

1951

LaVar W. Thatcher et al v. Isabelle Merriam et al : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Evans, Neslen, Mangum & Morris; Attorneys for Appellants;

Recommended Citation

Brief of Appellant, *Thatcher v. Merriam*, No. 7689 (Utah Supreme Court, 1951).
https://digitalcommons.law.byu.edu/uofu_sc1/1508

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

**IN THE SUPREME COURT
of the
STATE OF UTAH**

LaVAR W. THATCHER, Administrator
of the Estate of Joseph F. Livingston,
deceased, ELLA IVORY LIVINGSTON,
GENIEL L. THATCHER, RUBY
LIVINGSTON, an incompetent, by Ella
Ivory Livingston, her guardian ad litem,
LESLIE L. WRIGHT, DAVID HALL
LIVINGSTON, an infant, by Ella Ivory
Livingston, his guardian ad litem,
Appellants,

— vs. —

ISABELLE MERRIAM, EDWIN N.
ROBERSTON, Administrator of the
Estate of Lillian Robertson, deceased,
and ELLEN COOK,

Respondents.

APPELLANTS' BRIEF

EVANS, NESLEN, MANGUM
& MORRIS,
Attorneys for Appellants.

INDEX

	<i>Page</i>
STATEMENT OF THE CASE	1-2
STATEMENT OF FACTS	2-8
STATEMENT OF POINTS RELIED UPON	8-10
ARGUMENT	10

- I. Since by the instrument designated Assignment, Exhibit A, relied on by respondents as creating a gift, Joseph F. Livingston retained during his lifetime present and future dominion over the subject of the purported gift, the attempted gift failed, and it was error for the court to find that all of the right, title, and interest of Joseph F. Livingston in and to the Promissory Note, Exhibit D; the Deed of Trust, Exhibit B; and the Chattel Mortgage, a copy of which is Exhibit C; were assigned to respondents, Isabelle Merriam and Ellen Cook, and Lillian Robertson, and to render judgment that the defendants Isabelle Merriam, Edwin N. Robertson, Administrator of the Estate of Lillian Robertson, deceased, and Ellen Cook, are the owners of the Promissory Note, Deed of Trust, and Chattel Mortgage..... 10-15

- II. Since the Promissory Note, Deed of Trust, and Chattel Mortgage were all retained by Joseph F. Livingston and not delivered to Isabelle Merriam, Ellen Cook, or Lillian Robertson, and the Promissory Note was not indorsed by Joseph F. Livingston, it was error for the Court to find that by the purported Assignment all of the right, title, and interest of Joseph F. Livingston in and to the Promissory Note, Deed of Trust, and Chattel Mortgage referred to in said Assignment were assigned to defendants Isabelle Merriam, and

INDEX (Continued)

	<i>Page</i>
Ellen Cook, and Lillian Robertson, and to render judgment that defendants Isabelle Merriam, Edwin N. Robertson, Administrator of the Estate of Lillian Robertson, deceased, and Ellen Cook are the owners of the Promissory Note, Deed of Trust, and Chattel Mortgage ..	15-20
III. It was error for the court to permit Isabelle Merriam to be a witness and to testify in violation of Section 104-49-2 (3), Utah Code Annotated, 1943	20-23
CONCLUSION	24

CASES CITED

Allen-West Commission Co. v. Grumbles, 63 C.C.A. 401, 129 Fed. 287	18
Basket v. Hassell, 107 U.S. 602, 27 L. Ed. 500, 2 Sup. Ct. R. 415	11
Bowline v. Cox, Alabama (1946), 26 So. 2d. 574	14
Cox v. Hill, 6 Md. 274	19
Fenton Estate, In Re, 182 Iowa 346, 165 NW 463	18
Gordon v. Young, 10 Ken. Law Reports 681	18
Hamilton's Estate, In Re, Wash. (1946), 174 Pac. 2d. 301	14
Holman v. Deseret Savings Bank, et al., 41 Utah 340, 124 Pac. 765	11, 14
Maxfield v. Sainsbury, 110 Utah 280, 172 Pac. 2d. 122	23
Peterson v. Weiner, Texas (1934), 71 SW 2d. 544	11, 13

INDEX (Continued)

	<i>Page</i>
Romney's Estate, In Re, 60 Utah 173, 207 Pac. 139	11
Scherzinger's Estate, In Re, (1947), 74 N.Y.S. 2d. 756	15
Stevenson v. Earl, 6 5N. J. Eq. 721, 55 Atl. 1091	11
Storr v. Storr, 329 Ill. App. 537, 69 NE 2d. 916	14
Sylvain v. Page, 84 Mont. 424, 276 Pac. 16, 63 A.L.R. 528 ..	18
Young v. Young, 80 N.Y. 422, 36 Am. Rep. 634	11, 16

