

1954

Nellie A. Lovett v. The Continental Bank and Trust Co : Brief of Appellant

Utah Supreme Court

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Case No. 8199

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

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NELLIE A. LOVETT,

Plaintiff and Respondent,

— vs. —

THE CONTINENTAL BANK AND
TRUST COMPANY, a corporation,
Executor of the Estate of Mrs. J. U.
Giesy, also known as Juliet Galena
Giesy, Deceased,

Defendant and Appellant.

BRIEF OF APPELLANT

**SKEEN, THURMAN, WORSLEY
& SNOW,**

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BRIEF OF APPELLANT

STATEMENT OF FACTS

This action arose out of a claim asserted by Nellie A. Lovett, plaintiff below, respondent herein, against The Continental Bank and Trust Company, defendant below, appellant herein, as Executor of the Estate of Mrs. J. U. Giesy, for certain jewelry claimed by Mrs. Lovett to have been given to her by Mrs. Giesy, prior to her death, and for compensation for services claimed by Mrs. Lovett to have been rendered for Mrs. Giesy.

Mrs. Giesy was the widow of a physician who had formerly practiced in Salt Lake City. She resided in the Maryland Apartments on East South Temple Street. She died in 1953, at an age of approximately 76 years.

Mrs. Lovett is the wife of Harry D. Lovett, an accountant for 31 years at Utah Power and Light Company. He testified that his wife visited Mrs. Giesy in May of 1950 and from that time until the time of Mrs. Giesy's death on March 17, 1953, performed numerous personal services for Mrs. Giesy such as house work and personal beauty work; that during this period his wife accompanied Mrs. Giesy to The Continental Bank and Trust Company and to her physician, Dr. Smith, and that Mrs. Lovett from time to time made out checks for Mrs. Giesy and assisted her with her correspondence.

Curiously, however, Mrs. Lovett was not seeking employment when she went to visit Mrs. Giesy that May in 1950 (R. 56), and Mrs. Giesy had in her employ several persons from time to time — Mrs. Alene Douglas, a negress, Mrs. Haig and Mrs. Maddocks (R. 31, 38, 39).

On Sunday afternoons Mr. and Mrs. Lovett and Mrs. Giesy often went for automobile rides together, as Mr. Lovett said, to make Mrs. Giesy's life as happy as possible (R. 72). Mrs. Giesy, compared Mr. Lovett to her husband, Dr. Giesy, in commenting that Dr. Giesy never took her to the gas station to buy gasoline (R. 72).

Mr. and Mrs. Lovett had dinner with Mrs. Giesy "lots of times" during their association, sometimes in Mrs. Giesy's apartment, sometimes in restaurants while they would be enjoying automobile rides together. Sometimes Mrs. Giesy would pay the check, sometimes Mr. Lovett would pay the check (R. 72). None of the persons employed by Mrs. Giesy were observed eating with her, however (R. 62, 63).

Mrs. Giesy often went with Mrs. Lovett to watch Mr. Lovett bowl (R. 72).

In all, their association appeared to be a mutually enjoyable one, typical of many friendly social relationships. And as would be expected, Mrs. Lovett was never paid any money during all the time she was acquainted with Mrs. Giesy (R. 66). All employees of Mrs. Giesy were paid regularly (R. 67).

In spite of the obvious bond of affection between Mrs. Lovett and Mrs. Giesy, Mr. Lovett was careful to state that while Mrs. Giesy liked Mrs. Lovett, Mrs. Lovett's emotion was one of "respect" (R. 73).

About six months after the May visit at Mrs. Giesy's apartment, Mrs. Giesy, in the company of Mrs. Lovett purchased a large diamond ring (Ex. 1) from Daynes Jewelry for \$2,070.00.

In October, 1952, Mrs. Giesy entered the hospital (R. 35). She remained there for a period of six or seven

weeks (R. 36), leaving in the middle of November. While there, her jewelry was placed in a vault in the hospital (R. 46).

Mr. Lovett testified that during the latter part of November, 1952, while visiting Mrs. Giesy, Mrs. Giesy said that she wanted Mrs. Lovett to have the ring and handed it to her in an envelope (Ex. 2) which contained a box with the ring inside of the box.

