1963

# First Security Bank of Utah, N. A. v. Edward H. Bates : Brief of Respondent

Utah Supreme Court


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# In the Supreme Court of the State of Utah



FIRST SECURITY BANK OF UTAH, N. A., a corporation,
Plaintiff and Respondent,

vs.

EDWARD H. BATES,
Defendant and Appellant.

**CASE NO. 9926**

# RESPONDENT'S BRIEF

Appeal from Judgment of the Fourth District Court
of Utah County
HON. JOSEPH E. NELSON, Judge

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NEW CENTURY PRINTING CO., PROVO, UTAH

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vs.

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# RESPONDENT'S BRIEF

## STATEMENT OF THE KIND OF CASE

Plaintiff seeks to annul and set aside a deed on the basis that there was no present, absolute and unconditional delivery of the deed to the grantee during the grantor's lifetime; and that the deed was testamentary in character and, therefore, inoperative because it was not executed in accordance with the Statute of Wills.

## DISPOSITION IN LOWER COURT

The case was tried to the Court. From a judgment by the District Court in favor of the plaintiff, defendant appeals.

## RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment.

## STATEMENT OF FACTS

Although there is no dispute as to the facts elicited at trial, nevertheless, the appellant's Statement of Fact does not completely and correctly state those facts. For that reason the respondent feels compelled to set forth some importnt facts not stated by the appellant. In order to keep the sequence straight and to eliminate the necessity of referring from the appellant's brief to the respondent's brief in order to determine what the facts are, the respondent will therefore restate the facts.

Willis Bates, the decedent, was an old friend of Thelma Vest Smurthwaite, then known as Thelma Vest. For the purpose of this fact statement, Mrs. Smurthwaite will be referred to as Thelma Vest throughout the recitation. Miss Vest had known Willis Bates for ten years prior to January, 1949, and referred to him as a dear friend of the family (R. 60-61). Mr. Bates was a bachelor and took his meals at the Vest Restaurant in Payson, eating there in the presence of Miss Vest three times a day. Prior to January, 1951, Miss Vest was a school teacher, however, in November of 1950 she was elected Utah County Recorder and is presently Utah County Recorder (R. 59). Thelma Vest was a Notary Public in January of 1949. On January 14, 1949, Willis Bates was a masonry contractor. He, at that time, owned the home in question in Payson, Utah, many items of personal property, two autobobiles, one touring car and a ton and a half truck.

On January 14, 1949, Mr. Bates, while at the restau-

rant of the parents of Miss Vest, had a conversation with Miss Vest. The substance of the conversation is set forth as follows:

"A. Mr. Bates came to me and said, "Thelma, I have received a telephone call from California offering me employment." And, he said, "I have always wanted to get out of this cold weather." He said, "It is pleasant weather down there and good working conditions, and so I am leaving immediately." He said, "I am hesitant about going." He said, "I hate to leave my home." He had just built a little new home. He said, "If anything happens to me, I would want my brother Ted to have the home." He said, "We are in a spot in Payson right now, there is no attorney here". He said," Mr. McMullin has died". Mr. Hodgson at that time had not come to town. Mr. R. A. Porter had gone and left to make a livelihood somewhere else. He said, "Could you help me?" I said, "I am Notary Public". He said, "Could you help me make the deed in the event that anything happened to me that Ted could have my home". He said, "I have done much for Lewis, who is the Principal of the High School". He said, "I educated Walter". He said, "I have never done much for Ted and he is the baby of the family". He said, "I have always felt compassionate towards Ted and I have always felt that I would like to do more for him if I ever was in a position to do it". He said, "He is married and has had kind of a rough time." So he said, "If you will help me with this, I will appreciate it". He said, "Then if you would hold this for me, I will appreciate that too". He said, "In the event anything happens to me, you give it to Ted, but I don't want Ted to know that you have this document unless something happens to me." He said, "That is just our secret."

I said, "Willis, I will be glad to help you". It was all on the spur of the moment this evening and he was going to leave the next morning or by midnight to drive to the coast to immediately get ready to accept the appointment by the first of the week, and it was all a suddenness at that time."

Miss Vest prepared the deed to the house and she also prepared, at the decedent's request, a bill of sale to one Oldsmobile touring car, one Chevrolet ton and a half truck, and to all personal property belonging to the decedent (Exhibit 2).

One of the documents prepared by Miss Vest for the decedent on January 14, 1949, which is not in evidence and was apparently destroyed after the death of the decedent, was a power of attorney. Miss Vest testified that the purpose of this instrument was as follows:

"A. Yes, there was a bill of sale and a power of attorney so that if anything happened to him, that I could get the papers and tell Ted about it, it was crudely drawn up. It was to tell Ted where the keys to the safety deposit box were so Ted could get the keys and get what he might have there."

After January 14, 1949, the decedent sold the Oldsmobile referred to in the bill of sale and purchased a 1958 Cadillac (R. 98). The decedent further retained possession of all of his other personal property, occupied the premises, and paid taxes thereon from the date the documents were made until his death on January 21, 1962.

In September of 1956 the first wife of the defendant died. In 1960 he remarried and was later divorced.

On two occasions Miss Vest left the State and returned

the documents to the decedent with comments, the substance of which are as follows:

> "Willis, I am going away. I would not want to take this with me. Perhaps if I leave them they will get destroyed. I thnik you better take care of these until I return."

In 1960 when the decedent learned that Edward had married he came to Miss Vest and had a conversation in the restaurant again:

> "A. Yes, he said, "Thelma". I said, "Yes". He said, 'Are you busy?" I said, 'Not too busy". He said, "Could I talk to you?" He said, "I am quite concerned over this marriage of Ted's". I said, "Yes, I heard Ted got married". He said, You know, I thought about the deeds. I want Ted and those children to have that home, but", he said, "I would not want that woman or any of her kin or her family to have one sand of one brick of any part of that place". He said, "It is for Ted and those motherless children". I said, "Willis, you know, if you feel that way, I think it might be a good idea for you to go around the corner and have Mr. Hodgson, he is just around the corner from where you live, the attorney-at-law, and it is very convenient. If I were you, I would go and have him draw you up a letter as to what you would like done". He said, "Well, I have been awful upset over this". He said, "'If anything happens to me," he said, "I would want Ted to record the deed and then I would want the children to have the home". So, I just passed it off at that time after I mentioned it might be well for him to go and talk to Mr. Hodgson."