STATUTES CITED

Utah Code Annotated, 1943:	
Section 61-1-31	19
Section 104-49-2 (3)	20, 21, 22

AUTHORITIES CITED

28 C.J., Gifts, Sections 5, 15, 21, 23, and 41	11
28 C.J., Gifts, Section 43	12
12 R.C.L. 931	11
25 A.L.R., pages 642 to 685	15
25 A.L.R., pages 662 to 665	15
25 A.L.R., pages 659 to 661	15
25 A.L.R., page 675	16
63 A.L.R., page 537	17
58 Am. Jur., Witnesses Sec. 357	23

IN THE SUPREME COURT of the STATE OF UTAH

LaVAR W. THATCHER, Administrator
of the Estate of Joseph F. Livingston,
deceased, ELLA IVORY LIVINGSTON,
GENIEL L. THATCHER, RUBY
LIVINGSTON, an incompetent, by Ella
Ivory Livingston, her guardian ad litem,
LESLIE L. WRIGHT, DAVID HALL
LIVINGSTON, an infant, by Ella Ivory
Livingston, his guardian ad litem,
Appellants,

CASE NO.
7689

— vs. —

ISABELLE MERRIAM, EDWIN N.
ROBERSTON, Administrator of the
Estate of Lillian Robertson, deceased,
and ELLEN COOK,
Respondents.

APPELLANTS' BRIEF

STATEMENT OF THE CASE

This is an appeal from a judgment in favor of respondents Isabelle Merriam, Edwin N. Robertson, Administrator of the Estate of Lillian Robertson, deceased, and Ellen Cook, and against all the appellants, by which it was determined that the respondents were the owners and holders of a Promissory Note dated November 1, 1947, in the sum of \$70,476.92 executed by

defendant L. DeWayne Merriam, payable to the order of Joseph F. Livingston, and that said respondents were also the owners and holders of a Deed of Trust and Chattel Mortgage which were executed and delivered by defendant L. DeWayne Merriam to secure the payment of said Promissory Note, and which judgment also determined that none of the appellants had or ever had any right, title, claim, or interest in or to said Promissory Note or in the indebtedness represented thereby or in said Deed of Trust or Chattel Mortgage securing the payment of said Promissory Note (R-30). One of the original defendants in the action was L. DeWayne Merriam. He was served with Summons, but did not appear and his default was entered. He was the maker of the Promissory Note, Chattel Mortgage, and Deed of Trust. Said L. DeWayne Merriam is taking no part in this appeal. The pages of the record will hereafter be referred to in parenthesis with no other designation.

STATEMENT OF FACTS

This action was one commenced in the District Court of Salt Lake County by the administrator of the Estate of Joseph F. Livingston, deceased, and the heirs of said decedent to have declared void and of no force and effect a certain instrument designated "Assignment," dated March 27, 1948, by which Joseph F. Livingston during his lifetime attempted to make a gift of an obligation owed to him by Lorin DeWayne Merriam, to three sisters of said Joseph F. Livingston; namely, Isabelle Merriam, Lillian Robertson, and Ellen Cook (1-3).

Lorin DeWayne Merriam is the same person as L.

DeWayne Merriam and his first name is incorrectly spelled in the transcript of the testimony "Lauren."

The case was tried before the Honorable Ray Van Cott, Jr., without a jury on March 9, 1951.

The respondents in their original Answer did not set forth any claim to the Promissory Note, Chattel Mortgage, and Deed of Trust, nor did they disclose upon what theory they claimed to be the owners of said instruments. However, at the close of the evidence, upon request of counsel for appellants, counsel for respondents stated that he claimed there was a gift of the note and the mortgages securing it by virtue of the execution and delivery by the deceased of the Assignment (92). Counsel for respondents at that time also amended the prayer of the Answer "to include such further relief as the defendants are entitled to and particularly that it be adjudged and determined that the three defendants are the owners of the note and the mortgages securing the payment of the note, which note is referred to in the Complaint and which was introduced in evidence."

The obligation of Lorin DeWayne Merriam was evidenced by a Promissory Note dated November 1, 1945, signed by him, originally for the sum of \$94,577.00, payable ten years after date in annual installments commencing November 1, 1946, with interest thereon at the rate of 6% per annum from date, payable annually (Exhibit E). The payment of the obligation was secured by a Deed of Trust dated April 29, 1946, covering 5,260 acres of real property situated in Rio Blanco and Moffat Counties, State of Colorado, which was signed by Lorin DeWayne Merriam (Exhibit B), and by a Chattel Mort-

gage dated April 29, 1946, which was also signed by Lorin DeWayne Merriam (Exhibit C). The Chattel Mortgage was on 3,141 head of sheep then located at Scenery Gulch, west of Meeker, Colorado, and other personal property (Exhibit C).

