

1954

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

Utah Supreme Court

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Civil No. 8199

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IN THE SUPREME COURT
of the
STATE OF UTAH

DEC 13 1954

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.

Clerk.

Supreme Court, Utah

BRIEF OF RESPONDENT

McBROOM & HANNI,
Attorneys for Respondent.

INDEX

	Page
I. STATEMENT OF FACTS	1
II. POINTS ARGUED BY RESPONDENT	3
III. STATEMENT OF EVIDENCE.....	4
1. Evidence in Support of Recovery of Reasonable Value of Respondent's Services.....	4
2. Evidence in Support of Gift to Respondent of Diamond Ring (Ex. 1)	10
3. Evidence in Support of Gift to Respondent of Jewelry (Exs. 3-11, except Ex. 6).....	11
IV. ARGUMENT	17
Point I: The evidence was sufficient to support the verdict of the jury in favor of respondent on respondent's first cause of action for the recovery of the items of jewelry (Exs. 3-11, except Ex. 6) that were the subject matter thereof.	17
Point II: The evidence was sufficient to support the verdict of the jury in favor of respondent on respondent's second cause of action for the recovery of the reasonable value of respondent's services.	25
1. Whether or not the evidence was sufficient to support a recovery on an express promise of the decedent to pay respondent the specific sum of \$3,300.00 was immaterial.	25
2. The evidence was sufficient to support the verdict of the jury in favor of respondent for the recovery on an implied promise of the reasonable value of re- spondent's services rendered at decedent's special instance and request.	28
Point III: The instructions as given did not place the burden on appellant of negating a gift of the large diamond ring (Ex. 1) that was the subject of appellant's counterclaim. The instructions did not prejudice appellant.	30
Point IV: The instructions as given were not a misstatement of the law pertaining to delivery of the gift of jewelry (Exs. 3-11, except Ex. 6) that was the subject of respondent's first cause of action. The instructions did not prejudice appellant....	32

STATUTES AND RULES CITED

Sec. 78-24-2, U.C.A., 1953.....	16, 21
Rule 8 (e) (2), Utah Rules of Civil Procedure.....	27
Rule 12 (e), Utah Rules of Civil Procedure.....	26

CASES CITED

Clayton v. Ogden State Bank, 82 U. 564, 26 P. 2d 545 (1933).....	27
Jones v. Cook, 118 U. 562, 223 P. 2d 423 (1950).....	18, 23
Morris v. Russell (Utah, 1951) 236 P. 2d 451.....	28
Taylor v. E. M. Royle Corp. (Utah, 1953) 264 P. 2d 279.....	27

IN THE SUPREME COURT of the STATE OF UTAH

NELLIE A. LOVETT,
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— 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.

Civil
No. 8199

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Mrs. J. U. Giesy, also known as Juliet Galena Giesy, died testate on the 17th day of March, 1953, (R. 104, 105). She left an estate of the appraised value of approximately \$60,000.00 (R. 103, 104). Under the terms of Mrs. Giesy's will a cousin named Boyd Guthrie and his wife, Anona Guthrie, of Rifle, Colorado, were named as residuary legatees, and Anona Guthrie was named as legatee of Mrs. Giesy's jewelry with the exception of one diamond bracelet bequeathed to an Olive Taylor (Ex. 21, R. 137, 138). The will was executed on the 21st day of February, 1951, (R. 143). The Continental Bank and

Trust Company was appointed executor of the will (R. 1, 5).

Mrs. Nellie A. Lovett, plaintiff and respondent, commenced this action against the Continental Bank and Trust Company, defendant and appellant, as such executor. Respondent's complaint consisted of two causes of action (R. 1, 2).

In her first cause of action Mrs. Lovett sought the recovery of certain items of jewelry (Exs. 3-11) in the possession of the defendant executor. Mrs. Giesy had given these items of jewelry to Mrs. Lovett shortly prior to Mrs. Giesy's death, *infra* p. 11 *et seq.* After Mrs. Giesy's death, Mrs. Lovett had, pursuant to an agreement between her then attorney, Mr. Edward M. Morrissey, and the executor bank, turned these items of jewelry over to the executor for safekeeping pending the disposition of this matter, *infra* p. 15 *et seq.*

Mrs. Lovett's second cause of action consisted of two counts. The first count was in *quantum meruit* for recovery of the reasonable value of certain services performed by Mrs. Lovett for Mrs. Giesy between the first day of June, 1950, and the 16th day of March, 1953, at Mrs. Giesy's special instance and request, which services were alleged to be of the reasonable value of \$3,300.00. The second count was on an express contract of Mrs. Giesy to pay Mrs. Lovett \$3,300.00 for said services. Both counts were alleged in one paragraph (R. 2).

The defendant executor counterclaimed for the recovery of a large diamond ring (Ex. 1) in the possession of Mrs. Lovett (R. 6). Mrs. Giesy had given this ring

to Mrs. Lovett in November of 1952, approximately four months prior to Mrs. Giesy's death, *infra* p. 10 *et seq.* It was not turned over to the executor for safekeeping with the jewelry described in respondent's first cause of action, *infra* p. 16 *et seq.*

The trial resulted in a verdict in favor of the respondent and against the executor on the respondent's first cause of action for the recovery of the items of jewelry described therein (R. 186) and a verdict in favor of the respondent and against the executor on respondent's second cause of action for the recovery of the reasonable value of respondent's services in the amount of \$3,300.00 (R.187) and a verdict in favor of the respondent and against the executor on the executor's counterclaim for the recovery of the large diamond ring (R. 188). Judgment was entered in favor of the respondent on each of the verdicts (R. 183-185), and the executor's motions for new trial and judgment notwithstanding the verdicts were denied (R. 197). The defendant executor appeals.

POINTS ARGUED BY RESPONDENT

1. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY IN FAVOR OF RESPONDENT ON RESPONDENT'S FIRST CAUSE OF ACTION FOR THE RECOVERY OF THE ITEMS OF JEWELRY (EXS. 3-11, EXCEPT EX. 6) THAT WERE THE SUBJECT MATTER THEREOF.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY IN FAVOR OF RESPONDENT ON RESPONDENT'S SECOND CAUSE OF ACTION FOR THE RECOVERY OF THE REASONABLE VALUE OF RESPONDENT'S SERVICES.

1. Whether or not the evidence was sufficient to

support a recovery on an express promise of the decedent to pay respondent the specific sum of \$3,300.00 was immaterial.

2. The evidence was sufficient to support the verdict of the jury in favor of respondent for the recovery on an implied promise of the reasonable value of respondent's services rendered at decedent's special instance and request.

3. THE INSTRUCTIONS AS GIVEN DID NOT PLACE THE BURDEN ON APPELLANT OF NEGATING A GIFT OF THE LARGE DIAMOND RING (EX. 1) THAT WAS THE SUBJECT OF APPELLANT'S COUNTERCLAIM. THE INSTRUCTIONS DID NOT PREJUDICE APPELLANT.

