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Nora Cluff and Nora Cluff, Administratrix of the Estate of William Bert Cluff v. Verne B. Cluff and Luana R. Cluff : Appellant's Brief

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

NORA CLUFF and NORA CLUFF, Administratrix of the Estate of William Bert Cluff,

Plaintiffs and Appellants,

vs.

VERNE B. CLUFF and LUANA R. CLUFF,

Defendants and Respondents.

APPELLANTS' BRIEF

Appeal from the Judgment of the
District Court for Millard County
Hon. J. Harlan Burns, Judge

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Plaintiffs and Appellants,

vs.

VERNE B. CLUFF and LUANA R. CLUFF,

Defendants and Respondents.

Case No. 13162

APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an action to recover the balance due and owing on a Promissory Note executed by defendants.

DISPOSITION IN THE LOWER COURT

The case was tried to the court. From a Judgment for the defendants, plaintiffs appeal.

RELIEF SOUGHT ON APPEAL

Plaintiffs seek reversal of the Judgment and Judgment entered in favor of defendants, or in the alternative, a New Trial.

STATEMENT OF FACTS

(The parties will be referred to as they appeared in the lower court.)

Plaintiff Nora Cluff filed this action in her representative capacity as the Administratrix of the Estate of William Bert Cluff and in her individual name to collect the balance due and owing on a Promissory Note executed by the defendants.

Plaintiff was married to William Bert Cluff in February of 1952. (Tr. 6) The defendant Verne B. Cluff is an adult son of William Bert Cluff of a prior marriage.

At the time of the marriage, William Bert Cluff was the record title owner of real property located in the City of Fillmore, County of Millard, State of Utah. This property consisted of a service station and a trailer park.

In 1959, plaintiff and her deceased husband, William Bert Cluff, moved from Fillmore, Utah to Washington, Utah. The parties leased to the defendant Verne Cluff the service station but retained control of the trailer park which they operated during the summer and would then close during the winter. (Tr. 7)

This procedure continued until the early part of Oc-

tober, 1963, when plaintiff and her husband entered into an agreement with the defendants to sell the service station and trailer park for the sum of $36,000.00. (Tr. 11) The terms of the sale were noted on Exhibit P-2 and provided as follows:

> "Contract $150.00 20 years. Start Jan. 1, 1963. no interest. Deed from Bert Cluff Nora B. Cluff to Verne. Payment to B. C. until Death and then to Family until paid.
>
> 138 ft."

Plaintiff testified that in consideration of the aforementioned Agreement, she and her husband executed and delivered to defendants a Warranty Deed to the property. (Exhibit P-1)

Plaintiff further testified that in consideration for the delivery of this Deed, defendants then executed a Promissory Note in the sum of $36,000.00 made payable to William Bert Cluff and was delivered to him on January 1, 1967. William Bert Cluff died on January 24, 1967, and plaintiff was appointed Administratrix of his estate. After her appointment, defendants refused to make any further payments on the Note, so this lawsuit was filed.

It has been the position of the plaintiff that the transaction with defendants on October 13, 1962, constituted a sale of the property to defendants for the sum of $36,-000.00. To further substantiate and support this contention, certain exhibits were offered by plaintiff and admitted into evidence.

A Memorandum Book consisting of records pertaining to transactions by the deceased, William Bert Cluff, is Exhibit P-3. The portion of this record, which is material to this case, is the notation on the next to last page under 1965 where it is written as follows:

> *"Received from Verne Cluff on Contract the sum of* $1,800.00."

This amount of $1,800.00 is the annual payment as provided in the Note; that is, $150.00 per month for 12 months. No other explanations of that entry were given by defendants.

Certified copies of Federal Income Tax Returns for the years 1963, 1964, 1965 and 1966 were also admitted in evidence. (Exhibit P-4) Each return makes some reference to the fact that the deceased, William Bert Cluff, received $1,800.00 per year. Each return also treats this amount as income pursuant to a sale of real property and for the payment of a Note executed in 1963 for the sum of $36,000.00. The court will note that in schedule 2 of 1965 and 1966 the defendant is referred to specifically by name, and the terms of the sale are identical with the written notation on Exhibit P-2.

The testimony of the defendant demonstrated the following:

1. That in 1962, the defendant executed a Note in the sum of $36,000.00 made payable to William Bert Cluff

and provided for $150.00 monthly payments with no interest.