Sometime later he had another conversation with Miss Vest which apparently took place at the same location but

after the divorce between the defendant and his wife. The conversation was as follows:

> "Finally, one day I saw him and he said, "I feel better". He said, "Ted is getting a divorce from the woman, do you know that?" I said, "No I don't". He said, "Thank the Lord he is not going to live with her, he has seen the light". I had nothing against the woman myself, so far as that is concerned. It is their business and I knew her and I knew her family. They are fine people but, he said, "I am glad he is getting a divorce". So he said, "I am happy about it". He said, "We will leave things like they are, I feel relieved" * * * (R. 68).

Matters remained fairly constant from 1960 to January of 1962, at which time Mr. Willis Bates went to the hospital for an operation. Apparently he did not believe he was going to die, but nevertheless wanted to have a conversation with Miss Vest (then Mrs. Smurthwaite) concerning the deed. The conversation was as follows:

> "A. He said, "Thelma, I am glad to see you and I am glad you came". He said, "You know how I feel about my home', and I said, "Yes, Willis, I do". He said, "I want Ted to record the deed when I am gone". He said, "I want you to deliver the deed to Ted and I want Ted, if he has not severed his relationships with Dora or this woman, I want you to have Ted make a deed to those motherless children". I said, "Are you sure they are completely divorced?" He said, "Ted tells me he is". He said, "One never knows." He said, "The home is for Ted and his kids", and he also said at the same time, I was crying, I was quite touched. I said, "You are not going to die, Willis, what is the matter, you should not take such a negative attitude". He said, "Of course I am not, but one needs to be pre-

pared. If one has desires and wishes, he likes to see them carried out". He said, "I have that faith and confidence and trust in you". He said, "Of course, I have a job that I have got to go to". And, he said, "I have to get well". And he said, "They are going to open me up right here". (indicated) He said, "It is the same thing that Lewis and Walter had". He said, "It is going to rupture if I go on". He said, "This is a simple operation, there is nothing to worry about". He said, "They are putting a plastic tube in here (indicated), and I will be as good as new". I said, "You mean you are going on construction with a plastic tube in you?" He said, "Heavens yes, I will be ready to a lot of things by then". I said, "In March?" He said, I will be down on the lake catching catfish and bass". He said,

I will be down there with Bert one of these days", and we laughed about that." * * * (R. 69)

"Q. Did he say anything about making a deed from Ted to the children?

A. Yes, he said that he would like Ted to make a deed to Rose Mary. He said, "Rose Mary is not well". He said, "If it takes every penny that I have left, I want that little girl made well, if it takes every penny I have left."

Q. What did he say about making the deed to Rose Mary?

A. He said, "I would like Ted to record the deed and make a deed to Rose Mary and Joe, Ted's motherless children".

Q. Did he say for you to see that he did so?

A. He told me to instruct Ted to that effect.

Q. Didn't he say anything about it to this effect, "You promise me or see that he does that?"

A. He said, "I want you to see that Ted makes a deed, you will give the deed to Ted and then tell Ted I want him to make a deed to the kids".

Q. You weren't to give the deed to him unless you got assurance that he did so or made a deed from him to the children?

A. I was to give the deed to Ted and have him record it and then make a deed to the children."

The facts stated above are the sequence of the conversation between the decedent and Miss Vest, however, Miss Vest, throughout the transcript, made other statements as to what was said at the time the various conversations related above took place.

For example, referring to the time when the defendant had remarried, counsel for the plaintiff asked Miss Vest as follows:

"Q. He wanted to change the deed when Ted remarried?

A. He mentioned to me the fact that he wanted the deed made to the children when Ted remarried. He still wanted Ted and his children to have the home.

Q. He wanted it to go to Ted's children when he remarried?

A. Yes." (R. 72)

In referring to the conversation in the Veterans Hospital, Miss Vest testified as follows:

"Q. He wanted Ted's children to have this place, did he not?

A. Yes.

Q. And that was his last wish?

A. Yes, that Ted's children have the place especially the one that was an invalid, I shouldn't say invalid, she is not an invalid, she is ill. She had a nervous breakdown, but she is better now."

Q. And at that time he wanted her to have it because of her illness.

A. Not her alone.

Q. Well who?

"A. He wanted the children, she and the boy to have the home, never the girl alone. He made the statement, "If it took every penny that I have, I would like to see the little girl made well". Ted's wife died from cancer, just a very slow edging death and it was terrible on Ted and on her and her family." (R. 73)

The Court was concerned about the relationship between the decedent and Miss Vest. Testimony concerning whether she was escrow holder for the grantee of the deed and bill of sale, or whether she was merely custodian for safe keeping and an agent of the grantor, was elicited from Miss Vest. Her testimony in this respect was as follows:

"Q. You gave them back to him and he could have kept them?

A. Yes.

Q. You didn't call him up and tell him to bring the papers back?

A. No, several times I felt like giving them back, they were quite a concern at times. I worried about them sometimes, but then I felt like he trusted the papers with me.

Q. If he had asked for them at any time, he could have had them?

A. I would have handed them to him if he had wanted to keep them.

Q. You would have given them to him at any time?

A. You bet, I would have been glad to give them to him if he had wanted them. I felt that he had confidence and trust and faith in me and wanted me to keep the papers.

Q. You understood that if he had wanted them back, he could have had them back?

A. Yes definitely.
Q. Did he understand that to your knowledge?
A. Oh yes, he must have done, those were his papers." (R. 75)

## ARGUMENT

### POINT I

THE BURDEN OF PROVING THE VALIDITY OF A DEED NOT IN THE POSSESSION OF THE GRANTEE AT THE DEATH OF THE GRANTOR IS UPON THE CONTESTANT.

The appellant has cited the case of Chamberlain v. Larsen, 83 Utah 420, 29 P.2d 355, as authority for the proposition that the burden of proving non-delivery is upon the plaintiff. Under the circumstances of the Chamberlain case, the respondent would not dispute that statement of law. The Chamberlain case, however, is not in point from a factual standpoint. In the Chamberlain case, there had been a delivery to the grantee prior to death. The grantor and the grantee, in the Chamberlain case, were both elderly sisters who resided together. In that case, both the grantor and the grantee went to a Mr. Fletcher, a Notary Public, and the grantor requested him to make the deed in question. The grantor did most of the talking and stated, in the presence of the grantee, that she wanted the grantee to have the property. The grantor and the grantee had a safety deposit box in their joint name at Zions Savings Bank and Trust Company. When the deed was made it was placed by the grantor in the joint safety deposit box of the grantor and grantee. After the death of the grantor it was taken by the grantee and recorded.