4. THE INSTRUCTIONS AS GIVEN WERE NOT A MISSTATEMENT OF THE LAW PERTAINING TO DELIVERY OF THE GIFT OF JEWELRY (EXS. 3-11, EXCEPT EX. 6) THAT WAS THE SUBJECT OF RESPONDENT'S FIRST CAUSE OF ACTION. THE INSTRUCTIONS DID NOT PREJUDICE APPELLANT.

STATEMENT OF EVIDENCE

We do not agree with appellant's statement of facts.

1. EVIDENCE IN SUPPORT OF RECOVERY OF REASONABLE VALUE OF RESPONDENT'S SERVICES.

At the outset it is to be noted that appellant claims that the evidence was not sufficient to support the verdict of the jury in favor of respondent on respondent's second cause of action for the recovery on an implied contract of the reasonable value of respondent's services rendered to the decedent at the decedent's special instance and request. (Appellant's brief pp. 17-22.) The evidence in support of respondent's second cause of action was as follows.

In May of 1950 the circumstances of the parties were as follows. Mrs. Giesy was 73 years of age. She was frail and required a great deal of attention (R. 26, 73). She was the widow of Dr. J. U. Giesy, a former practicing physician in Salt Lake City, Utah, who had died in approximately 1945 (R. 25, 115, 125). She had no children and no brothers or sisters (R. 25). Her only relatives were an aunt named Juliet Guthrie and a cousin named Boyd Guthrie and his wife, Anona Guthrie, all of whom lived in Rifle, Colorado (R. 25). She lived alone in the Maryland Apartments on East South Temple Street in Salt Lake City, Utah, (R. 25). She occupied a large apartment consisting of a living room, dining room, bedroom, bathroom, kitchen and a long connecting hall (R. 71). Up to May of 1950 she had employed a Mrs. Gaynor (Ganger R. 56) to take care of her (R. 56). Mrs. Ganger quit working for Mrs. Giesy in May of 1950 (R. 26). Mrs. Giesy had previously become acquainted with the respondent, Mrs. Lovett, through Mrs. Ganger (R. 56). Mrs. Lovett is the wife of Mr. Harry D. Lovett. Mr. Lovett has been employed as an accountant for the Utah Power & Light Company for the past 31 years (R. 24).

In May of 1950 Mrs. Giesy called Mrs. Lovett on the telephone and asked her to come to Mrs. Giesy's apartment because she wanted to talk to her (R. 25). Mrs. Lovett and her husband, Mr. Harry D. Lovett, went to Mrs. Giesy's apartment in response to the telephone call. Mrs. Giesy had the following conversation with Mrs. Lovett in the presence of Mr. Lovett. Mrs. Giesy told Mrs. Lovett that Mrs. Ganger had quit working for her.

She asked Mrs. Lovett if Mrs. Lovett would take over Mrs. Ganger's work and do Mrs. Giesy's housework and beauty work. She told Mrs. Lovett that the beauty work would consist of washing and tinting her hair, giving her a facial, and doing her nails every Saturday and generally taking care of her hair and personal appearance throughout the week. Mrs. Lovett replied that she would. Mrs. Giesy then said, "I don't want you to be concerned about the pay, because you will be well paid for your services." (R. 26, 27.)

Thereafter, Mrs. Lovett commenced working for Mrs. Giesy on approximately June 1, 1950, (R. 27). Mrs. Lovett went to Mrs. Giesy's apartment daily (R. 29). She prepared Mrs. Giesy's meals, washed the dishes, polished the floors, dusted the furniture, washed the windows, hung the curtains and did the general housework (R. 28, 61, 70, 71). Each Saturday she washed and tinted Mrs. Giesy's hair, gave her a facial and manicured her nails (R. 28).

Mrs. Giesy was in the hospital for two weeks during the month of June, 1950, (R. 29). When Mrs. Giesy was released from the hospital, on the advice of her doctor, she employed a Mrs. Alene Douglas to work five days a week and to stay with her at night for approximately one month until August 1, 1950, (R. 29, 30). During the period that Mrs. Douglas was there, Mrs. Lovett continued to work for Mrs. Giesy and did the same work that she had previously done (R. 30, 31).

Mrs. Douglas quit on approximately August 1, 1950, (R. 31). At that time Mrs. Giesy had the following con-

versation with Mrs. Lovett in the presence of Mr. Lovett and Mrs. Douglas. Mrs. Giesy told Mrs. Lovett that Mrs. Douglas was quitting and asked Mrs. Lovett if she would continue on with her work. Mrs. Lovett said she would. Mrs. Giesy also asked Mrs. Lovett to accompany her when she went downtown because her doctor (Dr. David E. Smith, R. 116) had advised her that she could not go downtown alone. She also asked Mrs. Lovett to stay with her at night. (R. 31, 32.)

During the twenty-six month period from August 1, 1950, to October 1, 1952, Mrs. Lovett did the following work for Mrs. Giesy. Mrs. Lovett continued to do Mrs. Giesy's general housework, prepare her meals, do the dishes and do Mrs. Giesy's beauty work (R. 33-35, 61, 69-71.) Mrs. Lovett took Mrs. Giesy to her doctor two or three times a week. She went back and stayed with Mrs. Giesy at night for two or three hours each night (R. 32, 60.) During this period Mrs. Lovett spent an average of more than six hours a day at Mrs. Giesy's apartment and two or three hours at night (R. 34). On several occasions during this period Mrs. Giesy told Mr. Frank J. Nelson, a lifetime acquaintance of Mrs. Giesy's and disinterested witness, of the work Mrs. Lovett was doing for her and in particular that Mrs. Lovett was doing her housework, preparing her meals, doing her beauty work and taking care of her business (R. 92-93). Mrs. Giesy, on many occasions during this period, told Mrs. Lovett that she need not be concerned about her pay; and, that she would be well paid for her services (R. 35). During this entire twenty-six month period Mrs. Giesy employed no other help, with the exception of a negro woman who worked

for her a total of three days (R. 35).

Mrs. Giesy went to the hospital on October 1, 1952. She was in the hospital until approximately November 15, 1952, as a result of a serious skin ailment on her face, neck and ears. (R. 35, 36.) During this period Mrs. Lovett did the following work. She did Mrs. Giesy's beauty work and shopping. She laundered Mrs. Giesy's clothes daily. Mrs. Lovett, on advice of Mrs. Giesy's doctor, was required to disinfect her hands with lysol each time she handled Mrs. Giesy's clothes. She also took care of all of Mrs. Giesy's correspondence, which consisted of reading Mrs. Giesy's mail to her, writing for her and writing her checks, because the skin disease prevented Mrs. Giesy from wearing her spectacles and she could not see to the work. Mrs. Lovett stayed with Mrs. Giesy at the hospital at night when she was not covered by a special nurse. See testimony of Mr. Harry D. Lovett (R. 36-37, 66) and testimony of Mayme C. Garrison, Mrs. Giesy's nurse, (R. 96, 100).