2. That after the execution of said Note, the defendants delivered the same to the named Payee.

3. That the payments of $150.00 per month commenced January 1, 1963 and continued for a period of four years, or until the death of the deceased, William Bert Cluff, when all payments ceased.

In defense of this action, defendant first claimed that William Bert Cluff released defendants from making any payments after his death. This evidence was developed by the testimony of the defendant's brother, Joseph L. Cluff. This witness testified that during the year 1965, he received a letter from his father and enclosed in this letter was an envelope (Exhibit P-7) which was sealed and marked, "TO VERNE." The witness testified that he opened the envelope and found inside the note which is the subject of this lawsuit and claimed that marked across the note were the following words:

"PAID IN FULL — BERT CLUFF."

The witness further testified that in addition to this sealed envelope containing the Note was also enclosed a letter from his father, William Bert Cluff, which the witness testified instructed him to deliver the sealed envelope with the Note to Vern, "after his death." Mr. Joseph L. Cluff further testified that he retained the envelope and Note in his possession until *after the death* of this father when he made a copy of it which he showed

to the defendants at the funeral here in Utah. Thereafter, he claims to have mailed the Note to the defendant at his home in Fillmore, Utah. The brother then testified that he brought Exhibit P-7 with him when he appeared at the trial of this case.

The defendant, Verne Cluff, verified the testimony of his brother by admitting he had seen a copy of the Note at the funeral and subsequently received the original Note from his brother. The defendant then testified that he saw the Note around his house, but just misplaced it and he had no idea as to what had happened to it.

As a further defense to this action and in an attempt to disprove the fact that there was a sale of the property, as evidenced by the Warranty Deed (Exhibit P-1), the defendant outlined the title to the property described in the Deed. This testimony was admitted over the objections of counsel for plaintiff.

Defendant claimed that at the mere age of 16, while attending school, he purchased the property himself on December 10, 1938 and received a Deed to the property. (Tr. 67) There was no statement as to who paid taxes on the property thereafter. In 1948, defendant stated he was concerned about a lawsuit and claimed he conveyed the property to his father by Warranty Deed and for valuable consideration in order to defraud creditors in the event he became liable thereon. Again, there is no testimony as to who paid taxes after this Deed.

Defendant was again permitted to testify, over the

objections of counsel for plaintiff, that while the conveyance in 1948 was by Warranty Deed, it was, in reality, nothing more than to establish a trust and that the deceased, William Bert Cluff, received the property as Trustee for and on behalf of the defendant. It was the further position of the defendant that the Deed dated October 13, 1962 had no relationship at all to the execution of the Note for $36,000.00 and was, in fact, merely an act of his father in reconveying property to him which his father held in trust. However, defendant failed to make any explanation whatsoever as to why he had given the Promissory Note for $36,000.00 merely for the *return* of his property nor why he made payments of $150.00 per month on that Note during his father's lifetime.

The trial court, at the conclusion of the presentation of the evidence by the respective parties, made Findings of Fact, Conclusions of Law and entered a Judgment in favor of Defendants and against the Plaintiffs. Many of the trial court's Findings of Fact were clearly erroneous and demonstrated a misunderstanding of the evidence set forth at trial and a misunderstanding of the law in relation to such matters. As such, the judgment itself must also fail. It is, therefore, the Findings of Fact, Conclusions of Law and Judgment in favor of Defendants which is the subject of this Appeal.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN THAT ITS

FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE EVIDENCE.

POINT II.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A VALID COMPLETED GIFT OF THE PROMISSORY NOTE TO THE DEFENDANT.

POINT I.

THE TRIAL COURT ERRED IN THAT ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE EVIDENCE.

The trial court entered Findings of Fact and Conclusions of Law to support the Judgment of No Cause of Action. Certain Findings of Fact entered by the court are not only unsupported by the evidence introduced at the trial, but are directly contrary to the evidence. In order to properly present this matter to this court, it is necessary to examine those Findings of Fact individually.

In Findings of Fact number II the court found:

> ". . . that Verne B. Cluff has remained the owner in interest of the property to the present, notwithstanding a Deed from Verne B. Cluff, a single man, to his father and mother, William Bert Cluff and Ruby Cluff, on the 25th day of March, 1946, which Deed the Court finds from the evidence was given

> without payment or consideration and was executed solely for the purpose of avoiding the property in a personal injury claim of Verne B. Cluff and that his father and mother, William Bert Cluff and Ruby Cluff and the survivor of them, Bert Cluff, held the property as Trustees, and that Nora Cluff, second wife, who was married to William Bert Cluff in 1954, never held any interest in equity in the said property."

