

1987

# In the Matter of the Estate of Katherine Wentland Gorrell, Deceased v. Robert E. Gorrell : Petition for Writ of Certiorari

Utah Supreme Court

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870372

IN THE SUPREME COURT  
OF THE STATE OF UTAH

In the Matter of the Estate  
of KATHERINE WENTLAND GORRELL,  
Deceased.

v.

ROBERT E. GORRELL

PETITION FOR A  
WRIT OF CERTIORARI

No. 870372

(Category No. 13)

PETITIONER FIRST SECURITY BANK OF UTAH, N.A.'S  
PETITION FOR A WRIT OF CERTIORARI

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**FILED**

OCT 13 1987

Clerk, Supreme Court, Utah

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|--|---|--------------------------------------|
| In the Matter of the Estate<br>of KATHERINE WENTLAND GORRELL,<br>Deceased. | ) | PETITION FOR A<br>WRIT OF CERTIORARI |
| v.   | ) | No. _____                            |
| ROBERT E. GORRELL  | ) | (Category No. 13)                    |

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LIST OF PARTIES

First Security Bank of Utah, N.A., is the personal representative of the Estate of Katherine Wentland Gorrell, deceased.

Robert E. Gorrell was the husband of Katherine Wentland Gorrell, deceased.

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### QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err by disturbing the District Court's finding of fact that petitioner established a prima facie case that Katherine Wentland Gorrell owned certain money found in a heart shaped beauty box following her death?

2. Did the Court of Appeals err by requiring petitioner to introduce evidence of the source of the money, as well as the fact of its possession by Katherine Wentland Gorrell, to establish a prima facie case that Katherine Wentland Gorrell owned the money?

3. Did the Court of Appeals improperly place the burden of proof on petitioner?

### OPINION OF THE COURT OF APPEALS

The decision of the Court of Appeals is reported as Gorrell v. Gorrell, 740 P.2d 267 (Utah App. 1987)

### GROUND FOR JURISDICTION

Jurisdiction of this Court is invoked pursuant to Utah Code Ann. § 78-2-2(3)(a). The decision of the Court of Appeals was entered on July 27, 1987. A timely petition for rehearing was filed by petitioner. The Court of Appeals denied petitioner's petition for rehearing by order dated September 10, 1987.

### STATEMENT OF THE CASE

First Security Bank of Utah, N.A. ("First Security"), as personal representative of the Estate of Katherine Wentland



Gorrell, deceased, initiated this action to determine the ownership of \$43,748.00 in cash found by Mrs. Gorrell's husband following his wife's death. Mr. Gorrell found the money in a heart shaped beauty box that had been hidden in an agate blue roasting pan located in a kitchen cupboard in Mrs. Gorrell's home. First Security claims that the money is an asset of the estate and should be distributed through the estate. Mr. Gorrell challenged First Security's claim that the money was the property of the estate.

The District Court heard testimony from Mr. Gorrell and Normandy W. Johnson, Mrs. Gorrell's daughter (R. 57-161).<sup>1</sup> Based upon that record, the District Court found that the money was in the possession of Mrs. Gorrell at the time of her death and concluded that First Security had established a prima facie case that Mrs. Gorrell owned the money. (R. 161-62). Accordingly, consistent with Utah law, the District Court placed upon Mr. Gorrell the burden of proving his title to the money. (R. 162). The District Court found that on the evidence presented, Mr. Gorrell failed to carry his burden of proof. (R. 40, 163). The District Court, therefore, ruled that the money was an asset of the estate. (R. 41, 163).

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<sup>1</sup>All citations herein are to the Record on Appeal as paginated by the Clerk of the District Court.

On appeal, the Court of Appeals reversed the District Court's judgment, thereby effectively awarding the money to Mr. Gorrell. Gorrell v. Gorrell, 740 P.2d 267, 270 (Utah App. 1987). The Court of Appeals ruled that First Security Bank had not presented a prima facie case that Mrs. Gorrell owned the cash at the time of her death. Id. at 269. Based on that re-evaluation of the factual record, the Court of Appeals ruled that the District Court improperly had placed the burden of proving title to the money on Mr. Gorrell. Id.

#### STATEMENT OF THE FACTS

Mr. and Mrs. Gorrell were married in November 1961. (R. 58). At the time of their marriage, Mr. Gorrell was 52 years of age (R. 56-57) and Mrs. Gorrell was 57 years of age. (R. 127). Mrs. Gorrell owned her home, which was fully paid for, owned her own car and operated her own beauty shop prior to her marriage to Mr. Gorrell. (R. 63-64). In contrast, at the time of their marriage, Mr. Gorrell did not own a home or a car. (R. 65). Mr. Gorrell testified that he brought no assets into the marriage. (R. 65).

During the course of the marriage, both Mr. and Mrs. Gorrell worked. Mrs. Gorrell continued to operate her beauty shop for at least four or five years and perhaps as long as ten years after the Gorrells were married. (R. 93-94, 164). Mr. Gorrell worked until 1979 at various jobs. (R. 90).

Mrs. Gorrell handled all of the business affairs of the family. (R. 80). Mr. Gorrell testified that Mrs. Gorrell was "very careful" with money, (R. 85), and that she "controlled" all the money. (R. 112-13). Mr. Gorrell also testified that Mrs. Gorrell kept cash around the house. (R. 106). Mrs. Gorrell's daughter confirmed that Mrs. Gorrell kept cash at home because of a fear of banks arising out of her experiences during the Depression. (R. 152). Mrs. Gorrell's daughter also testified that Mrs. Gorrell purchased a new car in 1967 for \$2,700.00 and paid a hospital bill of \$1,200.00 both with cash. (R. 159-60).

The money at issue in this action was discovered by Mr. Gorrell in a heart shaped beauty box which had been hidden in a blue agate roasting pan. (R. 86-87). Mr. Gorrell had no knowledge of the existence of the money until he discovered it. (R. 39). Mr. Gorrell discovered the money while rearranging the kitchen cupboards on the day of Mrs. Gorrell's death. (R. 86-87). During the marriage, Mr. Gorrell had never done any cooking. (R. 87). Only after Mrs. Gorrell died and Mr. Gorrell had to prepare his own meals did he have any contact with the household's cooking utensils. (R. 87). Mr. Gorrell testified he did not know where the money came from. (R. 88). Instead, he agreed that only Mrs. Gorrell knew the source of the money. (R. 88).

Finally, Mr. Gorrell testified that during the approximately ten weeks between Mrs. Gorrell's death and the date that the account into which the money had been deposited was frozen, (R. 22), he spent more than \$30,000.00 of the money. (R. 98-100, 114-16).

#### ARGUMENT

- I. THE COURT OF APPEALS' DECISION IS CONTRARY TO STANDARD OF REVIEW ADOPTED BY THE UTAH SUPREME COURT.
- A. The Court Of Appeals Failed To Give Proper Deference To The District Court's Findings.

The Utah Supreme Court has stated emphatically that appellate courts must afford great deference to the factual findings by a trial court, unless the trial court has misapplied the law or its findings are clearly against the weight of the evidence. Garcia v. Schwendiman, 645 P.2d 651, 653 (Utah 1982); First Security Bank of Utah v. Hall, 29 Utah 2d 24, 504 P.2d 995, 996 (1972); Stanley v. Stanley, 97 Utah 520, 94 P.2d 465, 466 (1939). In this instance, the Court of Appeals improperly substituted its judgment of the facts concerning possession of the money for that of the District Court.

The Court of Appeals ruled that the District Court "incorrectly placed the burden of proof on [Mr. Gorrell]." 740 P.2d at 269. The Court of Appeals' ruling was premised upon its conclusion that "the bank failed to establish a prima facie

case of ownership." Id. The Court of Appeals' analysis clearly demonstrates that it substituted its own assessment of the facts for that of the District Court. The Court of Appeals, however, did not find or rule that the District Court's findings were "clearly against the weight of the evidence" as required by Utah law. Thus, in reversing the District Court's judgment, the Court of Appeals failed to give proper deference to the District Court's factual findings.

B. The District Court's Factual Findings Are Supported By The Evidence.

The dispute between the parties concerns the ownership of the money found by Mr. Gorrell following his wife's death. If the money was owned by Mrs. Gorrell, it is an asset of her estate that must be distributed in accordance with the terms of her will. The Utah Supreme Court has held that once the representative of a decedent's estate establishes prima facie evidence that the property was owned by the deceased at the time of death, the burden of proving title to the property shifts to the party asserting an adverse claim. Hall, 504 P.2d at 996. A prima facie case of ownership of cash is established by proving possession of the cash. Gray's Harbor Lumber Co. v. Burton Lumber Co., 65 Utah 333, 236 P. 1102, 1103 (1925).

The District Court explicitly found that the money discovered by Mr. Gorrell was in Mrs. Gorrell's "possession and

control" until the time of her death. (R. 161-62). This finding is amply supported by the evidence in the record. Mr. Gorrell had no knowledge of the money's existence prior to discovering it. (R. 39). Mr. Gorrell testified that Mrs. Gorrell handled the family's business affairs, (R. 80, 112-13), and was very careful with money. (R. 85). The money was found in a heart shaped beauty box which had been hidden in a blue agate roasting pan in a kitchen cupboard. (R. 87). Mr. Gorrell testified that he had done no cooking while his wife was living. (R. 87). He found the heart shaped beauty box on the day his wife died while rearranging the kitchen cupboards to make access easier for himself. (R. 86). All of these facts support the District Court's finding that the money was in the control and possession of Mrs. Gorrell up until the time of her death. The District Court's finding also is confirmed by the fact that the record contains absolutely no evidence that even so much as suggests that anyone other than Mrs. Gorrell had possession of the money up until Mr. Gorrell discovered it after his wife died. The record clearly establishes that the District Court's factual finding that the money was in the possession of Mrs. Gorrell at the time of her death is not contrary to the weight of the evidence. Moreover, under Utah law, proof of possession of cash constitutes prima facie evidence of ownership. Gray's Harbor, 236 P. at 1103. Accordingly, the Court of Appeals erred in disregarding the

District Court's finding that First Security had established a prima facie case that Mrs. Gorrell owned the money. Garcia, 645 P.2d at 653; Hall, 504 P.2d at 996.

II. THE COURT OF APPEALS' RULING IS CONTRARY  
TO UTAH LAW.

As argued above, the District Court properly found that Mrs. Gorrell possessed the money up until the time of her death. In Utah, possession of cash or notes establishes a prima facie case of ownership. Gray's Harbor, 236 P.2d at 1103; accord, In re Bickford, 74 Ill. App. 2d 190, 219 N.E.2d 159, 162 (1966). The Bickford case illustrates the application of the possession rule in a factual context remarkably analogous to the facts present in this case. In Bickford, the estate sought to recover \$2,507.00 in cash that was found by the respondent in the decedent's apron following her death. As here, the trial court found that the decedent possessed the money at the time of her death thereby creating a prima facie case of ownership by the decedent. The trial court further found that the respondent had not satisfied his burden of proving title to the money. On appeal, the Illinois Appellate Court affirmed, reasoning that

Since we find possession to have been in decedent  
we must further find that Respondent did not meet  
his burden of proving ownership in himself . . . .

219 N.E.2d at 162.

In this case, the Court of Appeals cited facts pertaining to the length of the Gorrell's marriage and the work histories of Mr. and Mrs. Gorrell in support of its conclusion that First Security had failed to make a prima facie showing that Mrs. Gorrell owned the money at the time of her death. 740 P.2d at 270. In effect, the Court of Appeals required First Security to produce evidence of the source of the money, in addition to evidence of possession, to establish the prima facie case of ownership. In that respect, the Court of Appeals' ruling is contrary to the rule established by Gray's Harbor. Accord, Bickford, 219 N.E.2d at 162.

To the extent that the Court of Appeals decision may be construed to be based on a finding that Mr. Gorrell contributed to the funds that were found in the heart shaped beauty box, the finding is not supported by the record. Mr. Gorrell admitted he did not know where the money in the heart shaped beauty box came from, but that only Mrs. Gorrell knew the source of that money. (R. 88). The record also contains ample evidence that Mrs. Gorrell brought substantial assets into the marriage, (R. 64), while Mr. Gorrell had nothing. (R. 65). Mrs. Gorrell was very careful with money, (R. 85), and kept cash in her possession at least in part due to a distrust of banks resulting from the Depression. (R. 106, 152). Based on the evidence presented at trial, the District Court found that there was an equal likelihood that the source of the money



was Mrs. Gorrell solely, or Mr. Gorrell solely or both Mr. and Mrs. Gorrell. (R. 162-63). The District Court concluded that "there is absolutely no way I can determine which of those, or which combination of those events occurred." (R. 163). Since the District Court found that the source of the money had not been established by the evidence, the only basis for determining ownership is possession, which the District Court found in favor of Mrs. Gorrell.