In that case the statement of the court that the burden of proving non-delivery was upon the plaintiff since the grantee had possession of the deed, both before and after the death of the grantor.

The law is different, however, where the grantee does not have possession of the deed at the death of the grantor. The rule in that instance is the opposite. That rule is expressed in the case of Alexander vs. American Bible Society, et al., 94 NE 2d 833. The facts in that case are as follows:

William H. Mason and Annie M. Mason were the owners of certain property. Both were 88 and 92 years of age respectively. On February 5, 1945, they executed two warranty deeds, one conveying to the American Bible Society the West half of the land in Section 29, and the other conveying to Blackburn University the six acre tract in Section 22. After making the deed they delivered the deeds to Russell Younger, who testified that in the month of February, 1945, he called at the Mason home at the request of Mr. Mason, who in the presence of Mrs. Mason, handed him the two envelopes and at that time Mr. Mason stated in substance:

> "Here is two envelopes. The instructions are written on the outside and when we die you follow the instructions on the envelopes."

He further testified that except for the instructions on the back of the envelopes containing the deeds he never at any time received any other directions or instructions from either Mr. or Mrs. Mason concerning the deeds and that after delivery to him of the envelopes, Mr. Mason nor his wife ever mentioned the matter to him. Younger tes-

tified that he placed the envelopes containing the deeds in one of the drawers in the vault of the Shelby Loan and Trust Company. He was an officer of Shelby Loan and Trust Company, and that the deeds remained there until after the death of Mr. and Mrs. Mason and that this drawer where the deeds were kept was not accessable to anyone other than the officers and employees of the bank.

ISSUE:

Whether or not Mr. and Mrs. Mason, in depositing the envelopes containing the deeds with Younger established an intent to place the deeds beyond recall or control and with a present intent to immediately convey a future interest in the lands.

HELD:

It appears that after Younger received the envelopes containing the deeds they were never in the possession of the grantors and that they never could have obtained possession thereof without obtaining at least the permission of Younger or some other officer or employee of the bank, since the grantors did not have access to the vault in which the deeds were held.

> "Where a deed is merely left with a third person for safekeeping, to be taken care of, and the grantor has the power of recall, the deed has not been legally delivered even though the deed remains with the third person until after the grantor's death and is then recorded. (Authorities) Likewise, if the grantor delivers the deed to a third party without any direction as to delivery to the grantee, the deed is invalid. (Authorities) If the grantor merely places the deed in the hands of a third person for safekeeping or as a

convenient place for deposit, the deed is not validly delivered and conveys no title. (Authorities)."

**"Inasmuch as the deeds were not in the possession of the grantees at the time of grantor's death, the burden then fell upon the grantees to prove that the grantors had made an effectual legal delivery of the deeds beyond their possession, control and dominion and without the right to recall the same or change the disposition thereof."**

(Emphasis added)

"While the intention of the grantors in the case at bar is meritorious and one would expect that because of their previous experiences in life they would desire that organizations such as the American Bible Society and Blackburn University would benefit from their worldly possessions, the law has prescribed certain plain rules to be observed in the execution of documents by which the title to real property is transferred, and while in this case the intention of the parties may fail, the court cannot ovrrule long established rules of law governing the transfer of real property in this state, which have been established for the benefit of the public at large and the violation of which would tend to render titles to real estate unstable and uncertain."

"We hold that there was no proof that these deeds were validly delivered during the lifetime of the grantors and that the decree of the Circuit Court of Moultrie County is erroneous. The decree is reversed and the cause is remanded with directions to that Court to enter a decree in favor of the plaintiff, removing the deeds as clouds upon her title and confirming the title to said premises in her."

See also 16 Am. Jur. 650, Sec. 372, part of which is quoted as follows:

"A party claiming under a deed is bound to prove its execution and delivery, including its acceptance and that the transaction was complete before the death of the grantor."

See also Supplement 16 Am. Jur. 650.

## POINT II

THE PLAINTIFF DID SUSTAIN THE BURDEN OF PROOF AND THE JUDGMENT IS SUPPORTED BY FACT AND BY LAW.

It is a well established point of law that the findings of the trial court in respect to a fact situation will not be reversed without a clear showing of abuse of discretion on the part of the trial judge. If the trial court's decision can be sustained on a factual point, it will be sustained by the Supreme Court on review. Cases in support of this position are as follows:

O'Gara v. Findlay, 6 U.2d 102, 306 Pac. 2d 1073:

"The main contention upon appeal is that there was no valid delivery of the deed in question. In reviewing this contention, we will keep in mind the fact that the trial court found a valid delivery. Since this is true, we will not overturn its decision unless it is manifest that the trial court misapplied proven facts or made findings clearly against the weight of the evidence."

Wolff v. Fallon (Ca. Dist. Ct. of Appeal) 269 Pac. 2d 630:

"It is well established that the right to relief from restrictive covenants such as those herein depends upon the facts of each case. The findings of the trial court

in such a case are entitled to the same weight as in any other case, and if based on any substantial evidence, they are final." Strong v. Hancock, 201 Cas. 530; 258 P. 60; Robertson v. Nichols, 92 Ca. App. 2d 201, 207; 206 P.2d 898.

Key v. McCabe, 356 P.2d 169:

"There is the sole question presented for determination: Is there substantial evidence in the record to support the findings of fact set forth above?

"Yes. The rules is established that when a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. (Primm v. Primm, 45 Cal. 2d 690, 293 (1), 299 P.2d 231.)"

In respect to this point, the respondent respectfully states to the Court that there are numerous findings other than the four recited on Page 7 of appellant's Brief upon which the Court based its decision. Other facts that were undoubtedly persuasive in this regard were as follows:

That at the time of executing the deed in question, on January 14, 1949, Miss Vest prepared for the decedent a bill of sale as to the decedent's automobile, and a power of attorney to authorize the attorney to do certain things for him. Decedent, after making the deed and bill of sale, sold the automobile, thereby evidencing that he did not intend ownership of the automobile to be transferred at the date of the bill of sale, but that he intended to maintain ownership and control over it. This document was of the

same nature as the deed, except the deed was to real property and the bill of sale was to personal property.

