1948

Mac Peterson v. Verga Peterson Anderson : Brief of Appellant

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

ASSIGNMENT OF ERRORS

Page

THE COURT ERRED IN DENYING DEFENDANT AND APPELLANT JUDGMENT IN THE TRIAL OF SAID ACTION IN THE DISTRICT COURT, NO CAUSE OF ACTION, AND IN ENTERING JUDGMENT IN FAVOR OF PLAINTIFF AND RESPONDENT IN SAID ACTION. - - - - - - - - - - - - 17-26

THE COURT ERRED IN ITS ENTRY OF JUDGMENT BASED UPON THE PROPOSED FINDINGS OF FACT FILED IN SAID ACTION, AND THAT SAID FINDINGS OF FACT ARE NOT SUPPORTED BY THE EVIDENCE AND ARE INSUFFICIENT UPON WHICH TO BASE THE JUDGMENT, AND THAT SAID JUDGMENT IS VOID BY REASON THEREOF. - - 15-17

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APPELLANT'S BRIEF

Appeal from the Seventh Judicial District Court
of Sanpete County, State of Utah

Honorable F. W. Keller, Judge

STATEMENT OF FACTS

The Appellant appeals from an Order of Judgment made by the District Court of Sanpete County, on the 19th day of November. 1948. The Respondent filed his complaint on September 12, 1947. The case was tried on the 29th and 30th

In the Supreme Court
of the State of Utah

MAC PETERSON, as Executor of the Last Will and Testament of John S. Peterson, Deceased,
Plaintiff and Respondent,

vs.

VERGA PETERSON ANDERSON,
Defendant and Appellant

CASE NO. 7291

days of October and on the 19th day of November, 1948, and on the 19th day of November, 1948, the Court made and entered its Order of Judgment in favor of the plaintiff and against the defendant for the sums of $4,545.00 and $500.00, respectively, together with interest upon said sums from May 31, 1946, and June 29, 1946, respectively. From this Order and Judgment, the defendant appeals to the above entitled Court.

ASSIGNMENT OF ERRORS

Comes now the defendant and appellant and makes the following assignment of errors upon which she will rely for the reversal of the Judgment appealed from in this cause:

1. The Court erred in denying defendant and appellant judgment in the trial of said action in the District Court, no cause of action, and in entering judgment in favor of plaintiff and respondent in said action.

2. The Court erred in its Entry of Judgment based upon the proposed Findings of Fact filed in said action, and that said Findings of Fact are not supported by the evidence and are insufficient upon which to base the Judgment, and that said Judgment is void by reason thereof.

3. The Court erred in denying the defendant's Motion for a New Trial.

ARGUMENT

The evidence in this case shows, in effect, the following facts:

That plaintiff was the son, and defendant, the daughter, of John S. Peterson, deceased, he having died on February 22,

1947. In checking over the property left by the decedent, the children discovered that there had been some money drawn out of the bank where he kept his account in Gunnison, and in discussing the matter, the defendant herein advised them that he had drawn the money out of the bank and paid off a mortgage on the hotel which belonged to the defendant. The plaintiff and his witnesses claimed that the defendant had designated, at one time in the conversation, that the money received by her was a loan, and later that she stated and maintained that it was a gift to her. Over this conversation, the matters in question in this law suit arose, and upon this conversation alone does plaintiff bring his action and rest his case upon said reported bare statement that the money was a loan, and gives no credit whatever to the statements of the defendant that the money was a gift to her.

It is evident from the evidence in this case that no evidence of indebtedness growing out of a loan was taken by the decedent from the defendant herein at the time the money was paid for her, and, therefore, there is no evidentiary record in writing concerning the matter, the plaintiff relying wholly upon the alleged statement of the defendant that the money transferred to her from her father in his lifetime was a loan. We will briefly, at this point, state a summary of the evidence on the question involved in the case.