On November 1, 1947, another Promissory Note was executed and delivered to Joseph Franklin Livingston by Lorin DeWayne Merriam for the sum of \$70,476.92, payable on or before ten years after date with interest at the rate of 5% per annum from date thereof (Exhibit D), in which it was provided that the Note was secured by Deeds of Trust on lands in Moffat and Rio Blanco Counties, Colorado, and by Chattel Mortgage on certain sheep. The Note also provided that the maker agreed to pay annually toward the obligation any and all net profits realized from the operation of the mortgaged sheep. This Note was apparently a renewal of the earlier Note for \$94,577.00 (41). This Note shows by indorsement in handwriting of one, A. H. Anderson, under date of November 1, 1948, that interest was paid to date and \$5,476.92 was paid on the principal, leaving a balance on the Note of \$65,000.00 (38). Joseph F. Livingston died on April 14, 1948. A short time before his death, according to the testimony of Lester Cook, and Mrs. Isabelle Merriam, Joseph F. Livingston executed and delivered the Assignment, Exhibit A. The instrument bears date of March 27, 1948, and appears to have been acknowledged on the same day before a Notary Public. According to Mrs. Isabelle Merriam, who did not attend the trial, but whose testimony was read from a deposition, the Assignment was delivered by Joseph F. Livingston to Isabelle

Merriam and her two sisters, Mrs. Cook and Mrs. Robertson, while at the home of Mr. and Mrs. Cook (74). Mrs. Merriam believed that it was delivered on March 26, 1948 (76). Lester Cook also testified that he saw the Assignment first on March 26, 1948 (54). The testimony of Mr. Cook (56) and Mrs. Merriam (77) is to the effect that the Assignment was taken to a Notary Public for the signature of the Notary Public without Joseph F. Livingston being present (56), and without his personal acknowledgement.

Neither the Promissory Note dated November 1, 1945, Exhibit E, (58-59), nor the Promissory Note dated November 1, 1947, Exhibit D, (37, 58, 62, 81), nor the Deed of Trust, Exhibit B (59), nor the Chattel Mortgage (61), a photostatic copy of which was prepared by the County Recorder of Rio Blanco County, Colorado, Exhibit C, was delivered to the said three sisters of Joseph F. Livingston, or to anyone on their behalf by Joseph F. Livingston, or by anyone on his behalf during the lifetime of Joseph F. Livingston (58-59). The Chattel Mortgage had been filed in the office of the County Recorder of Rio Blanco County, Colorado, on June 7, 1946 (Exhibit C) and apparently remained on file there. The Deed of Trust, Exhibit B, was filed for record in the office of the County Recorder of Rio Blanco County, Colorado, on June 7, 1946, and was apparently returned to Joseph F. Livingston, and found by LaVar W. Thatcher among the papers of Mr. Livingston the day after his death (35). LaVar W. Thatcher also testified that he found the copy of the Chattel Mortgage, Exhibit C, and the Promissory Note, Exhibit D, among the papers of Mr. Living-

ston the day after his death (37). Mr. Thatcher found the Promissory Note, Exhibit E, after the death of Mr. A. H. Anderson, who was the manager of the sheep operations for the Estate of Joseph F. Livingston, deceased, (59-60) among the papers belonging to the Livingston Estate in Mr. Anderson's desk (40-41). Mr. Anderson died in August, 1950 (40). Mr. Cook testified that he had the photostatic copy of the Chattel Mortgage, Exhibit C, made (60) after the death of Mr. Livingston (61).

The Assignment, Exhibit A, was recorded in the office of the County Recorder of Rio Blanco County, Colorado, on April 30, 1948, 16 days after the death of Joseph F. Livingston. It was apparently recorded at the request of DeWayne Merriam whose name appears, together with his address, on the cover of the document (Exhibit A).

The Assignment, Exhibit A, contained the following provisions in regard to the Assignment of the Deed of Trust and the Promissory Note:

“* * * provided, however, that the undersigned assignor hereby reserves unto himself during his lifetime all amounts becoming due on the principal of said promissory note and all amounts in excess of the amounts periodically becoming due thereon which the maker thereof under the terms of said note may choose to pay on said principal during the lifetime of the assignor herein; the interest on said principal amount to be paid as said interest shall accrue, to the assignees herein in the percentages hereinabove reserved, i.e., 50% of said interest accruing to be paid to said Isabelle Merriam, 25% of said interest accruing to be paid to said Lillian Robertson, and 25% of said interest accruing to be paid to said Ellen Cook, the undersigned hereby authorizing the

maker of said note and mortgage to make payment of the amounts herein assigned to the persons named in the percentages herein mentioned * * * " (Exhibit A, Pages 1 & 2) (4 & 5) (26 & 27).