Mrs. Giesy was released from the hospital in approximately the middle of November, 1952, (R. 38). During the period from November 15, 1952, to March 15, 1953, Mrs. Lovett continued to work for Mrs. Giesy. She did the following work. She prepared Mrs. Giesy's meals, did her beauty work and did general housework such as washing the floors and dusting. She took Mrs. Giesy to the doctor because Mrs. Giesy could not go alone. She took care of Mrs. Giesy's correspondence, wrote her letters, took care of Mrs. Giesy's bills and wrote her checks because Mrs. Giesy was having difficulty with her eyes.

She relieved a practical nurse at night. She worked for Mrs. Giesy an average of five or six hours a day. See testimony of Mr. Harry D. Lovett (R. 39-40) and testimony of Mrs. Kathryn Maddocks (R. 76-78, 86-87). During this period Mrs. Giesy had the following additional help. A Mrs. Haig and a night nurse were employed to stay with Mrs. Giesy for approximately one month after Mrs. Giesy was discharged from the hospital. Mrs. Haig and the night nurse were released in the middle of December, 1952, (R. 38, 29). Thereafter a Mrs. Kathryn Maddocks was employed as a practical nurse for Mrs. Giesy until March 15, 1953, (R. 38, 39, 75). On March 15, 1953, Mrs. Giesy again went to the hospital (R. 75, 76). She died on March 17, 1953, (R. 97, 98, 104, 105).

Mrs. Lovett worked for Mrs. Giesy a total of 33 months. She worked every day. She worked an average of in excess of six hours per day. (R. 41, 77, 78.) Mrs. Maddocks testified that the reasonable value of, and ordinary charge for, services such as those performed by Mrs. Lovett for Mrs. Giesy throughout the entire period, was \$1.25 to \$1.50 an hour (R. 78).

Mrs. Giesy repeatedly told Mrs. Lovett not to be concerned about her pay; and, that she would be well paid for her services. See testimony of Mr. Harry D. Lovett (R. 27, 35, 41) and corroborating testimony of Mrs. Maddocks (R. 78) and Mr. Frank J. Nelson (R. 94, 95).

Mrs. Lovett's second cause of action was submitted to the jury under instructions that the jury must find by a preponderance of the evidence: that Mrs. Lovett performed services for Mrs. Giesy at Mrs. Giesy's request;

that it was contemplated by Mrs. Giesy and Mrs. Lovett that Mrs. Giesy would pay Mrs. Lovett for such services; that Mrs. Giesy did not pay Mrs. Lovett for such services; and, that in determining the reasonable value of such services the jury might consider the nature of the services, the length of time required to perform the services and the relationship between the parties. See Instruction No. 3 (R. 168), Instruction No. 7 (R. 173), Instruction No. 10 (R. 176) and Instruction No. 11 (R. 177). The jury returned a verdict in favor of Mrs. Lovett on her second cause of action in the amount of \$3,300.00 (R. 187). We submit that the verdict was amply supported by a preponderance of the evidence.

2. EVIDENCE IN SUPPORT OF GIFT TO RESPONDENT OF DIAMOND RING (EX. 1).

The evidence in support of the verdict of the jury in favor of the respondent and against the appellant on appellant's counterclaim for recovery of the large diamond ring (Ex. 1, R. 41, 42, 45) was as follows. Mrs. Giesy purchased the large diamond ring from Daynes Jewelry Company in December of 1950 (R. 42, 89, 90). On the day that Mrs. Giesy purchased the ring, Mr. Lovett took Mrs. Giesy and Mrs. Lovett home to Mrs. Giesy's apartment. Mrs. Giesy showed the ring to Mr. Lovett in Mrs. Lovett's presence and said, "This ring is to be your wife's. I bought it for her." (R. 42, 43.)

In March of 1952, approximately a year prior to Mrs. Giesy's death, she told Mr. Alex P. Anderson, the manager of Daynes Jewelry Company, that she was going to give the large diamond ring to Mrs. Lovett (R. 89-91).

In November of 1952, after Mrs. Giesy was released from the hospital, she gave the ring to Mrs. Lovett in Mr. Lovett's presence under the following circumstances. Mrs. Giesy said to Mrs. Lovett that the ring was getting too large for her and she could not wear it any more. She then said, "I've given it to you, so now I want you to have it." Thereupon she handed the ring to Mrs. Lovett in an envelope (Ex. 2) inscribed, "To My 'Witto' Nell-Galena". (R. 43-46.) The large diamond ring has been in Mrs. Lovett's possession ever since that occurrence (R. 44).

Appellant offered no evidence in support of its counterclaim for the recovery of the large diamond ring, and the testimony of appellant's own witness, Dr. David E. Smith, was that Mrs. Giesy had given the ring to Mrs. Lovett (R. 119-120). We submit that the evidence is conclusive that Mrs. Giesy gave Mrs. Lovett the large diamond ring and that as a matter of law Mrs. Lovett is entitled to the ring as against appellant's counterclaim.

3. EVIDENCE IN SUPPORT OF GIFT TO RESPONDENT OF JEWELRY (EXS. 3-11, EXCEPT EX. 6).

Appellant claims that the evidence was not sufficient to support the verdict of the jury in favor of respondent on respondent's first cause of action for recovery of the items of jewelry (Exs. 3-11, with the exception of Ex. 6) that were the subject matter thereof. (Appellant's brief, pp. 9-13.) The evidence in support of respondent's first cause of action was as follows.

Mrs. Giesy executed her last will and testament on the 21st day of February, 1951, (R. 143). Under the terms

of the will, Anona Guthrie, the wife of Mrs. Giesy's cousin, Boyd Guthrie, was named as legatee of Mrs. Giesy's jewelry with the exception of one diamond bracelet bequeathed to an Olive Taylor. (Ex. 21, R. 137, 138.)

When Mrs. Giesy was in the hospital in October of 1952, she had a conversation with Mrs. Lovett in the presence of Mr. Lovett with reference to her jewelry in which she said that Dr. Smith had made arrangements with the superintendent of the hospital to put her jewelry in the hospital vault. She then told Mrs. Lovett that Dr. Smith might/w^d have turned it over to Mrs. Lovett, because she was going to have it anyway. She then said, “* * * because Anona will never wear any of my jewelry.” (R. 46.)

Miss Mayme C. Garrison attended Mrs. Giesy as a special nurse while Mrs. Giesy was in the hospital in October of 1952 (R. 96). Mrs. Giesy at that time told Miss Garrison that, “She wanted Mrs. Lovett to have her jewelry,” and that the Guthries had had all of her estate that they would get (R. 97). Mrs. Giesy also told Mr. Frank J. Nelson in a conversation concerning her will that the Guthries would receive nothing from her (R. 94). The latter conversation occurred in March of 1952, approximately a year prior to Mrs. Giesy's death (R. 93).