The first witness testifying for the plaintiff was Billie Peterson Clinger, a daughter of the decedent who, upon the question involved here, testified as follows: That her father, in July and in November of 1946, when she visited him at

Gunnison, Utah, was living in the hotel with Verga (who is the defendant herein) and that she was taking care of him at the time of said visits; that in 1944 the decedent had given the defendant a deed to the hotel and that all of the children of the decedent so understood (Tr. 4); that the balance of the children were happy that their father was being cared for by the defendant herein; that in checking over the bank accounts and books taken from the decedent's effects, they found some check stubs missing in the books (Tr. 5).

That Vance, a brother, had taken over the store belonging to the decedent in January, 1946 (Tr. 6).

That in the conversation, and apparently in the discussion with reference to the money, the defendant stated that she knew where the money went; that her father loaned it to her to pay off the mortgage; that a short time thereafter she stated to them that it was a gift to her and not a loan (Tr. 7). The witness again stated that the defendant had referred to the money received from the decedent as a loan (Tr. 11). When the witness was asked if the defendant stated that the $600.00 item was loaned to her by the decedent, her reply was "that was my understanding of it" (Tr. 15). She does not say the defendant so stated.

Jessie Sprott, called as a witness for the plaintiff, testified as follows: That in April and November of 1946, she visited her father; that at that time, he was living at the hotel and was being taken care of by the defendant (Tr. 16). That at the discussion about the money involved some of them were present and some of them had gone to their homes (Tr. 17).

That when they found a check missing in the check book, the defendant was not present (Tr. 17). The witness does not know whether the defendant was present at any of the conversations because her father had died and she was upset (Tr. 19). That the defendant claimed the money was a gift to her (Tr. 22). The witness does not know whether any other sums were given, save and except the $4,500.00 or whether any other item was discussed at all that night (Tr. 23). That the defendant had stated that she took the check stubs and cancelled checks from the check books so that she would have evidence that her mortgage was paid. When asked upon cross-examination to repeat the statement made by the defendant concerning the $4,500.00 check, or to state what was said about the matter by anyone, the witness stated that she could not remember, and that she could not state what was said (Tr. 24). That the statement made by the defendant that the money was a gift, was made at the home in the presence of the family (Tr. 25).

Veyda Peterson Pardoe, a witness for the plaintiff, testified that the decedent, when she saw him in November, 1946, was living at the hotel with the defendant (Tr. 26). That Verga, the defendant, took care of him at said place; that Verga was giving him good care, and was doing her best to care for him; that she was good about seeing that he had good meals, clean bedding, and that he was personally clean; that it was hard for him to get in and out of the tub to take a bath, and that the defendant had a shower put in for him (Tr. 27). That the defendant stated that her father had made a loan to her to pay off the mortgage; that the money was given to

her to pay off the mortgage, and that it was loaned to her; that she stated that the money was a gift to her, but that was after she said it was a loan (Tr. 31).

Mac Peterson, the plaintiff, called as a witness on his own behalf, testified as follows: That he saw the decedent in January, 1946, the last time, and he was living at the hotel with the defendant (Tr. 41). That the defendant was taking care of him while he was living at the hotel (Tr. 42). That the defendant made a statement that her dad had loaned her that money to pay off the mortgage of the Gunnison Hotel; that the money was paid in the latter part of January, 1946, about a year before the decedent's death (Tr. 63). The witness was asked if he had found any entries in the ledger or in the account books pertaining to such an item, and he replied that he did not; that the witness found out that the decedent had made a check for $500.00 on May 27, 1946 (Tr. 64). That the witness saw a cashier's check for the amount of $500.00 (Tr. 65). The witness testified that the defendant told them that the money was a gift (Tr. 70). The witness testified that since the time he signed the complaint that he had found out from the books that there were a number of items of money that came in to the decedent as collection on accounts that were never banked in the bank (Tr. 73).