The Assignment, Exhibit A, also contained the following provision in regard to the assignment of the Chattel Mortgage and the Note securing the same:

"* * * being subject to the same terms and conditions as hereinabove set forth, to-wit: reserving unto the assignor herein during his lifetime all amounts becoming due on the principal of said note and all amounts in excess of the amounts periodically becoming due thereon which the maker thereof under the terms of said note may choose to pay on said principal during the lifetime of the assignor herein, the interest on said principal amount to be paid as said interest shall accrue, to the assignees herein in the percentages hereinabove reserved, i.e., 50% of said interest accruing to be paid to said Isabelle Mirriam, 25% of said interest accruing to be paid to said Lillian Robertson, and 25% of said interest accruing to be paid to said Ellen Cook, the undersigned hereby authorizing the maker of said note and chattel mortgage to make payment of the amounts herein assigned to the persons named in the percentages hereinabove mentioned." (Exhibit A, Pages 2 & 3) (5 & 6) (27 & 28).

There is no evidence that Lorin DeWayne Merriam was at any time prior to the death of Joseph F. Livingston notified by him of the purported assignment.

Lester Cook, who is one and the same person as W. L. Cook, after the death of Joseph F. Livingston, was on August 30, 1948, given a general power of attorney to act for Isabelle Merriam, Lillian Robertson, and Ellen Cook (Exhibit F) (47 & 83).

The evidence in the case consisted of the testimony of three witnesses and Exhibits A to F inclusive. The witnesses were LaVar W. Thatcher (34 to 42), the Administrator of the Estate of Joseph F. Livingston, deceased, one of the appellants who was the only witness for the plaintiffs; and Lester Cook (44 to 62 and 82 to 90), who is the husband of one of the respondents, Ellen Cook, and the attorney in fact for Ellen Cook and Isabelle Merriam, and who was the attorney in fact for Lillian Robertson prior to her death; and Isabelle L. Merriam, whose deposition was read into the record (62 to 81). Mrs. Merriam is one of the respondents. Mr. Cook and Mrs. Merriam were the only witnesses for the defendants. The plaintiffs made objection to Mrs. Merriam becoming a witness for the respondents because her testimony was concerning statements by or transactions with Joseph F. Livingston, or matters of fact which must have been equally within the knowledge of the witness and Joseph F. Livingston, it being claimed by appellants that Mrs. Merriam was prohibited from being a witness by the terms of Section 104-49-2 (3), Utah Code Annotated, 1943, (62, 63 & 64).

At the close of the trial in the District Court, the original Exhibits D and E, being the Promissory Notes, were by stipulation of the parties withdrawn and photostatic copies thereof were substituted.

STATEMENT OF POINTS RELIED UPON

Appellants intend to rely upon the following points for a reversal of the judgment of the Court below:

POINT I.

Since by the instrument, designated Assignment, Exhibit A, relied on by respondents as creating a gift, Joseph F. Livingston retained during his lifetime present and future dominion over the subject of the purported gift, the attempted gift failed, and it was error for the Court to find that all of the right, title, and interest of Joseph F. Livingston in and to the Promissory Note, Exhibit D; the Deed of Trust, Exhibit B; and the Chattel Mortgage, a copy of which is Exhibit C; were assigned to respondents, Isabelle Merriam and Ellen Cook and Lillian Robertson, and to render judgment that the defendants Isabelle Merriam, Edwin N. Robertson, Administrator of the Estate of Lillian Robertson, deceased, and Ellen Cook, are the owners of the Promissory Note, Deed of Trust, and Chattel Mortgage.

POINT II.

Since the Promissory Note, Deed of Trust, and Chattel Mortgage were all retained by Joseph F. Livingston and not delivered to Isabelle Merriam, Ellen Cook, or Lillian Robertson, and the Promissory Note was not endorsed by Joseph F. Livingston, it was error for the Court to find that, by the purported Assignment, all of the right, title, and interest of Joseph F. Livingston in and to the Promissory Note, Deed of Trust, and Chattel Mortgage referred to in said Assignment were assigned to defendants Isabelle Merriam and Ellen Cook and Lillian Robertson, and to render judgment that defendants Isabelle Merriam, Edwin N. Robertson, Administrator of the Estate of Lillian Robertson, deceased, and Ellen Cook are the owners of the Promissory Note, Deed of Trust, and Chattel Mortgage.

POINT III.

It was error for the Court to permit Isabelle Merriam to be a witness and to testify in violation of Section 104-49-2 (3), Utah Code Annotated, 1943.

ARGUMENT

POINT I.

Since by the instrument, designated Assignment, Exhibit A, relied on by respondents as creating a gift, Joseph F. Livingston retained during his lifetime present and future dominion over the subject of the purported gift, the attempted gift failed, and it was error for the Court to find that all of the right, title, and interest of Joseph F. Livingston in and to the Promissory Note, Exhibit D; the Deed of Trust, Exhibit B; and the Chattel Mortgage, a copy of which is Exhibit C; were assigned to respondents, Isabelle Merriam and Ellen Cook and Lillian Robertson, and to render judgment that the defendants Isabelle Merriam, Edwin N. Robertson, Administrator of the Estate of Lillian Robertson, deceased, and Ellen Cook, are the owners of the Promissory Note, Deed of Trust, and Chattel Mortgage.