On Friday, March 13, 1953, Mrs. Giesy became acutely ill. She continued to get worse from Friday morning until Saturday when Mrs. Maddocks, her nurse, called Dr. Smith (R. 79). Dr. Smith, the personal physician and friend of Mrs. Giesy called upon her that day and again Sunday morning. On Sunday morning Dr. Smith said that Mrs. Giesy would have to go to the hospital.

She had been very ill on the 13th, 14th and 15th; and Dr. Smith had wanted her to go to the hospital earlier, but she did not want to go (R. 117). On Sunday morning he insisted.

He told Mrs. Giesy that he did not want her to take her jewelry to the hospital because he had a great deal of difficulty with her jewelry at times when she was in the hospital before. He said:

“I don’t want to be bothered with it. I don’t intend to be responsible; I don’t intend to have the hospital held responsible.”

He suggested that she have Mrs. Lovett take charge of the jewelry. Mrs. Giesy said that she would (R. 117). She directed Mrs. Maddocks to call Mrs. Lovett so that she could turn the jewelry over to her.

At about one o'clock on March 15, 1953, Mrs. Giesy was taken to the hospital. Mrs. Maddocks testified that she was instructed to follow her with the jewels. However, Mrs. Maddocks said she had a blowout in the driveway so she called Mr. and Mrs. Lovett and requested that they take her to the hospital.

When Mr. and Mrs. Lovett arrived at Mrs. Giesy's apartment, Mrs. Lovett went in the apartment and Mr. Lovett remained in the car. When Mrs. Lovett came out of the apartment, she was carrying a jewel box (Ex. 12). Mr. Lovett, Mrs. Lovett, and Mrs. Maddocks then went to the L.D.S. Hospital. When they arrived at the hospital, Mrs. Lovett and Mrs. Maddocks went inside. Mr. Lovett remained in the car to examine the jewelry (R. 49). He saw in the box certain items of jewelry (Ex. 3 through 11, except 6). When Mrs. Lovett and Mrs. Maddocks returned, Mr. Lovett drove them home.

That evening Mr. and Mrs. Lovett returned to the hospital to visit Mrs. Giesy. Mr. Lovett testified that Mrs. Giesy said that she wanted Mrs. Lovett to have the jewelry. Mr. Lovett put the jewelry in his safety box at Walker Bank Building.

During the night of March 16 and the morning of March 17, Mrs. Giesy was in a stuporous condition. That morning Mr. and Mrs. Lovett were advised by a nurse at the hospital that Mrs. Giesy was dying and to hurry to the hospital. Twenty minutes later Dr. Smith called and said that Mrs. Giesy had died. Mr. and Mrs. Lovett went to the hospital, arriving there at approximately 6:30 a.m. They met a nurse, Mrs. Garrison, in Mrs. Giesy's room. Mrs. Giesy's body was in the room at the time. She had on her ears a pair of diamond earrings (Ex. 6). At the request of Mrs. Lovett, the earrings were removed from Mrs. Giesy's body by Mrs. Garrison and handed to Mrs. Lovett (R. 54).

Within four days following Mrs. Giesy's death, and within a day or two following the funeral, Mrs. Lovett called Mr. D. A. Skeen, Mrs. Giesy's attorney, and asked if she could see him. She was told that she could and she went to his office. She asked about the will and it was either read to her or she was given its substance. Mrs. Lovett previously knew she was a beneficiary under the will (R. 143).

She said that she had a box containing Mrs. Giesy's jewelry and asked what she should do with it. She said that she had taken it because she didn't want to leave it in the home after Mrs. Giesy's going to the hospital (R. 139). Mr. Skeen said he thought they should call Mr. O'Meara, Trust Officer of The Continental Bank, Executor of the Will. When Mr. O'Meara arrived, he asked

Mrs. Lovett for the jewelry which, he had been advised, was in her possession. She said that she would turn it over to him. She said that she had it in a safety deposit box for "safekeeping." She refused to turn over the large diamond ring purchased from Daynes, however, since, she claimed, "it had been given to her." (R. 131).