The intent of the decedent is clearly manifested by his action in respect to the personal property. The Power of Attorney, the deed and the bill of sale were not to be delivered except upon the death of William Bates (R. 65). It appears the deed was testamentary and there was no delivery prior to death. The decedent kept control of the property and intended to, except upon condition of death. Furthermore, Miss Vest was not the escrow holder, but was merely the custodian. (See Statement of Facts above). (R. 75). It seems singularly important that she said, in respect to the documents, including the deed, **"Those were his papers.'** (R. 75). Miss Vest at no time looked at herself as an escrow holder, but merely as custodian for the grantor. For that reason she could not have been anything more than the agent of the grantor and certainly not the agent of the grantee.

The appellant's strongest case in this argument is the case of Lossee v. Jones, 235 P.2d 132. We believe that case is clearly distinguished from the present case for a number of reasons. The authorities indicate that the question of delivery is based upon a multitude of circumstances. In the Lossee case the decedent had left her own home and went to the home of one of her daughters, who was one of the grantees named in the deeds in question in that suit. The mother was 80 years of age. Prior to that time she had maintained complete custody and control over the deeds. When she delivered the deeds, she delivered the deeds to one of the grantees. These are hardly the circumstances of the principal case, although the differences may

be relatively small, they are, nevertheless, distinct and justify different conclusions.

The appellant cites the case of Burnham, et al. v. Eschler, 208 P.2d 96, as supporting this contention. Respondent believes this case is distinct from the principal case, in that the grantor in the Burnham case delivered the deed to L. R. Eschler, the husband of the grantee, who was the agent, not of the grantor, but of the grantee. He, himself, (L. R. Eschler) had a contingent interest in the property. Mrs. Schank, the grantor, made several statements to several persons that she had deeded the property away; that the property was owned by her niece, Leta, and that the property "Had been taken care of." Furthermore, there was a long history of gifts from the grantor to the grantee. The grantor had no children and the grantee was raised as a child of the grantor. The grantor further stated that the reason she gave the deed to the husband of the grantee was "she didn't want Leta to feel any personal obligation to her in her lifetime. The grantor never attempted or considered changing the deed. The court found, under those circumstances, that the grantor delivered the deed to Mrs. Eschler, the grantee, absolutely without reservation and without intending to reserve any control over the instrument. This is not the circumstance in our case, where the grantor obviously exercised control over the instrument, as indicated by his other conduct and disposition of the property given in other instruments of like import.

The court, in the Burnham vs. Eschler case, says this:

"If the grantor reserves control of the instrument and it is subject during his lifetime to revocation, no pres-

ent estate passes to the grantee and the deed is invalid for want of delivery." (Authorities)

"No other intention than that of the deceased to divest herself absolutely of title when she handed the deeds to Mr. Eschler can be reasonably deduced from the evidence in the principal case."

Respondent respectfully submits to the court that in the case at issue, other intent can be reasonably deduced from the evidence and, in fact, other intent preponderates against the defendant.

The appellant cites as additional authority the case of Gappmayer v. Wilkenson, 53 Utah 236, 177 Pac. 763. This case also does not stand for the point for which the appellant cites it. In that case, at the time that the grantor and the escrow holder arranged to transfer the property without the consent of the grantees, both acknowledged that the property was not the grantor's nor the escrow holder's, but was the property of the children. All during this transaction Gappmayer, the original grantor, and Nelson, the original grantee, who eventually by-passed the deeds of the children by deeding to the Wilkensons, told Wilkenson that the property was the property of the minor children and that he, in effect, held the property only as escrow holder for the said children. The grantor furthermore never attempted to get the deeds back for his own benefit and for his own urposes, but merely for the benefit of the minor children.

## POINT III

THE EVIDENCE SHOWS THAT THE GRANTOR NEVER DID INTEND A PRESENT, ABSOLUTE AND UNCONDITIONAL DELIVERY OF THE DEED AT THE

TIME THAT HE GAVE IT TO MISS VEST AND JUDGMENT OF THE TRIAL COURT SHOULD BE SUSTAINED.

The appellant has broken his argument into three points, however, the respondent believes that the issues are relatively simple in this case and could be reduced to the following questions:

1. Did the grantor intend a present, absolute and unconditional delivery of the deed to the grantee at the time he gave the deed to Miss Vest?, and

2. Was the deed testamentary in character and, therefore, inoperative because not executed in accordance with the Statute of Wills?

Since the second question is necessarily determined by the first question, the argument can properly be addressed to both issues at the same time. The test to be applied in a case such as this is, did the grantor reserve the right to recall the deed from the possession of the depositary? If he did, then there was no delivery and the conveyance failed. The respondent has set forth facts in his Statement of Facts which we believe clearly show that there was not a present, absolute and unconditional grant and that the grantor intended to keep possession of the house and keep ownership of the personal property, except in the event of a contingency, to-wit: Death. The facts stated above also show that Miss Vest did not consider herself a trustee or escrow agent of the grantee. She felt, on the contrary, that she was the custodian and agent of the grantor, and that she held only at his instance and request.

The respondent believes that the rule in these cases

is simple and is stated in the cases cited by the appellant as well as in the cases cited by the respondent. The rule is the same in all instances. That rule was enunciated quite clearly in the Eschler case cited above by the appellant, the exact quotes from the case being cited by the respondent, and by the Illinois Court in the Alexander vs. American Bible Society Case. The respondent is even impressed with the statement of the law cited by the appellant under Point III and especially in that portion of his quotation set forth on Page 11 of appellant's brief as follwos:

> "However, for either delivery to be effective to pass title, the grantor must have surrendered all dominion and control over the interest to be conveyed. If he reserves a power to recall the deed, by word, act, or writing, and regardless of whether he ever exercises it or not, no delivery has resulted and no transfer occurs. (Citing Singleton vs. Kelly, 61 Utah 277, 212 Pac. 63).

The question, therefore, reduces itself to the application of the rule to the particular fact situation. Appellant has cited a number of cases where under the circumstances of those cases the court, in applying the rules set forth above, has concluded that the deed was effective. The respondent respectfully urges this Court that in every case cited by the apellant there was a noteable and distinct difference between the facts in that case and the one in the instant case. The respondent, therefore, cites to the Court cases wherein the deed was held ineffective for lack of delivery and because it was testamentary in character, and cases which the respondent believes are more analogous to the fact situations in the instant case.