And, in Findings of Fact number III:

> "The Court further finds that as a means of reconveying the trustee's interest in the property from the trustee Bert Cluff to the owner and beneficiary, Vern B. Cluff, that a Warranty Deed was executed Oct. 13, 1962, by William Bert Cluff and Nora Cluff to Verne B. Cluff and Luana R. Cluff, husband and wife, as joint tenants, and the same recorded by the Grantee."

As previously stated, plaintiff objected to the introduction of any testimony pertaining to the chain of title of the real property which was involved in the sale, and more particularly described in Exhibit P-1. The trial court, however, overruled the objection and not only permitted the introduction of the chain of title, but also permitted the defendant to testify as to the purpose and consideration of the transfer of the Deeds. This Honorable Court will note that the trial court made a Finding that the Deed dated March 25, 1946 between defendant and his father and then surviving mother, while a Warranty Deed and while reciting that the same was given for One Dollar and other good and valuable consideration, held that the transfer was a trust and that William Bert

Cluff held the properties as Trustee. The plaintiffs respectfully submitted that allowing such testimony violates all rules of evidence and permits a person to vary the terms of a written Deed. It also was erroneously admitted into evidence because it permitted this defendant to make oral statements and the other parties to the transaction are dead and unable to contradict such testimony. Plaintiffs respectfully submit that the trial court committed error in admitting the testimony and then holding that the Warranty Deed was a Trust Deed.

In Finding of Fact no. IV the trial court found:

> ". . . with regard to an Agreement, as it is pleaded in paragraph 2 of the plaintiff's complaint that the evidence and testimony failed to establish any agreement either oral or written and that there was no written document enforceable against the defendants or either of them respecting the sale of the within described property or any property. Neither was there any memorandum or document signed by the parties to be charged respecting the sale of the said N. ¾ of Lot 6, Blk. 88, Plat "A" Fillmore City Survey and the No. 218.5 Ft. of Lot 5, Blk. 88, Plat A, Fillmore City Survey."

The court appears here to be setting forth a Finding in relation to the Statute of Frauds, which is further demonstrated by the court's Conclusion of Law, wherein the court concludes that plaintiff:

> "failed to establish by a preponderance of evidence or at all, any agreement or memorandum of agreement binding the defendants or either of

them to pay a sum of money to the plaintiffs or any person whomsoever . . ."

The Court has clearly misinterpreted the requirements of the Statute of Frauds in relation to such matters. First of all, the Statute of Frauds is an *affirmative* defense which, if not pleaded, is waived. See *Collett* v. *Goodrich*, 119 Utah 602, 231 P. 2d 730 (1951). For this reason it is not permitted to base a Motion to Dismiss on a claim of a violation of the Statute of Frauds. See *W. B. Gardner, Inc.* v. *Pappas*, 24 U. (2d) 264, 470 P. 2d 252 (1970). Further, where the party asserting the Statute *admits* that the contract exists and the terms thereof, no requirement of an actual document, signed by the parties to be bound thereby, is necessary. The Courts simply will not allow the Statute to be used as a shield by which a fraud may be perpetrated. See *Jacobsen* v. *Cox*, 115 Utah 102, 202 P. 2d 714 (1949). Finally, it should be noted, that the only reason why the note itself was not available was that Defendant *himself* claimed to have lost, misplaced or destroyed the document. Particularly under such circumstances as these, the Plaintiff is allowed to introduce oral Parole evidence in relation to the terms of the note and its execution. See 37 C. J. S. Frauds, Statute of, Section 280, p. 809-810. Since the alleged failure to produce any evidence of an agreement binding Defendant to pay a sum of money was the conclusion upon which the Judgment of No Cause of Action was based, that Judgment is also clearly erroneous.

In Finding of Fact number V, the court again demon-

strates its erroneous interpretation of the evidence. In that Finding, the Court states:

> "The Court finds an unsecured Promissory Note from Verne B. Cluff and Luana R. Cluff, his wife, which the defendants testified was a financial arrangement from the son as a monthly support payment for his father, William Bert Cluff, during his lifetime."

The most exacting examination of the record in this case fails to disclose any such testimony by Defendants or any other person. No explanation at all was produced at the trial to explain why this note was given if not for the purchase of the property. Defendants never introduced any testimony to show, nor even claimed, that said note was given without consideration but, rather, claimed merely that the note was satisfied.