C. E. Anderson, a witness called for the defendant, was sworn and testified that he is the cashier of the Gunnison Valley Bank; that he was familiar with a release of mortgage dated January 29, 1946; that he signed the release as a Notary Public, notarizing the signature of I. Overfelt (Tr. 79). That he

knows the signature of John S. Peterson and the signature of I. Overfelt; that the Release of Mortgage was executed on the date it bears; that the check paying off the mortgage was made in the handwriting of Mr. Overfelt and signed by John S. Peterson, which papers were introduced in evidence (Tr. 80).

Charles Rasmussen, a witness for and on behalf of the defendant, was sworn and testified that he was a Director of the Gunnison Valley Bank, and was now President of the Bank, and had been for four or five years; that he had been a Director of the bank for many years and had had business transactions with John S. Peterson (Tr. 82). That he had seen him practically every day and had rented property from him for 21 years from 1917 to 1938 (Tr. 83). That he was always alert in his mind and knew what he was doing in a business way (Tr. 84).

Deliliah Jensen, a witness called for the defendant, testified as follows: That she saw John S. Peterson, the decedent, at the hotel practically every day (Tr. 87). That she had heard conversations between the decedent and the defendant and had heard statements that the decedent had made to the dfendant (Tr. 88). That upon one occasion, when she and the defendant and John S. Peterson were present, she was wallpapering the bedroom when he came home. That was in the latter part of February, 1946; that when he came in, she commenced kidding with him because she had known him for many years; that she said to him "you are fixing it up Mr. Peterson," and he replied, "Yes we are fixing it up; I gave Verga the money to pay off the mortgage so that she could have it nice. I'd rather not, I don't want a mortgage over my head and I don't want

a mortgage on the house that I am living in." (Tr. 87B) He further said "it is my money and I can do with it the way I want to. If I want to give it away, I can, this has been my business and there is nothing that I would rather see fixed up nice than this hotel." (Tr. 88 and 89B) That this conversation took place in the hotel in the decedent's room; that one day when a Mrs. Worthen was present with her and the defendant and the decedent, that the defendant was telling the other women, Mrs. Worthen, that her dad gave her money to pay off the mortgage and that the decedent sat right there and he said yes that he did; that the decedent was sure thrilled with having a home like he had it, and that he told her so on his birthday on June 8, 1946 (Tr. 89). That at the time Verga was there and had made a nice big cake; that he had given some of it to his dog, and he stated that he was glad that the dog could have some and he thought more of him than his family. That was on June 8, 1946 (Tr. 90). That there were many similar conversations along the same line (Tr. 90).

Le Rita Worthen, called as a witness for the defendant, testified as follows: That on January 30, 1946, she was in the Gunnison Hotel when Mrs. Jensen was present, and that Verga was there and Vrga stated "don't you think I have a pretty good dad?" to which the witness replied "Yes," and Verga said as follows: "he has given me money to pay the mortgage off so that I am happier than I have been for a long long time." The witness said "I wish you were my dad," and he replied "well, this is the nicest home I have had for many years, and I feel like I should do something for Verga, for I have tried to help the boys (Tr. 4).

Bob Anderson, a witness for the defendant, testified as follows: That he was a student at the University of Utah, and that he was home in 1946, and at the dinner table, his Father had said to the decedent that his Mother had told them about paying off the mortgage, and he said to the decedent "Verga tells me that you paid off our mortgage," and he asked the decedent why he paid it off (T. p. 96). That the deceased answered by saying that the reason he paid it off was because he did not want a mortgage on the roof over his head, and that he might as well help Verga as give it all to the boys, and then his Mother, Verga, asked the decedent if she should tell the rest of the family about it and he answered "No," that it was none of their business and he did not owe any of them a cent, and that she should tell them when the right time came; that that was all he had said about the matter (T. p. 97).

Leonard Anderson, called as a witness on behalf of the defendant, testified as follows: That he is the husband of the defendant, Verga Peterson Anderson; that he was acquainted with the deceased in his lifetime; that at a certain time he asked the deceased how he came to pay the mortgage on the hotel, and the decedent answered him by saying he did not want a mortgage on the roof over his head; that he wanted to help Verga out a little bit, and he had the money and that he thought he had better do that inasmuch as he did not want to give it all to the boys (T. p. 98).