Pendleton v. Kelly, 212 P. 63, (a Utah case). In that case, by separate writing, the grantor had manifested an intent that the deed was not to be delivered except in the event of his death, however, that he reserved the right to withdraw or change the same during his life. The court in that case held:

> "The writing, together with the deed, even though the deed was delivered, **together with grantor's later conduct,** proved that the grantor did not intend the deed as absolute and unconditional. Therefore, the court proprly set the deed aside. This is so even though reservation of a life estate in a deed raises a presumption of an intention on the part of the grantor to make an immediate transfer." (Emphasis added)

In the case of First Security Bank of Utah, N. A. vs. Burgey (A Utah Case), 251 Pac 2d 297, the Court said:

> "Delivery is essentially a matter of intent, **Such intent is to be arrived at from all the facts and surrounding circumstances, both before and after the date of the deed,** including declarations of the alleged grantor where it appears the declarations are made fairly and in the ordinary course of life. (Authorities) The testimony reveals that the deceased clearly intended that the deed and bill of sale pass the property to the defendant. The facts and circumstances, however, support the trial court's finding that the deceased had no intention to pass title immediately, but that such deed and bill of sale were to become operative upon the death of the decedent. Under such circumstances the deed and bill of sale were clarly testamentary in character and intent and were inoperative since they did not conform to the statutory requirements for testamentary dispositions." In re Alexander's Estate, 104 Utah 286, 139 Pac 2d 432 (Emphasis added)

The Oregon court, in the case of Marquart, et al. vs. Dick-Executor, 310 P2d 742, considered this matter. A brief summary of that case is as follows:

FACTS:

Prior to January 14, 1943, the Marquart Brothers, John and Joseph, who had never married, owned four parcels of land. On January 14, 1943, they executed reciprocal deed to the land. They were executed in the office of Frank G. Dick, an attorney, with oral instructions to hold them until the death of one of the grantors, whereupon the deed to the survivor was to be placed on record.

John died intestate January 13, 1950. Up to that time both brothers possessed the property. The deed to Joseph was recorded. Joseph then made a will and left the property by will to the Shriners Hospital. Suit is brought by heirs of John to set aside the deed.

ISSUE:

Was the deed from John to Joseph testamentary in character, therefore, inoperative because not executed in accordance with the Statute of Wills?

HELD:

> "* * * The question as to when a deed executed and deposited with a stranger, to be delivered to the grantee upon the death of the grantor, is effective to pass title, has been subject of much judicial controversy; but it is now substantially agreed that its solution depends on whether the grantor intends to and does retain dominion and control over it after such delivery, or parts with the possession and control of it absolutely at the time of delivery. In the former case, by

the great weight of authority—although the decisions are not entirely harmonious — there is no sufficient delivery, and the deed passes nothing. But if the grantor parts with all dominion and conrol over the deed, reserving no right to recall it or alter its provisions, it is a good delivery, and the grantee will, on the death of the grantor, succeed to the title."

"* * * Therefore, the inquiry is simplified by asking, did the grantor intend the property to pass? The intention is to be gathered from the words or acts, or both, of the maker of the instrument and the surrounding circumstances."

The deed was held invalid because of the ineffective delivery.

This case also stands for the proposition that the grantor's intent at the time of making the deed can be determined from his after actions and conduct.

A case which the respondent believes is analogous to the principal case is the case of Snodgrass vs. Snodgrass, 107 Okla. 140, 321 P. 237:

In that case the grantor executed two warranty deeds by terms conveying them to each of two of his adult children, Minne E. Pierce and Joyce L. Snodgrass, a separate tract of real estate subject to a reservation of a life estate to himself. These he deposited with one Jay Collins, who was an abstractor and a loan agent, and not a lawyer ,and who had drawn the papers for him. On May 22, 1915, the same grantor executed a similar deed to Rachael Rice, his adult daughter, conveying to her another tract of real estate and depositing the same with other papers with Mr. Collins. No instructions were given to Mr. Collins in respect to holding these deeds. After the

death of Mr. Snodgrass, Sr., an executor was appointed, a Will was admitted to brobate which contained a provision that gave particular sums to residuary legatees. These legatees had commenced an action against the executor to compel him to bring an action to set aside the deeds on the grounds that there was no effective delivery. The trial court held in favor of the grantees of the deeds and this court reversed the trial court. In reversing the trial court it said:

> "Where there is a question as to whether there has been a delivery of a deed of conveyance, the real test of the intention of the grantor, which intention may be manifested by mere acts or by words, or both combined, and such acts and words and the circumstances relevant thereto are susceptable to parol proof."

Argument was made that the fact that he did not call for the deeds but left them unchanged was evidence of his intention to make an effective irrevocable delivery. The court said:

> "The question we have to decide is not whether he did change the deeds, but whether in his lifetime there remained in him the power to change them. We see no logic in the statement that his failure to take up or change the deeds is evidence that he intended to part with control of the deeds when he left them on deposit with Mr. Collins. Had these deeds been delivered to the grantees when executed or had it been made clear to them at that time that these tracts of real estate did, at the time of the execution of such deeds, then become their very own to be of them owned subject only to the life estate therein reserved, why these grantees could have then and at all times thereafter disposed of all of the land during the life-

time of the grantor. All this, of course, the grantor knew. Likewise, if the deeds had been delivered, then if, during the years that intervened between the execution of the deeds and the grantor's death, one of the grantees should have died, then the grantor could not have changed the deed and the title to the land would have passed into the probate proceeding of the county court. Of course, apparently not to the liking of the grantor. * * * *"

Argument was made that he reserved a life estate, which is evidence of a delivery of the residuary estate. The court held:

"Had the grantor, when he executed these deeds in fact intended to reserve control over them in order to properly meet unforseen contingencies and in order to make certain that the land would be unencumbered part of his estate when he should die and had merely desired that the deeds, if unchanged by him during his life, should merely have testamentary effect upon his death, what thing different would he have done than what he did do in this case. * * * * Presumptions and burden of proof are worthy of little consideration here, because from all of the evidence the ultimate conclusion to our mind and conscience is irresistable that these deeds never passed beyond the grantor's control during his lifetime and were never delivered and were not effective while the grantor lived."