Mr. O'Meara, who arrived immediately after Mrs. Lovett had learned the contents of the will, observed that she was "upset, even shocked". Under the terms of the will, Mrs. Lovett was to receive a collection of ceramic geese figurines and a needlepoint rocking chair. Mr. Lovett was to receive a piano (R. 132, Ex. 21).

Mrs. Lovett called Dr. Smith and asked him to come to her home. He did so. Mrs. Lovett said she had all of the jewelry. Dr. Smith replied that when Mr. O'Meara asked for the jewelry, she should turn it over to him. She said that she would. She did not suggest in any way that it had been given to her (R. 119).

A day or two prior to April 3, 1953, Mr. O'Meara discussed the jewelry with Mr. Edward M. Morrissey, attorney, who at this time had been employed by Mrs. Lovett. He said if demand were made he would advise Mrs. Lovett to return the jewelry, without waiving any claim she might have. Demand was made on April 3, 1953 (Ex. 15). Mrs. Lovett was advised to return all jewelry except the large ring, that claim would probably not be made for the ring (R. 90, 91, 92). All jewelry except the ring was later delivered to the bank.

Sometime later, Mrs. Lovett came to Dr. Smith's office and said that she had turned all the jewelry over to the estate, except the large ring. She said "they were going to try to take the ring from her" (R. 120), and added that she was considering claiming all of the jewelry. Yet even to Dr. Smith, whom she had visited with Mrs. Giesy for almost three years, she did not say it had been given to her. She had been "advised to claim it." (R. 121).

On June 13, 1953, a suit was filed in which the first cause of action sought to recover the jewelry which had been delivered to The Continental Bank and Trust Company. The second cause of action asked for \$3,300.00, which it was alleged Mrs. Giesy agreed to pay Mrs. Lovett for services (R. 2). The Bank counterclaimed for the large ring. On February 16, 1954, the jury returned a verdict for the plaintiff for the jewelry, except the earrings which had been withdrawn from their consideration on motion, and for \$3,300.00.

On February 17, 1954, the Bank moved for a new trial or for judgment notwithstanding the verdict. This motion was denied. This appeal followed.

STATEMENT OF POINTS

I. THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO JUSTIFY THE VERDICT IN FAVOR OF PLAINTIFF ON PLAINTIFF'S FIRST CAUSE OF ACTION.

II. THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO JUSTIFY THE VERDICT IN FAVOR OF PLAINTIFF ON PLAINTIFF'S SECOND CAUSE OF ACTION.

1. There is no evidence to support an express contract of employment as pleaded in plaintiff's complaint.
2. The evidence of implied contract of employment is insufficient as a matter of law to justify the verdict in favor of plaintiff.

III. THE TRIAL COURT ERRED IN ITS CHARGE TO THE JURY.

1. Instruction No. 3 is erroneous as a matter of law in that it places the burden of negating a gift upon the defendant.
2. Instruction No. 6 is erroneous as a matter of law in that it is a misstatement of the law as it pertains to delivery of the subject of an alleged gift.

ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO JUSTIFY THE VERDICT IN FAVOR OF PLAINTIFF ON PLAINTIFF'S FIRST CAUSE OF ACTION.

In her first cause of action plaintiff claimed that she was the owner of and entitled to possession of the pieces of jewelry involved in this case. Her claim of ownership is based upon an alleged gift, claimed to have been made on March 13, 1953.

The law is well settled that one who asserts title by gift has the burden of proving that a gift was made, in-

cluding the existence of all of the elements essential to its validity. A clear and unmistakable intention on the part of the donor to make a gift of his property is one of the essential requisites. *Jones, et al., v. Cook* (Utah, 1950) 223 P. (2d) 423.