Verga Peterson Anderson, the defendant, testified as follows: That at the time the family met together after the decedent's burial, they had a conversation relative to the money

in question in this case (Tr. p. 102). That at said conversation, while they were having dinner, there was a quarrel about what became of certain monies that had belonged to the decedent, and that Merrill had accused Vance of taking the money; that they were sore at Vance over the store proposition so while this conversation was going on, the defendant decided to tell them about the money her Father had given her, and she told them the truth about the matter, that her Dad had given her the money to pay the mortgage off and that the reason she is now in a law suit was because she had told the truth, and after considerable bickering, the crowd separated and the next morning they got in touch with the defendant and requested her to go to the bank and borrow money and pay the money back which had been given her which she refused to do, stating that her Father had given it to her, and that she did not owe anyone of them a dime, and that Vance said to all of them that if they would pay off all the money that the deceased had given them through the years, it could all be put in the bank and split up, and the defendant replied that the deceased had given her the money, and that she did not owe one of them a dime, at which time Mac suggested that they get Lew Larson and repeat both sides of the story to him, and whatever his decision was would be accepted; that on Wednesday afternoon they went to see Mr. Larson and told him their side of the story and on the following morning Mr. Larson came down and they all held Court over to the house (Tr. p. 104). That they held a meeting, all members being present, and that each side told their story to Mr. Larson, and he stated as follows: "I think this girl has earned

every dime she has," and the rest of the family became sore and said that they would fight it out in Court; that they then held no further conversation with the defendant, but ostracized her from the family, and shut the door in her face; that they then went ahead and sold the things out of the house and disposed of the property and never consulted her further about anything (Tr. p. 105).

From the foregoing it will readily be seen that there is no evidence whatever concerning any loan transaction from the decedent to the defendant; that is, there is no evidence to establish a loan by any act or statement of the decedent made in his lifetime or of any other witness concerning any transaction between the decedent and the defendant in decedent's lifetime; no papers of any sort indicating any agreement upon a loan between the said parties, and there is evidence in the record to show that the decedent, in his lifetime, did not claim the money delivered to the defendant as a loan, but his statements, as testified to by the witnesses, proves conclusively that the money was a gift and was given to the defendant to pay off the mortgage on the property in which the decedent lived, and in his own words, for the reason that he did not desire to live in property that was covered by a mortgage. This leaves us, for consideration, as the only evidence in the case, the alleged statement of the defendant that her Father had loaned her the money, said statment allegedly having been made at the time of the meeting of the family after the burial of the decedent, and it will be noted that all of the testimony given concerning this transaction is to the effect that immediately after the alleged

statement of loan, and at the same time, and in the same conversation, the defendant asserted that the money in question was given to her as a gift from her Father.

And this is not an unusual circumstance when considered in the light of the fact that the defendant had taken the decedent and made a home for him and kept him comfortable, taking care of his every want and need in his old age and declining years.

When all of the circumstances as they existed, as revealed by the evidence, are taken into consideration, it would be a natural human thing for the decedent to do to have consideration for the people who were furnishing him housing and taking care of his every want and need, to want to reimburse them in some way, and when the life of the decedent is reviewed it can cause no emotional upset of one's mind when he requests that the place in which he lives should not be burdened with a mortgage but that it should be clear, and, of course, it was his money and he had a right to do with it as he saw fit.

This merely shows unquestionably that the preponderance of the evidence in this case is in favor of the defendant and against the plaintiff.

In support of our position we submit the following argument and citations.

It will be noted that the matter at issue concerns only the proposition of whether the money paid in the discharge of the mortgage upon the property was a loan or a gift.

The appeal, as taken, rests upon the propositions that the judgment and findings are not supported by and are contrary to the evidence, and that the plaintiff failed to support his allegation of a loan by a preponderance of the evidence, and in fact, failed to establish so much as a prima facie case against the defendant, when all of the evidence is considered, and particularly the evidence adduced by the defendant in the trial of said cause.