The subject of the claimed gift is divisible into two parts, the principal of the obligation and the interest thereon. The argument on Point I will apply only to the principal of the obligation, and will not apply to the interest thereon. We do not particularly urge that the purported gift of the interest was ineffective because of retention of dominion over and control of the same, however, we rely on the other points herein to reverse the judgment of the lower court in that regard.

A valid gift *inter vivos* must have no reference to the future and must go into immediate and absolute effect. The donor must be divested of and the donee invested with the right of property in the subject of the gift. It must be absolute, irrevocable, and without reference to its taking place at some future time. The donor must deliver the property and part with all present and future dominion over it.

The above statement is supported by the following citations: *Holman v. Deseret Savings Bank, et al.* (1912) 41 Utah 340, 124 Pac. 765; *In Re Romney's Estate* (1922) 60 Utah 173, 207 Pac. 139; *Peterson v. Weiner* (Texas 1934) 71 SW 2d. 554; *Stevenson v. Earl* 65 N. J. Eq. 721, 55 Atl. 1091, 103 Am. St. Rep. 790, 1 Ann. Cas. 49; *Young v. Young* 80 N. Y. 437, 36 Am. Rep. 634; *Basket v. Hassell* 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. R. 415, 28 C. J. Gifts, Sections 5, 15, 21, 23, and 41, 12 R.C.L. 931.

Joseph F. Livingston reserved unto himself during his lifetime the absolute right to the principal of the obligation, not only to the amounts becoming due, but also to any excess which the maker of the note might choose to pay. The Note was payable on or before ten years after date and could have been paid in full at any time. This reservation was a complete dominion over the principal of the gift. No part of the principal was given to the purported donees. Mr. Livingston, the day after the execution of the Assignment, could have received the entire principal due on the obligation if Lorin DeWayne Merriam decided to pay off the obligation. Only the death of Mr. Livingston prevented him from collecting the principal amount of the obligation. The

attempted gift of the principal, therefore, could have no effect in praesenti but could only take effect upon the death of Mr. Livingston. The most that can be urged regarding the principal of the obligation is that it was an attempt to make a gift of the amount remaining unpaid on the principal, if any, at the death of Mr. Livingston. In other words, there was an attempt to make a gift effective upon death of Mr. Livingston of the amount remaining unpaid at the time of his death, which attempt is testamentary in character and the instrument creating it not being executed with the formalities of a Will is, therefore, void.

“A gift of property to take effect after the donor’s death, the donor in the meanwhile retaining the control and dominion of the property, cannot be sustained. Such gifts are in contravention of the Statutes governing the testamentary disposition of property. It is not necessary that the condition that the property shall not pass until the death of the donor be expressly stated, in order to invalidate the gift as one inter vivos, it being sufficient if the condition is implied. On the other hand, if the gift is absolute, the mere postponement of the enjoyment until the death of the donor is not material and will not defeat it.”
28 *C. J. Gifts*, Section 43.

Appellants are aware of the line of cases which hold that a gift of an obligation retaining the income or interest for life is under certain conditions valid. It is our contention, however, that the instant case is clearly distinguishable from those cases. In the line of cases referred to the donor has divested himself of all control over the principal which was the subject of the gift and retained unto himself only the income or interest on the

obligation. The donor in those cases divested himself of all power to defeat the gift during his lifetime. The subject of the gift was placed beyond the donor's power and control, and there was nothing that the donor could do in regard to the principal of the obligation. In this case Mr. Livingston retained all control over the principal and could do with it as he saw fit. He retained within his power the right to defeat the gift of the principal so that the gift was not absolute and immediately effective.

In the case of *Peterson v. Weiner*, supra, there is a good discussion on the subject of retention and control over a note, and it was there held that where the payee of a note, who attempted to make a gift of it, retained and collected payments thereon until his death, he could not make a valid gift of the balance due on the note without making a Will. The court stated on Page 546 of 71 SW 2d.:

“Regardless of this proposition, however, he undoubtedly had the right to collect and use the monthly installments and to this extent had dominion over the note, and only his death could defeat his perfect right to use both the principal and interest of the note. There could be no gift of any part of the note or the debt which the note represented, so long as Eaton had such dominion of the same, and such power to defeat the entire gift.

“It is true that a person may retain a life estate in property and convey the remainder to another, but under such circumstances the grantor only has the use of the property, and cannot otherwise dispose of the property. It has been held that one may give money to another, but require the payment of interest during his life-

time, but this is not inconsistent with the idea that he has parted with the title to the principal.