In the Jones Case, Leah C. Jones brought action against Mark B. Cook as Executor of the Estate of Mark Cook, his father, for conversion of an automobile which Mrs. Jones claimed as a residuary legatee under the last will and testament of Mark Cook. The evidence in that case showed that the defendant Mark B. Cook paid the taxes on the automobile beginning with the year 1944. Mark Cook died in July, 1943. The certificate of ownership was in the name of Mark Cook. Mark B. Cook used the automobile part of the time but it was left in a garage on the homestead of the parents most of the time. Defendant at that time had no passenger car of his own but he had a truck. Up to the time of trial defendant made no claim to the effect that he acquired title by virtue of a parole gift from his father in May, 1943. At the time of trial, however, he set up such a defense. His wife testified that in May, 1943, Mark Cook came over to the home of defendant and requested defendant to take him for a ride in the car. The witness was invited to go along. The father then handed the defendant the certificate of title to the automobile and said, "Mark, here is the certificate of ownership and the extra set of keys to the car. I'm giving it to you with the understanding that you take mother and I at any time we want to

go." Defendant did not tell plaintiff at any time prior to the trial that his father had made a gift of the car to him. His wife testified that the father told her husband to say nothing to anyone about the matter.

This Court said:

"There is no presumption in favor of a gift inter vivos. One who asserts title by gift inter vivos has the burden of proving that a gift was made including the existence of all of the elements essential to its validity. (Citing Authorities). The rule is that 'a clear and unmistakeable intention on the part of the donor to make a gift of his property is an essential requisite of a gift inter vivos.' (Citing Authorities)."

It was held in that case that the defendant did not prove a parole gift by clear and convincing evidence. The certificate of ownership was not endorsed; there was a serious dispute as to when defendant obtained possession of the certificate; and it was doubtful as to whether the alleged donor was divested of all dominion and control over the property since the father was unable to drive the car, and it was kept on the father's premises except when defendant was using it; defendant did not claim a gift for four years, and the assertion of such contention for the first time when the case went to trial suggests that the idea of a gift was an after-thought. The judgment of the lower court in favor of defendant was reversed.

The evidence before the court as to the alleged gift in the instant case is likewise not clear and convincing.

Mrs. Maddocks was specifically directed by Mrs. Giesy to follow the ambulance to the hospital with the jewelry. Instead, she telephoned Mrs. Lovett to come to the apartment, and when she arrived, handed to her the jewelry (R. 80).

By her instructions to Mrs. Maddocks, Mrs. Giesy expressed clearly an intention to retain dominion and control over the jewelry.

Mrs. Giesy told Dr. Smith just before she left for the hospital that she would have Mrs. Lovett take charge of her jewelry while she was in the hospital (R. 117).

No claim of gift was made while Mrs. Giesy was living even though Mrs. Maddocks handed the jewelry to Mrs. Lovett two days prior to Mrs. Giesy's death. It was not mentioned to Dr. Smith even though Mrs. Lovett had known him and of his relationship of friend and physician of Mrs. Giesy for at least three years.

A few days after Mrs. Giesy's death, at the home of Mrs. Lovett, Dr. Smith was told by Mrs. Lovett that she would turn over all jewelry except the large ring to Mr. O'Meara. She made no claim of gift (R. 119). This conversation, oddly, was at the instance of Mrs. Lovett. She wanted to know what to do with the jewelry. Peculiar, to say the least, if she thought Mrs. Giesy had given it to her. Why differentiate between the large ring and the other jewelry? The answer is obvious. She was "advised" to make claim of gift of the other jewelry (R. 121).

Mrs. Lovett told Mr. Skeen and Mr. O'Meara that she had the jewelry for "safekeeping" (R. 131). She said she would withhold the large ring, "because *it* had been given to her" (R. 131, emphasis added), but the other jewelry would be delivered to Mr. O'Meara.

Counsel attempted to show by the testimony of Mr. Morrissey, Mrs. Lovett's attorney at that time, that when the jewelry was delivered to the Bank, Mrs. Lovett was not admitting anything. It is indeed significant that the conversation between Mr. Morrissey and Mr. O'Meara was about two weeks after the conversations between Mrs. Lovett and Dr. Smith, and Mrs. Lovett and Mr. Skeen and Mr. O'Meara at Mr. Skeen's office. Mr. Morrissey did not advise Mrs. Lovett to return the jewelry until after April 3, 1953, two weeks after she had already agreed to do so. (R. 110, 119, 131).