Counsel cited the case of Anderson v. Mauk, et al., 67 P.2d 429, Oklahoma. This case comes from the same jurisdiction as the Snodgrass case, however, the facts in this case are considerably different and not authoritative for the proposition for which they are cited by the ap-

pellant. It is, however, interesting to note the court also said this in the Anderson case, which we believe is the rule which should be applied to this case.

> "**It is equally well established** that if the grantor intends at the time he makes a delivery to the third person to retain the lawful right and power to revoke or recall the instrument of conveyance, or to thereafter control the disposition of the same, the transaction constitutes nothing more than an ineffective attempt to make a testamentary disposition of the property and the deed, not being executed in accordance with the Statute of Wills, is ineffective and invalid for that purpose. (Authorities)." (Emphasis added.)

The appellant also cites the case of Wilkerson v. Seib, which apparently summarizes the California cases. This case does not give the appellant any solace or comfort. The case is found in the California Supreme Court as a result of a dismissal of the plaintiff's complaint. The decision was based upon the allegations contained in the complaint and the matter was remanded for further proceedings, which we presume means trial. The most that the Court says in this case is that if the allegations were true, as sated in the complaint, there was a complete, absolute and unconditional delivery of the deed to a third party to hold in trust for the grantee. The trustee of the deed failed to turn it to the grantee upon the death of the grantor and the property was probated and sold to an inocent third party. The Court does not conclude that the deed per se is valid or invalid, but merely states that if the allegations contained in the complaint are true it is a basis for trial. This was a proper decision but not au-

thority for the proposition for which the case is cited by the appellant.

The respondent has traced the California cases submitted by the appellant and the California rule is not different than the Utah rule. It is merely the application of the particular rule heretofore stated to the fact situation. California cases can be found both sustaining and rejecting the deed.

For the benefit of the Court for comparison purposes the respondent submits the following case analogies:

Barnes, et al. vs. Spangler, 25 P.2d 732 (Colorado) In this case the grantor, then being of 78 years of age, requested the grantee to come and make a home in his premises, operate and manage the same, cook and care for him, and then he, in return, would deed to her the premises, which constituted apartments and were apparently of sizeable value. She did as he requested. The Grantor, outside of the presence of the grantee, made and executed a Warranty Deed to the premises to the grantee and left the deed with the Exchange National Bank of Colorado Springs, Colorado, with written instructions as follows:

> "Colorado Springs, Colorado
> "October 20, 1922
>
> "The Exchage National Bank
> "Colorado Springs, Colorado
>
> "Gentlemen:
>
> "I hand you herewith warranty deed dated October 20, 1922, given by me to Vera May Spangler conveying residence property situate at 221 North

Cascade, Colorado Springs, Colorado, which I shall ask you to accept for safekeeping and deliver to Miss Vera M. Spangler in the event of my death.

"Yours very truly,

"James S. Willard."

Thereafter, on September 21. 1927, the day following Willard's death, the bank delivered the said deed to the defendant, who on said date filed the same for record. The trial court entered a finding in this case that the said James S. Willard, the grantor, constituted the bank as trustee for the defendant and intended to reserve no control or dominion over the said deed and to divest himself of title and did, in fact, and in law, reserve no control or dominion over the said deed and intended to and did convey title to the defendant in praesenti. Upon appeal the Court said:

"The test in this case, as in all others where delivery is to a third person, is: Did grantor, at the time of alleged delivery to bank, intend to part with control and make present grant of title without reserving right to revoke or recall the deed?"

"A careful reading of the instructions which accompanied the handing of the deed to the depositary dispels any doubt in the writer's mind as to Willard's intentions. They were made clear by the instructions. He intended delivery to be made after his death and said so. Under this writing the bank was Willard's agent and possession of the bank and depositary was the possession of Willard and the bank could have delivered the deed to Willard at any time before his death without liability to defendant and Willard could

have destroyed it without liability to defendant. The instrument could not operate as an escrow on account of the lack of sufficient parties and consideration, and also the failure to actually contract. It is an indispensible feature of each delivery of a deed that grantor part with possession and control of any power over it for the benefit of grantee and the grantor's act or word must be such as to deprive him of all authority or the right to recall, and must evidence an intention to part presently and unconditionally with the deed; otherwise there is no delivery."

"The facts do not justify the findings of the trial court that there was a legal delivery. Consequently, the conveyance attacked by plaintiff in this case is void and ineffective and should be set aside. This court, on several occasions, determined this question and especially in Childers vs. Baird, 59 Colorado 382, 148 P. 854; Harrison vs. Taylor, 83 Colorado 430, 266 P. 217; Griffiths vs. Sands, 84 Colorado 456, 271 P. 191; and the law books present such unanimity of opinion that it is useless to make further discussion."

This case and the citations cited by the Supreme Court of Colorado would seem to be completely opposed to the defendant's categoric statement that there are no cases to support the position of the plaintiff.

Compare the language in the written instructions in the Barnes case with the oral instructions in the Bates case and you will find that they are practically identical. In the Bates case he said "In the event anything happens to me, you give it to Ted, but I don't want Ted to know that you have this instrument, unless something happens to me." (R. 62). The deed was not to be delivered until he died (R. 66). Miss Vest, on two occasions, returned the

instrument saying: "Willis, I am going away. I would not want to take this with me. Perhaps if I leave them they will get destroyed. I think you better take care of them until I return". He would always bring them back to me when I returned. He felt I was custodian of the papers." (R. 63). **The evidence clearly shows that Miss Vest merely was taking care of the papers for safekeeping and not as agent for the grantee or as escrow holder.** The only difference between the oral instructions here and the written instructions in the Barnes case, is that the word "safekeeping" was not used in the oral instructions to Miss Vest, however, all of the statements surrounding the keeping of these papers by Miss Vest indicates it was for safekeeping and for and on behalf of the grantor (R. 75). He could have had them back at any time for "those were his papers." This evidence is unrebutted and unrefuted and conclusively shows that between Miss Vest and Mr. Bates the papers were his papers and were not delivered for any purpose to constitute an absolute grant or unconditional delivery.