In the first place, a judgment must be supported by the findings of fact as required by the Utah Code, 104-26-3. "Under this section written findings of fact and conclusions of law, separately stated, must be made and filed before any judgment can be entered. They are the foundations of the judgment and are as necessary to precede any judgment as a verdict in case of trial by jury. There is no presumption in the absence of findings." Reich v. Rebellion Silver Mining Company, 3 Utah 254, 2 P 703.

There is also the requirement of the law that the findings must be properly supported by the evidence in order for the judgment to stand. "The requirements of this section (104-26-3) is just as essential in equity as in a law case. A judgment rendered on no findings, or not upon sufficient, or proper findings to support it, has no more validity in equity than at law." In re Thompson's Estate, 72 Utah 17, 35, 269 P. 103.

The judgment of the trial court, being a conclusion of law based on the findings, cannot itself be supported by an alleged finding of fact which is identical to the conclusions itself, and unsupported by the necessary findings of fact. "The

court's finding must be of fact and not a conclusion of law; that is, the court must specifically find the facts with regard to the matters and then draw his conclusion from the facts found." Brown vs. Johnson, 43 Utah 1, 134 P 590, 46 LRA (NS) 1157.

A failure on the part of the trial court to adhere to this rule operates to defeat a party's right to appeal ond suppresses those basic rights provided by these rules of procedure in our judicial system. "Where a case is tried to the court without a jury, the court should find the facts upon every issue, either affirmatively or negatively, as the evidence may be, and thus give the defeated party an opportunity to assail the findings as not being supported by the evidence." Thomas v. Clayton Piano Co., 47 Utah 91, 151 P 543.

The present appeal rests mainly upon the contention that the judgment of the trial court should be reversed because, "The trial court should not make findings of fact where there is no evidence to support them. If it does so, judgment thereon will be reversed." Hathaway v. United Tintic Mines Co., 42 Utah 520, 132 P 388.

Likewise, if there is evidence to support them, then said finding should be supported by a statement thereof. It being contended by the defendant that a finding of a loan is a legal conclusion, and not itself a finding of fact. Findings of fact involved in the present issue must relate to the elements which make up such a conclusion, namely:

1. Appropriate contractual intent on the part of both parties to the transaction.

2. The existence of a valid loan agreement.

3. The delivery of the money with the necessary intent. Since a loan seriously cannot be said to exist unless these three elements are present, to adjudge that a loan does exist in the absence of a specific affirmative finding on each of these three elements would be contrary to law and reason, a circumvention of the requirement of section 104-26-3 of the Utah Code and in violation of the precedent set forth above.

The plaintiff in this case alleges that the transaction in question was a loan. The defendant denies this, saying that the transaction was a gift.

It goes without saying that the plaintiff, the moving party, in alleging the transaction to be a loan, has the burden of proving it by a preponderance of the evidence. "The burden of proof is upon the party asserting the affirmative of an issue, using the latter term in the larger sense and as including any negative proposition which such party might have to show. If he alleges a fact that is denied, he must establish it. He is the actor, and as such remains so throughout the case as to the allegations which he makes, or rather must make. Having alleged the truth of a matter in issue, he must prove it. The party denying his allegations cannot have this burden at any time during the trial." 216 P 691, 31 ALR 1441.

The plaintiff must fail to recover if he fails to discharge this burden or if the evidence is equally balanced. 30 Utah 453, 85 P. 1002.

Thus it is obvious that the plaintiff, alleging a loan, must prove it. "When an action is brought to acquire

money alleged to have been loaned by plaintiff to defendant under an oral contract, and defendant claims the money as a gift, the plaintiff has the burden of proving the alleged oral agreement to repay." Mace v. Tingey, 106 Utah 42, 149 P2d, Payne v. Williams, 62 Colo. 86, 160 P 196. And ordinarily there is no presumption against a gift. Mace v. Tingey, supra, Jackson v. Lamar 68 Wash. 385, 121 P 857.

