 595, 597; *Duckworth v. Watsonville Water, etc., Co.*, 170 Cal. 425, 150 P. 58; *Tillaux v. Tillaux*, 115 Cal. 663, 47 P. 691; *Tisdale v. Bryant*, 38 Cal. App. 750, 177 P. 510; *White v. Hendley*, 35 Cal. App. 267, 169 P. 710."

"(2) Nor can the promise to marry respondent be considered as a condition subsequent. The record does not show, nor is it found, that there was any agreement by appellant to reconvey if she did not marry respondent. The deed of conveyance appears to have been absolute and unconditional.

"As stated in *Schott v. Schott*, supra: "The plaintiff saw proper to accept the verbal promise of the defendants to do certain things without any agreement or understanding that the failure to do the acts as promised should be a condition or in any way affect the validity of the deed, or

entitle him to a reconveyance." Under such circumstances, in the absence of fraud, actual or constructive, defendant would have no right to rescind, or to have the deed set aside.' "

On the question of evidence showing intent, we refer you to 64 Utah 260, 228 P. 911, quoting from *Mower v. Mower*, page 914.

"Since delivery is essentially a matter of intent, which intent is to be arrived at from all the facts and surrounding circumstances, we believe the better rule is to include in those facts and circumstances declarations of the grantor both before and after the date of the deed, at least where it appears that the declarations are made fairly and in the ordinary course of life, and not in apparent anticipation of controversy or litigation with reference to the matter discussed, and in the absence of any evidence of bad faith, fraud, or misrepresentation."

*Mower v. Mower* is quoted and followed in *Reed v. Knudson*, 80 U. 428, 15 P. 2d 347 and in *Losee v. Jones*, 120 U. 385, 235 P2d 132, and *Stanley v. Stanley*, 97 U. 520, 94 P.2d 465.

## POINT II.

THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW MADE AND ENTERED BY THE COURT ARE NOT SUPPORTED BY THE EVIDENCE AND THAT THE COURT SHOULD HAVE SIGNED THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT SUBMITTED BY THE DEFENDANT AS THEY ARE SUPPORTED BY THE EVIDENCE. THE COURT SHOULD HAVE SUSTAINED DEFENDANT'S OBJECTIONS TO PLAINTIFF'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT.

Defendant and Appellant filed objections to the Findings of Fact and Conclusions of Law and Judgment proposed by Plaintiff-Respondent and this document is in the record at pages 81 to 87. To avoid unduly prolonging the length of this brief, Appellant respectfully requests the Court to examine and read this document and the matters pointed out therein and consider it as a part of the entire issue. Without repeating the testimony furnished the trial Judge in the objections, we point out only the legal effect and the errors in brief.

Paragraph I of the Findings though pointed out at the trial and perhaps unimportant the defendant is not the Executor but is the Administrator.

Paragraph II—The Court finds "In the latter part of October, 1957, the deceased agreed to a divorce on condition that as part of the divorce settlement she be granted the real property." There was some testimony to this effect by Plaintiff, but his testimony was self-serving and came as a change in position after consulting his attorney and is contrary to the testimony of Mr. Moss, which was:

(Rec. 57-58)

"27 Q. And in order to obtain this he was willing to give  
28 it to her, this property, as a divorce settlement,  
29 isn't that essentially what he told you?

30 A. Well he did say that he was going to, willing  
1 to convey the property to her; that it basically  
2 should be hers because of her need for income.

3 Q. In the divorce settlement?

4 A. Well I didn't understand it was to be for a  
5 divorce settlement.' "

Paragraph III of the Findings is contrary to all evidence.

Paragraph IV of the Findings is drawn from thin air. There is no such evidence in the record. Surely there should be a breath of evidence to support a finding. We call your attention to the testimony of Mrs. Porter, secretary to Mr. Moss, in this connection as set out in the objections. (Rec. 84-85) (Rec. 33, 36, 37) in the transcript.

Paragraph V of the Findings is not based on the evidence. The first sentence is immaterial and has no relationship to the issues and is not supported by the evidence. The last sentence thereof is a conclusion of law. It is the position of the defendant that the execution and delivery of the deed and the leaving of the deed in the office of Mr. Moss constituted a valid delivery of the deed to Mrs. Fuller. That upon the death of Mrs. Fuller the deed and the Will were delivered to Forrest W. Fuller. (Rec. 45) This evidence also shows that Forrest W. Fuller, the son of Mr. and Mrs. Fuller, and a lawyer considered that the deed had been validly delivered to Mrs. Fuller through her agent, Mr. Moss, or he would not have been justified in recording the deed.