On Friday, March 13, 1953, Mrs. Kathryn Maddocks was attending Mrs. Giesy. Mrs. Giesy became very seriously ill. She continued to get worse until Sunday morning, March 15, 1953. On Sunday morning Dr. Smith came to Mrs. Giesy's apartment. (R. 79, 117.) Mrs. Maddocks

testified that at that time Dr. Smith and Mrs. Giesy had the following conversation in her presence. Dr. Smith told Mrs. Giesy that she would have to go to the hospital. Dr. Smith then asked Mrs. Giesy what she wanted done with her jewels while she was ill. Mrs. Giesy replied, "I want Nell to have them, they are hers." Mrs. Giesy then handed her jewel box (Ex. 12, R. 81) to Mrs. Maddocks and said, "These are for Nell, give them to Nell." (R. 79, 80, 83.) The jewel box contained Mrs. Giesy's jewelry (Exs. 3-11, except Ex. 6). (R. 49, 50.) Dr. Smith then left for the hospital (R. 79, 80, 118). He had previously called an ambulance for Mrs. Giesy (R. 118).

Thereafter the ambulance came, and Mrs. Giesy told Mrs. Maddocks to follow her to the hospital with the jewels. Mrs. Maddocks had a blowout in the driveway of the apartment. (R. 80.) She went back to the apartment and called the Lovetts and told them what had happened. The Lovetts said they would come and take her to the hospital. (R. 48, 80.) When the Lovetts arrived at the apartment, Mrs. Maddocks handed the jewel box to Mrs. Lovett and said, "Mrs. Giesy said you were to have these jewels." (R. 80.)

Mr. Lovett then drove Mrs. Lovett and Mrs. Maddocks to the hospital (R. 49, 81). Mrs. Lovett and Mrs. Maddocks went to Mrs. Giesy's room. While they were there, Mrs. Lovett asked Mrs. Giesy whether she should turn the jewels over to the Continental Bank. Mrs. Giesy replied, "No, those jewels are yours, Nell." (R. 81, 84.) Mr. Lovett took Mrs. Lovett and Mrs. Maddocks home. (R. 50, 81.)

That evening Mr. and Mrs. Lovett returned to the hospital and visited Mrs. Giesy. Mrs. Lovett again asked Mrs. Giesy whether or not she wanted Mrs. Lovett to turn the jewelry that Mrs. Maddocks had delivered to her over to the executor of Mrs. Giesy's estate. Mrs. Giesy replied, "No, the vultures will be after my things soon enough. I want you to have them." (R. 51, 52.)

Thereafter Mr. Lovett placed the jewelry in his safe deposit box in the Walker Bank and Trust Company (R. 52).

Mrs. Giesy wore her diamond earrings (Ex. 6) to the hospital (R. 98, 99). On Tuesday morning, March 17, 1953, Miss Mayme C. Garrison, Mrs. Giesy's nurse, telephoned the Lovetts and told them that Mrs. Giesy was dying. (R. 52, 98.) About twenty minutes later Dr. Smith called and told the Lovetts that Mrs. Giesy was dead (R. 52). They both asked Mr. and Mrs. Lovett to hurry up to the hospital (R. 52, 53). Mr. and Mrs. Lovett went to the hospital and met Miss Garrison at Mrs. Giesy's room. (R. 53). Miss Garrison told Mrs. Lovett that Mrs. Giesy said Mrs. Lovett was to have her jewelry and then asked Mrs. Lovett if she would care to remove Mrs. Giesy's earrings from her. Mrs. Lovett replied that she would not and asked Miss Garrison to do so. Miss Garrison then removed the earrings and handed them to Mrs. Lovett. (R. 99.) At the close of respondent's evidence respondent's counsel agreed that respondent's first cause of action so far as it pertained to the earrings (Ex. 6) be dismissed because respondent's evidence affirmatively showed that the earrings were not delivered to respondent prior to Mrs. Giesy's death (R. 114).

The appraised value in probate of all of the jewelry involved in this case, including the large diamond ring, was \$5,000.00. The retail value of all of the jewelry, including the large diamond ring, was \$7,000.00. (R. 104.)

In March of 1953, at the inception of the dispute involved in this matter, Mrs. Lovett employed Mr. Edward M. Morrissey, a member of the Utah State Bar, to represent her (R. 107, 108). Thereafter Mr. Morrissey had a conversation with Mr. W. L. O'Meara, the trust officer of the Continental Bank and Trust Company, with reference to the jewelry involved in this action. They both expressed the view that they did not want a lawsuit and, in order to avoid difficulties, agreed to the following: that Mr. O'Meara would make formal demand on Mrs. Lovett through Mr. Morrissey for return of the jewelry; that on receipt of the demand Mr. Morrissey would advise Mrs. Lovett to deposit the jewelry with the executor bank for safekeeping only; and, that in so doing Mrs. Lovett would not be relinquishing any right or waiving any claim that she might have to the jewelry and she would not be admitting anything with reference to her claim to the jewelry. See testimony of Mr. Edward M. Morrissey (R. 108-111) and testimony of Mr. W. L. O'Meara (R. 135-136). Thereafter Mr. O'Meara, by letter dated April 3, 1953, (Ex. 15) made demand on Mrs. Lovett through Mr. Morrissey for each of the items of jewelry described in respondent's first cause of action (Exs. 3-11, R. 1) and for the large diamond ring (Ex. 1, R. 6) described in appellant's counterclaim (R. 108, 113).

Upon receipt of the letter from Mr. O'Meara, Mr.

Morrissey had the following conversation with Mrs. Lovett. He told Mrs. Lovett of his conversation with Mr. O'Meara and advised Mrs. Lovett that she should turn over all of the jewelry, except the large diamond ring, to the executor for safekeeping pursuant to his agreement with Mr. O'Meara to the effect that in so doing she would not be relinquishing any of her rights to the jewelry and that it would be deposited with the bank for safekeeping only pending disposition of this matter. With reference to the large diamond ring, Mr. Morrissey advised Mrs. Lovett that, under the circumstances she related to him, she should not turn it over to the bank because it was his opinion that neither the heirs nor anyone else would make any claim to it (R. 110-112). Thereafter on April 7, 1953, Mrs. Lovett, pursuant to Mr. Morrissey's recommendation, delivered all of the items of jewelry (Exs. 3-11) to the executor bank, with exception of the large diamond ring (Ex. 1), and obtained a receipt for the same (Ex. 16, R. 111, 113).