III. RESOLUTION OF THIS ISSUE BY THE UTAH SUPREME COURT IS IMPORTANT TO THE DEVELOPMENT OF UTAH LAW.

This case presents the important issue of how claims of ownership of personal property, especially cash, are to be resolved in probate proceedings. The need for a clear test for resolving such disputes is particularly important because the best source of evidence, testimony from the decedent, is not available. The decision of the Court of Appeals undermines the certainty of prior Utah case law which holds that possession of cash establishes a prima facie case of ownership, see, e.g., Gray's Harbor, and that once a prima facie case of ownership is established by an estate's personal representative the opposing claimant bears the burden of proving title to the property. See, e.g., Hall. The Court of Appeals' decision fails to follow this precedent by requiring proof of the source of the property in addition to proof of possession to establish a prima facie case of ownership. As this case illustrates, the

additional proof required by the Court of Appeals often will not be available because the sole competent witness is the decedent. The Court of Appeals' rule is impractical and it should be rejected in favor of the rule established by Gray's Harbor, Hall and Bickford.

#### CONCLUSION

Petitioner First Security Bank, as the personal representative of the Estate of Katherine Wentland Gorrell seeks a writ of certiorari to the Court of Appeals. The writ of certiorari is appropriate and necessary in this case because the decision of the Court of Appeals is not consistent with prior rulings of this Court, because the Court of Appeals improperly substituted its assessment of the facts for the findings of the District Court and because the case presents an opportunity for this Court to settle an important issue of Utah law.

DATED this 13th day of October, 1987.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By



Michael J. Glasmann

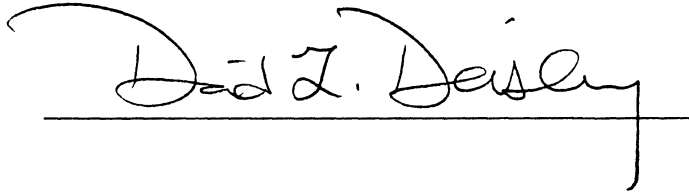
David L. Deisley

Attorneys for Petitioner, First  
Security Bank of Utah, N.A.

CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the within and foregoing PETITION FOR A WRIT OF CERTIORARI to be mailed, postage prepaid, this 13th day of October, 1987, to the following:

Pete N. Vlahos, Esq.  
Vlahos & Sharp  
2456 Kiesel Avenue  
Ogden, Utah 84401  
Attorney for Respondent,  
Robert E. Gorrell

A handwritten signature in cursive script, reading "David L. Deisley", is written over a horizontal line. The signature is fluid and extends slightly below the line.

4866D

Tab A

though she did not have to rule out all other possible non-negligent causes, she did have to offer evidence showing that the balance of probabilities weighed in favor of negligence. *Id.* See also *Prosser and Keeton on the Law of Torts* § 39, at 248 (W. Keeton 5th ed. 1984).

[3] In order to create a genuine factual dispute on this point, Robinson thus had to come forward with evidence to counter Dr. Burke's affidavit opinion—that non-negligent causes of her infection were probable—with expert testimony to the effect that Robinson's infection most likely resulted from negligence, assuming it was possible to find an expert who could and would make such a statement.<sup>1</sup> The depositions of respondents' doctors relied upon by appellant simply do not do the job. They provide no evidence that Robinson's infection was most likely caused by negligence, notwithstanding what the doctors might have believed on March 21, 1982, before the laboratory test results were received. Since appellant did not submit evidence creating a genuine issue of fact about the most likely cause of her injuries, the trial judge properly proceeded to conclude that respondents were entitled to summary judgment as a matter of law.

We agree that trial courts should be extremely cautious in granting summary judgment for a defendant on the basis that plaintiff has failed to secure expert testimony to support a medical negligence action. *Chiero v. Chicago Osteopathic Hosp.*, 74 Ill.App.3d at 176, 29 Ill.Dec. at 654, 392 N.E.2d at 211. But appellant contends that a plaintiff suing on a theory of *res ipsa loquitur* is always entitled to a trial on the merits, so that summary judgment is always inappropriate. Such an argument miscomprehends the purpose and application of the doctrine, as well as the pretrial responsibilities of a plaintiff faced with a summary judgment motion. In this regard, we concur in the reasoning of the appellate court quoted in *Chiero*:

We agree that if there is any sound basis to do so, a trial court should reject sum-

mary judgment in this type of case. Where, however, the record indicates that plaintiff has [had] every opportunity to establish his case and has failed to demonstrate that he could show negligent acts or omissions . . . [on the part of the] defendant by expert medical testimony, where the issue is clearly one which cannot be determined by laymen alone, summary judgment could be allowed.

*Chiero v. Chicago Osteopathic Hosp.*, 74 Ill.App.3d at 177, 29 Ill.Dec. at 654, 392 N.E.2d at 211 (quoting *Hill v. Durkin*, 58 Ill.App.3d 1003, 1008, 16 Ill.Dec. 372, 376, 374 N.E.2d 1147, 1151 (1978)).

The judgment of the trial court is affirmed. Costs to respondents.

GARFF and BILLINGS, JJ., concur.



In the Matter of the ESTATE, OF Katherine Wentland GORRELL, Deceased,

v.

Robert E. GORRELL, Appellant.

No. 860113-CA.

Court of Appeals of Utah.

July 27, 1987.

The Second District Court, Weber County, David Roth, J., found cash asset to be solely asset of wife's estate, and husband appealed. The Court of Appeals, Bench, J., held that representative of estate failed to establish *prima facie* case of ownership of cash found hidden in box by evidence that wife owned home in which couple lived and that husband had no prior knowledge of hidden cash, where husband lived with wife in home for over 22 years,

supporting her negligence action without the discarded needles.

1. We give no credence to appellant's claim that she was unable to obtain an expert opinion



fendant. In 1969, the market value of the stock increased significantly. Defendant effected a transfer of the shares on the books of the corporation by supplying a bond and thereafter sold the shares. At trial, the sole issue was whether or not defendant had acquired ownership of the shares of stock by way of gift. Evidence at trial showed defendant's father did not sign the assignment and transfer contained on the reverse side of each stock certificate. Furthermore, the certificates remained in the name of defendant's father on the records of the corporation during both parents' lifetimes. The trial court concluded defendant had failed to prove a gift by clear and convincing evidence, and entered judgment for plaintiff. On appeal defendant argued the trial court erred in imposing the burden of proof of ownership on her. The Utah Supreme Court affirmed the trial court and held defendant had the burden of proving ownership, in view of the name on the stock certificates and the absence of transfer endorsements. *Hall*, 504 P.2d at 996. From that holding, it is apparent that once plaintiff had made a prima facie case of ownership, the burden of proof shifted to defendant.

The mechanics of this standard were more clearly articulated in the *Bickford* case. In *Bickford*, the administratrix of decedent's estate initiated a proceeding against respondent, decedent's son, to recover certain assets in respondent's possession allegedly belonging to the estate. One of the contested assets was \$2,507.00 in cash discovered, after decedent's death, in the pocket of her dress located in a store-room of her house. At trial, witnesses for petitioner-administratrix testified decedent owned the home in which she lived. She had operated a restaurant for twelve years prior to her death but, due to ill health, was hospitalized for the three months immediately preceding. Decedent kept all her receipts and business papers in the store-room. Respondent testified he lived with decedent most of his life including the period of his marriage. He helped his mother in the restaurant which, he testified, was unprofitable for some time prior to her death. Respondent claimed the money con-

sisted of gifts from his father and grandfather which he had delivered to his mother for safekeeping. Respondent had not been employed regularly for eight years.

The trial court entered judgment for petitioner and respondent appealed. The Appellate Court of Illinois held, "The burden of persuasion remains with petitioner but when petitioner has presented a prima facie case of ownership by the decedent the burden of establishing ownership in himself shifts to respondent." 219 N.E.2d at 161. In affirming the trial court for failure of respondent to sustain his burden of proof, the Appellate Court went on to establish criteria for assessing what constitutes a prima facie case of ownership. The Court held as follows:

The evidence shows clearly that the money involved was in the pocket of a dress owned by decedent and in her control until the time of her removal to the hospital. There is no evidence showing any change in control at that time or from that time to the date of death. In our opinion, this establishes *the element of possession* in decedent at the time of death rather than in Respondent and *when considered with the other evidence amply presents a prima facie case of ownership of such money by decedent*. This being the case, the burden was on Respondent to show by what right he claimed ownership. The facts which Respondent claims support his ownership of the money are disputed in practically every material respect.

*Id.* (Emphasis added.) The "other evidence" which amply presented a prima facie case of ownership of the cash in that case included decedent's exclusive ownership of the dress in which the cash was found, decedent's income through her own business, and the absence of contributions to household income by respondent.

In the instant case, the trial court incorrectly placed the burden of proof on appellant since the bank failed to establish a prima facie case of ownership. The bank established only that decedent owned the home in which the couple lived and that appellant had no prior knowledge of the

*hidden cash. No "other evidence" sufficient to establish a prima facie case of ownership was presented. On the contrary, appellant and decedent lived together in decedent's home for over 22 years. There was also no evidence the roasting pan in which the money was found was owned exclusively by decedent. Decedent worked for only three to four years after the marriage and then retired, receiving approximately \$225.00 per month in social security. Appellant, however, made significant financial contributions to the marriage. He worked full time for most of the marriage and delivered all of his income to decedent who handled the family finances. Under those circumstances, there being no prima facie case of ownership by the bank, it was error for the court to impose on appellant the burden of proving ownership of the cash.*

We therefore reverse the judgment below. Costs to appellant.

GARFF and JACKSON, JJ., concur.



**Ben K. HOOPHAINA, Plaintiff  
and Appellant,**

**v.**

**INTERMOUNTAIN HEALTH CARE,  
dba, LDS Hospital, and Jane Doe,  
Defendants and Respondents.**

**No. 860076-CA.**

**Court of Appeals of Utah.**

**July 27, 1987.**

Medical malpractice action was brought against hospital and hospital moved for summary judgment. The Third District Court, Salt Lake County, Dean E. Conder, J., granted hospital summary judgment and appeal was taken. The Court of Appeals, Greenwood, J., held that in ab-

sence of expert to testify for plaintiff that quinidine mistakenly administered to him harmed him, there was no evidence upon which finding of liability against hospital could lie.

Affirmed.

### **1. Hospitals ⇐8**

In medical malpractice actions, plaintiff must provide expert testimony to establish standard of care, hospital's failure to comply with that standard, that hospital caused plaintiff's injury, and any issues of fact which are outside knowledge and experience of lay persons.

### **2. Hospitals ⇐8**

Inasmuch as hospital admitted that its employee mistakenly administered single 200-milligram tablet of quinidine to plaintiff, hospital's breach of standard of care was admitted without requiring expert testimony, so that only issues remaining for jury were whether injury existed and whether quinidine caused plaintiff's injury.

### **3. Hospitals ⇐8**

In absence of expert to testify for plaintiff that quinidine mistakenly administered to plaintiff by hospital employee harmed plaintiff, or that more than single 200-milligram tablet was administered, plaintiff could not prove injury existed or that quinidine caused injury, for purpose of maintaining medical malpractice action against hospital.

### **4. Pretrial Procedure ⇐40**

Trial court did not err in denying medical malpractice plaintiff's motion to compel hospital to provide answers to interrogatories concerning name and address of patient who should have received quinidine mistakenly administered to plaintiff, under State Department of Health, Hospital and Psychiatric Hospital Rules and Regulations, requiring confidentiality of patient information. U.C.A.1953, 78-25-25.

Matt Biljanic, Midvale, for plaintiff and appellant.



Tab B

IN THE UTAH COURT OF APPEALS

-----ooOoo-----

In the matter of the Estate of )  
Katherine Wentland Gorrell, )

Deceased, )

v. )

Robert E. Gorrell, )

Appellant. )

ORDER DENYING PETITION  
FOR REHEARING

Case No. 860113-CA

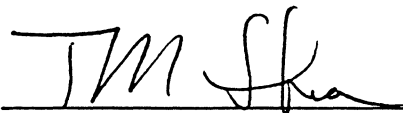
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THIS MATTER having come before the Court upon Respondent's  
Petition for Rehearing in the above captioned matter, and the Court  
having duly considered said petition,

IT IS HEREBY ORDERED that the Respondent's Petition for  
Rehearing be denied.

Dated this 10th day of September, 1987.

FOR THE COURT:



Timothy M. Shea  
Clerk of the Court

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER DENYING PETITION FOR REHEARING by depositing the same in the United States mail, postage prepaid to the following:

Pete N. Vlahos  
Vlahos & Sharp  
Attorney at Law  
2447 Kiesel Avenue  
Ogden, UT 84401

Michael J. Glasmann  
Attorney at Law  
1000 First Security Bldg.  
Ogden, UT 84401

DATED this 10th day of September, 1987.

A handwritten signature in cursive script, reading "Karen Bean", written over a horizontal line.

Karen Bean  
Case Management Clerk

Tab C

Amado B. GARCIA, Plaintiff  
and Appellant,

v.