Paragraphs VI, VII, and VIII are not supported by the evidence as set out above and argued in this brief. Mr. Moss was not an agent of Mr. Fuller but according to his testimony (Rec. 57, Line 7) he acted only for Mrs. Fuller and there was no escrow.

Based upon the law as cited above and the evidence the District Judge should have signed the Findings of Fact and Conclusions of Law and Judgment of the Defendant and not those of Plaintiff. The purpose of filing Objections to Findings is to afford the Judge an opportunity to correct any errors and erroneous impressions



formed during the trial. In this case the Judge even had the transcript to check but no doubt felt it was not necessary as no corrections were made. The Findings were signed as submitted.

### POINT III

THAT A NEW TRIAL SHOULD HAVE BEEN GRANTED AND DEFENDANT AFFORDED AN OPPORTUNITY TO INTRODUCE NEWLY DISCOVERED EVIDENCE WHICH WAS MATERIAL AND SUPPORTED THE POSITION OF DEFENDANT, WHICH EVIDENCE WAS NOT DISCOVERED UNTIL AFTER THE TRIAL. THOUGH DEFENDANT EXERCISED DILIGENCE, HE WAS UNABLE TO LOCATE THE WITNESSES PRIOR TO THE TRIAL.

In support of defendant's motion for a new trial, an affidavit was filed. (Rec. 91) This new evidence would have shown that on November 15, 1957, the deed was given to Mrs. Fuller. That on March 3, 1958, the mortgage on the B Street property was increased and the money received in excess of \$4,000 was loaned to the son, Forrest W. Fuller, and he made a note to his mother, not to his father, for the amount loaned. This is further evidence that Mr. and Mrs. Fuller considered the property to be hers and she was entitled to all income and proceeds from any transaction in relation to the property.

Had the information concerning this loan been known prior to the trial it could have been used in the examination of Mr. Fuller as well as the son and thus additional evidence might have been obtained to enlighten the Court on the issue of intent in delivering the deed. This evidence further supports the testimony of Mr. Moss.

Mr. Fuller testified at the trial, (Rec. 26)

"Question by Mr. King: 'Well, was she managing the property up at "B" Street?

A. She always managed the property. She managed it from the day we took it over except that I did the work when I was home.' "

After the trial and the testimony of Mr. Fuller, defendant was able to locate witnesses to contradict this statement and had they been permitted to testify at a new trial, would have testified that prior to 1957 they paid rent to Mr. Fuller but after 1957 and the giving of the deed, they paid their rent to Mrs. Fuller. This evidence was material and important to show how Mr. and Mrs. Fuller considered and treated the property after the giving of the deed. The defendant should have been given an opportunity to introduce this evidence. The matter was tried without a jury and it would have been a simple matter to permit a partial new trial for this purpose.

In the motion for a New Trial counsel for defendant also as shown by the affidavit (Rec. 92) argued the Court should have admitted in evidence the Will of Fae L. Fuller and the Inventory of her estate. These two points are also set out in Appellant's points No. IV and V and will be hereafter argued.

## POINTS IV AND V

THE COURT ERRED IN SUSTAINING AN OBJECTION TO THE ADMISSION OF THE FAE L. FULLER WILL.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO THE ADMISSION OF THE INVENTORY IN THE FAE L. FULLER ESTATE.

As points IV and V involve the same principles and go to the same point of law they will be argued together. Record 46 Court refused to admit the Fae L. Fuller Will in evidence. Record 53 the Court refused to admit the Inventory in evidence. The purpose of requesting that the Will and Inventory be received in evidence was to show how Fae L. Fuller understood the transaction. The Will and Inventory would have shown that without the property in question there was no purpose in making a will.

In the case of Johnson vs. Cameron, Supreme Court of North Carolina, 48 SE 640, on page 641, we find this statement:

"The Court erred also in rejecting evidence that the grantor by his will, disposed of this land, it being competent as tending to throw light upon the nature of his possession of the deeds and of the land."

We feel the Court erred in refusing to admit the Will and Inventory.

## CONCLUSION

Based upon the law and the evidence the Defendant-Appellant feels that the Court should reverse the trial Court and direct the trial Court to sign the Findings, Conclusions of Law and Judgment submitted by defendant.

Respectfully submitted,

KARL V. KING  
*Attorney for Defendant  
and Appellant*