Finally, in Findings of Fact nos. VI, VII and VIII, the trial court found that there was a:

> "complete discharge and satisfaction of the Note by William Bert Cluff and a delivery of the Note marked 'paid in full' by the payee."

and, further that:

> ". . . The same was to be delivered to Verne *without condition or the awaiting of the death of said Bert Cluff.*" (W-48, emphasis ours)

These Findings are totally contrary even to that evidence presented by the defendants at the trial. Joseph L. Cluff, the brother of the defendant, testified as follows:

> ". . . I explained how I received it and I received a letter with a sealed letter inside of it. The letter told me *when Dad died* to give the letter to Verne or destroy it, either one . . ." (Tr. 83, emphasis ours)

This latter erroneous Finding on behalf of the trial court becomes of vital importance in light of the requirements necessary to constitute a valid, completed gift of the Note, as was contended by the defendants. An in depth discussion of this requirement is set forth in Point II of this brief.

These Findings, being the entire basis for the court's Judgment of No Cause of Action in this matter, require that this court reverse that Judgment and enter a Judgment on behalf of the plaintiffs or, at the very least, remand this case for a new trial.

POINT II.

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS A VALID COMPLETED GIFT OF THE PROMISSORY NOTE TO THE DEFENDANT.

Although the promissory note was never found by Plaintiff she knew that it existed and so alleged in her action. The Defendant, Verne Cluff, admitted the existence of the promissory note, payable to decedent, that it called for $150.00 per month payments, and that it was executed during that period of time when his father deeded the property to him (Tr. 77). Further, Plaintiff

testified that it was in the sum of $36,000 to be paid over a twenty year period (Tr. 11) and as to the circumstances surrounding the execution of the note (Tr. 11). Defendant further admitted that he made payments, thereon from January of 1963 to the date of his father's death (Tr. 77). As a defense, however, he alleged at the trial that the note had been returned to him and the debt thereby cancelled. The allegations of the manner in which this was accomplished, however, clearly demonstrate that no valid completed gift was made. Defendant alleged that the note was delivered to his brother, Joseph Cluff, in California to be delivered to him or destroyed *upon his father's death* and that, *after his father's death*, the note was in fact, delivered to him by Joseph. The note itself was alleged to have been lost, misplaced or destroyed by the Defendant (Tr. 84) and no "clear and convincing evidence" was presented by Defendant to prove the essential elements of such a gift. Those elements, as explained in the Utah case of *Helper State Bank* v. *Crus*, ... Utah ....., 81 P. 2d 359 (1938) are that:

> ". . . gifts, intervivos have no reference to the future, and go into immediate and absolute effect. To constitute such a gift, the donor must be divested of, and donee invested with, the right of property in the subject of the gift. It must be absolute, irrevocable, without any reference to its taking place at some future period. The donor must deliver the property and part with all present and future dominion over it." (Quoting from *Holman* v. *Deseret Savings Bank*, 41 Utah 340, 124 P. 2d 65.)

These requirements were not demonstraed to be satisfied by the Defendant's allegations. No immediate gift was intended, it was not to take place until the death of the donor, and no parting of all dominion over the note was shown. To the contrary, Defendant's contention was, at the very most, that the note was delivered to the decedent's son in California, while Defendant and the decedent resided in Utah, with express instructions that it be delivered or destroyed upon the death of the father. This simply is not such language as would indicate a present intention to make the gift. Indeed, had such intention existed, the father would obviously have delivered the promissory note directly to the son here in Utah, where he lived. By delivering this note to another son, as an agent acting for him, he obviously intended to maintain control over this note and to have no present vesting of this note in the Defendant. This fact is additionally demonstrated by the testimony that the Defendant had continued making payments under that note every month until the death of the father (R. 83-84), and that the father continued to accept all payments on that note and to show those payments on his Income Tax Returns as income from the sale of the property. (Ex. P-4) Thus clearly, no present intention to make this gift existed at the time of the delivery to the brother. As such, this gift was not completed during the lifetime of the donor and, therefore, must fail. Because of this, Plaintiff retained an interest in that note and thus should have been granted an award therefore.