“We conclude that Joseph Eaton did not part with the absolute title of the indebtedness evidenced by the note and that he retained dominion over the same in that he had a right to collect and spend as he saw fit not only the interest, but the principal provided for in the note, and this right could only be questioned by his dying before all the payments became due.”

The above case is strikingly in point with the instant case and it and the other authorities cited support our contention that Joseph F. Livingston retained such dominion over and control of the principal of the purported gift as to defeat it. We are not aware of any case where the donor has retained such control of and dominion over the purported gift, as retained by Mr. Livingston in the instant case, where the court has held that there was a valid gift.

In the instant case, although the administrator of the estate of, and the heirs of Joseph F. Livingston were the plaintiffs, the persons who sought to prove a gift were the supposed donees of the gift, they being Isabelle Merriam and Ellen Cook, and Edwin N. Robertson, Administrator of the Estate of Lillian Robertson, deceased. The last three were defendants in the action, but they had the burden to establish all of the facts essential to the validity of the gift by clear and convincing proof. There seems to be no conflict in the authorities on this point and in support of our position we cite the following cases: *Holman v. Deseret Savings Bank, et. al*, 41 Utah 340, 124 Pac. 765; *Bowline v. Cox* 26 So. 2d. 574; *Storr v. Storr*, 69 NE 2d. 916; *Re Hamilton's Estate* (Wash.

1946) 174 Pac. 2d. 301; and *In Re Scherzinger's Estate* 74 N.Y.S. 2d. 756.

POINT II.

Since the Promissory Note, Deed of Trust, and Chattel Mortgage were all retained by Joseph F. Livingston and not delivered to Isabelle Merriam, Ellen Cook, or Lillian Robertson, and the Promissory Note was not indorsed by Joseph F. Livingston, it was error for the Court to find that, by the purported Assignment, all of the right, title, and interest of Joseph F. Livingston in and to the Promissory Note, Deed of Trust, and Chattel Mortgage referred to in said Assignment were assigned to defendants Isabelle Merriam and Ellen Cook and Lillian Robertson, and to render judgment that defendants Isabelle Merriam, Edwin N. Robertson, Administrator of the Estate of Lillian Robertson, deceased, and Ellen Cook are the owners of the Promissory Note, Deed of Trust, and Chattel Mortgage.

In 25 *A.L.R.* Pages 642 to 685 appears a lengthy and comprehensive annotation on the subject "Delivery of bond or note of third persons by way of gift." Section (g) of said annotation deals with "delivery by separate writing," Pages 662 to 665. It appears that courts of other states have held both ways on the question of whether a note can be given by a separate writing and by the donor retaining possession of the note. We have found no Utah case on the subject. There is also a Section (e) in said annotation, Pages 659 to 661 on the subject "Necessity for Indorsement." The cases there cited are from other states and none from Utah, and some support the validity of a gift by delivery of the

instrument merely, without indorsement or other writing, while others hold that the gift failed for lack of indorsement and delivery. A significant fact, however, is that no case is set forth in the annotation which holds that there is a valid gift of a note or other instrument where the note or other instrument has been retained by the person who attempted to make the gift, where the note was not endorsed and where the person attempting the gift has retained dominion and control, over the subject of the gift, during his lifetime.

In discussing the case of *Young v. Young*, 80 N.Y. 422, 36 Am. Rep. 634, the following appears in the annotation commencing on Page 675:

“In *Young v. Young*, N.Y., supra, there was held to be no valid gift of bonds where the owner, intending to give them to his son, indorsed upon the envelope containing the bonds memoranda indicating such ownership, followed by a statement that the interest was to belong to him as long as he lived, but where there was no actual delivery from the donor to the donee. The court, after stating the general rule applicable to gifts, says that the first question is whether a gift of an instrument securing the payment of money can be made in praesenti, reserving to the donor the accruing interest. Answering this question, the court says: ‘I can conceive of but one way in which this is possible, and that is by an absolute delivery of the security which is the subject of the gift to the donee, vesting the entire legal title and possession in him on his undertaking to account to the donor for the interest which he may collect thereon. But if the donor retains the instrument under his control, though he do so merely for the purpose of collecting the interest, there is an absence of the complete delivery which

is absolutely essential to the validity of a gift. A gift cannot be made by creating a joint possession of donor and donee, even though the intention be that each shall have an interest in the chattel, especially where, as in this case, the line of division between these interests is not ascertainable. The reservation of the interest on the bonds to the donor was for an uncertain period—that is, during his lifetime and until his death; it was impossible to determine the precise proportion of the money secured by the bonds, to which the donee was entitled. If, therefore, the donor retained the custody of the bonds for the purpose of collecting the accruing interest, or even if they were placed in the joint custody or possession of himself and the donee, there was no sufficient delivery to constitute a gift. But if an absolute delivery of the bonds to the donee with intent to pass the title was made out, the donor reserving only the right to look to the donee for interest, the transaction may be sustained as an executed gift.’ ”

