

1949

## Zella B. Wakefield v. Ivan L. Ballard et al : Brief of Respondents

Utah Supreme Court

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Gaylen S. Young; Attorney for Defendants and Respondents;

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

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ZELLA B. WAKEFIELD, as administra-  
trix of the Estate of Lucinda A.  
Ballard, deceased,

*Plaintiff & Appellants,*

VS.

IVAN L. BALLARD, STERLING BALLARD,  
ROSAMOND BALLARD, MABEL BALLARD,  
surviving widow of Melvin Ballard,  
deceased, and HOWARD BALLARD,  
RALPH BALLARD, F. M. BALLARD,  
MARIE BALLARD DAVIS, LOUISE  
BALLARD BARNEY, BERNIECE BALLARD  
DAVIS, and MARGARET BALLARD  
TAYLOR, sons and daughters of the  
said Melvin Ballard, deceased, and  
JEANETTE S. BALLARD, administratrix  
of the Estate of Leland B. Ballard,  
deceased.

*Defendants & Appellants.*

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No. 7381

**RESPONDENTS' BRIEF**

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and Respondents

**FILED**

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# In the Supreme Court of the State of Utah

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## RESPONDENTS' BRIEF

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### FACTS

This action is to set aside certain deeds given by Lucinda A Ballard, deceased. The suit is based upon an alleged agreement between said deceased and all eight of her children entered into about February, 1927. By virtue of this agreement plaintiff claims a resulting trust and that said deceased, Lucinda A. Ballard, had no right to deed her real property away. In the prayer of the

complaint it is asked that said deeds be annulled and that the court adjudge that all the property which the said deceased deeded away in her life time to her three sons included in the three deeds referred to, be the property of the estate of said deceased *free and clear of all liens and encumbrances*.

The complaint alleges a breach of the alleged agreement by the deceased, Lucinda A. Ballard, in deeding to the boys and a breach by the boys requesting her to deed it to them.

In their answer the defendants denied any such agreement as alleged and deny that the said boys or any of them requested the deceased to deed them the property and set up the statute of limitations.

After the evidence was introduced, the court found for the defendants and against the plaintiff, no cause of action. The court concluded, among other things, that the action was one of fraud and not for breach of contract — that the transfers by the deceased were of “her own free will and choice without any fraud or undue influence whatsoever.” — and that in any event the statute of limitations applied as against the administratrix of the estate of Leland B. Ballard, deceased, and the heirs of Melvin Ballard, deceased.

## ARGUMENT

### NO MUTUAL AGREEMENT FOR TRUST WAS ENTERED INTO

The plaintiff is trying to impress a trust. Her case falls of its own weight if no agreement existed as alleged

in the complaint. That no mutual agreement was entered into by all the heirs of Francis M. Ballard is shown by the following facts:

When Francis M. Ballard died in August, 1927, he left his wife and eight children. Five of the children were daughters and three were sons. They were all adults and married. Leland B. Ballard had married well and was consequently at that time better fixed financially than the rest. He was the youngest of all the children. They sort of looked to him for financial assistance when they needed it. He had furnished all the money to remodel the home before the father's death. (Ex. "A")

Leland B. Ballard was commonly known as Bert Ballard. Hereafter he may be referred to as Bert. The clerk of the Court did not number the pages of the transcript of proceeding along with other papers so when referring to the testimony to be found in the proceedings, I shall designate that record as (T.P.).

In the first place plaintiff alleges the agreement was mutual among *all* of the heirs. Eva B. Martin, the next to the oldest child, testified she was not at the conference where plaintiff was trying to prove that the mutual agreement took place. After being asked why she gave the quit claim deed, she answered: "Well, the idea was that it was to . . . the property really would belong to her if we would sign it over to her. Otherwise, it belonged to the estate. That was the understanding I got" (T.P. 63 and 64). She was the plaintiff's witness. If the plaintiff's case is no stronger than her weakest witness,

then defendants should succeed on this testimony alone. Ivan L. Ballard also testified that Eva was not at the meeting. (T.P. 77).

Now what did Leah B. Ericksen, another of plaintiff's witnesses say? She said the conference following the funeral was held in February, 1927. (T.P. 10) "It was suggested," she said, "that we make a quit claim deed and deed everything back to mother for her to use as long as she lived, for her . . . *and use it as she wished.*" (T.P. 22 and 13) She did not testify there was any mutual agreement that Mrs. Ballard should have the property for her life time and then that it would go to her estate. She did not testify as was alleged in the complaint that the three boys requested the other heirs to join in the transfer of their interests. She did say: "We had her word that when she was through with it, she would see that we were all dealt with fairly." (T.P. 25) When talking about the property being sold for taxes, we have from Mrs. Ericksen the following:

"Q. So you didn't do anything to try to save it from taxes?

A. No.

Q. But for your interest, you were not very much interested?

A. Interested as far as one could be, *with it belonging to some one else.*" (T.P. 16 and 17).

Mrs. Zella B. Wakefield, another of plaintiff's witnesses gave some interesting testimony. At the conference immediately following the death of Francis M.



Ballard about February, 1927, she said to the rest of the Ballard children: "Any interest that might be left to me, I want you children to decide and use it for my mother's needs. (T.P. 33) She was asked:

"Q. You gave that (the deed) to her?

A. Yes.

Q. It was her property?

A. Yes.

Q. You didn't have any strings on it, it was given to her, wasn't it? You didn't say anything in your deed about there being any strings on it, did you?