Fred C. SCHWENDIMAN, Chief of Drivers  
License Division, State of Utah,  
Defendant and Respondent.

No. 17559.

Supreme Court of Utah.

April 1, 1982.

Motorist appealed from an order of the Second District Court, Davis County, Douglas L. Cornaby, J., affirming the Department of Public Safety's administrative revocation of his driving privileges under the implied consent statute. The Supreme Court, Durham, J., held that where the motorist occupied the driver's position behind the steering wheel of an automobile, with possession of the ignition key and with the apparent ability to start and move the vehicle, he had "actual physical control" under the implied consent statute, even though he might have been prevented from moving the vehicle by a fence in front and a parked car in the rear.

Affirmed.

#### 1. Automobiles ⇌144.2(9, 10)

Showing that arresting officer had grounds to believe that person was in physical control of vehicle is not by itself sufficient to support administrative license revocation for refusal to submit to blood test, but Department of Public Safety must show that operator was in actual physical control of motor vehicle in addition to showing that arresting officer had grounds to believe that operator was then under influence of alcohol; same burdens must be met in district court de novo review. U.C.A. 1953, 41-6-44.10(b).

#### 2. Automobiles ⇌144.2(10)

In contrast to prosecutions under criminal statutes, driver's license revocation proceeding requires proof only by preponder-

ance of evidence and not beyond reasonable doubt. U.C.A.1953, 41-6-44 10(b)

#### 3. Appeal and Error ⇌1009(1, 4)

Standard for appellate review of factual findings affords great deference to trial court's view of evidence unless trial court has misapplied law or its findings are clearly against weight of evidence.

#### 4. Automobiles ⇌144.1(1)

"Actual physical control" language of implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants. U.C.A.1953, 41-6-44.10(a).

See publication Words and Phrases for other judicial constructions and definitions.

#### 5. Automobiles ⇌144.1(1)

Where motorist occupied driver's position behind steering wheel of automobile, with possession of ignition key and with apparent ability to start and move vehicle, he had "actual physical control" under implied consent statute, even though he might have been prevented from moving vehicle by fence in front and parked car in rear. U.C.A.1953, 41-6-44.10(a).

#### 6. Automobiles ⇌144.1(1)

Fact that motorist occupying driver's position in automobile might be physically obstructed from driving away does not preclude license revocation under implied consent statute. U.C.A.1953, 41-6-44.10(a).

#### 7. Automobiles ⇌144.2(9)

To obtain license revocation under implied consent statute, Department of Public Safety need not show that motorist actually intended to exert "actual physical control" over vehicle. U.C.A.1953, 41-6-44.10(a).

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Richard W. Brann, Ogden, for plaintiff and appellant.

David L. Wilkinson, Atty. Gen., Bruce M. Hale, Asst. Atty. Gen., Salt Lake City, for defendant and respondent.

DURHAM, Justice:

After a trial de novo, the district court affirmed the defendant's administrative revocation of plaintiff Garcia's driving privileges. Plaintiff appeals from the district court decision and contends that there was insufficient evidence to support the district court's finding that he was in "actual physical control of a motor vehicle" as contemplated by the Utah implied consent statute.

At 6:00 p. m. on November 1, 1980, Officer Gerald Ecker responded to a disturbance complaint at an apartment complex in Sunset, Utah. When he arrived at the complex, Officer Ecker was met by a Mr. Varble, who had positioned his own vehicle behind the automobile of the plaintiff to prevent the plaintiff from backing out of his parking stall. A fence was located approximately three feet in front of the plaintiff's car. Officer Ecker testified that as he approached the Garcia vehicle, he observed the plaintiff alone in the vehicle behind the steering wheel in the "process of starting his motor vehicle" by attempting to turn on the ignition; the officer testified that he saw the keys in the ignition. While there was some dispute about whether or not the key was actually in the ignition, the district court found it "believable that the plaintiff had the keys in the ignition," and it is not disputed that he had the ignition key in his exclusive possession. Officer Ecker observed that plaintiff was apparently under the influence of alcohol. A second police officer, Officer Gale, arrived at the scene, obtained the keys from the plaintiff and, after interviewing Officer Ecker and Mr. Varble, placed the plaintiff under arrest for being in actual physical control of a vehicle while under the influence of alcohol.

The plaintiff refused to permit chemical tests of his blood or breath, and consequently received a one-year revocation of his driver's license after an administrative hearing by the Department of Public Safety pursuant to the authority of the Utah implied consent statute, § 41-6-44.10, Utah Code Ann. (1953). This statute provides for revocation of a person's driver's license when he refuses to submit to chemical tests

of his blood, breath or urine "for the purpose of determining whether he was driving or in actual physical control of a motor vehicle while under the influence of alcohol." The statute's enforcement provision, § 41-6-44.10(b) U.C.A., requires that the arresting officer have reasonable grounds to believe that the arrested person has been driving or is in actual physical control of a motor vehicle while under the influence of alcohol.

[1] The defendant argues that a showing that the arresting officer had grounds to believe the person was in physical control of a vehicle is by itself sufficient to support an administrative license revocation. We disagree. This Court has previously recognized two separate evidentiary burdens to be borne by the Department of Public Safety in a revocation proceeding. The department must show that an operator was "in actual physical control of a motor vehicle" in addition to showing that the arresting officer had grounds to believe that the operator was then under the influence of alcohol. *Ballard v. State*, Utah, 595 P.2d 1302 (1979).

[2] The same burdens must be met in the district court. The district court's jurisdiction, conferred by § 41-6-44.10(b) U.C.A., is limited to a trial de novo "to determine whether the petitioner's license is subject to revocation under the provisions of this act." In *Ballard, supra*, we characterized the trial de novo as "civil and administrative, the purpose of which is for the protection of the public." 595 P.2d at 1304. In contrast to prosecutions under criminal statutes, a license revocation proceeding requires proof only by a preponderance of the evidence and not beyond a reasonable doubt. Since all other matters were resolved by stipulation, the single issue before the district court, and now before us, is whether the defendant proved by a preponderance of the evidence that the plaintiff was "in actual physical control of a motor vehicle" as contemplated by the implied consent statute.

[3] The district court found "from the totality of the facts and the circumstances that the [plaintiff] had actual physical control of the vehicle as required by the Implied Consent Statute." The standard for appellate review of factual findings affords great deference to the trial court's view of the evidence unless the trial court has misapplied the law or its findings are clearly against the weight of the evidence. *Pagano v. Walker*, Utah, 539 P.2d 452 (1975); *Reed v. Alvey*, Utah, 610 P.2d 1374 (1980).

The meaning of "actual physical control" is suggested by the structure of § 41-6-44.10(a), which reads:

Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test or tests . . . for the purpose of determining whether he was driving or in actual physical control of a motor vehicle while under the influence of alcohol . . . . [Emphasis added.]

The use of the disjunctive "or" strongly suggests an intent to proscribe conduct beyond and different from driving or operating a moving vehicle.<sup>1</sup> Thus, the standard in Utah for determining whether a person was "in actual physical control" of a vehicle is different from the standard used in states which have only "driving" or "operating" language in their statutes. *State v. Daly*, 64 N.J. 122, 313 A.2d 194 (1973), for example, relied upon by plaintiff, was decided under a criminal statute with "operating" language and is not persuasive in this case. Of greater value is the case of *State v. Ruona*, Mont., 321 P.2d 615 (1958), in which the Montana Supreme Court, following an earlier Ohio case, construed a criminal statute with the phrase "drive or be in actual physical control," and adopted the view that:

. . . the statute defined two distinct offenses, in "operating a vehicle," and "being in actual physical control of a vehicle" while intoxicated.

1. As of 1967, § 41-6-44.10(a) U.C.A. simply stated that "any person operating a motor vehicle" was deemed to have given his consent to chemical tests. In 1969, a new subparagraph (b) was enacted which referred to tests "for the purpose of determining whether he was driving

321 P.2d at 618. This conclusion was likewise reached in *Walker v. State*, Okl.Cr., 424 P.2d 1001 (1967), where the Oklahoma Court of Criminal Appeals held that the use of the disjunctive in Oklahoma's statute resulted in two offenses, one being "to drive or operate" and the other being "to be in actual physical control" of a motor vehicle. The language of Utah's implied consent statute requires the same construction.

A definition of "actual physical control" is contained in *State v. Bugger*, 25 Utah 2d 404, 483 P.2d 442 (1971). The statute in question there was § 41-6-44, which made it unlawful for any person under the influence of intoxicating liquor "to drive or be in actual physical control of any vehicle within this state." In *Bugger*, the defendant was found asleep in his car, which was completely off the traveled portion of the highway; the motor was not running. This Court held that there was no actual physical control of the vehicle. "Actual physical control" was defined in its ordinary sense to mean "present bodily restraint, directing influence, domination or regulation." 483 P.2d at 443. The Court found, on these facts, that the defendant was "not controlling the vehicle, nor was he exercising any dominion over it." *Id.*

Acts short of starting the motor have been held to constitute actual physical control in other jurisdictions. In *Hughes v. State*, Okl.Cr., 535 P.2d 1023 (1975), the court found a defendant to have been in actual physical control of a vehicle when the vehicle was found improperly parked in a residential area. The defendant was in the front seat, the ignition key was in the ignition, and the motor was turned off. The court said:

It is our opinion that the legislature, in making it a crime to be in "actual physical control of a motor vehicle while under the influence of intoxicating liquor," in-

or was in actual physical control of a motor vehicle under the influence . . .," which is the same language found in the current statute. Thus, the Legislature appears to have deliberately expanded the scope of the statute's coverage.

tended to enable the drunken driver to be apprehended before he strikes . . . .

\* \* \* \* \*

We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than when the intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious volition with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away.

535 P.2d at 1024. The same public policy concern for prevention compelled a similar result in *City of Cincinnati v. Kelley*, 47 Ohio St.2d 94, 1 Ohio Ops. 56, 351 N.E.2d 85 (1976). In that case an intoxicated motorist seated in the driver's seat of a legally parked car with his hands on the steering wheel and the keys in the ignition was found to be in actual physical control of his vehicle, even though the engine was off. The court held that the relevant city ordinance provided for two separate offenses, in that it prohibited "operating or being in 'actual physical control' of a vehicle while under the influence of alcohol." (Emphasis in original.) From that initial premise, the court concluded that it should interpret the "control" offense in light of the apparent legislative purpose in defining an offense separate from "operating."

The clear purpose of the control aspect of the instant ordinance is to deter persons from being found under circumstances in which they can directly commence operating a vehicle while they are under the influence of alcohol . . . .

\* \* \* \* \*

2. See, e.g., *State v. Ghylin*, N.D., 250 N.W.2d 252 (1977) (purpose of statute to deter intoxicated persons from getting into their vehicle except as passengers); *State v. Beckey*, 291 Minn. 483, 192 N.W.2d 441 (1971) (purpose of implied consent law to aid enforcement of criminal drunk driving statute); *State v. Halvorson*, Minn., 181 N.W.2d 473 (1970) (purpose to promote traffic safety); *State v. Schuler*, N.D., 243 N.W.2d 367 (1976) (purpose of "actual physical control" statute is preventive).

[T]he term "actual physical control," as employed in the subject ordinance, requires that a person be in the driver's seat of a vehicle, behind the steering wheel, in possession of the ignition key and in such condition that he is physically capable of starting the engine and causing the vehicle to move.

351 N.E.2d at 87. That a preventive purpose should be read into the "actual physical control" language is the opinion of a substantial majority of the jurisdictions in interpreting similar statutory language.<sup>2</sup>

In a recent case, *State v. Junczewski*, Minn., 308 N.W.2d 316 (1981), the Supreme Court of Minnesota held that a defendant who had been found inside a pickup truck seated behind and leaning against the steering wheel was in "actual physical control" of the vehicle. While there was uncertainty as to whether the motor was running, the court held that "[w]hether a motor must be running before a person may be in actual physical control is essentially a policy issue." 308 N.W.2d at 320.

[4, 5] As a matter of public policy and statutory construction, we believe that the "actual physical control" language of Utah's implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants as in *Bugger, supra*. Therefore, under the facts before us, where a motorist occupied the driver's position behind the steering wheel, with possession of the ignition key and with the apparent ability to start and move the vehicle,<sup>3</sup> we hold that there has been an adequate showing of "actual physical control" under our implied consent statute.

3. The testimony of Officer Ecker was that plaintiff had the key in the ignition and "was in the process of starting his motor vehicle." He later expressed the view that the plaintiff was having trouble doing so because of the degree of his intoxication, but nothing in the record warrants a finding that the plaintiff was physically unable to start the car, as would be the case with an unconscious or sleeping motorist.



[6] That the plaintiff might have been prevented from moving his vehicle by the space in front and the parked car of Mr. Marble in the rear does not alter our conclusion. In that respect, our decision comports with cases from other jurisdictions in which there was a physical obstacle preventing actual movement of the vehicle, but the courts nonetheless found actual physical control.<sup>4</sup> The record in this case demonstrates that plaintiff's automobile could have traveled at least a few feet if it had been put into operation.