Again from the case of Mace v. Tingey: "The undisputed record reveals that in September, 1937, Elizabeth Emma Dyer, herein called deceased, an elderly spinster, entered the home and employment of defendant as a domestic; that in November, 1938, due to a combination of defendant's financial condition and the impaired state of health of deceased, such employment terminated, but deceased continued to live in defendant's home without charge until her death in April, 1942, except for a short time (six weeks) in 1941 when she was in a hospital. Plaintiff contends that the court erred in admitting testimony as to these facts and evidence showing that during part of that time, deceased was either practically an invalid or unable to completely care for herself or to work, on the ground such evidence was irrevalent and immaterial. Was such objection well taken? Plaintiff refers us to no authority where this point was involved, but the question is not one of first impression. Where, as here, the question is as to whether the transaction was a loan or a gift, and neither party can testify thereto, the circumstances under which the transaction took place are certainly material in determining the intent of the donor and the purpose for which the property was turned over. Testimony touching the motives, inducements, or

reasons for the donor turning the property to the donee, rather than the heirs is pertinent to the issues." Gilham v. French, 6 Colo. 196 2dP. St. Rep. 196; Nichols applied Evidence, Vol. 3, p. 2383; "and is admissible for the purpose of sustaining the probability that the gift was in fact made." 38 C.J.S. 867; Sando v. Smith, 237 Ill. App. 570, 28 C.J. 674, and note 96. "The relation of the parties, the situation then existing, and the circumstances under which the gift was made, including the donor's previous life, habits and relations to others, as well as the condition of the donor at the time of the gift may be considered by the court;" Russell v. Langford, 135 Cal. 356, 67 P. 331; "so too evidence of friendly or affectionate relations between the parties," Young v. Anthony, 104 NYS 87, 119 App .Div. 612; Smith v. Maine, 25 Barb. 33; Rhodes v. Childs, 64 Pa. 18; "that the parties had resided together," Currie v. Langston, 92 Mont. 570, 16 P. (2d) 708; "and that the donee had rendered service to the donor," Young v. Anthony supra; 38 CJS 868, 28 CJ 674; "is admissible on the question of motive and intent."

"Generally the donee has the burden of proving a gift." Blackburn v. Jones, 59 Utah 558, 205 P. 582; Ward v. Ward, 94 Ore. 405, 185 P. 906. "But when an action is brought to recover money alleged to have been loaned by plaintiff to defendant under an oral contract, and defendant claims the money was a gift, the plaintiff has the burden of proving the alleged oral agreement to repay." Payne v. Williams, 62 Colo. 86, 160 P. 196. There is no evidence in the case at bar of any agreement to repay. "Ordinarily there is no presumption against a gift." Jackson v. Lamar, 67 Wash. 385, 121 P. 857. "There

was here no witness who testified directly as to the transaction. Plaintiff produced witnesses, beneficiaries under the will, or relatives, who testified that defendant told them the money was a loan and that she should have signed a note. The so-called "dead man statute" (Subdivision 3 of Sec. 104-49-2 UCA 1943) was invoked by plaintiff to prevent defendant testifying as to what actually occurred when the money changed hands. Defendant, as a witness however, denied making the statements attributed to her by plaintiff's witnesses. She offered a witness who corroborated her denial that she had stated the money was a loan; another witness testified that deceased had told him she had given defendant the money."

Not only is the burden of proof on the plaintiff, but he also must be first to proceed with his proof of the matter alleged. This is true because the relationship of the parties involved in this controversy, together with the surrounding circumstances as found in the record, not only fail to raise a presumption in favor of the plaintiff by placing the burden of proceeding with the evidence on the defendant, but to the contrary. The evidence contained in the record points to the probability of a gift (Mace v. Tingey, supra.) The record shows that defendant was the daughter of deceased, that she cared for the deceased and helped to make a comfortable home for him, that deceased expressed his intention that she should have the hotel, that the members of the family all understood and were in agreement with an understanding to that effect, and that a check signed by deceased discharged a mortgage note of the daughter held by a bank on the property given defendant by deceased. The record contains

no evidence indicating discord or lack of love and affection between the daughter and deceased.
contains no evidence indicating discord or lack of love and affection between the daughter and deceased.