Even if the above facts are deemed to be insufficient to prove that *no* present donative intent existed it certainly cannot be said that those facts were sufficient to prove there *was* such an intent. The mere fact that a plaintiff generally has the burden of proof which the trial court apparently applied in this case, did not place that burden of proof on Plaintiff. It was the *Defendant's* burden, not hers, to *prove* all of the elements of a valid, completed gift. This was explained in *Jones* v. *Cook*, 118 Utah 562, 223 P. 2d 423 (1950). In that case, it was claimed that the father intended to give the car to Defendant and certain testimony was presented in relation to the fact that Defendant sometimes kept the car at his home and sometimes kept the car at the Defendant's premises, that he had paid taxes thereon, and other facts tending to show the intention of a present gift but the major problem existed there, as here, in that Defendant did not tell Plaintiffs at any time prior to trial that his father had made a gift of the car to him. The Court, in that case, explained:

> "There is no presumption in favor of a gift intervivos. One who asserts title by gift intervivos has the burden of proving that a gift was made, including the existence of all of the elements essential to its validity . . . The rule is that 'a clear and unmistakable intention on the part of the donor to make a gift of his property is an essential requisite to a gift intervivos.' " 38 C. J. S., Gifts, Section 15, p. 790.

In that case, although it was demonstrated that the alleged donee had exercised certain dominion over the car, this was not deemed to constitute "clear and convincing evidence" of the alleged gift. See also *Christensen* v. *Ogden State Bank*, 75 Utah 478, 286 P. 638 (1930), *Holman* v. *Deseret Savings Bank*, 41 Utah 340, 124 P. 765 (1912), and *Lovett* v. *Continental Bank & Trust*, 4 Utah 2d 76, 286 P. 2d 1065 (1955).

This was again recently emphasized in *Sims* v. *George*, 24 Utah 2d 102, 466 P. 2d 831 (1970) wherein the Court explained:

> "We are quite in accord with the proposition of Law advocated by the Plaintiff: that the initial burden as to the prima facie proof of a gift, and also the burden of ultimate persuasion in the case, rests upon the defendant, as the claiming donee. We further agree with the general rule that one so claiming a gift from another must so demonstrate by clear and convincing evidence; and this is especially so when the claimed donor is deceased."

This merely comports with the general rule of law in the United States as set forth in 38 Am. Jur. 2d, Gifts, Section 107:

> "It is generally agreed that to establish a gift of a debt to a debtor, the burden of proof rests upon the party alleging the fact, and that the evidence for such purpose must be clear and convincing. This requirement is especially applicable where the claim is not asserted until after the death of the creditor . . ."

Obviously, the concern is that of fabrication on behalf of an individual who suddenly comes forth for the first time after the death of the decedent and alleges that, now that the decedent is unable to testify otherwise, the decedent had earlier given certain items of property to him. Thus, more than a mere preponderance of the evidence is required to prove such a gift . . . the evidence must be "clear and convincing."

Finally, even if the Defendant's evidence were deemed to reach the point of "clear and convincing" evidence in relation to the facts claimed to have surrounded the return of this Promissory Note, those facts themselves demonstrate that no valid, completed gift was made since actual delivery of the Note did not occur until after the decedent's demise. The fact that such a delivery is ineffective to complete a gift was originally pointed out by the Utah Supreme Court in case of *Peck* v. *Rees*, 7 Utah 467, 27 P. 2d 581 (1891). In that matter, a deceased attempted to deliver a deed of property after his death in a manner similar to that involved in the case at bar. The Court, in refusing to acknowledge a valid conveyance, explained:

> "* * * If, however, a grant or execute a deed of gift of real estate, and place it in the hands of an agent to deliver to the grantee, and the grantor dies before delivery, no delivery can then be made, because the authority of the agent to act ended with the death of the principle; * * *".

See also annotation at 63 A. L. R. 2d 259, and, more particularly, at page 274 wherein the author points out:

> "The delivery to a third person of a release of a debt represented by a note and mortgage, to be delivered to the debtor upon the death of the creditor, does not constitute a completed gift."

Since the evidence clearly established that, in the case at bar, the delivery was made to a third person to be delivered to the debtor (Defendant) upon the death of the creditor (the deceased) and that such delivery was not, in fact, made prior to the death of the donor, no completed gift was made.

Some authorities, however, have explained that the distinction rests on whether the gift was *final* when delivered to the third person. As stated in 38 Am. Jur. 2d, Gifts, Section 29 at p. 833:

> "It is, of course, competent for an owner of personal property to make, and he may make, a valid gift thereof, with the right of enjoyment in the donee postponed until the death of the donor, if the subject of the gift is delivered to a third person, with instructions to deliver it to the donee on the donor's death, and if the donor parts with all control over it, reserves no right to recall it, and intends thereby a final disposition of property."