[7] Similarly, we find it unnecessary for the department to show actual intent under the control provisions of the implied consent statute. Just as an intent to drive is inferred from one's actual driving, so also may an intent to control a vehicle be inferred from the performance of those acts which we have held to constitute actual physical control.

The decision of the district court is affirmed.

HALL, C. J., and STEWART, OAKS and WHEAT, JJ., concur.



Rod WILSON and Marilee W. Wilson,  
et al., Plaintiffs and Appellants,

v.

Don B. MANNING, City Recorder, City  
of Fruit Heights, Defendant and  
Respondent.

No. 17632.

Supreme Court of Utah.

April 1, 1982.

Petitioners brought action for a writ of mandamus commanding a city recorder to

submit a rezoning ordinance to a referendum. The Second District Court, Davis County, Thornley K. Swan, J., denied the petition, and appeal was taken. The Supreme Court held that an unsigned minute entry did not constitute an entry of judgment, nor was it final judgment for purposes of applicable rules governing appeals.

Appeal dismissed.

#### Appeal and Error 78(1)

An unsigned minute entry denying petition for writ of mandamus did not constitute an entry of judgment, nor was it final judgment for purposes of applicable rules governing appeals. Rules Civ.Proc., Rules 58A(b, c), 72(a).

Curtis J. Drake, Salt Lake City, for plaintiffs and appellants.

D. Kent Norton, Salt Lake City, for defendant and respondent.

#### PER CURIAM:

Petitioners brought this action for a writ of mandamus commanding a city recorder to submit a rezoning ordinance to a referendum. The district court denied the petition in an unsigned minute entry accompanied by a certificate of mailing which directed counsel for the defendant to prepare an order conforming to the minute entry. However, no order appears in the record and apparently none was entered. The notice of appeal states that petitioners appeal "from the minute entry entered in this action . . ."

An unsigned minute entry does not constitute an entry of judgment, nor is it a final judgment for purposes of Utah R.Civ.P. 72(a). Utah R.Civ.P. 58A(b) and (c); *Steadman v. Lake Hills*, 20 Utah 2d 61, 433 P.2d 1 (1967); *Hartford Accident & Indemnity Co. v. Clegg*, 103 Utah 414, 135

<sup>4</sup>See, e.g., *State v. Dunbany*, 184 Neb. 337, 167 N.W.2d 556 (1969), *State v. Schuler*, N.D., 243

N.W.2d 367 (1976).

Tab D

29 Utah 2d 24

**FIRST SECURITY BANK OF UTAH, N. A.,**  
as administrator of the Estates of George  
Hatton Buckley and Pearl Murdock Buck-  
ley, Plaintiff and Respondent,

v.

**Lucille Buckley HALL and Harold E. Hall,**  
Defendants and Appellants.

No. 12837.

Supreme Court of Utah.

Dec. 28, 1972.

Action by administrator of estates of deceased father and mother to recover from daughter certain stock certificates or proceeds from sale thereof. The Fourth District Court, Utah County, George E. Ballif, J., entered judgment for plaintiff and defendants appealed. The Supreme Court, Tuckett, J., held that daughter, who had effected transfer of shares on books of corporation by supplying bond, had burden of showing that the shares, which had been carried on books of corporation in name of father who had not executed stock transfer endorsements, had been given by father to mother and later by mother to daughter.

Affirmed.

Ellett, J., dissented and filed opinion.

### 1. Gifts ⇨47(1)

In action by administrator of estates of deceased father and mother to recover from daughter stock certificates or proceeds from sale thereof, daughter, who had effected transfer of shares on books of corporation by supplying bond, had burden of showing that the shares, which had been carried on books of corporation in name of father who had not executed stock transfer endorsements, had been given by father to mother and later by mother to daughter.

### 2. Appeal and Error ⇨1008.1(1), 1012.1(4)

The Supreme Court will not disturb findings of trial court unless court has misapplied proven facts or made findings clearly against weight of the evidence.

### 3. Executors and Administrators ⇨59 Gifts ⇨49(6)

In action by administrator of estates of deceased father and mother to recover from daughter stock certificates, or proceeds from sale thereof, which administrator claimed to be assets of one or other of the estates, wherein daughter claimed that, after death of father, de facto distribution of his estate was made by mother and children, that mother had accepted the certificates as part of her share of estate and subsequently gave them to daughter, evidence was insufficient to show that mother had received the shares as part of that de facto distribution.

J. Rulon Morgan, Frank J. Allen, Clyde, Mecham & Pratt, Salt Lake City, for defendants-appellants.

Glen J. Ellis, Maxfield, Gammon, Ellis & McGuire, Provo, for plaintiff-respondent.

TUCKETT, Justice:

The plaintiff as administrator initiated these proceedings in the court below seeking to recover from the defendant Lucille Buckley Hall certain stock certificates or the proceeds from the sale thereof which it claims to be assets of one or other of the estates being administered upon. The defendant Lucille Buckley Hall claimed ownership of the shares by an inter vivos gift from her mother Pearl Murdock Buckley. During his lifetime George Hatton Buckley owned certain stock certificates representing approximately 5500 shares of stock in the Mercur Dome Gold Mining Company. The defendant Lucille Buckley Hall claims that prior to his death her father George Hatton Buckley made a gift of the stock certificates to her mother Pearl Murdock Buckley who thereafter kept the certificates in a black box which also contained other papers and records. The decedent George Hatton Buckley did not sign the assignment and transfer contained on the reverse side of each stock certificate and the certificates remained in the

name of George Hatton Buckley on the records of the corporation during the lifetimes of George Hatton Buckley and his wife Pearl Murdock Buckley. During the year 1969 the market value of the stock in question increased sharply and the defendant who had possession of the certificates effected a transfer of the shares on the books of the corporation by supplying a bond and thereafter sold the shares.

The parties proceeded to trial in the court below on the issue of whether or not the defendant had acquired ownership of the shares of stock by reason of a gift from the defendant's father to the defendant's mother and in turn a gift from the defendant's mother to the defendant. On conflicting testimony the trial court found that the defendant had failed to prove a gift by clear and convincing evidence from her father to her mother. The court concluded that the plaintiff was entitled to judgment in an amount equal to the net proceeds on the sale of the stock by the defendant and also that the plaintiff was entitled to possession of a stock certificate not included in the sale.

[1,2] On appeal the defendant contends that the trial court erred in imposing upon the defendant the burden of proving her ownership of the shares of stock in question by way of a gift by clear and convincing evidence. It would appear to us that the defendant having acquired possession of the stock certificates which were carried on the books of the corporation in the name of the decedent George H. Buckley, and George H. Buckley not having executed the stock transfer endorsements which were a part of each certificate, the defendant did in fact have the burden of establishing her ownership by gift by clear and convincing proof.<sup>1</sup> As this court has stated in numerous prior decisions we will not disturb the finding of the trial court unless that court has misapplied

proven facts or made findings clearly against the weight of the evidence.<sup>2</sup>

[3] As a second claim of error on the part of the trial court, the defendant claims that after the death of George Hatton Buckley a de facto distribution of his estate was made by his widow and children at which time various items of personal property belonging to the decedent were given to the widow and children. Defendant claims that the mother Pearl Murdock Buckley accepted the certificates of shares as a part of her share of the estate. The court below found that the evidence was insufficient to show that Pearl Murdock Buckley received the shares of stock as a part of that de facto distribution.

It is quite clear that the money and shares of stock when in the hands of administrator should be distributed as assets of the estate of George Hatton Buckley. The judgment of the court below is affirmed. Plaintiff is entitled to costs.

CALLISTER, C. J., and HENRIOD and CROCKETT, JJ., concur.

ELLETT, Justice (dissenting):

I dissent.

The evidence without contradiction shows that George Buckley gave the stock to his wife, Pearl Murdock Buckley, in 1945. Apparently the trial judge elected not to believe the disinterested witnesses but instead based his opinion on what he must have conceived to be a rule of law. In his memorandum decision he stated:

. . . [T]he Court finds and concludes that defendant has failed to prove by clear and convincing evidence that the decedent, George Hatton Buckley, made a gift to Pearl Murdock Buckley of the stock certificates *in that he failed to endorse the stock certificates in November of 1945 when he purportedly de-*

1. Jones v. Cook, 118 Utah 562, 223 P.2d 423; Raleigh v. Wells, 29 Utah 217, 81 P. 908; Christensen v. Ogden State Bank, 75 Utah 478, 286 P. 638; Greener v. Greener, 116 Utah 571, 212 P.2d 194.

2. Stanley v. Stanley, 97 Utah 520, 94 P. 2d 465.

*claimed he was giving same to Pearl Murdock Buckley and his failure to divest himself of the physical control of the certificates at the time the purported declarations of gift were made [Emphasis added]*

In the case of *Taylor v Daynes*, 118 Utah 61, 218 P 2d 1069 (1950), this court held that a sale of stock was made on July 21, 1947, although the stock certificate was not signed until February, 1948. In deciding the matter, this court quoted from the case of *Jones v Commercial Investment Trust*, 64 Utah 151, 228 P. 896, as follows: "If they intend the title to be transferred when the contract is made, it is a contract of sale, otherwise it is a contract to sell."

If George Buckley handed the stock to his wife, as the witnesses said he did, and at the time intended to give it to her, the gift was completed to the extent that she would have the equitable title to it, which would be good against all the world, and this is true even though the stock was not endorsed and was thereafter kept in a box to which George had access.

George Buckley was injured, and from 1931 to his death he was a semi-invalid and unable to work. His wife, Pearl Murdock Buckley, worked as a janitress to support the family. They were poor, and when George died in 1950, the only assets he left were a small bank account, a ring, an old car, a few war bonds, and plaintiff claims the stock in question which he had acquired while working the mine. The stock at that time was worthless as an asset.

Gerald Buckley testified for the plaintiff regarding the property which his father, George Buckley, had left.

Q There was a division among the family of your father's estate without probate proceedings?

A I didn't know of any division of my dad's property.

Q Well, who got the property, then?

A Well, just mother had it.

In his deposition which was read Gerald Buckley also testified:

Q But you made no claim to the stock?

A It was mom's stock.

Appellant testified with reference to the assets of George Buckley as follows:

Q What was done with respect to the war bonds and the old car? What was done with the old car and the bonds?

A My brother Bert sold the car. And the war bonds and that was my mother's.

Q Was there any other property in the estate, that you know of?

A Just my dad's ring.

Q Who got the ring?

A Gerald.

The testimony was uncontradicted that Pearl Murdock Buckley gave the worthless stock to appellant sometime during 1960.

Although the stock in question was worthless, George Buckley always claimed that someday it might become valuable and it should be saved. His son Gerald had some of the same stock, and the father told him to hold onto it and pay the assessments, as it might become valuable. George's belief seemed prophetic, and in 1969 the stock in question was sold for \$25,000.

For 19 years after his death neither of the sons of George Buckley made any claim to the stock in question. In fact, in 1968 Gerald Buckley told appellant to sell it and even signed a bond so she could have the stock transferred to her own name in order to sell it without probating the estate of their parents.

The plaintiff in its complaint shows that this matter is an attempt to get appellant to divide what she received from the sale of the stock with the other two heirs and is not a bona fide probate of the estate. Paragraph 8 of the complaint reads:

That demand has been made upon the Defendant Lucille Buckley Hall by the other heirs and by the Administrator ap-

pointed herein and that she has failed, neglected or refused to deliver to the other heirs their respective shares of the Estates.

It does not appear that any effort has been made by the administrator to collect from the other heirs the property which they received after the death of their father or mother.

There is another matter not urged by appellant which should require a reversal of the judgment in this case. It involves the jurisdiction of the court to appoint the plaintiff as administrator of the two estates jointly, and we should notice matters of jurisdiction whenever we are aware of them whether urged or not. If we ignore the matter now, we would simply make for other lawsuits, for if the administrator is not lawfully appointed, its acts are void and subject to collateral attack.

The complaint states that plaintiff is the administrator of the estates of George Hatton Buckley and Pearl Murdock Buckley; that there are three heirs; that the stock in question constitutes a part of the estate of George Hatton Buckley; and that the heirs are entitled to one-third equal share.

The probating of estates of deceased persons is purely statutory, and unless done according to the statute, the attempt to probate is a nullity. Section 75-4-6, U.C.A.1953, provides for letters of administration upon several estates jointly under two conditions:

(1) Where the estate of one deceased person has descended from another deceased person whose estate has never been probated, or

(2) Where two or more deceased persons held property as tenants in common, etc.

Obviously these two estates cannot be jointly probated under (2) above, for it is not claimed that Mr. and Mrs. Buckley held anything as tenants in common. The

question arises: Did all of the estate of Mrs. Buckley descend from Mr. Buckley?

In its complaint plaintiff says the shares of stock constituted "a major portion of the estates of George Hatton Buckley and possibly that of Pearl Murdock Buckley." It thus appears that each estate had other assets.