Another case which supports the position of the plaintiff herein is the case of Latshaw vs. Latshaw, et al., 107 N.E. 111 (Illinois). In this case Mary J. Latshaw and her daughter, Mary, one of the plaintiffs herein, went to the office of James Marley, who was the circuit clerk and recorder of Edgar County, for the purpose of having a deed prepared conveying the land in controversy to the plaintiffs (two daughters). Marley was a close personal friend of the grantor. Marley had the deed prepared, Mrs. Mary J. Latshaw executed the deed and handed it to Marley with instructions to keep the deed for her and not to re-

cord it until after her death. One of the grantees named in the deed, her daughter, Mary, was present during this transaction. There was evidence that Mary gave her mother $1.00 or other consideration for the said deed, however, subsequent to the execution of the deed, Mrs. Latshaw requested Mr. Marley to deliver the deed to Mrs. Tom Davis, which he did. Apparently the deed was thereafter delivered to the grantor and apparently destroyed. The question is whether the transaction constituted a delivery. The deed purported to be an absolute conveyance of the fee simple title without restrictions or limitations. The Court found that there was no valid delivery of the deed:

> "The evidence seems to warrant the conclusion that it was the intention of the grantor to retain control of the deed and the premises until her death for the purpose of enabling her, in case she should desire, to make a different disposition of the property to do so without consulting anyone else. At the time she signed the deed she manifestly intended that the grantees should have the land at her death, but she reserved the right to change her mind, which she did, as is evidenced by her persistent efforts to repossess herself of the deed and its destruction after it came into her hands."

The only difference between this case and the Bates case is that here the grantor actually received the deed back and destroyed it, whereas in the Bates case he did not, however, he could have and, therefore, the deeds stand in identically the same position. Furthermore, the Bates case is strengthened by the nature of the transaction and the fact that the grantee never knew that he was the gran-

tee of the said instrument and never assented to the same prior to the death of the grantor. Furthermore, the instructions in the Bates case and the subsequent conduct of Bates gives little doubt that Bates intended to exercise and maintain control of the said instrument.

In the case of Linn, et al. vs. Linn, et al. (Illinois), 104 N.E. 229, the facts were these:

The grantor owned a sizeable amount of ground in the states of Illinois and Nebraska. He contacted one R. W. Aimes, who was a minister of the gospel, concerning the preparation of instruments to convey the same to his children and inquired of Mr. Aimes how to best accomplish his purpose. Mr. Aimes suggested that deeds be made and that they be placed in escrow for the purposes of the grantor. At the time of making the inquiry of Mr. Aimes the grantor, James H. Linn, asked if it would be possible to withdraw the deeds if he later changed his mind and Mr. Aimes stated that he thought it would be possible. Mr. Linn thereafter had the deeds made and took them to John C. Culbertson, a banker. The deeds were delivered in this form: The deed to each grantee was placed in a separate envelope numbered from one to six on each envelope and on each envelope was endorsed: "James H. Linn. This envelope not to be opened during my life." At the same time the deeds were prepared the witness prepared a list or paper containing the names of the respective grantees and a description of the land contained in the deed to each grantee and these descriptions were numbered from one to six to correspond with the numbers on the envelopes containing the deeds. This list the witness called "the escrow of the deeds." It showed who the grantees were and the description of the land conveyed in the

deed in each of the envelopes. No further instructions were given to Culbertson, the banker. Shortly before the death of Mr. Linn and while he was laying on his death-bed, he directed one of the grantees to a drawer in a bureau in the room where he would find some keys and told the grantee to take the keys and go upstairs to the drawer named and get a paper, which the father said was a list of the deeds he had made. This list was apparently the same list that he had previously designated as "the escrow of the deeds." The witness testified that his father said "When I am dead take them back to Culbertson and present them and get your deeds and take them to Pontiac and have them recorded and that will settle it." The witness testified he went upstairs but could not find the paper so he brought the drawer and its contents down to his father and his father took the list out and handed it to him. This act was, it was claimed, intended to be a symbolic delivery of the deeds. The Court made the following finding:

> "The following propositions have been settled by repeated decisions of this Court: A deed delivered by a grantor to a third person for delivery to the grantee upon the grantor's death may be a valid conveyance, but it is indispensible in such cases to the validity of the conveyance that the deed, when delivered to the third party, shall pass absolutely beyond the dominion and control of the grantor. If there is any reservation of control of the deed by the grantor, **if he merely places it in the hands of a third person as a convenient PLACE of deposit, still intending to retain control OVER it himself—it is not a valid delivery and conveys no title.** So long as the deed in the hands of the depositary is subject to recall by the

grantor, the grantee acquires no right under it and if the grantor dies without parting with control over the deed, no one has authority afterwards to deliver it to the grantee. **The circumstances of the delivery to the depositary must clearly show the grantor intended the deed to presently become operative.** It must take effect upon execution and delivery, if at all. The intention of the grantor may be evidenced by words or by acts, or by both words and acts, but however shown it must appear that no control of the deed was reserved or intended to be reserved by the grantor after delivering it to the depositary. (Numerous citations)." (Emphasis Added)

"There can be no doubt from the testimony that James H. Linn intended that if he died without withdrawing the deeds from Culbertson's possession and disposing of the land, it should go to the grantees in the deeds, but this intention could not prevail if he retained any dominion or control over the deeds and intended to reserve the right to make any other disposition of the land he saw fit to make during his lifetime. Such an intended disposition of property is ambulatory until the death of the grantor and can only be affected by an instrument in writing in conformity with the Statute for the disposition of real estate by Will. (Authorities) * * * *."

The Court found that the delivery of the deed was ineffective to pass title.

The plaintiff believes that there is a case that is identical from a fact standpoint with the instant case. That is the case of Rhines vs. Young, a Washington case, found in 166 P. 642. Inasmuch as that case is so similar to the instant case from every standpoint, it is set out herein verbatim:

"The plaintiff, Oma Rhines, seeks recovery of possession of certain real property in the City of Tacoma from the defendants, William B. Young and others, and also to be adjudged the owner thereof as against the claims of the defendants. Trial in the Superior Court for Pierce County resulted in findings and judgment in favor of the defendants, from which the plaintiff has appealed to this court.