As a part of respondent's case Mrs. Lovett was called as a witness to testify in her own behalf, not as to her transactions with decedent or as to any matters equally within hers and decedent's knowledge, but only with regard to the circumstances connected with her turning the jewelry over to the bank after decedent's death. Appellant objected that, since Mrs. Lovett was a party to an action against the executor of a decedent's estate, the dead man's statute, Section 78-24-2, U.C.A., 1953, made her incompetent to testify as a witness regardless of whether or not her testimony related to transactions with the decedent or matters equally within hers and the de-

cedent's knowledge. The trial court sustained appellant's objection and refused to permit Mrs. Lovett to testify to the circumstances connected with her turning the jewelry over to the bank after decedent's death. (R. 105.)

Respondent's first cause of action for recovery of the items of jewelry (Exs. 3-11, except Ex. 6) and appellant's counterclaim for recovery of the large diamond ring (Ex. 1) were both submitted to the jury under instructions that the burden was on respondent to prove each of the elements of a gift of each of the items of jewelry involved in this case by clear and convincing evidence. See Instruction No. 6A (R. 172) and Instruction No. 9 (R. 175). The jury returned a verdict in favor of respondent on her first cause of action for recovery of the items of jewelry that were the subject matter thereof and a verdict in favor of respondent and against appellant on appellant's counterclaim for the large diamond ring (R. 186, 188). We submit that the verdicts were amply supported by the evidence.

ARGUMENT

POINT I.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY IN FAVOR OF RESPONDENT ON RESPONDENT'S FIRST CAUSE OF ACTION FOR THE RECOVERY OF THE ITEMS OF JEWELRY (EXS. 3-11, EXCEPT EX. 6) THAT WERE THE SUBJECT MATTER THEREOF.

At the outset appellant sets forth the rule that the burden is on one who claims title to personal property by gift to prove all of the elements of a gift including

the intention of the donor by clear and convincing evidence. (Appellant's brief, pp. 9-11, citing *Jones v. Cook*, 118 U. 562, 223 P. 2d 423, 1950.) Appellant than purports to quote certain testimony from the record and from that testimony argues that the facts in the case before this court are not clear and convincing to the effect that Mrs. Giesy gave the items of jewelry that were the subject of respondent's first cause of action (Exs. 3-11, except Ex. 6) to Mrs. Lovett and, therefore, the verdict of the jury on respondent's first cause of action should be set aside. (Appellant's brief, pp. 12, 13.)

Appellant's conclusion is not correct. The trial court instructed the jury that the burden was on respondent to prove each of the elements of a gift of the jewelry involved in this case by clear and convincing evidence, and that the intention of the donor to make a gift must be shown by the evidence to be clear and unmistakable, Instruction No. 6A (R. 172) and Instruction No. 9 (R. 175). We submit that the evidence was clear and convincing that Mrs. Giesy gave respondent the jewelry (Exs. 3-11, except Ex. 6) that was the subject of respondent's first cause of action, and that in any event there was substantial evidence to support the verdict of the jury.

Respondent's evidence was as follows. After Mrs. Giesy executed her will in February of 1951, (R. 143) she repeatedly stated that she was going to give her jewelry to Mrs. Lovett and that the Guthries had had all of her estate that they would get. See testimony of Mr. Lovett (R. 46), Miss Mayme C. Garrison (R. 96, 97) and Mr. Frank J. Nelson (R. 94). On March 15, 1953, when Dr.

Smith told Mrs. Giesy that she would have to go to the hospital and asked her what she wanted done with her jewels, Mrs. Giesy replied, "I want Nell to have them, they are hers." Mrs. Giesy then handed her jewel box to Mrs. Maddocks and said, "These are for Nell, give them to Nell." (R. 79, 80, 83). Thereafter Dr. Smith left for the hospital (R. 79, 80, 118). When the ambulance came, Mrs. Giesy told Mrs. Maddocks to follow her to the hospital with the jewels, but due to difficulty with her automobile Mrs. Maddocks was unable to do so (R. 80). Mrs. Maddocks called the Lovetts and told them what had happened, and the Lovetts said that they would come and take her to the hospital. (R. 48, 80.) When the Lovetts arrived at the apartment, Mrs. Maddocks handed the jewel box to Mrs. Lovett and said, "Mrs. Giesy said you were to have these jewels." (R. 80). Thereafter on two occasions Mrs. Lovett asked Mrs. Giesy at the hospital whether or not Mrs. Giesy wanted Mrs. Lovett to turn the jewels that Mrs. Maddocks had delivered to her over to the executor. Mrs. Giesy replied, "No, those jewels are yours, Nell," (R. 81, 84) and "No, the vultures will be after my things soon enough, I want you to have them." (R. 51, 52.) *Supra*, p. 11 *et seq.*

Furthermore the inferences drawn by appellant from the record are not correct.

1. Appellant claims that the fact that Mrs. Giesy directed Mrs. Maddocks to follow the ambulance to the hospital with the jewelry evidenced a clear intention on the part of Mrs. Giesy to retain dominion and control over the jewelry, appellant's brief, p. 12. Mrs. Giesy's

direction to Mrs. Maddocks to follow her to the hospital with the jewels was not inconsistent with her direction to Mrs. Maddocks to give the jewels to Mrs. Lovett. Following that occurrence Mrs. Giesy told Mrs. Lovett at the hospital on two occasions, in response to a question as to whether or not Mrs. Lovett should turn the jewelry over to the executor, that Mrs. Lovett should not do so, that the jewels belonged to Mrs. Lovett and that she wanted Mrs. Lovett to have them. The other testimony detailed above evidences a clear intention on the part of Mrs. Giesy to give the jewelry to Mrs. Lovett.

2. Appellant asserts that Mrs. Giesy told Dr. Smith that she would have Mrs. Lovett take charge of her jewelry while she was in the hospital, appellant's brief, p. 12. Dr. Smith so testified (R. 117). From this testimony appellant infers that Mrs. Giesy did not intend to give the jewelry to Mrs. Lovett, *ibid.* p. 12. Mrs. Maddocks testified that Mrs. Giesy told Dr. Smith, "I want Nell to have them, they are hers," and then handed her jewel box to Mrs. Maddocks and said, "These are for Nell, give them to Nell." The other testimony detailed above is directly in conflict with that of Dr. Smith on this issue and evidences a clear intention on the part of Mrs. Giesy to give the jewelry to Mrs. Lovett.

3. Appellant asserts that the verdict of the jury is not supported by clear and convincing evidence that Mrs. Giesy did give Mrs. Lovett the jewelry because Mrs. Lovett did not take the witness stand to rebut the testimony of Dr. Smith, Mr. O'Meara and Mr. D. A. Skeen to the effect that Mrs. Lovett did not tell them that Mrs.