In order for the two estates to be probated jointly under the provision of the statute, it is necessary that all of the estate of Mrs. Buckley be received from the estate of her deceased husband.<sup>1</sup> If in fact the stock never left George's estate, as the trial court held, then a probate of George's estate would give one-third to Pearl Murdock Buckley and two-ninths to each of the three children.<sup>2</sup> If then Pearl gave the stock to appellant, as the undisputed evidence shows, then appellant would get five-ninths of the stock and her two brothers only two-ninths each. The trial judge made no finding as to whether Pearl gave to appellant the one-third interest which descended to her, holding it had no legal consequences. If Mrs. Buckley gave to appellant all of her interest in the stock, there would be nothing to probate in her estate, which plaintiff claims descended to her from the estate of her husband.

It is, therefore, necessary to determine whether Pearl gave her one-third interest to appellant, and the court erred in holding that whether or not the gift was made was of no legal consequence.

Since the complaint shows that the estates could not be probated jointly, the plaintiff has no standing to maintain this action.

I would reverse the judgment and remand the case with directions to dismiss the action. I would award costs to the appellant.

At least the case should be remanded for a determination of the issue of whether or not Pearl Murdock Buckley gave her share of the stock to the appellant.

1. *In re Martin Estates*, 109 Utah 131, 166 P.2d 197 (1946).

2. Section 74-4-5(1), U.C.A.1953.

Tab E

**STANLEY v. STANLEY.**  
**No. 6110.**

Supreme Court of Utah.  
Oct. 14, 1939.

**1. Appeal and error**  $\S$ 1009(3)

In equity case findings of trial court on conflicting evidence will not be set aside unless it manifestly appears that the court has misapplied proven facts or made findings clearly against the weight of the evidence.<sup>1</sup>

**2. Deeds**  $\S$ 208(3)

In quiet title action involving issue whether testator had delivered deed to widow, widow's testimony that she saw testator removing deed from his pocket, that he remarked that he had present for her and handed deed to her requesting that deed be not recorded until after his death, and that thereafter deed remained in her possession, justified inference that deed was delivered and was prima facie sufficient for that purpose, but such inference was not conclusive.

**3. Deeds**  $\S$ 194(2)

Presumption of delivery arising from grantee's possession of deed was not conclusive.

**4. Evidence**  $\S$ 269(2)

In quiet title action involving question whether testator had delivered deed to his widow with intent to pass title, testator's statement after alleged delivery that he was owner of property was admissible only upon question of intent to presently pass title if in fact there had been a manual delivery.

**5. Deeds**  $\S$ 56(2)

"Delivery" of a deed is essentially a matter of intent which intent is to be arrived at from all facts and surrounding circumstances.

[Ed. Note.—For other definitions of "Deliver; Delivery," see Words & Phrases.]

**6. Evidence**  $\S$ 269(3)

Declarations of grantor before and after date of deed, at least where it appears that

the declarations were made fairly and in ordinary course of life, can be considered in determining whether deed was delivered with intent to presently pass title.<sup>2</sup>

**7. Deeds**  $\S$ 208(1)

In quiet title action involving question whether testator had delivered deed to widow with intent to presently pass title, evidence sustained trial court's finding that deed had not been delivered with such intent even if widow had been permitted to testify as to the manual delivery of the deed. Rev.St.1933, 104-49-2.

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Appeal from Second District Court, Weber County; E. E. Pratt, Judge.

Action to quiet title by Lily E. Stanley, executrix of the last will and testament of Willis O. Stanley, deceased, against Emily C. Stanley. Judgment for plaintiff, and defendant appeals.

Affirmed.

DeVine, Howell & Stine and Neil R. Olmstead, all of Ogden, for appellant.

Thatcher & Young and Valentine Gideon, all of Ogden, for respondent.

EVANS, District Judge.

This is an action to quiet title to certain premises in Ogden, Utah, and designated as 823 and 825 Twenty-Fifth Street. Willis O. Stanley died on November 17, 1937, leaving as his survivors the defendant, his widow, and George C. Stanley and Lucile Stanley, children by adoption. Willis O. Stanley will be hereafter referred to as the testator. He and the defendant had been married some fifty years prior to his death and had lived together until 1932, at which time they separated. The testator had for many years been employed as a travelling salesman on a salary of \$250 per month, one-half of which he regularly remitted to the defendant, which, together with rentals received from properties acquired during the marriage, she deposited in the bank as a joint account. Of the various properties acquired, all were taken in the name of the defend-

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<sup>1</sup> Olivero v. Eleganti, 61 Utah 475, 214 P. 313; Klopenstine v. Hays, 20 Utah 45, 57 P. 712; Singleton v. Kelly, 61 Utah 277, 212 P. 63, 66; Holman v. Christensen, 73 Utah 389, 274 P. 457; Zuniga v. Evans, 87 Utah 198, 48 P.2d

513, 101 A.L.R. 532; Wilcox v. Cloward, 88 Utah 503, 56 P.2d 1; Hoyt v. Upper Marion Ditch Co., 94 Utah 134, 76 P.2d 234.

<sup>2</sup> Mower v. Mower, 64 Utah 260, 228 P. 911.



ant, except the property here in question, which stood on the records in the name of the testator. All living expenses and all expenses incident to the upkeep of these properties were paid from this joint account by checks drawn by the defendant, who assumed the general management of the properties because of the testator's frequent absences from home. Sometime after 1929 the defendant closed this joint account and opened an account in her own name which was, however, handled in the same way as had been the joint account.

In the year 1906, the testator executed a deed conveying the premises in question to the defendant. This deed was recorded three months after the death of the testator. The plaintiff, while admitting the execution of the deed, contends that it was never delivered. The defendant, on the other hand, contends and offered evidence to support her contention that the deed was delivered. The trial court found the issues in favor of the plaintiff upon what appears to be conflicting evidence.

[1] The scope of the review on appeal in equity cases is clearly settled in this jurisdiction. "This court is authorized by the state Constitution to review the findings of the trial courts in equity cases, but the findings of the trial courts on conflicting evidence will not be set aside unless it manifestly appears that the court has misapplied proven facts or made findings clearly against the weight of the evidence." *Olivero v. Eleganti*, 61 Utah 475, 214 P. 313, 315.

To the same effect are *Klopenstine v. Hays*, 20 Utah 45, 57 P. 712; *Singleton v. Kelly*, 61 Utah 277, 212 P. 63, 66; *Holman v. Christensen*, 73 Utah 389, 274 P. 457; *Zuniga v. Evans*, 87 Utah 198, 48 P.2d 513, 101 A.L.R. 532; *Wilcox v. Cloward*, 88 Utah 503, 56 P.2d 1; *Hoyt v. Upper Marion Ditch Co.*, 94 Utah 134, 76 P.2d 234.

Let it be here observed that it is not contended that there is not a substantial conflict in the evidence. The defendant, however, assigns as error the ruling of the court in excluding the defendant's testimony of the delivery of the deed to her by the testator shortly after its execution, and upon the same principle that the court erred in not permitting her to identify the signature of the testator to a document which, it is claimed, would tend to support her claim of ownership. It is further contended by the defendant that the court

should have excluded statements made by the testator to third persons to the effect that he owned the property. Had the court adopted the defendant's theory and admitted the evidence offered by the defendant and had excluded evidence offered by the plaintiff over defendant's objection, that would not, however, dispose of the conflict, but it is insisted that except for the errors complained of the evidence would have so preponderated in favor of the defendant as to lead to a different conclusion.

The testimony upon which the plaintiff relies, and which it is contended is inconsistent with the defendant's claim that the deed was delivered to her, may be briefly summarized, as follows:

The testator left the management of the various properties acquired by them before their separation, including 823 and 825 Twenty-Fifth Street, to the defendant. Shortly after their separation the testator consulted counsel about obtaining payment of the rents on these houses directly to him. In February, 1934, he notified the defendant that he would thereafter care for his property, shortly after which he rented one house, and in May, 1935, moved into the other, occupying a part and renting a part. He exercised exclusive ownership of this property until his death in November, 1937. In 1935 he mortgaged the property without objection from the defendant, or the assertion of any claim of ownership, although she refused to join in the mortgage. The testator left a will devising his real property to the plaintiff personally. He neither claimed or owned any other real estate. The defendant had access to the desk in which he kept his papers at all times since the execution of the deed under which she claims, and after the death of testator his personal effects were removed to the home of defendant. In 1934, the testator left with one Forrest all the keys to the property and defendant demanded of him that he deliver the keys to her, which demand was refused on the ground that she was not the owner. She at that time asserted no claim of ownership. Immediately after the death of the testator the defendant filed a petition for the probate of a will dated in 1892, in which the defendant was the sole beneficiary. She alleged in a verified petition that the testator owned the property in question at the time of his death. The defendant had always attended to the

incidents of acquiring, renting and preserving her own property and was therefore familiar with the matters entering into the transfer of titles. When told that some wall paper had been sent to the testator's place on 25th Street, the defendant said: "If it had gone up to my place you would have gotten that money." Pending the proceedings for probate of the 1892 will, a later will was discovered by George C. Stanley, dated in 1934, in which the plaintiff was made the sole beneficiary. The defendant was advised of the discovery and the will was filed with the Clerk of the Court on November 27, 1937. On December 8, 1937, the defendant received notice of the hearing on the petition for probate of the later will. The deed was filed for record by the defendant on February 15, 1938. Shortly before that, according to the testimony of her daughter Emily, the defendant brought out a box and looking over the papers she found that deed. In 1913, the testator procured insurance in his own name on the property in question, which he renewed from time to time until shortly before his death. The defendant insured her properties with the same agency. Due to the testator's frequent absences the policies and statements for premiums were usually mailed to the defendant, who promptly paid the premiums upon the several properties standing in her name. The testator invariably paid the premium on the property here in question, except the last premium on the policy issued shortly before the testator's death, and for which a claim has been filed against the estate.

With respect to the delivery of the deed, the trial court excluded evidence offered by the defendant as to the formal act of delivery as being incompetent under the provisions of Section 104-49-2, R.S.U. 1933. However, she was permitted to testify that she first saw the deed on May 19, 1906, in the testator's hands and next saw it in her own hands after which she immediately placed it in a tin box; that when she first saw the deed the testator was removing it from his pocket, remarking that he had a present for her, and handed it to her, and that she paid him a dollar, requesting however, that the deed be not recorded until after his death, and that thereafter it remained in her possession.

[2,3] This testimony would undoubtedly justify an inference that the deed was delivered and should be considered prima

facie sufficient for that purpose. The inference is not conclusive, nor would the presumption arising from the possession of the deed by the defendant be conclusive.

[4-6] Was the behavior of the testator and of the defendant subsequent to their separation inconsistent with the claim that the deed was delivered with intent to presently pass title? It is apparent that the testator thereafter exercised all of the indicia of ownership by entering into the exclusive possession of the premises, taking insurance in his own name, redeeming the property from a tax sale, mortgaging the property with the knowledge of the defendant, disposing of the property by will, collecting rents, paying taxes and assuming all expenses of upkeep, all without any protest or objection or claim by or on behalf of the defendant. In the course of these various transactions he had repeatedly stated and represented that he was the owner of the property, such statements, however, being admissible only upon the question of intent to presently pass title, if in fact there had been a manual delivery.

"Since delivery is essentially a matter of intent, which intent is to be arrived at from all the facts and surrounding circumstances, we believe the better rule is to include in those facts and circumstances declarations of the grantor both before and after the date of the deed, at least where it appears that the declarations are made fairly and in the ordinary course of life." *Mower v. Mower*, 64 Utah 260, 228 P. 911, 914.

Then also these declarations were reinforced by the sworn declaration of the defendant in her petition for probate of a will to the effect that the testator was the owner of this property at the time of his death.

In this respect a very natural question presents itself. If, as the defendant claims, she had in her possession the deed at the time of testator's death, why not then record the deed instead of offering the will for probate, and thus avoid subjecting the property to the claims of creditors, not to mention the difference in the expense of the two respective procedures? Then a later will is found which is filed for probate in which the plaintiff is named as beneficiary and of which proceedings the defendant had notice. Some three months elapsed before the deed was placed of record. Had the defendant been mentally in-

firm, or inexperienced in matters of business, or indifferent to her own interests, or had she forgotten about the deed, such might afford some explanation of these inconsistencies. The record, however, discloses no satisfactory explanation of the defendant's extraordinary behavior, and the facts tend quite convincingly to support the plaintiff's theory that the deed was discovered among the testator's papers after the later will had been filed for probate.

[7] As we view the evidence in this case the findings of the trial court are amply supported by the evidence, and this would be true even though the defendant had been permitted to testify as to the manual delivery of the deed, and quite as effectually disposes of all presumptions in the defendant's favor which would cast the burden of proving non-delivery upon the plaintiff.

There being no reversible error, the judgment is affirmed, with costs to the respondent.

MOFFAT, C. J., and LARSON and McDONOUGH, JJ., concur.