Another exhaustive annotation on the question of the necessity for delivery in effectuating a gift is found in 63 *A.L.R.* 537. This annotation discusses the question as to whether or not a gift may be effectively made by the execution of a formal instrument, such as an Assignment, without the actual delivery of the subject of the gift. The annotation frankly concludes that on this question there is a division of authority, some cases holding the delivery of the Assignment to be sufficient, others reaching a contrary result. It is noted, however, that in most of the cases supporting the proposition that a gift can be effectuated by the execution and delivery of a formal instrument, the actual delivery of the subject of the gift was impracticable. Several cases are cited

where the "donor" attempted to effect a gift of items of personal property such as horses and cattle (*Gordon v. Young* 10 Kentucky Law Reports 681), piano and other furniture (*In Re Fenton* 182 Iowa 346, 165 NW 463) and money that was secreted in a hidden cache in the corner of a brickyard (*Sylvain v. Page* 276 Pac. 16, 63 A.L.R. 528). Appellants have no quarrel with the results reached in the cases where the delivery of the subject matter of the gift would be impracticable. However, the annotation referred to lists a considerable number of cases which hold that the mere execution and delivery of a formal instrument without delivering the subject of the gift is insufficient. Included in this line of cases are several where the purported gift involved is a promissory note.

In the case of *Allen-West Commision Company v. Grumbles* 63 C.C.A. 401, 129 Fed. 287, a husband executed a written Assignment in the form of a bill of sale transferring to his wife all of his interest in a corporation of which he was a stockholder. He retained the stock certificates in his own possession, left his stock in his own name, voted the stock and received the dividends therefrom. After becoming insolvent he transferred the certificates to his wife by indorsement, and by surrender of the certificates to her without referring to the previous assignment. In an action brought by husband's creditors, the court stated:

"* * * It is true that in cases where manual delivery of the subject of the gift, or of the evidences which command it, is impracticable or impossible, and in cases in which a written conveyance is the most effectual mode of divesting the

donor of dominion and control of the thing, such a conveyance is sufficient. But it is equally true that a written assignment is utterly inadequate, where the delivery of the subject of the gift or of the delivery of the evidences of it is practicable, and the latter is the more ready and efficient way of commanding the dominion and control of the subject of the gift."

Although the question before the court was whether the written Assignment was valid as against creditors of the husband, it was undoubtedly the court's opinion from the language used in the case that even as between the donor and donee, the Assignment was ineffective.

In the case of *Cox v. Hill*, 6 Md. 274, a "donor" executed a writing reciting that in consideration of love and affection, he assigned and paid over to "donee" a certain debt represented by a note, reserving to the donor the interest during her natural life. This writing was delivered to donee, but there was no delivery of the note. The court held that there was no completed gift where the note was retained by the donor.

It appears to appellants that our Utah Statute, Section 61-1-31, Utah Code Annotated, 1943, has some bearing on the problem before the court. This Statute is as follows:

"Section 61-1-31. What Constitutes Negotiation.

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery."

The Note in the instant case was payable to the order of Joseph Franklin Livingston, also known as Joseph F. Livingston, so our Statute was not complied with either by indorsement or by delivery.

In the instant case the intended gift, if in fact one was intended, was not the "Assignment" but was rather the "Note" itself. It was the item of value. But Joseph Livingston did not part with its possession nor did he resort to the simple device of indorsing the note to the "donees." Rather, he elected to hold the subject matter of the alleged gift in his own possession and under his own control. By so doing, it is submitted he did not make an effective delivery thereof.

POINT III.

It was error for the Court to permit Isabelle Merriam to be a witness and to testify in violation of Section 104-49-2 (3), Utah Code Annotated, 1943.

Isabelle Merriam by her deposition was permitted to be a witness over objection of appellants, concerning the purported delivery of Assignment and to testify about statements made by Joseph F. Livingston and other matters of fact equally within her knowledge, and that of the deceased Joseph F. Livingston. This was in direct violation of Section 104-49-2 (3), Utah Code Annotated, 1943, which is as follows:

"104-49-2. Who May Not Be Witnesses.

"The following persons cannot be witnesses:

"(3) A party to any civil action, suit or proceeding, and any person directly interested in the event thereof, and any person from, through or under whom such party or interested person

derives his interest or title or any part thereof, when the adverse party in such action, suit, or proceeding claims or opposes, sues, or defends, as guardian of an insane or incompetent person, or as the executor or administrator, heir, legatee, or devisee of any deceased person, or as guardian, assignee or grantee, directly or remotely, of such heir, legatee or devisee, as to any statement by, or transaction with, such deceased, insane, or incompetent person, or matter of fact whatever, which must have been equally within the knowledge of both the witness and such insane, incompetent or deceased person, unless such witness is called to testify thereto by such adverse party so claiming or opposing, suing, or defending, in such action, suit or proceeding."

