

1949

## Ray W. Rosebraugh v. Rex G. Branch : Brief of Respondent

Utah Supreme Court

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IN THE  
**SUPREME COURT**  
OF THE  
**State of Utah**

RAY W. ROSEBRAUGH, as Administrator  
of the Estate of Wesley D. Brown, De-  
ceased,

Plaintiff and Appellant,

vs.

REX G. BRANCH,

Defendant and Respondent.

No. 7252

BRIEF OF RESPONDENT

**FILED**

LOWE & LOWE

Attorneys for Respondent.

**FEB 15 1949**

CLERK, SUPREME COURT, UTAH

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**STATEMENT OF THE CASE, THE ISSUES AND THE FACTS**

The brief of plaintiff and appellant states the issues and facts of the case. The question, therefore, resolves itself into whether or not Mr. Brown and Mr. Branch inadvertently and by mistake used the figures \$6,600.00 instead of \$3,943.93. The Pre-Trial Order stated that the only matter to be submitted was whether there was a mutual mistake as to the price to be paid for the brokerage business.

**ARGUMENT**

Let us consider what evidence was presented in the case.

The note was presented as plaintiff's Exhibit A. The defendant then called George Harding Horsley. Undoubtedly no other person was in a position to testify as did Mr. Horsley. He and Mr. Brown occupied the same office, one handling food processing machinery and the other handling and operating a food brokerage. Is it not the natural process for Mr. Brown to inform Mr. Horsley that Brown was selling his business to Branch? Mr. Horsley testified that Mr. Brown informed him that on account of Brown's failing health that he was selling to Branch. We next quote Horsley's testimony on Page 8 of the transcript: "He said that they had gone back and were taking the earnings of the brokerage company during the past five-year period and then dividing them by five to get them on a five-year average, and on that basis he was selling the business to Mr. Branch." We call the court's attention to the fact that Mr. Brown in this statement was telling what he and Branch had done and how the selling price had been arrived at. This testimony shows not only Mr. Brown's idea but also the idea of Mr. Branch and clearly shows that both of the men were laboring under a mutual mistake.

Now let us see what corroborative evidence was submitted to show this mutual mistake. We first submit the testimony of Joan Kruitmoes. She was the bookkeeper and general clerical assistant in the Brown Brokerage Company. On Page 13 of the transcript of the evidence she testified that Mr. Brown told her to take the figures for 1942, 1943, 1944, 1945 and 1946 and get the yearly average for those five years. On Page 14 she testified that she took the totals and made the average for the five years. She identified the various papers. She apparently was not told why Mr. Brown wanted the five-year average, but he did instruct her to make the compilation, which she did. The exhibits

showed the average for the five-year period was \$3,943.93.

We next consider the testimony of Herbert J. Corkey, a C. P. A., who was the senior accountant of the firm of Wells, Baxter & Miller. This firm had prepared the income tax returns for Mr. Brown from 1943 to 1946 inclusive, and Mr. Corkey had also examined the Brown books for 1942. On Page 29 he testified that the average of the brokerage business for the five-year period was \$3,943.93.

In the brief of the appellant the attention of the court was called to the fact that the defendant did not testify regarding his transactions with the deceased person. Clearly 104-49-2, Utah Code Annotated, 1943, prohibits such testimony. The brief states, however, that any objection might have been waived by the plaintiff. The law expressly says that "The following persons cannot be witnesses:" and then enumerates the condition that existed in this case. The attorneys for the defendant followed the express law, and we feel that a statement that the defendant should have testified is ill-advised. It was not necessary for the defendant to testify that the mistake was mutual. Mr. Brown had done so in his statement to Mr. Horsley, and his books showed the same mistake. Brown said in his statement to Mr. Horsley that Brown and Branch had gone back and were taking the earnings of the brokerage company the past five-year period and then dividing them by five to get them on a five-year average, and on that basis Brown was selling the business to Branch. We maintain that that is a clear statement showing a mutual mistake.

The plaintiff submitted no evidence whatsoever to rebut the testimony of the three witnesses for the defendant and the books and other papers showing the mistake.