These circumstances, as shown by the record, not only do not help the plaintiff, but do raise a presumption in favor of the defendant, namely, that the payment by deceased was a gift to defendant. "A payment by a parent of a substantial amount to discharge a debt for a child will be deemed prima facie to be intended as an advancement or a gift." In re Wiese's Estate, 270 N.W. 382; Morrison et al. v. Morrison et al., 96 S.W. 100; West et al. v. Beck et al., 64 N.W. 599; In re Pickenbrock's Estate, 70 N.W. 1084, 26 A.L.R. 1146. And even where the father, after payment of the mortgage, takes an assignment in blank of the mortgage and note (the record in the instant case shows no disposition of the cancelled mortgage and note), such a payment is deemed an advancement to the child." Johnston v. Eaton, 51 Kan. 708, 33 P. 597, "and the clearest evidence is required to rebut this presumption." Lewis v. Bowman, 113 Mont. 68, 121 P. 2d 162; Nailor v. Nailor, 5 Mackay 93, 16 D.C. 93, appeal dismissed, 1888, 127 U.S. 787, 32 L.Ed. 331. Furthermore, "it is presumed that advances made between parents and children are gifts, and such presumption prevails until the contrary is clearly established." In re Randall's Estate, 101 Colo. 249, 72 P. 2d 471; Murphy v. Murphy, 95 Iowa 271, 63 N.W. 697; Higham v. Vanosdal, 125 Ind. 74, 25 N.E. 140; First Nat. Bank v. Keller, 122 N.J.Eq. 481, 194 A. 554.

Consequently, with the burden of proof and the burden of proceeding with the evidence being on the plaintiff, what must he prove? The payment of the money is admitted. The plaintiff, then, must prove by a preponderance of the evidence that deceased intended to enter into a loan agreement with the defendant, the existence of such agreement, and the payment of the money by deceased with said contractual intent. Thus, in broad terms, the plaintiff's case depends on his proof of deceased's intent. The intent of deceased, accordingly, is the vital issue of fact upon which the findings and judgment must depend.

And where, as here, the question is as to whether the transaction was a loan or a gift, and neither party can testify thereto, the circumstances under which the transaction took place are material in determining the intent of the donor.. Mace v. Tingey, supra. Reference to such circumstances has been made in the foregoing. The record contains evidence by way of the testimony of deceased's children that there was a family understanding to the effect that defendant was to receive the hotel in exchange for her service in caring and providing a home for the deceased until his death. The members of the family were in harmony with this understanding. The record further shows that defendant did care and provide a home for deceased until his death; also that imediately after completion of the transaction in question the deceased declared what he had done and for what purpose. There was no reference or indication whatsoever in those statements that the transaction was a loan or intended by deceased to be such. No such inference logically can be drawn from those statements nor from the transaction

itself. No reference was made to an agreement with defendant, no reference was made to repayment by defendant, and no reference was made to the disposition of the cancelled note and mortgage. The logical and only inference which can be drawn from the transaction, the surrounding circumstances and the statements of the deceased is that deceased intended the payment to be a gift.

The evidence in the record contains nothing which points to a loan or which tends to prove facts from which a loan might be inferred. Plaintiff has proved the irrelevant fact that almost one year after the transaction occurred, defendant stated to members of deceased's family that deceased had loaned her the money. Because of the remoteness in time, such a statement cannot be considered as part of the res gestate, thus of value in proving the substance of the statement. Furthermore, can such a bare and remote statement seriously be considered in an attempt to determine the intent of deceased at the time of the transaction. Such vidence is clearly incompetent for such a purpose.