In the case at bar, of course, no such parting of control over the note appeared. The Defendant testified that he made payments for over 4 years and up until the time of his father's death (Tr. 83-84) and the deceased received those payments and reported them as income on his Income Tax Returns (Ex. P-4). This was done

despite the purported delivery of the note to Joseph Cluff in 1965. Such actions certainly do not demonstrate a parting with control over the note nor do they demonstrate an intent to make a present gift.

Additionally, the authorities clearly distinguish between the transfer to a third party as agent for the donee as compared to an agent for the donor.

As stated in 38 C. J. S., Gifts, Section 86, P. 905, 906, in discussing the question of the validity of a gift causa mortis which, insofar as the requirement of a present transfer, is identical to a gift intervivos, the author states:

> "It is well settled that a gift causa mortis may be effected by delivery to a third person as agent or trustee for the donee, although the gift does not come to the knowledge of the donee, and is not accepted by him, until after the donor's death. In many jurisdictions, the person to whom delivery is made will be presumed, in the absence of countervailing circumstances, to take the property as the trustee of the intended donee, and not as the agent of the donor. The third person must, of course, accept the gift for the donee prior to the donor's death; but a delivery to a third person with instructions to deliver to the intended donee at the death of the donor, the latter retaining dominion and control over the property in the meanwhile, is ineffectual as a gift causa mortis, because the third party is constituted merely the agent or bailee of the donor. Such a transaction is regarded as an attempted testamentary disposition, and, unless accompanied by writing executed as a will, is nugatory for the purpose designed. *The agent has no authority to deliver after the donor's death,*

for his authority as such ceases when his principal dies." (emphasis ours)

Further, in 38 Am. Jur. 2d, Gifts, Section 28 at p. 832, the author explains:

> Although there must be a delivery and acceptance in order to constitute a valid gift, it does not necessarily follow that the delivery must be made to the donee personally; it may be made to some third person for him. But while delivery may be made by an agent of the donor, delivery to such an agent is not enough. The gift is not complete until there is a delivery to the donee or to someone acting for him, and until the gift is completed by such a delivery, the donor may reassert title to the property. Moreover, *since the authority of an agent is generally revoked by the death of his principal, the death of the donor before the actual delivery of the property to the donee terminates the authority of the agent of the donor to make such delivery, and works a revocation of the gift.* On the other hand, it has been held that a delivery of property to one as the agent or trustee *of the donee*, under such circumstances as to indicate that the donor relinquishes all control and dominion of the property, constitutes a complete and irrevocable gift which is not affected by the death of the donor before the property actually comes into the hands of the donee. (emphasis ours)

In the case at bar, it can not be doubted that Joseph Cluff, the son of decedent, at the very most, received the note as agent for his father . . . not as agent for his brother, the Defendant. As the Defendant himself testified:

> "Oh, well, when I said I had it, that my brother had brought the note to me, *that he had orders to either destroy it or deliver it to me, I says*, 'What shall I do with it?' " (emphasis ours) (Tr. 83).

It is clear, therefore, that the brother was, in fact, taking his order in relation to this document from his father and not as an agent of the brother. Most important, however, is the fact that the Defendant totally failed to establish by any evidence, let alone by "clear and convincing evidence," that the brother acted in any capacity other than as agent for the decedent. As such, the full weight of authority establishes that the death of the donor before the property was delivered to the Defendant revoked the authority of Joseph Cluff to deliver the note to his brother and that the delivery, thereafter, was not sufficient to constitute a valid gift.

For these reasons, the Note remained as a valid and binding obligation of the estate and the court erroneously held that there was a valid, completed gift of that Note to the Defendant.

CONCLUSION

The facts of this case as testified to by both Plaintiff and Defendants demonstrate that there was, in fact, a promissory note payable at the rate of $150 per month for twenty years, non-interest bearing for a total of $36,000, payable to the deceased. As such, at his death, this note became the property of his estate and as an heir has an interest in that note. The testimony further failed to

demonstrate any discharge and satisfaction of that note. As such, it is respectfully submitted that this is not such a matter as should merely be remanded for trial but, rather, the trial court's decision should be reversed and Judgment entered for Plaintiff on her claim. At the very least, however, the record clearly establishes such error as would demand that the case be remanded for a new trial.

Respectfully submitted,

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