The plaintiff and appellant referred to the case of *Weight v. Bailey*, 45 Utah 584, 147 P. 899. This case shows that an instrument will not be reformed upon a probability or mere preponderance of evidence, but the only two witnesses were the appellant and respondent. Their testimony was exactly opposite. The case is indeed entirely favorable to our idea of the present case, and that is that our evidence is clear and distinct. There is no evidence to the contrary, as existed in the *Weight v. Bailey* case.

We refer to 45 Am. Jur., Page 618, wherein a mutual mistake is described as one which is reciprocal and common to both parties, each alike laboring under the same misconception in respect to the terms of the written instrument.

The reformation of a written instrument is a matter for equitable relief.

“If his case is weak in its equities, reformation will be denied. If his equity is met by an equity of equal dignity, the parties will be left to exercise their strict legal rights. If his equity is not met by opposing equities, the court will have less hesitation in granting the relief asked.” 45 Am. Jur., 628.

Again we quote Am. Jur. to show that we come within the law.

“In other words, it must be proved that it was the intention of both parties to make an instrument such as is sought to be established by the allegations of the party claiming the equity of reformation. Express proof as to the intention must be adduced, and the precise terms of a contract, if any existed, must be proved.” 45 Am. Jur., 649.

We established the evidence of the mistake in the testimony.

"Evidence of fraud or mistake is seldom found in the instrument itself, and unless parol evidence may be admitted for the purpose of procuring its reformation, the aggrieved party would have as little hope of redress in a court of equity as in a court of law. Generally, it may be said that any testimony which tends to prove the mistake alleged or the intention of the parties is admissible. A witness in a position to know may testify concerning the intention of the parties to an agreement, to the same effect as to any other fact." 45 Am. Jur. 650.

The evidence was clear and fully satisfied the trial court.

"Whatever the form of expression, the only question is, does it satisfy the mind of the court? When the mind of a judge is entirely convinced upon any disputed question, whether of fact or law, he is bound to act on the conviction. Of course, relief will be granted if the mistake is admitted by the other party." 45 Am. Jur. 653.

We feel that the statement made by Mr. Brown to Mr. Horsley is practically the same as though he were admitting the mistake. The court was satisfied and we believe that the case is not one for reversal on the ground of insufficiency of evidence.

"In actions for reformation, the question whether the evidence is of the strong character required to justify relief is one of fact for the trier of the fact. Under the practice in some states, a decree reforming an instrument will not be reversed on the ground of insufficiency of the evidence, if there is a preponderance of evidence in support of the findings, such preponderance being regarded as sufficient to sustain a judgment in any civil case; and as in other cases, a decision upon a conflict of evidence as to mistake is conclusive on the appellate court." 45 Am. Jur. 656.

The various cases cited in 3 Am. Jur. on Appeal and Error, as shown on Page 480, clearly show that the holding of the trial court should be sustained.



"Even though in equity cases the reviewing court examines the evidence, it will not, as a general rule, disturb the findings of the chancellor or the trial judge on questions of fact and the decree or judgment based thereon, unless the findings are clearly against the preponderance of the evidence; against a clear preponderance of the evidence; are clearly or manifestly against the weight of the evidence; are clearly and plainly wrong; unless it clearly appears that the chancellor or the trial judge erred in his conclusions; or unless the findings are clearly and manifestly wrong. In any event, the decision of the chancellor on a question of fact will be affirmed on appeal if his finding is supported by a preponderance of the evidence; and where, under the evidence as a whole, the truth of the matter involved is doubtful, the doubt will be resolved in favor of the finding of the chancellor." 3 Am. Jur. 480.

### CONCLUSION:

The only evidence submitted in this case and justice and equity and all general principles of law show that this contract should be reformed. There is no dispute but what there was a mistake, and that in lieu of the figure of \$6,600.00 the amount should have been \$3,943.93. Mr. Brown's books, records, income tax reports and his own statement to Horsley established this fact. In addition, the defendant and respondent is supported by the testimony of all witnesses, and certainly the action of the trial court shows that in his mind the evidence of the mutual mistake was clear and convincing.

We, therefore, submit that the judgment of the lower court should be affirmed.

Respectfully submitted,

LOWE & LOWE

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