Although numerous opportunities were presented, Mrs. Lovett never claimed that a gift of the jewelry to her had been made prior to the filing of her complaint. This conduct, viewed in the light of human experience, shows most persuasively that the claim of gift was a complete after-thought, made upon advice of counsel. If this were not a fact, Mrs. Lovett would have taken the stand in rebuttal, as permitted by the Dead Man's Statute, and denied it.

The verdict in this case upon Respondent's first cause of action lacks the support of clear and convincing evidence and should accordingly be reversed.

II. THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO JUSTIFY THE VERDICT IN FAVOR OF PLAINTIFF ON PLAINTIFF'S SECOND CAUSE OF ACTION.

- 1. There is no evidence to support an express contract of employment as pleaded in plaintiff's complaint.**

Paragraph 4 of plaintiff's second cause of action alleges "that between the first day of June, 1950, and the 16th day of March, 1953, plaintiff rendered services to said deceased at said deceased's express instance and request of the reasonable value of Thirty-three Hundred Dollars (\$3,300.00); that said deceased agreed to pay plaintiff the sum of Thirty-three Hundred Dollars (\$3,300.00) for said services."

Rule 8 (e) (2), U.R.C.P., provides "a party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses."

At the conclusion of the plaintiff's evidence, defendant moved to dismiss the second cause of action of plaintiff's complaint upon the ground that the evidence failed as a matter of law to show an express agreement between plaintiff and Mrs. Giesy for payment of the sum of Thirty-three Hundred Dollars (\$3,300.00) for services alleged to have been performed by plaintiff. Plaintiff contended that her pleading came within the rule permitting alternative statements of a claim in the same count and that the motion therefore should be denied.

The same objection was raised by defendant in its requested instructions for the jury wherein defendant sought to have the issue of implied contract taken from the jury.

Rule 8 (e)(2) permits alternative statements of a claim but does not permit inconsistent statements of a claim not pleaded alternatively. A fair reading of paragraph 4 of plaintiff's second cause of action states a claim upon express contract, the two sentences in that count being conjunctive rather than disjunctive. This being so, the issue of implied contract should not have been submitted to the jury and defendant's motion to dismiss the second cause of action should have been granted at the close of plaintiff's evidence.

In *Morris v. Russell*, (Utah, 1951) 236 P. (2d) 451, the plaintiff pleaded on one count an express contract for \$100.00 per month and on another count for *quantum meruit* for the reasonable value of his services. At the conclusion of the plaintiff's evidence, the court granted a motion to strike the count in *quantum meruit*. After the presentation of the defendant's evidence, however, the court vacated its former ruling and reinstated the count. The Supreme Court on appeal said that the adding of the *quantum meruit* count was equivalent to conforming to the proof and that, since there was no showing that the defendants were misled nor prevented from presenting their evidence or in any way prejudiced by reinstating the count, the trial court did not err in per-

mitting the case to go to the jury on the theory of implied contract.

Where, however, the defendant does not have adequate notice of his opponent's claim and is surprised, misled, or prejudiced in his defense, and has no opportunity to meet the issues presented, it is error to submit a case to the jury on a theory of implied contract when the cause of action was pleaded in express contract. See *Taylor v. E. M. Royle Corp.* (Utah, 1953), 264 P. (2d) 279.

Defendant in this case was prepared to meet a claim based upon an express contract. Defendant's investigation disclosed, and the trial confirmed, that there was in fact no such contract. Defendant was relatively assured that any proof of express contract would have to come from the plaintiff herself and, since defendant was of the opinion that the testimony of plaintiff would not be proper in this case, defendant considered it necessary to be very cautious so as to avoid a waiver of the incompetency of the plaintiff as provided for by the Dead Man's Statute.

If defendant had reasonably been apprised of the nature of the claim which would be made by plaintiff upon the trial of this case, defendant would have employed pretrial discovery procedures to determine precisely what services plaintiff claimed were performed and in all respects, defendant could have prepared itself to meet such proof.

Defendant, under the peculiar facts of this case, had no opportunity to determine the precise nature of plaintiff's claim by way of interrogatory or deposition of the plaintiff, since to employ either of those procedures might well have resulted in a waiver of the incompetency of the plaintiff.