It is necessary also to consider the circumstances under which the alleged admission was made. The record shows that the members of deceased's family, in the course of compiling the assets of the estate, discovered certain unexplained financial matters. This, as the record clearly shows, caused the tempers and nerves of the members of the family to be strained and gave rise to an exchange of words and accusations. It was in this atmosphere that defendant made her statement. It is clear that under such circumstances any words spoken by those involved were necessarily hasty and without deliberation. It

was an obvious attempt on the part of defendant to smooth the troubled family waters, with little or no regard on her part of the consequences of such a statement. Furthermore, the record shows that within the space of very few minutes, defendant retracted her former statement, and declared that the transaction in fact was a gift from deceased. Under the circumstances, little probative value can be attached to defendant's admission. "Weight to be given admissions, whether oral or written, depends in great part on circumstances under which admission was made." Christensen et al. v. Johnson, 90 Utah 273, 61 P. 2d 597. "If an admission, however, is to carry weight, it first must be shown to have been made with deliberation." Mehr v. Child et al., 61 P. 2d 624.

Other than this alleged admission by defendant, the record is bare of any evidence whatsoever which might remotely refer to a contractual intent on the part of deceased. Thus, we have a case of plaintiff's position resting entirely upon the alleged admission and in the face of all overwhelming circumstances and testimony to the contrary. "Evidence of verbal declarations of adverse party, uncorroborated by other facts or circumstances, are not sufficient to sustain jury verdict or court finding upon a vital issue." Comm. Importing Co. v. Wear et al., 200 Wash. 156, 41 P. 2d 777.

No direct evidence was introduced at the trial concerning the nature of the transaction. Resort was necessary, therefore, to the surounding facts and circumstances. Mace v. Tingey, supra. The circumstances alone give rise to a presumption of a gift, as stated above. There is ample testimony and facts in the record to support this presumption. On the other side, the

only evidence to support the notion of a loan is the uncorroborated statement by defendant which is remote in point of time and incompetent by way of probative value on the issue of decedent's intent.

It is clear that the plaintiff has failed to prove his allegation of a loan by a preponderance of the evidence. Not only this, but plaintiff has failed completely to overcome the presumption of a gift, establish his prima facie case and place the burden of proceeding with the evidence on the shoulders of defendant.

The trial court itself states that the proof of the circumstances under which defendant received the money was somewhat vague. In the face of all these factors, can the judgment be allowed to stand? "Findings and judgments cannot rest on conjecture and speculation," 195 P. 2d 574, "and must be predicated upon definite and tangible supporting facts." 47 P. 2d. 53. The plaintiff must fail "where plaintiff's undisputed evidence from which essential fact is sought to be inferred points with equal force to two things, one of which renders the defendant liable and the other not." 89 P. 2d 490.

As to the duty of the Supreme Court in this regard, the judgment of the trial court cannot stand. "When testimony preponderates on one side or the other in such way as to convince the Supreme Court that the trial court erred, the trial court's judgment will be reversed." Wilson v. Cunningham, 24 Utah 167, 67 P. 118. See also Jensen v. Howell, 75 Utah 64, 74; 282 P. 1034.

"The findings of the trial court also must be supported by competent evidence if they are to stand." Harper v. Tri-State Motors, Inc., 90 Utah 212, 222, 58 P. 2d 18, rehearing denied 90 Utah 226, 63 P. 2d 1056; Vadner v. Rozzelle, 88 Utah 162, 164, 45 P. 2d 561, rehearing denied 88 Utah 172, 54 P. 2d 1214; Greco v. Gentile, 88 Utah 255, 53 P. 2d 1155.

It is clear, therefore, that the Supreme Court has the power to vacate the findings of the trial court where the findings are manifestly against the clear weight of the evidence as to indicate that it was not fairly or impartially considered by the trial court, or that undue weight was given to portions of the evidence, or that the trial court misconceived or misapplied the evidence. In re Yowell's Estate, 75 Utah 312, 329, 285 P. 285.

We submit, therefore, that on the basis of the record, the finding and judgment of the trial court must be reversed.

Respectfully submitted,

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