Giesy gave her the jewelry in certain conversations concerning turning the jewelry over to the executor, appellant's brief, pp. 12-13. We submit that that above conclusion is not correct and that no such inference can be drawn from the record.

a. Mrs. Lovett took the witness stand as a part of her own case to testify to the circumstances following Mrs. Giesy's death connected with her turning the jewelry over to the executor bank. Appellant objected that the dead man's statute, Sec. 78-24-2, U.C.A., 1953, made Mrs. Lovett incompetent to testify as a witness regardless of the fact that her proffered testimony pertained to matters that occurred after Mrs. Giesy's death and not to any transactions with the decedent or matters equally within hers and the decedent's knowledge. The trial court sustained appellant's objection and refused to permit Mrs. Lovett to testify to the circumstances connected with turning the jewelry over to the executor. (R. 105.) *Supra*, p. 16, *et seq.* Section 78-24-2, U.C.A., 1953, makes a party to an action against an executor incompetent to testify only as to transactions with the decedent and matters equally within the party's and the decedent's knowledge.

b. Furthermore, the testimony of Dr. Smith, Mr. O'Meara and Mr. Skeen was so conflicting and so irreconcilable with the basic facts of the case that it was apparent that these witnesses were testifying to their present impressions of a past event and not to what they actually saw and heard. Respondent's counsel, therefore,

determined that it was not necessary to call Mrs. Lovett in rebuttal.

Dr. Smith testified that, when Mrs. Giesy arrived at the hospital, Mrs. Giesy explained to him that she was late because she waited until Mrs. Lovett came to the apartment and that she then turned the jewelry over to Mrs. Lovett herself (R. 118, 123, 124). Mr. Skeen testified that Mrs. Lovett told him that, when Mrs. Giesy left for the hospital, Mrs. Lovett put the jewelry in the jewel box and took it herself (R. 139, 144). The actual facts, as testified to by Mrs. Maddocks who was present at the time, were as follows. Mrs. Giesy handed the jewel box to Mrs. Maddocks with directions to give the jewels to Mrs. Lovett. After Mrs. Giesy left for the hospital, Mrs. Maddocks attempted to follow the ambulance. She had a mishap with her automobile and called the Lovetts. When Mrs. Lovett arrived at the apartment, Mrs. Maddocks handed the jewel box to Mrs. Lovett and said, "Mrs. Giesy said you were to have these jewels." (R. 79, 80, 82, 83.)

Mr. O'Meara testified that in the conference in Mr. Skeen's office Mrs. Lovett said that she would not turn the large diamond ring (Ex. 1) over to the executor because it had been given to her (R. 131). Mr. Skeen testified that in the same conference Mrs. Lovett made no claim to any of the jewelry and in particular that she did not claim ownership of the large diamond ring (R. 144).

c. Appellant asserts that Mrs. Lovett told Mr.

O'Meara in the conference with Mr. Skeen that she had the jewelry for "safekeeping", appellant's brief, p. 13. Mr. O'Meara's testimony was not to that effect. Mr. O'Meara testified that Mrs. Lovett told him that *she had the jewelry in her safety deposit box* for the purpose of safekeeping and not that she was holding it for safekeeping. (R. 131.)

d. Furthermore the record shows the following. Mrs. Giesy gave the jewelry to Mrs. Lovett on March 15, 1953. Mrs. Giesy died on March 17, 1953. In March of 1953, Mrs. Lovett employed an attorney to represent her at the inception of the dispute involved in this matter (R. 107, 108). Thereafter she deposited the jewelry with the executor bank for safekeeping only, and only on the condition that in so doing she was not relinquishing any of her rights, or waiving her claim, or admitting anything with reference to her claim, to the jewelry. See testimony of Mr. Edward M. Morrissey (R. 108-111) and testimony of Mr. W. L. O'Meara (R. 135-136). *Supra*, p. 15 *et seq.* Mrs. Lovett did not deposit the large diamond ring with the executor because her attorney advised her not to do so because it was his opinion that under the circumstances neither the heirs nor anyone else would make any claim to it (R. 111-112). The large diamond ring had been given to Mrs. Lovett in November of 1952, four months prior to Mrs. Giesy's death (R. 43-46).

The decision in *Jones v. Cook*, 118 U. 562, 223 P. 2d 423, appellant's brief, pp. 10-11, is to be distinguished on its facts and in principle from the case before this

court. In *Jones v. Cook* the plaintiffs, residuary legatees under the will of their father, sued the defendant executor for conversion of an automobile that belonged to the father during his lifetime. The defendant executor was also a son of the decedent. The defendant pleaded as defenses that the plaintiffs' action was barred by the statute of limitations and a decree in the probate proceedings. The defendant claimed for the first time at trial that he acquired title to the automobile by gift from the decedent. The only evidence in support of the defendant's claim of a gift was his wife's testimony to the effect that the decedent had given him the automobile a few weeks prior to decedent's death. The evidence showed that the automobile had remained in the possession of the decedent and his wife most of the time after the alleged time of the gift, that the certificate of title was never endorsed by the decedent to the defendant and that the defendant did not claim that the decedent had given the automobile to him for over four years after the decedent's death. The trial court refused to find that the decedent had given the automobile to the defendant. The supreme court affirmed the decision of the trial court on that issue.

The case before this court was submitted to the jury under instructions that the burden was on respondent to prove all the elements of a gift by clear and convincing evidence, and the jury found in favor of respondent. We submit that the verdict was amply supported by clear and convincing evidence.

POINT II.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY IN FAVOR OF RESPONDENT ON RESPONDENT'S SECOND CAUSE OF ACTION FOR THE RECOVERY OF THE REASONABLE VALUE OF RESPONDENT'S SERVICES.

1. Whether or not the evidence was sufficient to support a recovery on an express promise of the decedent to pay respondent the specific sum of \$3,300.00 was immaterial.

Paragraph No. 4 of respondent's second cause of action reads verbatim as follows:

"4. That between the 1st day of June, 1950, and the 16th day of March, 1953, plaintiff rendered services to said deceased at said deceased's special instance and request of the reasonable value of \$3,300.00. That said deceased agreed to pay plaintiff the sum of \$3,300.00 for said services." (R. 2)

Appellant claims that respondent is limited on her second cause of action to recovery on an express promise of Mrs. Giesy to pay respondent the specific sum of \$3,300.00. Appellant reaches this result by the following process of reasoning. (1) That the allegations in paragraph 4 for recovery in *quantum meruit* and for recovery on the express promise are written in the conjunctive rather than the disjunctive. That, therefore, paragraph 4 does not state a claim for recovery on two theories in the alternative. That the Utah Rules of Civil Procedure do not authorize this form of pleading. That as a result respondent is limited to recovery on an express promise of Mrs. Giesy to pay the specific sum of \$3,300.00 for services rendered. (2) That a fair reading of paragraph

4 leads to the conclusion that respondent was only seeking to recover on an express promise of Mrs. Giesy to pay the specific sum of \$3,300.00 because the allegations are written in the conjunctive rather than the disjunctive. That the appellant could not determine the exact nature of respondent's claim by taking her deposition or interrogatories because employment of such procedure would have resulted in waiver of respondent's incompetency under the dead man's statute to testify at trial. That had appellant known that respondent was seeking to recover the reasonable value of respondent's services performed at Mrs. Giesy's request, appellant would have employed discovery procedures regardless of waiver of respondent's incompetency. That, therefore, appellant was misled and prejudiced in the preparation of its defense; and, as a result, respondent is limited to recovery on the express promise. (Appellant's brief, pp. 14-17.)