It is clearly apparent that this case comes within the rule of *Taylor v. E. M. Royle Corp.*, *supra*, since defendant was not, prior to the submission of plaintiff's evidence in this case, ever called upon to meet a claim based upon *quantum meruit*.

We earnestly submit that defendant was misled by plaintiff's pleading, surprised by the proof, and prejudiced in the preparation of its defense.

2. The evidence of implied contract of employment is insufficient as a matter of law to justify the verdict in favor of plaintiff.

It is well settled that if, from all the circumstances surrounding the parties and under which the services were commenced and rendered, it can be reasonably inferred that the one expected to receive remuneration and the other intended to pay for the services, a promise to pay therefore may be implied. See *Mathias v. Tingey*, 39 Utah 561, 118 P. 781 (1911).

Correspondingly, if the circumstances repel the inference that compensation was intended, no obligation to pay will be implied. Thus it has generally been held

that when one performs work for another, relying solely upon his generosity in expectation of being rewarded by a gift or by a legacy, wages are not demandable in an action at law for the value thereof if the party benefited dies without making such provision. "Circumstances other than relationship of parties which repel inference of an agreement to pay for work performed at one's request or with his acquiescence." 54 A.L.R., 548, citing *Jacob v. Ursuline Nuns*, 2 Mart. (La.) 269, 5 Am. Dec. 730 (1812); *Grandin v. Reading*, 10 N.J. Eq. 370 (1855) Obiter; *Davison v. Davison*, 13 N.J. Eq. 264 (1861) Obiter; *Shakespeare v. Markham*, 10 Hun. (N.Y.) 311 (1877), affirmed in 72 N.Y. 300 (1878); *Miller v. Lash* (1881) 85 N.C. 51; *Little v. Dawson*, 4 Dall. (Pa.) 111, 1 L. Ed. 763 (1791); *Messier v. Messier*, 34 R.I. 233, 82 Atl. 966 (1912) Obiter.

The issue before the court on this appeal with respect to the particular point now under consideration is, therefore: Whether the services were rendered under such circumstances as the parties would reasonably contemplate that compensation was intended, or whether the services rendered would reasonably be interpreted as a gratuity in expectation of a legacy.

This would normally be a question of fact, but when the evidence, as here, fails to show circumstances from which a promise to pay can reasonably be inferred, respondent has failed to sustain her burden of proof.

An examination of the record shows:

Juliet Galena Giesy was 76 years of age at the time of her death. She had no close relatives, her husband having predeceased her (R. 25, 26);

Harry D. Lovett, husband of respondent, was employed as an accountant for Utah Power & Light Company and had been so employed for 31 years (R. 24);

Respondent began performing some personal services for Mrs. Giesy on or about June 1, 1950. She was not seeking employment (R. 56);

Respondent never was paid "in money" for any of the services she claimed to have performed, even though she claims to have performed services extending over a period of just less than three years. Every other person who performed a service of any kind for Mrs. Giesy was paid regularly (R. 66, 67, 68);

As appears from the entire record, and in spite of the efforts of Mr. Lovett to conceal this fact, the relationship of Mrs. Giesy and respondent was clearly something other than master and servant;

Mrs. Lovett was designated as "friend" on the admission records of the L.D.S. Hospital (R. 101);

Respondent told Mrs. Winder, a friend of Mrs. Giesy, that she was taking care of Mrs. Giesy as a friend and that she was doing it because she loved her (R. 129);

When respondent became aware of the provisions of Mrs. Giesy's will, she was "upset and shocked" (R. 131);

No claim was ever made for compensation for any services until after the death of Mrs. Giesy, indeed, not until the filing of this action;

Mr. Lovett, respondent and Mrs. Giesy spent considerable time together in a social relationship;

No comment was ever made with reference to pay for respondent, except the comment that respondent would be well paid.

It, therefore, appears clear from even a casual examination of this record that any services that might have been performed by respondent were intended to be gratuitous, in expectation of a legacy. There is no substantial evidence giving rise to the inference that either respondent or Mrs. Giesy intended the services to be upon a reasonable charge basis.