There can be no question concerning the parties in this case being covered by the provisions of the Statute. Mrs. Merriam, the witness, was a party to the action. The adverse parties were the administrator and heirs of the deceased person.

There can also be no question but that Mrs. Merriam was a witness as to statements by, transactions with, and matter of fact, which must have been equally within the knowledge of both herself and Joseph F. Livingston.

Mrs. Merriam was not called to testify by the adverse party, but was a witness for herself and her co-defendants.

The respondents in the court below took the position that since LaVar W. Thatcher, one of the appellants, was placed on the witness stand and testified, appellants thereby waived objections to the competency of Mrs. Merriam to testify.

Mr. Thatcher testified that he first saw the instrument, designated as Assignment, Exhibit A, at Mrs. Cook's home on Preston Avenue on the occasion of the taking of the deposition of Mrs. Merriam, about three weeks before the trial (35). The trial was on March 9, 1951. The deposition of Mrs. Merriam was taken on March 15, 1951. Mr. Thatcher also testified about the finding of the Deed of Trust, Exhibit B (35), the day after Mr. Livingston's death in Mr. Livingston's home; that he took it to Mr. Anderson's home, and later to Mr. Neslen's office, and later it was given to Mr. Anderson to deliver to Mr. Cook. He identified the signatures of Lorin (misspelled in the record Lauren) DeWayne Merriam, and of A. H. Anderson on Exhibit B. He also testified about the finding of the photostatic copy of the Chat-tel Mortgage, Exhibit C, among the papers of Mr. Livingston the day after Mr. Livingston's death (37). Also Mr. Thatcher testified about finding the Note for \$70,476.92, Exhibit D, in the same place (37) and that he handled Exhibits C and D in the same manner as Exhibit B. He also testified about finding the Note for \$94,957.00, Exhibit E, among the papers belonging to the Estate of Joseph F. Livingston in the desk of A. H. Anderson the day after the death of Mr. Anderson in August, 1950, (40 & 41). Although some statutes so provide (58 *Am. Jur., Witnesses*, Section 357, Page 210), Section 104-49-2 (3), Utah Code Annotated, 1943, does not remove the disqualification of an adverse witness when a protected party offers testimony.

Even in states where the statute provides in effect that the prohibition shall not extend to a transaction or

communication with a deceased to which a protected person is examined on his own behalf, the waiver does not apply where the protected person does not testify to any fact he was not at liberty to testify to without making an election under the Statute. 58 *Am. Jur., Witnesses*, Sec 357, Page 210. Mr. Thatcher did not testify concerning any statement made by Mr. Livingston on or about March 27, 1948, nor concerning the supposed delivery of the instrument designated Assignment.

Several Utah case have construed our Statute. *Maxfield v. Sainsbury* (1946) 110 Utah 280, 172 Pac. 2d. 123, is one of the recent cases, and it was decided in that case that the witness to be disqualified must be one whose interests are against the estate of the deceased where the representative of the estate objects to the witnesses testifying. Certainly in the present case before the court, the interests of Mrs. Merriam was adverse to those of the estate because she was seeking part of the assets of the estate. In the *Maxfield v. Sainsbury* case, supra, Justice Wolfe, in an opinion (concurring specially), makes a comprehensive analysis of the Statutes as to what persons are disqualified thereunder from testifying. Mrs. Merriam certainly is included among the persons who by our Statute may not be witnesses and may not testify adversely to the Estate of Joseph F. Livingston, deceased, as to statements by Joseph F. Livingston and to matters of fact which were equally within the knowledge of both Mr. Livingston and Mrs. Merriam. There can be no serious doubt but that the trial court committed error in permitting Mrs. Merriam to testify.

CONCLUSION

Because Joseph F. Livingston retained control of and dominion over the principal of the obligation, part of the subject of the claimed gift, the claimed gift of the principal of the obligation failed. The judgment of the lower court should be reversed as to the principal of the

obligation and it should be determined that the principal of the obligation is and always has been part of the assets of the Estate of Joseph F. Livingston, deceased.

Because there was no delivery of the Promissory Note and no indorsement of it, the claimed gift, including the interest on the obligation, failed and it should be determined that the interest, as well as the principal of the obligation, is, and always has been, a part of the assets of the Estate of Joseph F. Livingston, deceased.

The trial court erred in permitting Isabelle Merriam to be a witness and to testify as she did.

For the reasons cited, appellants submit that all the points urged are meritorious and that the judgment of the lower court should be reversed.

Respectfully submitted,

EVANS, NESLEN, MANGUM
& MORRIS,
Attorneys for Appellants.