We submit that neither appellant's conclusion nor the premises on which it is based are correct.

1. Paragraph 4 contains a statement of a claim for recovery on two theories, the one in *quantum meruit* and the other on an express contract. The allegations are in the disjunctive and not the conjunctive. The two counts are expressed in separate sentences, and they are set forth alternately. If appellant was possibly confused by absence of use of the word "or," appellant could have enlightened itself by a motion for more definite statement under Rule 12(e) of the Utah Rules of Civil Procedure, which motion would probably have been denied because the pleading is clear on its face.

2. Appellant claims that it was misled. We do not know in what plainer language appellant could have been informed that respondent was seeking to recover the reasonable value of her services performed at Mrs. Giesy's special instance and request than by the allegation, "That between the 1st day of June, 1950, and the 16th day of March, 1953, plaintiff rendered services to said deceased at said deceased's special instance and request of the reasonable value of \$3,300.00." Furthermore appellant could have employed discovery procedures to determine the exact nature of respondent's claim. The taking of the deposition of an adverse party does not waive the right to object to the competency of the party's testimony at trial under the dead man's statute, *Clayton v. Ogden State Bank*, 82 U. 564, 26 P. 2d 545 (1933).

3. Both theories of recovery are alleged in one count as authorized by Rule 8(e) (2) of the Utah Rules of Civil Procedure, which reads as follows :

"A party may set forth two or more statements of a claim * * * alternately or hypothetically, either in one count * * * or in separate counts * * *. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims * * * as he has regardless of consistency * * *."

The decision in *Taylor v. E. M. Royle Corp.*, (Utah, 1953) 264 P. 2d 279, is not authority for appellant's proposition. In the *Taylor* case the plaintiff declared on an ex-

press contract only. He neither pleaded (as was done in the case before this court) nor offered proof (as was done in the case before this court) of a claim in *quantum meruit*. At the close of all the evidence the trial court took the case under advisement and thereafter adjudged that the plaintiff was entitled to recover in *quantum meruit*. The supreme court reversed because the defendant had no notice whatsoever of a claim for the reasonable value of the plaintiff's services. The court distinguished and cited with approval *Morris v. Russell* (Utah, 1951) 236 P. 2d 451, wherein the plaintiff pleaded, as was done in the case before this court, a claim for recovery on an express contract and a claim for recovery in *quantum meruit* and the court held that the plaintiff was entitled to recover in *quantum meruit*.

2. The evidence was sufficient to support the verdict of the jury in favor of respondent for the recovery on an implied promise of the reasonable value of respondent's services rendered at decedent's special instance and request.

Appellant's argument on this issue is addressed solely to conflicting inferences that were resolved by the jury in favor of respondent. The inferences are drawn by appellant from a purported quotation of isolated bits of testimony that is not supported by the record. Appellant asserts that the issue before this court is whether Mrs. Lovett and Mrs. Giesy reasonably contemplated that Mrs. Lovett would be paid for her services, or whether the services would reasonably be interpreted as a gratuity. Appellant then states that the evidence does not show circumstances from which a promise to pay

could reasonably be inferred. (Appellant's brief, pp. 17-22.)

The issue before this court is whether or not there was any substantial evidence to support the verdict of the jury. We submit the matter on the record set forth above, p. 4, et seq., with the following additional comments. One does not engage in employment an average in excess of six hours a day for thirty-three months doing the following work: domestic work consisting of preparing meals, washing dishes, washing and polishing floors, laundering clothing, washing windows, and the general household duties of a large apartment; beauty work consisting of washing and tinting hair, giving facials and manicuring nails an average of in excess of once each week; correspondence work consisting of reading and writing mail, taking care of accounts and writing checks; and, personal work consisting of the care of the person of another, without both parties contemplating that the services will be paid for in money. This is particularly true where a person in the position of Mrs. Lovett was specifically asked to take over the duties of a former domestic employee and was repeatedly told that she need not be concerned about payment for her services because she would be well paid. The evidence in this case is that Mrs. Lovett's services were worth the reasonable value of \$1.25 to \$1.50 per hour (R. 78). Computed at that rate over a period of thirty-three months at an average of six hours per day, Mrs. Lovett's services were reasonably worth between two and three times the amount of the \$3,300.00 claim that she presented in pro-

bate. We submit that the verdict of the jury was amply supported by the evidence.

POINT III.

THE INSTRUCTIONS AS GIVEN DID NOT PLACE THE BURDEN ON APPELLANT OF NEGATING A GIFT OF THE LARGE DIAMOND RING (EX. 1) THAT WAS THE SUBJECT OF APPELLANT'S COUNTERCLAIM. THE INSTRUCTIONS DID NOT PREJUDICE APPELLANT.

Appellant claims that Instruction No. 3 placed the burden on appellant of negating a gift of the large diamond ring that was the subject of appellant's counterclaim.

1. Instruction No. 3 read as follows :

“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.*” (R. 168.) (Italics added.)

Instruction No. 2 (R. 166) set forth the allegations of appellant's counterclaim, which were in the ordinary form of a complaint in replevin, and alleged ownership and right to possession of the large diamond ring in Mrs. Giesy prior to her death, right to possession in the executor as her successor, a demand on Mrs. Lovett and refusal. The burden was on appellant to prove a *prima facie* case in replevin, as set forth in Instruction No. 2 and 3, by proving original ownership and right to possession in Mrs. Giesy, right to possession in the executor as her

successor and a demand and refusal. Respondent admitted those facts by proving that Mrs. Giesy purchased the ring from her own funds in December of 1950 (R. 42, 89-91), by admitting that appellant was executor of her estate (R. 1) and proving a demand by the executor (Ex. 15, R. 108, 113) and withholding of the ring by respondent (Ex. 16, R. 111, 113). *Supra*, p. 10 *et seq.*

It then became the burden of respondent to prove by clear and convincing evidence that Mrs. Giesy gave the large diamond ring to her. This burden on respondent was amply covered by Instructions No. 6A and 9, which were not in conflict with Instruction No. 3. Instruction No. 6A read as follows :

“The plaintiff, Mrs. Lovett, claims she owns *each of the items of jewelry in this case* because, she claims, the jewelry was given to her by Mrs. Giesy. You are instructed that *a person who claims ownership of property by gift has the burden of proving each of the elements of gift by clear and convincing evidence.*

“If you do not find that all of these elements of a gift to Mrs. Lovett have been proved by clear and convincing evidence, it would be your duty to find in favor of the defendant and against the plaintiff.” (R. 172.) (Italics added.)