While a case of implied promise need not be made out by overwhelming evidence, it is certainly true that a bill for services alleged to have been rendered to an old person for a considerable time before death without collecting on account, or without anything in writing to show the agreement, or without showing that any demand had ever been made on the one cared for and what the outcome of that demand was, should be carefully scrutinized before allowance by the executor, and should be carefully scrutinized by this court.

The picture which this record presents is one of a person rendering some services to an elderly lady of means as a friend, intended to be gratuitous from their inception, and understood by the recipient to be gratuitous until her death. It is undoubtedly true that respondent expected a legacy and that she thought she was the recipient of a substantial legacy until the will was read. If she had thought herself to be an employee, she would certainly have made demand for payment at some time. A person in the peculiar position of Mrs. Lovett, however, might not be expected to make a demand since that might antagonize Mrs. Giesy and result in no legacy being provided. Respondent well knew this hazard. Everything respondent did points directly to a hope that substantial provision would be made for her in Mrs. Giesy's will.

Here respondent having pleaded but totally failed in her proof on express contract, asserted that Mrs. Giesy should reasonably have understood that respondent expected money for her apparent acts of kindness, that Mrs. Giesy should have known that Mrs. Lovett was motivated, not by friendship, but by expectation of gain.

Respondent claims she was to be well paid. She claims that jewelry having by her evidence a retail value of \$7,000.00 and a large diamond ring costing \$2,070.00 were given to her, but, apparently, that is not being well paid. She contends that Mrs. Giesy should have understood that her "witto Nell" (Ex. 2) was working for wages.

The law has a substantial interest in protecting testamentary disposition of property. The law should and does, carefully scrutinize the activities of one who performs personal services in an obvious attempt to ingratiate herself with an elderly lady of substantial means in the expectation of receiving a considerable legacy upon the death of the one befriended, and who when disappointed by the provision made, claims that all services were performed in reasonable expectation of payment by both parties to the relationship. This conduct is all too common, and should not be sanctioned by this court.

III. THE TRIAL COURT ERRED IN ITS CHARGE TO THE JURY.

- 1. Instruction No. 3 is erroneous as a matter of law in that it places the burden of negating a gift upon the defendant.**

Instruction No. 3 was :

“The burden is upon the plaintiff to prove by a preponderance of the evidence, as that term is hereinafter defined, the allegations of the 2nd cause of action of said complaint, as the same are set forth in Instruction No. 1; and the burden is upon the defendant to so prove the allegations of its counter-claim, as the same are set forth in Instruction No. 2.”

This instruction placed the burden upon the defendant to negative the elements of a gift so far as the large diamond ring was concerned, which is contrary to the rule of the recent case of *Jones et al v. Cook* (Utah, 1950)

223 P. 2d 423, and the case of *Blackburn et al., v. Jones*, 59 Utah 558, 205 P. 582 (1922).

The latter case was an action brought by an executor to quiet title to certain real property. The defendant claimed title through gift. A decree was entered quieting title in the defendant from which judgment the plaintiff appealed. The Court said that a court of equity will scrutinize with jealous care any claim such as was made by defendant and the burden will be upon him to satisfactorily explain that the conveyance was made either as a gift or for a valuable consideration. The judgment was reversed.

In *Jones et al., v. Cook, supra*, the burden was upon the defendant, who claimed title by gift, to prove his title by clear and convincing evidence.

In the instant case, the respondent, as a part of her case in chief, set out to prove that a gift had been made to her of the large ring by Mrs. Giesy. Since the title she claimed was derived by gift, she, not the executor, had the burden of proof upon this issue.

Instruction No. 3 placed an impossible burden upon appellant. Appellant was required to prove that a gift of the large ring had not been made, and, as counsel for the Army in the recent McCarthy hearings, Joseph Welch, recently said: "Any lawyer knows you cannot prove a negative."

Error upon something as fundamental as the burden of proof, which is confused, not corrected, by the charge to the jury considered as a whole, properly requires a new trial. Particularly is this true where, as here, substantial prejudice results.