On November 19, 1949, Mrs. Anna Farrell, the grandmother of appellant, was the owner in her own right as her separate property of the real property here in question. On that day she caused to be prepared by her attorney, Mr. C. M. Riddell, a deed absolute in form purporting to convey the property to appellant. This deed was then signed and acknowledged by her and left with Mr. Riddell with instructions, as he claims to have understood her, to deliver it to appellant upon the death of Anna Farrell and when satisfactory proof should be furnished him of her death. In November, 1912, Mrs. Farrell went to Mr. Riddell and procured the deed from him. He then voluntarily gave it to her. This was done under such circumstances as to strongly indicate that both of them regarded the deed as being at all times in his possession merely as her agent and at all times under her dominion and control without any right or duty on his part to hold the same for the exclusive benefit of appellant. Mr. Riddell thereafter became of the opinion that he had mistaken his duty in surrendering the deed to Mrs. Farrell. Reflecting upon the circumstances under which the deed was signed, acknowledged, and left with him as he remembered them, he became of the opinion that the deed had been delivered to him by Mrs. Farrell with intent on her part to surrender all dominion and control over it and with the view of then vesting title to the property in appel-

lant, though it was not to be delivered by him to appellant until after the death of Mrs. Farrell. Neither the deed nor the property has ever been in the actual or constructive possession of appellant; Mrs. Farrell remaining in possssion of both the deed and the property until the time of her death. Mr. Riddell has never been in any sense the agent or attorney for appellant, unless he was irrevocably made by such by receiving the deed from Mrs. Farrell under such circumstances that it can be held she then surrendered all dominion and control over it. Mrs. Farrell died intestate at Tacoma in March, 1913. Thereafter William B. Young, her son and heir, became the duly appointed and qualified administrator of her estate. Respondent, Martha Young, is the daughter and the only other heir of Mrs. Farrell, and the other respondents have acquired an interest in the property as grantees of William B. Young. The property has been since the death of Mrs. Farrell in the possession of William B. Young, subject to the interests of the other respondents. This action was commenced in May, 1914, resulting in denial of the relief prayed for by appellant as above noticed.

Mr. Riddell is the only witness who testified as to what was said and done by Mrs. Farrell at the time the deed was signed, acknowledged, and left with him by her. Indeed, he appears to be the only living witness of what then occurred, he being the notary before whom Mrs. Farrell acknowledged the deed, and also the only witness to the deed signing as such. While the evidence seems to justify the belief that Mr. Riddell honestly believed that he had mistaken his duty in surrendering the deed to Mrs. Farrell during her lifetime, and honestly became of the opinion that it was left with him by Mrs. Farrell with a view of then surrendering all dominion and control over it and

having it delivered after her death to appellant, we feel constrained to conclude as the trial judge did that Mrs. Farrell did not intend to surrender dominion and control over the deed by leaving it with Mr. Riddell, but left it with him, as she believed, solely as her agent with the right on her part at all times exercising dominion and control over it. The testimony given upon the trial touching the question of Mrs. Farrell's intention at the time of leaving the deed with Mr. Riddell is quite voluminous and much of it in important particulars in serious conflict. A careful reading of the evidence, however, convinces us, as it did the trial judge, that Mrs. Farrell at the time of signing and acknowledging the deed and leaving it with Mr. Riddell and at all times thereafter labored under the belief that she had by its signing and acknowledgment in effect made a testamentary disposition of her property and not an absolute conveyance thereof. We deem it unnecessary to review the evidence in detail here.

In view of our conclusion touching the question of fact as to the intent of Mrs. Farrell in leaving the deed with Mr. Riddell, the law of the case seems plain. No claim is here made that the signing and acknowledgment of the deed and the leaving of it with Mr. Riddell constituted a valid testamentary disposition of the property therein described. Indeed no such claim could be successfully made in view of the provisions of Section 1320, Rem. Code, prescribing the manner of making wills in this state. It seems equally plain that the signing, acknowledging, and leaving with Mr. Riddell of the deed by Mrs. Farrell was not an effectual conveyance of the property, because of the fact that it was not delivered in the sense that Mrs. Farrell surrendered dominion and control over it. It seems to be well settled law that, while a deed may

become effectual to divest an owner executing it of title to the property described therein, by delivering it to a third person to be delivered to the grantee after the death of the owner, such delivery by the owner to a third person must be such that it becomes absolute and beyond recall by the owner. Otherwise there is in law no delivery of the deed to render it effectual as such. The rule is stated in 8 R. C. L. 996, as follows:

> "The rule sustained by the great weight of authority is that the grantor must not only deliver the deed to a third person for the benefit of the grantee ultimately, and in some way express his intention to that effect, but must also part both with the possession of the deed and with all dominion an d control over it."

Our own decisions are in harmony with this rule. Meikle vs. Cloquet, 44 Wash. 513, 87 Pac. 841; Maxwell vs. Harer, 51 Wash. 351, 356, 98 Pac. 756. See note to Munro v. Bowles, 54 L.R.A. 872.

We deem it unnecessary to further discuss the law of the case. The real question here involved is, in the last analysis, one of fact, to-wit: What was the intention of Mrs. Farrell in signing, acknowledging, and leaving the deed with Mr. Ridell?

The judgment is affirmed."

If the appellant's argument is sound, then on January 15, 1949, Edward H. Bates, the grantee of the instrument, could have mortgaged the house, could have sold the property, could have possessed the automobiles and personal property and disposed of them, could have exercised all rights that an owner could exercise in the prop-

erty. By analyzing the transaction from the standpoint of Edward H. Bates and his claim of absolute ownership of the property from January 14, 1949, it seems incongruous and unbelievable that such contention could seriously be made in light of the circumstances surrounding the execution of this deed and the maintenance, control and possession of the property by the grantor. It is, by the same token, just as obvious that the deed, power of attorney and bill of sale were an attempt by the grantor to make a testamentary disposition aided by inexpert counsel. Although the grantor's intention may have been meritorious, as the Illinois Court stated above, the law has prescribed the rule by which documents of this sort must be executed, which rule, if ignored, would render titles to real estate unstable. If appellant's contention is sound, any deed executed by any grantor and delivered to any third party is a valid, subsisting and legal deed, unless the grantor writes a letter contemporaneously with the execution and delivery of the deed, stating that he reserves a right to revoke the deed.

## CONCLUSION

The respondent respectfully urges the Court to sustain the judgment of the trial court. The respondent respectfully contends that the rule of law applicable to all cases cited by both appellant and respondent is the same and that the question of whether there is an effective inter vivos delivery depends upon the particular facts in each case. Respondent respectfully reiterates that the facts of this case conclusively show that the grantor, Willis Bates, did not intend a present, absolute and unconditional delivery of the deed to the grantee at the time he gave the deed

to Miss Vest, and furthermore, that the deed was testamentary in character and, therefore, inoperative because not executed in accordance with the Statute of Wills.

Respectfully submitted,

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