WOLFE, Justice (concurring).

I concur in the results. It would perhaps be well if we fastened upon an accurate and consistent expression of the judicial policy of this court in the review of equity cases. The Constitution of Utah, Art. VIII, Sec. 9, not only gives us authority but makes it our duty to review the facts. This has been construed to mean that we review and weigh the evidence as it appears in the record. *Lund v. Howell*, 92 Utah 232, 67 P.2d 215 (followed in *Id.*, 92 Utah 250, 67 P.2d 223); *Christenson v. Nielsen*, 88 Utah 336, 54 P.2d 430, 432 (where this court held that in an equity case the appellate court was "compelled to review the record and pass on the weight and sufficiency of the evidence"); *Buzianis v. Buzianis*, 81 Utah 1, 16 P.2d 413 (where the court held that where there was a conflict in the evidence it was the court's duty "to pass upon the relative weight thereof").

The cases are replete with expressions as to the tests to be applied to determine when we will reverse or affirm in an equity case. They vary considerably. Hereunder are cited cases from this jurisdiction with various expressions used. *Skola v. Merrill*, 91 Utah 253, 64 P.2d 185 (where

this court reversed the trial court because the "fair preponderance" of the evidence was the other way); *Chapman v. Troy Laundry Co.*, 87 Utah 15, 47 P.2d 1054, 1056 (where it was held that the Supreme Court has the burden of determining "whether the findings of fact are supported by a fair preponderance of the evidence"); *Transfer Realty Co. v. Lichfield*, 84 Utah 163, 33 P.2d 179, 181, rehearing denied, 85 Utah 451, 39 P.2d 752 (where it was held that this court "may examine the evidence to determine whether or not the trial court's findings are supported by a preponderance of the evidence"); *Lake Shore Duck Club v. Lake View Duck Club*, 50 Utah 76, 166 P. 309, 310, L.R.A.1918B, 620 (where it was held that the Supreme Court has the power "to review the testimony for the purpose of determining what the facts are \* \* \* even though its views are in conflict with the findings of the trial court"); *Forbes v. Butler*, 66 Utah 373, 242 P. 950, 951 (holding it incumbent on the court "to review the evidence and decide the case according to the facts as we find them to be, bearing in mind legal presumptions in favor of the judgment"); and *Garfield Banking Co. v. Argyle*, 64 Utah 572, 232 P. 541, 542 (holding that the Supreme Court in weighing evidence should take into consideration the fact that the "trial court was not bound to give the same weight or effect to all the statements made by the several witnesses").

In *Zuniga v. Evans*, 87 Utah 198, 48 P.2d 513, 520, 101 A.L.R. 532, a well considered case, it was stated: "After a careful reading of the entire testimony of this witness, and weighing the same along with the admitted facts in the case, we do not feel satisfied that the finding ought to be disturbed. The trial judge did not accept the testimony of this witness in full. The trial judge had a better opportunity from seeing and hearing the witness than we have from merely reading the transcript to appraise his credibility and to determine what weight should be given to his testimony. The opinion of the trial judge is therefore entitled to some weight with us."

Other cases containing similar expressions are as follows: *Williams v. Peterson*, 86 Utah 526, 46 P.2d 674; *Silver King Consol. Mining Co. v. Sutton*, 85 Utah 297, 39 P.2d 682; *Corey v. Roberts*, 82 Utah 445, 25 P.2d 940; *Consolidated Wagon & Machine Co. v. Kay*, 81 Utah 595, 21 P.

2d 836; *Holman v. Christensen*, 73 Utah 389, 274 P. 457; *Warner v. Tyng Warehouse Co.*, 71 Utah 303, 265 P. 748; *Ephraim Willow Creek Irr. Co. v. Olson*, 70 Utah 95, 258 P. 216; *Schulder v. Dickson*, 66 Utah 418, 243 P. 377; *Jenkins v. Nicolas*, 63 Utah 329, 226 P. 177; *McKellar Real Estate & Investment Co. v. Paxton*, 62 Utah 97, 218 P. 128; *Lawley v. Hickenlooper*, 61 Utah 298, 212 P. 526; *Bracken v. Chadburn*, 55 Utah 430, 185 P. 1021; *Kinsman v. Utah Gas & Coke Co.*, 53 Utah 10, 177 P. 418; *Campbell v. Gowans*, 35 Utah 268, 100 P. 397, 23 L.R.A.,N.S., 414, 19 Ann.Cas. 660 (followed in *Utah Com. & Savings Bank v. Fox*, 44 Utah 323, 140 P. 660; and *Little v. Stringfellow*, 46 Utah 576, 151 P. 347); *Fares v. Urban*, 46 Utah 609, 151 P. 57; *Froyd v. Barnhurst*, 83 Utah 271, 28 P.2d 135; *Paxton v. Paxton*, 80 Utah 540, 15 P.2d 1051; *Thomas v. Butler*, 77 Utah 402, 296 P. 597; *Clark v. Clark*, 74 Utah 290, 279 P. 502; *Olivero v. Eleganti*, 61 Utah 475, 214 P. 313 (and cases cited); *Singleton v. Kelly*, 61 Utah 277, 212 P. 63 (and cases cited); *Rieske v. Hoover*, 53 Utah 87, 177 P. 228.

The expressions range all the way from that which says a review in equity in this court is a trial de novo on the record, to that taken from *Olivero v. Eleganti*, supra, contained in the main opinion.

I opine that what was really meant was that on review we would go over the record to determine what our conclusions of fact were from the transcript of the evidence, and if at the end of that investigation we were in doubt or even if there might be a slight preponderance in our minds against the trial court's conclusions, we would affirm. This is because we would be confined to the dry written record and would not have the benefit of seeing and hearing the witnesses. In some cases that would be quite valuable while in others, where the evidence was purely or almost altogether documentary, it might be practically valueless. Such a distinction was noted in the concurring opinion in *Greco v. Grako*, 85 Utah 241, 39 P.2d 318, 322, where it was said: "I am not unmindful of the rule to the effect that, while a written record in an equity case may apparently show the preponderance of evidence in favor of a conclusion different from that reached by the trial judge, still the benefit of the doubt should be given to his conclusions where the imponderables, not revealed by the record, such as

the manner and demeanor of the witnesses (very important indexes to credibility), might weigh in the scale sufficiently to reverse that apparent preponderance of the record. Where, however, the preponderance shown by the record is so great in favor of a conclusion different from that arrived at by the trial judge that the unrecorded parts of the trial could not reasonably be expected to change such apparent preponderance, or where, as in this case, some fact independent of any element which might affect the credibility of witnesses speaks eloquently of a wrong conclusion by the trial judge, the rule does not apply."

The reason then that we have the expressions that in order to reverse there must be shown a "clear preponderance" or "fair preponderance" of the evidence the other way or that we must "bear in mind legal presumptions in favor of the judgment" etc., is because of this recognition that the lower court had the witnesses before it and was better able to judge of their credibility. This is borne out by the following expressions:

In *Corey v. Roberts*, 82 Utah 445, 25 P.2d 940, 942, the court held: "In equity cases the appeal (Const. Utah, art. 8, § 9) may be on questions of both law and fact. Such is the appeal in this case. On such review the duty of this court requires an examination of all questions of law and all facts revealed by the record, and, after making such examination and due allowance for the better opportunity afforded the trial court to observe the demeanor of witnesses, and more advantageous position of determining their credibility and the weight to be given to the testimony submitted, this court, analogous to a trial de novo on the record, will determine from a fair preponderance or greater weight of the evidence whether or not the findings of the trial court are supported thereby. *Lawley v. Hickenlooper*, 61 Utah 298, 212 P. 526."

In *Kinsman v. Utah Gas & Coke Co.*, supra, the court stated [53 Utah 10, 177 P. 420]: "While this court will, and it is its duty in equitable proceedings to, review the testimony and determine its weight, of necessity much consideration must and will be given to the trial court's findings, not only because such court heard the witnesses and had an opportunity to observe their demeanor upon the witness stand, their means of knowledge, their in-

terests, etc., but particularly in this case greater consideration should be given to the court's finding by reason of the court's opportunity in visiting the plant and vicinity, and seeing from personal investigation and observation the conditions that exist there."

I think hardly accurate the expression in *Chapman v. Troy Laundry Co.*, supra, that the Supreme Court has the burden of determining "whether the findings of fact are supported by a fair preponderance of the evidence." Our duty is to make an independent examination of the record. If after that we find (1) the preponderance of the evidence supports the trial court's findings of fact, or (2) if there is doubt in our minds as to where the preponderance lies, or (3) we think the evidence as revealed by the record may slightly preponderate against its conclusions but such preponderance may well be offset in favor of his conclusions by having seen the witnesses and been able to judge by their demeanor as to their credibility, then we will not reverse. The expressions that there must be a "clear" or "fair" preponderance of the evidence against the findings of the trial judge, seek to allow for his advantaged position in having seen the behavior of the witnesses on the stand.

In short, as held in *Wilcox v. Cloward*, 88 Utah 503, 56 P.2d 1, if after we review the record we cannot say that the court came to a wrong conclusion, we should affirm. We do not reverse if we find the court's findings supported by a fair preponderance of the evidence, or if supported only by a slight preponderance, or if the evidence is evenly balanced, or even if there is in the record a slight preponderance the other way, for the reasons above set out.

Being convinced that evidence of delivery of the deed from Willis O. Stanley to Emily C. Stanley should not be received because Emily C. Stanley was incompetent under Sec. 104-49-2, R.S.U.1933, I shall treat the case as if there was no evidence of delivery. This makes it unnecessary for me to determine whether declarations of a decedent tending to show ownership in him after a manual handing of a deed from himself to another when the deed ran to that other are admissible in evidence to find the intent with which the deed was so handed, especially where not made contemporaneously with the manual act. I am not prepared, without further research,

to subscribe to the doctrine of *Mower v. Mower*, 64 Utah 260, 228 P. 911, although it may be the law of this state.

It may be contended that even though there is no direct evidence of manual handing over from Willis to Emily Stanley, the inference from her testimony that she saw the deed in his hand and next saw it in her hand raises the inference of delivery. While I have grave doubts whether the rule of Sec. 104-49-2, R.S.U.1933, may be circumvented by admitting every fact surrounding the fact which is to be concluded from them, when such facts themselves were "equally within the knowledge", no cross assignment of error was made as to their admission hence they must stand as correctly admitted for this review. But I do not think the inference that a manual handing over took place need be indulged. Certainly when the facts from which we are asked to infer were wrongly admitted and we are asked to draw an inference which will reverse the trial court in its findings, we will do so only when it is the necessary and only inference. I do not see that it is such in this case. For that reason I found my concurrence on the assumption that it does not appear in this case that there was any delivery of the deed.

PRATT, J., being disqualified, did not participate herein.



**CHOURNOS v. EVONA INV. CO. et al.**  
No. 6092.

Supreme Court of Utah.  
Oct. 17, 1939.

**Landlord and tenant** ⇨95

Joint lease of grazing land, which provided that, in event of a sale of land being made to any person not a party to the lease, the lessees should be given one year within which to vacate the premises, after which the lease should be canceled, contemplated that, except for a purchase by a stranger, each lessee should continue the grazing of sheep upon the land at least for the period of the lease, and hence, if purchase of the leased premises by a lessee's son was made

Tab F

It appears that appellants, the prevailing parties on their appeal, presented to the clerk a duly certified cost bill for his approval and allowance. The item objected to and sustained by the clerk is as follows:

"Paid to Lew Rogers, court reporter, for typing transcript testimony of proceedings used in the transcript on appeal, \$276.31."

The clerk ruled that the item was not a proper item of costs authorized by section 1 of rule 6 of the Supreme Court Rules. We are not in accord with this ruling. The rule itself furnishes a sufficient answer to the objection to the allowance of the item. Section 1 provides as follows:

"The expense of printing or typewriting transcripts \* \* \* on appeal in civil causes \* \* \* shall be allowed as costs, and taxed in bills of costs in the usual mode. \* \* \*"

No sufficient reason appears why appellants should not be allowed the expense of transcribing the testimony upon which their appeal was based, and which was actually used on appeal.

The clerk's decision is reversed.

COLEMAN, C. J., and DUCKER, J., concur.

# GRAY'S HARBOR LUMBER CO. v. BURTON LUMBER CO. (No. 4106.)

(Supreme Court of Utah. May 11, 1925.)

1. Appeal and error  $\S$  277—Only such matters reviewed as deemed excepted to under statute, where no objection nor exception saved below.

Where defendant interposed no objection and saved no exception in district court, Supreme Court can only examine such matters as are deemed excepted to under the statute.

2. Judgment  $\S$  18(2)—Complaint in action on trade acceptances held not so lacking in essential averments as not to support judgment for plaintiff.

In action against drawee and acceptor on trade acceptance being an action on written instrument for payment of money only, complaint, which did not specifically allege ownership or right of possession, held not so lacking in essential averments as not to support judgment for plaintiff especially in view of fact that no defense was interposed under general denial.