In Instruction No. 9 the court instructed the jury that the intention of the donor to make a gift must be shown by the evidence to be clear and unmistakable (R. 175). The instructions, when read as a whole as required by Instruction No. 13 (R. 179), did not place the burden on appellant to negative a gift of the large diamond ring. They did place the burden on respondent to prove the

gift by clear and convincing evidence.

2. The instructions as given could not possibly have prejudiced appellant. The uncontradicted testimony of respondent's witnesses (R. 89-91, R. 43-46), the uncontradicted written evidence in Mrs. Giesy's own handwriting (Ex. 2) and appellant's own evidence (Dr. David E. Smith, R. 119-120) showed conclusively that Mrs. Giesy did give the large diamond ring to Mrs. Lovett. Appellant offered no evidence to the contrary. We submit that the evidence is conclusive that Mrs. Giesy gave Mrs. Lovett the ring and that as a matter of law Mrs. Lovett is entitled to the ring as against appellant's counterclaim. The instructions could not, therefore, have prejudiced appellant.

POINT IV.

THE INSTRUCTIONS AS GIVEN WERE NOT A MISSTATEMENT OF THE LAW PERTAINING TO DELIVERY OF THE GIFT OF JEWELRY (EXS. 3-11, EXCEPT EX. 6) THAT WAS THE SUBJECT OF RESPONDENT'S FIRST CAUSE OF ACTION. THE INSTRUCTIONS DID NOT PREJUDICE APPELLANT.

The second paragraph of Instruction No. 6 reads as follows:

"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." (R. 171.)

1. Appellant claims that Instruction No. 6 was erroneous in that under the instruction the jury could have found that delivery to Mrs. Maddocks was a sufficient delivery to constitute a completed gift without delivery of the jewelry to Mrs. Lovett, the donee, appellant's brief, pp. 24-25. We submit that under the instructions as given the jury could not have found that delivery to Mrs. Maddocks was a sufficient delivery to constitute a completed gift. The instructions by their express terms and by necessary implication did require that the jury find that the jewelry was in fact delivered to Mrs. Lovett by Mrs. Giesy or by Mrs. Maddocks acting pursuant to Mrs. Giesy's authorization and direction.

a. The clear import of Instruction No. 6, standing alone, was that the jury must find that the jewelry was in fact delivered to Mrs. Lovett by Mrs. Giesy or by Mrs. Maddocks. The words, "If you believe and find from the evidence that Mrs. Giesy delivered the jewelry in question to plaintiff, * * *" in the phrase, "If you believe and find from the evidence that Mrs. Giesy delivered the jewelry in question to plaintiff, or authorized or directed Mrs. Maddocks to deliver the jewelry to plaintiff, * * *" are an express or necessarily implied instruction that Mrs. Giesy must have delivered the jewelry to Mrs. Lovett directly or that she must have done so indirectly through Mrs. Maddocks acting under her authorization and direction.

b. Instruction No. 5 (R. 170) and Instruction No. 6, when read as a part of a connected whole, required the

jury to believe that the jewelry was in fact delivered to Mrs. Lovett by Mrs. Giesy or by Mrs. Maddocks acting under Mrs. Giesy's authorization and direction. Instruction No. 6 required the jury to believe that Mrs. Giesy delivered the jewelry in question to Mrs. Lovett, or authorized or directed Mrs. Maddocks to deliver the jewelry to Mrs. Lovett. Instruction No. 5 provided that, "Delivery, as used in these instructions, means *there must be an actual transfer by the donor of the possession, dominion and control of the property to the donee. A manual transfer of the property by the owner, or by a person authorized or directed to do so by the owner to the donee, is a sufficient delivery*, as that term is used and defined in these instructions." (Italics added.) Instruction No. 5 required the jury to believe that there was an actual transfer of possession, dominion and control of the property, to the donee by the donor, or by the person authorized or directed to do so by the donor, and Instruction No. 6 required the jury to believe that Mrs. Giesy delivered the jewelry to Mrs. Lovett, or authorized or directed Mrs. Maddocks to do so. The only reasonable interpretation of the two instructions when read together is that the jury was required to find that there was an actual transfer of possession, dominion and control of the property to Mrs. Lovett as donee by Mrs. Giesy or by Mrs. Maddocks acting under Mrs. Giesy's authorization and direction.

2. Appellant also asserts that Instruction No. 6 is erroneous because under the instruction the jury was not required to believe that delivery to respondent was ever intended by Mrs. Giesy to be completed, appellant's brief,

pp. 24-25. We submit that appellant's contention is not correct. Instruction No. 6 expressly provided that Mrs. Giesy must have delivered the jewelry to Mrs. Lovett, "or authorized or directed Mrs. Maddocks to deliver the jewelry to Mrs. Lovett with the intent that the jewelry go to and belong to Mrs. Lovett as her own property." Instruction No. 5 provided that delivery meant that there must have been an actual transfer of possession, dominion and control of the subject matter of the gift to the donee by the donor or by a person authorized or directed to do so by the donor. Both Instruction No. 6, standing alone, and the instructions as a whole, expressly required that the jury find that Mrs. Giesy intended the jewelry to be delivered to Mrs. Lovett.

3. The instructions as given could not possibly have prejudiced appellant. The admitted facts of the case were that the jewelry was in fact delivered to Mrs. Lovett. Respondent's and appellant's own witnesses testified that the jewelry was delivered to Mrs. Lovett. Respondent's witnesses testified that Mrs. Maddocks delivered the jewelry to Mrs. Lovett at the apartment pursuant to Mrs. Giesy's authorization. Respondent's witnesses further testified that, when Mrs. Giesy thereafter was informed at the hospital that the jewelry had been delivered to Mrs. Lovett, Mrs. Giesy told Mrs. Lovett not to turn the jewelry over to the executor, that the jewelry was Mrs. Lovett's and that she wanted Mrs. Lovett to have it. See testimony of Mrs. Maddocks (R. 79-84) and

testimony of Mr. Lovett (R. 48-52). Dr. David E. Smith, appellant's own witness, testified that Mrs. Giesy told him at the apartment that she was going to turn the jewelry over to Mrs. Lovett and that thereafter at the hospital Mrs. Giesy told him that she had delivered the jewelry to Mrs. Lovett (R. 117-124). The evidence is undisputed that Mrs. Lovett had possession of the jewelry immediately following Mrs. Giesy's death. The only question in the case was whether the jewelry was delivered to Mrs. Lovett for safekeeping or as a gift, and that question was clearly covered by Instructions No. 6, 6A and 9, in which the court charged the jury that the intention of the donor to make a gift must be shown by the evidence to be clear and unmistakable.

Respectfully submitted,

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