2. **Instruction No. 6 is erroneous as a matter of law in that it is a misstatement of the law as it pertains to delivery of the subject of an alleged gift.**

Instruction No. 6 provides :

“To constitute a gift *inter vivos* of personal property there must be a delivery of the subject of the gift by the owner to the donee, or to a third person for the benefit of the donee, with the intention to transfer title of the property to the donee. When property is so delivered with such intent, it becomes the property of the donee and the owner has no further interest therein.

“If you believe and find from the evidence that Mrs. Giesy delivered the jewelry in question to plaintiff, or authorized or directed Mrs. Madocks to deliver the jewelry to plaintiff, with the intent that the jewelry was to go to and belong to plaintiff as her own property, then you are instructed that a valid gift of the jewelry was made to plaintiff and on this issue your verdict must be in favor of plaintiff and against defendant on plaintiff's first cause of action.”

It is fundamental that delivery to a third person, unless that person receives as trustee for the donee, is not a sufficient delivery to complete a gift. This question is to be determined from the intention of the donor, the situation and relationship of the parties, the kind and

character of the property, and the things said and done in regard thereto. If the property remains under the control of the donor although in the keeping of a third person and the third person is subject to the further direction of the donor as to its final disposition then the third person's relationship is that of agent. See *Reed et al. v. Knudson, et al.*, 80 Utah 428, 16 P. (2d) 347 (1932).

In this case any delivery to Mrs. Maddocks would have been as agent for the donor and, since under the instruction the jury could have found that delivery to Mrs. Maddocks was a sufficient delivery to constitute a completed gift, the instruction was erroneous and prejudicial.

This is true even though there was some evidence produced by the respondent to the effect that the jewelry was thereafter handed to respondent since the jury was not required to believe, and there was no evidence to show, that delivery to respondent was ever intended by Mrs. Giesy to be completed, whether immediately or at all. In this connection it is significant that respondent's evidence showed that Mrs. Maddocks was to take the jewelry to the hospital and were it not for the fact that she blew out a tire the jewelry would have been taken to the hospital where presumably Mrs. Giesy would have retained some control over it. The evidence in this regard was not clear and convincing and was made even less so by the erroneous instruction with reference to one of the vital elements of a gift.

CONCLUSION

Cases are all too common in which friends of a deceased take charge of personal belongings so that they will not be left in a vacant apartment and then later claim that a gift of the belongings had been made. Such a claim can in most cases be asserted without fear of contradiction, since the lips of the other party to the transaction have been sealed by death.

It is significant in this case to observe the gradual change of position asserted by Mrs. Lovett from the time of Mrs. Giesy's death until the time of the filing of this action. She first readily admitted that she was holding the jewelry for safekeeping and much later as an after-thought, and when advised to do so by counsel, she asserted absolute ownership, but, even then, only through her counsel. She herself never at any time claimed that a gift had been made to her. She never at any time contradicted the testimony of Dr. Smith, with whom she was friendly, nor that of Mr. Skeen, or Mr. O'Meara, even though she was competent under the Dead Man's Statute to testify as to these matters in rebuttal had she so desired.

Claims of gifts asserted after the death of the alleged donor must be proven by clear and convincing evidence. The law of wills has been developed over centuries and formal requirements have been laid down by courts and by legislatures to insure that a person who makes testamentary disposition of his property can

die with the conviction that his wishes, as solemnly expressed, will be carried out by his executor.

Mrs. Giesy's intention as shown by her will (Ex. 21) was that Anona Guthrie, her cousin's wife receive her jewelry. Appellant was charged with the responsibility of executing Mrs. Giesy's will and giving expression to her intention. Such intention should not be frustrated upon evidence which is uncertain and unconvincing.

Also far too common are claims for compensation proceeding from disappointment in the terms of a will. Such claims are as old as reported decisions, for example, *Little v. Doffin, supra*, decided in 1791. Such claims must be scrutinized carefully by reviewing courts, and where, as here, are contradicted by all of the objective evidence in the case, must be rejected.

Appellant respectfully urges that the evidence in this case lacks the quality of clear and convincing evidence and, therefore, fails to support the verdict; that the instructions given on delivery and on the burden of proof were manifestly erroneous; that these errors resulted in substantial prejudice to appellant in the trial of this case; and that the judgment, accordingly, should be reversed and a new trial ordered.

Respectfully submitted,

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