3. Bills and notes  $\S$  524—Plaintiff suing on trade acceptances held to have made prima facie case of ownership by producing instrument, where no proof to contrary.

An action on trade acceptances, being an action on written instrument for recovery of money only, where instrument was in possession of plaintiff and was produced in court, presumption that plaintiff was owner prevailed,

and, in absence of proof to contrary, plaintiff made out a prima facie case.

4. Bills and notes  $\S$  395—Presentment for payment unnecessary in action against drawee and acceptor.

Under Comp. Laws 1917,  $\S$  4105, in action on trade acceptances against drawee and acceptor, who is primarily liable, presentment for payment is not necessary.

5. Corporations  $\S$  514(1)—Contention that complaint failed to allege plaintiff's capacity to sue without merit where defendant admitted that plaintiff was a corporation.

Contention that complaint failed to allege plaintiff's capacity to sue held without merit, where defendant admitted that plaintiff was a corporation, thus admitting its capacity to sue.

6. Appeal and error  $\S$  1170(3)—Failure of complaint to allege acceptance of trade acceptances by defendant held harmless, where proof thereof made without objection or exception by defendant.

Though complaint in action on trade acceptances did not expressly allege acceptance by defendant, held that, in view of Comp. Laws 1917,  $\S$  6622, where plaintiff proved fact of acceptance, and no objection or exception was taken to such proof, failure of complaint to so allege was harmless.

7. Bills and notes  $\S$  485—General denial of execution of written instrument or corporate capacity of plaintiff held insufficient.

Under Comp. Laws 1917,  $\S$  6594, providing that allegations of execution of written instrument, existence of corporation, etc., shall be taken as true unless denial thereof be verified by affidavit, defendant, intending to assail any of such matters, should clearly specify which one he desires to assail, and a mere general denial is insufficient. <sup>1</sup>

Appeal from District Court, Salt Lake County; Ephraim Hanson, Judge.

Action by the Gray's Harbor Lumber Company against the Burton Lumber Company. Judgment for plaintiff on appeal from city court, and defendant appeals. Modified, and affirmed as modified.

Ball, Musser & Robertson, of Salt Lake City, for appellant.

Irvine, Skeen & Thurman, of Salt Lake City, for respondent.

FRICK, J. This action was commenced in the city court of Salt Lake City. Judgment was there entered in favor of the plaintiff and against the defendant, and the latter appealed to the district court of Salt Lake county.

The complaint in the city court, omitting the prayer, reads as follows:

"Comes now the plaintiff and for cause alleges:

"(1) That it is a company organized under and pursuant to the laws of the state of Washington.

<sup>1</sup>For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

<sup>1</sup> Brewer v. Romney, 50 Utah, 236, 167 P. 366.

"(2) That on or about the 30th day of September, 1922, the defendant made, executed, and delivered to the plaintiff its trade acceptance in words and figures as follows, to wit: 'Trade Acceptance. \$439 58. Salt Lake City, Utah, Sept. 30, 1922. 60 days after date pay to the order of Gray's Harbor Lbr. Co. four hundred thirty-nine and 58-100 dollars. The obligation of the acceptor of this bill arises out of the purchase of goods from drawer. The drawee may make this trade acceptance payable at any bank, banker or trust company which he may designate. Gray's Harbor Lumber Co., by C. G. Blagdon, Secretary. To Burton Lumber Company, Salt Lake City, Utah. Accepted Sept. 30, 1922, payable Continental National Bank, Salt Lake City, Utah. Burton Lumber Company, by W. J. Burton, Treas.'

"(3) That thereafter plaintiff duly presented said trade acceptance for payment through the said Continental National Bank, and the same was returned with protest fees in the amount of \$4.77, and that, although demand has been made, the said trade acceptance or no part thereof has been paid."

In the city court a general demurrer was interposed to the complaint, which was overruled.

The defendant's answer, omitting the introduction and the prayer, reads as follows:

"(1) Admits the allegations contained in paragraph 1 of said complaint.

"(2) Denies each and every allegation and averment in said complaint not hereinabove specifically admitted."

Both the complaint and the answer were duly verified. No pleadings were filed in the district court, and no ruling of any kind respecting the pleadings filed in the city court was made in the district court.

Upon the issues presented by the complaint and answer, the case proceeded to trial in the district court. The plaintiff produced the original trade acceptance and offered the same in evidence, together with the indorsements thereon. His counsel then turned to defendant's counsel and asked whether the latter admitted nonpayment. Counsel for defendant said he assumed that the fact that the acceptance was outstanding was evidence of its nonpayment. The plaintiff then rested. The defendant, without any objection or taking any exception, and without producing evidence, also rested.

The court made findings in favor of the plaintiff, and entered judgment accordingly. Defendant filed its motion for a new trial, which was overruled, and this appeal followed.

[1] Notwithstanding the fact that no objection was interposed and no exception taken in the district court, twenty-seven errors are assigned in this court, nearly all of which are relied on for a reversal of the judgment. In view that the defendant interposed no objection and saved no exceptions in the district court, we can examine

only such matters as are deemed excepted to under the statute.

[2, 3] It is insisted that the complaint fails to state a cause of action. We have set forth both the complaint and the answer in full. While the complaint is far from being a model pleading, yet it is not so lacking in essential averments that it will not support a judgment. In passing upon the sufficiency of a complaint we must keep in mind that the demurrer was not called to the attention of the district court, and that that court made no ruling whatever with respect thereto. True, a demurrer was interposed in the city court, but an answer was subsequently filed in that court. The case, it seems, was considered in the district court entirely upon the complaint and answer. Moreover, the action is based upon a written instrument, for the recovery of money only. The instrument was in the possession of the plaintiff and was produced in court. Under all the authorities, therefore, the presumption that the plaintiff was the owner prevailed, and, in the absence of any proof to the contrary, the plaintiff made out a prima facie case when it produced the instrument. The contention, therefore, that the plaintiff must fail because it failed to allege ownership or right of possession is without merit.

[4] It is further contended that the plaintiff must fail because it did not prove presentment for payment. This action is against the drawee and acceptor who is primarily liable. In such an action presentment for payment is not necessary. Comp. Laws Utah 1917, § 4105; Brannan's Neg. Inst. Law (3d Ed.) 255, § 70.

[5] It is further contended that the complaint failed to allege plaintiff's capacity to sue. In view of the state of the pleadings, as will hereinafter more fully appear, there is no merit to this contention. Moreover, the record discloses that the defendant admitted that the plaintiff was a corporation and hence admitted its capacity to sue.

[6] It is, however, strenuously insisted that the complaint was fatally defective because it did not allege acceptance by the defendant. It is true that the plaintiff did not in express terms allege acceptance, but it certainly proved the fact of acceptance. No objection was interposed nor any exception taken to the proof. In view of that, this case falls squarely within the provisions of our statute (Comp. Laws Utah 1917, § 6622), which provides:

"The court must in every stage of an action disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

Let it be remembered also that this is an action to recover upon a written instrument



for the payment of money only. Judgment was entered against the defendant in two courts. No defense of any kind was interposed, and no explanation was made why judgment should not be so entered. No defense or explanation is now suggested; yet it is vigorously contended that the allegations of the complaint are insufficient to authorize a judgment. We have already pointed out that, while the complaint is lacking in specific averments, it nevertheless is not so lacking in essentials as to authorize this court to reverse the judgment. This is especially true in view that the answer of the defendant fails to state any defense whatever. True, the answer is a general denial, but what does it deny? Can one, by a mere general denial, and without any proof whatever, prevent a recovery upon a written instrument for the payment of money only where such instrument is produced in court by the terms of which appellant's promise to pay and its failure to do so are clearly established? Would it not be a mere travesty of justice to hold that, although the defendant voluntarily obligated itself to pay and plaintiff has proved the promise and the failure to redeem the obligation, it nevertheless must be thrown out of court because of some assumed technical defect in the complaint? In view of the nature of the action and the proceedings, and the utter failure of the defendant to suggest or to present any defense to the written instrument at any time save by merely interposing a general denial, there can be no question respecting plaintiff's right to judgment.

[7] The objections to the complaint practically all belong to that class which are admitted unless specifically denied. This court has already held that under our statute (Comp. Laws Utah 1917, § 6594) the execution of an instrument is not assailable under a general denial. *Brewer v. Romney*, 50 Utah, 236, 167 P. 366. That section provides:

"In all actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney."

If that section means anything, it means that, unless the defendant specifically denies the matters enumerated in the section they will be "taken as true." The statute is wholesome and of the highest utility. The matters referred to in the statute, while es-

sential in a pleading, are nevertheless more or less formal. Moreover, they occur in almost all actions and are seldom assailed. In view of that, it is but fair and just, and certainly comports with the due and just administration of justice, that, in case a defendant intends to assail any of those formal matters, he should specifically indicate it in his answer. Moreover, he should clearly specify which one of the several matters he desires to assail, so that proper preparation can be made on the part of the plaintiff to establish the matter or matters in dispute. If a mere general denial is held sufficient to authorize an attack upon the authority of the execution of a written instrument, or to assail the corporate capacity of plaintiff, or any of the other matters enumerated in the statute, then no one could tell in advance what the contested issues will be, and the plaintiff in every action must be prepared to sustain all of them, when perhaps none will be assailed at the trial. Indeed, such a practice must necessarily result in insisting upon the denial if the plaintiff is not prepared but, if he is prepared, to waive it.

While the record in this case in some respects is fragmentary and incomplete, it no doubt is so largely because of the fact that the defendant at no time presented or suggested any defense to the instrument sued on, and thus both the plaintiff and the court were somewhat careless in making a complete record.

The defendant, however, also insists that the evidence is insufficient to sustain the judgment for the \$4.77 protest fees allowed by the district court; moreover, that there is error in the judgment for costs. The plaintiff concedes that, in view that it failed to prove the protest fees, and that a cost bill was not served and filed within the time required by our statute, both of those items should be omitted, and that it voluntarily remits the foregoing items from the judgment.

The judgment is therefore modified by eliminating therefrom the item of \$4.77 as protest fees, and further by eliminating the amount allowed as costs, and, as so modified, the judgment is affirmed, with costs on appeal to plaintiff.

GIDEON, C. J., CHERRY, J., and CHRISTENSEN, District Judge, concur.

The term of office of Hon. A. J. WEBER, who was Chief Justice, expired before disposition of this case.

THURMAN, J., being disqualified, did not participate herein.

**CALIFORNIA PINE BOX DISTRIBUTORS,  
Respondent, v. BURTON LUMBER CO.,  
Appellant. (No. 4107.)**

(Supreme Court of Utah. May 11, 1925.)

Appeal from District Court, Salt Lake County; Ephraim Hanson, Judge.

Ball, Musser &amp; Robertson, of Salt Lake City, for appellant.

Irvine, Skeen &amp; Thurman, of Salt Lake City, for respondent.

FRICK, J. This action is based upon a trade acceptance in all respects similar to the one involved in the case of Gray's Harbor Lumber Company v. Burton Lumber Co., 236 P. 1102, just decided. The record is in the same condition as was the record in that case, and the questions presented for review are the same, except that in this case no protest fees were allowed.

For the reasons stated in the case just referred to, the judgment in this case is modified by eliminating therefrom the amount allowed as court costs, and, as so modified, the judgment is affirmed with costs, on appeal to plaintiff.

GIDEON, C. J., CHERRY, J., and CHRISTENSEN, District Judge, concur.

The term of office of Hon. A. J. WEBER, who was Chief Justice, expired before disposition of this case.

THURMAN, J., being disqualified, did not participate herein.

**PARKER v. WEBER COUNTY IRR. DIST.  
(No. 4142.)**

(Supreme Court of Utah. May 23, 1925.)

**1. Master and servant ⇨68—Engineer's right to payment held not dependent on actual rendition of services.**

Engineer's right to payment under contract of employment with irrigation district, terminable at any time, held not dependent on his performance of any services, but only on contract remaining effective and manner provided therein.

**2. Evidence ⇨444(2)—Exclusion of evidence, showing irrigation district's notice to engineer rendering contract of employment effective had been given on condition which was never fulfilled, held error.**

In action against drainage district for compensation due engineer under contract of employment, which plaintiff alleged became effective on notice given by district, it was error to exclude evidence adduced by district to show that notice was given on condition which was never fulfilled and so understood and accepted by plaintiff.

**3. Contracts ⇨42—Written instrument delivered on condition does not become effective until happening of contingency provided for.**

Where written instrument, regardless of nature, is delivered on express agreement that it shall not become effective except on happening of certain contingency, it does not become effective until that event occurs.

**4. Evidence ⇨444(2)—That written instrument was delivered on condition that it should not become effective until happening of certain contingency may be shown by parol.**

That written instrument was delivered on condition that it should not become effective until happening of certain contingency may be shown by parol.<sup>1</sup>

**5. Contracts ⇨238(2)—Evidence ⇨445(1)—Written instrument may be modified by parol agreement; parol modifying agreement may be established by parol evidence.**

Duly executed written agreement may be modified by subsequent oral agreement made same day, parol proof of which is admissible, and in action against irrigation district for payments due engineer under written contract of employment parol proof of oral agreement modifying written contract sued on was improperly excluded.

**6. Appeal and error ⇨837(12)—Improperly excluded evidence cannot be examined except to determine its admissibility, unless parties so stipulate.**

On appeal, improperly excluded evidence can only be examined for purpose of determining its admissibility, and cannot be considered by court, except parties stipulate to its correctness and authorize its consideration.

Appeal from District Court, Weber County; J. N. Kimball, Judge.

Action by A. F. Parker against the Weber County Irrigation District, wherein Wynne M. Parker, administrator of the estate of A. F. Parker, was substituted as party plaintiff. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Pratt & Pratt, of Ogden, for appellant.  
A. G. Horn, of Ogden, for respondent.

FRICK, J. A. F. Parker commenced this action in the district court of Weber county against the defendant Weber county irrigation district to recover for services pursuant to the terms of a certain contract of employment entered into between him and said district. After the action was commenced and pending, Parker died, and his son, the plaintiff named in the caption, was substituted, as administrator of the estate of the deceased.

In the complaint, after stating the necessary jurisdictional facts and matters of inducement, it is in substance alleged that on the 16th day of December, 1920, the deceased entered into a contract with said district, by the terms of which he was to perform cer-

⇨For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes  
236 P.—70      <sup>1</sup> Central Bank v. Stephens, 58 Utah, 358, 199 P.1012.

TAB



It is undisputed that the conduct of counsel in a criminal case may be such as to deny the defendant the fair trial contemplated by the due process clauses of both the State and Federal Constitutions. *People v. De Simone*, 9 Ill.2d 522, 524, 138 N.E.2d 556 (1956). However, our courts have repeatedly held that where the defendant is represented by counsel of his own choice, the judgment of conviction will not be reversed merely because his counsel failed to exercise the greatest of skill or for the reason that it might appear in looking back over the trial that he made some tactical blunder. In order to vitiate the trial, the whole of the representation must be of such low caliber as to amount to no representation and reduce the trial to a farce. *People v. Stephens*, 6 Ill.2d 257, 259, 260, 128 N.E.2d 731 (1955); *People v. Morris*, 3 Ill.2d 437, 443, 448, 121 N.E.2d 810 (1954). Defendant here was represented by counsel of his own choice and the record indicated that counsel creditably conducted the defense against insurmountable factual odds.

[29] The defendant also argues that the imposition by the court of an imprisonment term of from not less than one year and six months to not more than two years, upon the revocation of the probation, was excessive. The sentence was within the maximum penalty for the offense of which the defendant had been convicted. (Ill. Rev. Stat. 1963, ch. 38, section 117-3 (d); and ch. 111½, par. 441.) We recognize that this court may reduce the punishment imposed by the trial court if the circumstances warrant such reduction. Ill. Rev. Stat. 1965, ch. 38, section 121-9(b) (4).

[30, 31] The power to reduce a sentence is one that is to be exercised with caution. The imposition of sentence is peculiarly within the discretion of the trial court. This discretion should not be interfered with unless clearly abused. *People v. Stevens*, 68 Ill.App.2d 265, 273, 215 N.E.2d 147 (2nd Dist. 1966); *People v. Burks*, Ill.App., 215 N.E.2d 144 (2nd Dist. 1966); *People v. Brown*, 60 Ill.App.2d 447, 450,

208 N.E.2d 629 (1st Dist. 1965); *People v. Hobbs*, 56 Ill.App.2d 93, 98, 99, 205 N.E.2d 503 (1st Dist. 1965).

[32] Prior to imposing sentence, the trial court stated, among other things, that it appeared from the evidence that the defendant had made a mockery of its probation order; and that the defendant's testimony at the revocation hearing was fantastic and beyond belief. Under the circumstances of this case, we find no abuse of discretion in imposing sentence, and, accordingly, the judgment must be affirmed.

Judgment affirmed.

THOMAS J. MORAN, P. J., and ABRAHAMSON, J., concur.



In the Matter of the ESTATE of Bessie  
BICKFORD, Deceased, Petitioner-Appellee,

v.

Vern L. BICKFORD, Jr., Respondent-Appellant.

Gen. No. 66-6.

Appellate Court of Illinois.

Third District.

Aug. 5, 1966.

Action by administratrix to recover assets from intestate's son. The Circuit Court, Rock Island County, Probate Division, Forest Dizotell, J., rendered judgment for administratrix and son appealed. The Appellate Court, Stouder, J., held that evidence made prima facie case that assets consisting of money, tractor, and space heater were owned by intestate at time of her death and that son failed to carry burden of proving change of possession or

control or any other circumstance from which change of ownership could be inferred

Affirmed

**1. Executors and Administrators ⇐59**

Burden of proof in citation proceeding to recover estate assets is on petitioner until petitioner has presented prima facie case of ownership by decedent, at which time burden of establishing ownership shifts to person claiming the assets.

**2. Executors and Administrators ⇐59**

Evidence that money sought to be recovered by administratrix in citation proceedings was in pocket of dress owned by intestate and in her control until time of her removal to hospital presented prima facie case of ownership of such money by intestate.

**3. Executors and Administrators ⇐59**

Where evidence presented prima facie case of ownership of assets by intestate at time of death, evidence that intestate shortly before death had stated that contested assets belonged to son and son's uncorroborated testimony that he had received assets as gift did not establish son's ownership, in absence of change of possession or control, delivery either actual or constructive or any other circumstance from which change of ownership could be inferred.

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Stewart R. Winstein, Rock Island, for appellant.

Long, Gende & Schrager, E. Moline, for appellee.

STOUDER, Justice.

Petitioner Appellee, Bessie A. Winger, Administratrix of the estate of Bessie Bickford, commenced this action as a part of the probate proceedings pending in the Cir-

cuit Court of Rock Island County, by filing her petition for citation against Vern L. Bickford, Jr., Respondent, Appellant, to recover assets belonging to the estate of the deceased. This is an appeal from an order of the court finding that \$2,507.00, a tractor and a space heater belonged to the decedent at the date of her decease and ordering Respondent to turn over the property to the Petitioner, Administratrix.

Bessie Bickford died intestate on August 14, 1964, a resident of Rock Island County, Illinois. Letters of Administration were duly issued by the Circuit Court of Rock Island County to Bessie A. Winger, a daughter, Petitioner herein. Decedent left as her heirs at law, several children including Petitioner and Respondent. Citation proceedings were instituted by Petitioner to recover a tractor, space heater and \$2,507.00 in possession of Respondent, alleged to belong to decedent and hence considered part of the estate.

The evidence presented consisted primarily of the testimony of Petitioner, Respondent, other children of decedent and the former wife of Respondent. The evidence is undisputed that the decedent, Bessie Bickford, owned the house in which she lived and that Respondent had lived with her for most of his life including the period of his marriage. The decedent operated a restaurant for twelve years prior to her death. Decedent had been in ill health for approximately three years being hospitalized for three months prior to her death. After her death \$2,507.00 was discovered in the pocket of her dress located in a storeroom of her house. Decedent also kept her receipts and other business papers in the same storeroom in which the dress was kept. Respondent took possession of and counted the money in the presence of the other children after the decease of Bessie Bickford, the testimony being conflicting as to statements allegedly made by Respondent at the time. Although denied by Respondent, other witnesses testified that he stated the money was his mother's. The evidence was also conflicting concerning the possible

sources of the money, Respondent in his testimony claimed that he had received gifts from his father and grandfather some years earlier and that he had delivered the money to his mother for safekeeping. Respondent also testified that he had helped his mother in the restaurant and that the restaurant had been unprofitable for some time prior to his mother's death. Other testimony indicated that Respondent had not been employed regularly for more than eight years and that he had no money which he could have given his mother. It also appears from the testimony that three days before her death the decedent had made a statement in the hospital in the presence of her children to the effect that the money in the dress was Respondent's. So far as the tractor and space heater are concerned Respondent claimed that his mother had given them to him approximately four years prior to her death.

[1] Respondent, in seeking a reversal of the order of the trial court, argues that the order is against the manifest weight of the evidence. The primary area of controversy appears to be whether Petitioner or Respondent has the burden of proof. Respondent argues that the burden of proof in a citation proceeding is on Petitioner. Petitioner does not dispute this but contends that where Respondent does not obtain possession of property until after the death of decedent, he has the burden of showing ownership in himself. We believe there is merit in both arguments but that such arguments are not inconsistent, finding support as they do in the same Illinois authorities. The burden of persuasion remains with Petitioner but when Petitioner has presented a prima facie case of ownership by the decedent the burden of establishing ownership in himself shifts to Respondent. *Vercillo v. Gagliardi*, 27 Ill.App.2d 151, 169 N.E.2d 364. To the same effect are, *In re Hill's Estate*, 42 Ill.App.2d 396, 192 N.E.2d 429 and *Storr v. Storr*, 329 Ill.App. 537, 69 N.E.2d 916 where the decedent had transferred possession of the disputed asset prior to his death and ownership of such asset

was claimed by donee as an inter vivos gift. In the aforementioned cases the court concluded that the prima facie case of ownership had been presented by Petitioner thereby requiring Respondent donee to establish the inter vivos gift to him by clear and convincing evidence.

[2,3] It is in the application of these rules and in their differing views of the evidence that the parties disagree. Respondent contends that possession of the money involved was not obtained after the death of his mother but was always with Respondent. Therefore Petitioner has failed to sustain her initial burden of proving ownership of the money by decedent. We cannot agree with Respondent's analysis of the facts as shown by the evidence. The evidence shows clearly that the money involved was in the pocket of a dress owned by decedent and in her control until the time of her removal to the hospital. There is no evidence showing any change in control at that time or from that time to the date of death. In our opinion, this establishes the element of possession in decedent at the time of death rather than in Respondent and when considered with the other evidence amply presents a prima facie case of ownership of such money by decedent. This being the case, the burden was on Respondent to show by what right he claimed ownership. The facts which Respondent claims support his ownership of the money are disputed in practically every material respect. Even the statement of decedent shortly before her death that the money belonged to Respondent can be interpreted as a desire of the decedent that Respondent have such money after her death particularly when viewed in relation to other testimony suggesting that Respondent expected special treatment in the disposition of the decedent's estate. The trial court's determination of facts adverse to the claim of Respondent finds ample support in the conflicting evidence and such determination will not be disturbed on review.

As to the other items of personal property claimed to be gifts to Respondent by de-

cedent, again, we have only Respondent's assertion that they were gifts. The evidence discloses no change of possession or control, no delivery either actual or constructive nor any other altered circumstance from which a change of ownership can be inferred.

The authorities relied upon by Respondent all involve factual situations where actual possession of the property involved was clearly in Respondent at the time of death and have no application to the point at issue in the instant case. We are here dealing with the question of possession. Since we find possession to have been in decedent we must further find that Respondent did not meet his burden of proving ownership in himself and the decision of the lower court must be affirmed.

Judgment affirmed.

CORYN, P. J., and ALLOY, J., concur.



73 Ill.App.2d 369

**Bobby Ray CLARK and Warren H. Jordan,**  
Plaintiffs-Appellants,

v.

**William B. FIELDS, Defendant-Appellee.**

Gen. No. 65-74.

Appellate Court of Illinois.

Fifth District.

July 22, 1966.

Action against bailee of airplane which was destroyed in fire which occurred in back yard of bailee's home. The Circuit Court, St. Clair County, Harold O. Farmer, J., rendered judgment for bailee and bailors appealed. The Appellate Court, Eberspacher, J., held that where bailee set fire to trash in open gulley which was filled with

dry grass and which was only 15 or 20 feet from airplane, and then returned to his house while fire was smouldering and airplane was destroyed, evidence did not rebut bailors' prima facie case of bailee's negligence in that they had delivered plane to bailee who could not return it upon demand.

Reversed and remanded with directions.

Goldenhersh, P. J., dissented.

#### 1. Bailment §12

Gratuitous bailee is bound to take such care in preservation of property entrusted to him as every prudent man takes of his own goods of like character.

#### 2. Bailment §31(1)

Burden of proceeding as to issue of negligence shifts to bailee after bailor has shown that goods were received in good condition by bailee and not returned to bailor on demand.

#### 3. Appeal and Error §1003

Reviewing court has duty to reverse where verdict is clearly against manifest weight of evidence.

#### 4. Bailment §11

Where bailee set fire to trash in open gulley which was filled with dry grass and which was only 15 or 20 feet from airplane, and returned to his house while fire was smouldering and airplane was destroyed, bailee did not use ordinary care and was liable for the loss.

Kassly, Weihl, Carr & Bone, East Louis, for appellants, Rex Carr, East Louis, of counsel.

Johnson, Ducey & Feder, Belleville, appellee.

EBERSPACHER, Justice.