A. I expected mother to use the property that was left the family for her needs." (T.P. 36)

The whole evidence of Mrs. Wakefield, including her two letters, (Ex. 1 and 2), is replete with statements similar to the above. No evidence appears from her testimony that her mother was to have only life interest or that it was deeded in trust. To the contrary it shows an outright gift for her to use as she pleased. (T.P. 31 to 48, Ex. 1 and 2).

Another witness for plaintiff, Izetta B. Kapple Hills, testified about the conference:

"After our discussion, we all decided to quit claim the property back to mother for her to use as she should see fit, to take care of her" (T.P. 50)

None of her testimony indicates that the property was deeded in trust or for life only.



Myrtle Denhalter, another of plaintiff's witnesses, was questioned.

“Q. And wasn't it your purpose when you deeded your interest over to her, to in justice and fairness give her what you thought was just and fair?

A. Yes, sir, I did.

Q. And deeded the property to her?

A. Yes, I did.

Q. With no strings whatsoever on it?

A. That's right.” (T.P. 61)

Ivan L. Ballard, the only witness for the defendants outside of the deputy county recorder, said that at the first meeting following the funeral of their father, Francis M. Ballard, all the children were present except Eva. No discussion, he said, was had then concerning quit claim deeds. (T.P. 77). The next meeting was several months later when only a small number of the children were present. Then they took up the probate matters and their mother's keep. Nothing was ever said about the mother getting only a life interest or that after her death the rest should go to her heirs (T.P. 78). Ivan further said that Eva told the story about right in this regard. It is remembered that although she was not at these meetings she did give a quit claim deed. Her idea as to why she gave the quit claim deed was that if they gave the deeds, the property would belong to their mother, but if they did not give them, it would belong to the estate. (T.P. 63 and 64). That was the whole story

It must be born in mind that the reason the other two sons, Melvin and Bert, were not witnesses is that they had died before the trial.

The importance of security of titles leads the courts to be very cautious in their acceptance of claims of constructive trusts. Therefore, the plaintiff must sustain the burden of proof by clear and satisfactory evidence. (Bogart on Trusts and Trustees Vol. 3, Section 472.) The plaintiff has not sustained her burden of proof. The fact is the proof appears to be clear and satisfactory that no strings whatsoever were attached to the quit claim deeds.

We are fortunate in this case to have all the evidence before the court except the testimony of Bert and Melvin the two deceased sons. It is unfortunate, however, that with all the other evidence we could not have had the testimony of Bert because he knew more perhaps than any of them, having been administrator of the father's estate and having contributed much as is shown in Mrs. Lucinda Ballard's testimony in Ex. "A".

It is highly interesting to note that this action was commenced more than 21 years after the father's death and about 20 years after the quit claim deeds were executed and delivered to Mrs. Ballard. They all knew no reservation had been made in the deeds for any part of the estate. Mrs. Ballard did not die until 1943. So they had over 14 years in which they could have either secured corrected deeds from her or obtained a written understanding. In July, 1943, Mrs. Ballard through J. D. Skeen and E. J. Skeen, her attorneys, filed three

suits in the Fourth District Court one each against the three sons Bert, Melvin and Ivan. These suits were to set aside the particular deeds referred to in the case before this court. The files of all these cases were introduced in evidence at the trial by plaintiff's counsel . . . referred to as file number 12,547, file number 12,568, and file number 12,567. (T.P. 7). Note the first paragraph in each of those complaints:

“That prior to the.....day of.....”  
 (giving the date when each deed was executed by her) plaintiff was the owner and in possession of the following described real estate” etc.

Not one place in these complaints does it infer that she had only a life interest or that she was holding in trust for all the children. She claimed to be the owner. After the deaths of Lucinda A. Ballard, Melvin Ballard and Bert Ballard three Amended Complaints were filed by the plaintiff administratrix in this case. One of them was filed as late as the last day of December, 1947, or early in January, 1948. The said Administratrix, Mrs. Zella B. Wakefield, in each of these Amended Complaints swears under oath that before Mrs. Ballard deeded the property to each of the three sons she “was the owner and in possession” of the real estate transferred. Not a single reference is made to any life estate or trust agreement. All those actions were brought upon the theory that the deeds were made upon the promise and consideration that the sons would support Mrs. Ballard for her life time; and it was claimed they failed to do it. These action were all dismissed without prejudice at the

time of the trial of the case at bar. It will be noted several motions to dismiss were considered for lack of prosecution in these cases over the years when they were in court.

In her last days of failing health, August 16, 1943, fifteen days before her death, the daughters through her attorneys caused that this 87 year old woman, Mrs. Lucinda A. Ballard, be subject to direct and cross examination about this unfortunate family controversy. All her testimony was introduced in evidence in this case without any objection on the part of the defendants. It is known as exhibit "A". It was a deposition and was taken at the home of the daughter, Mrs. Izzetta B. Kapple (now Hill) in Payson, Utah. If that record is examined it will be seen that not one word is said about the present claim that she had only a life estate or that she held it in trust. This present case was started not until May, 1948, being more than 4½ years after Mrs. Ballard's death. This was the first time apparently that the question of a life holding and trust dawned upon the plaintiff, her attorneys and other daughters. This is truly interesting.

## NO UNDUE INFLUENCE BY SONS

Counsel alleges that the three boys Leland, Melvin and Ivan prevailed upon their aged mother to go to the office of her attorney R. A. Porter and sign the three deeds. The use of the word "prevail" infers some undue influence. The record in no place bears out that statement. Counsel cites seven pages in the transcript

of proceedings where it is supposed to be found. The only evidence on those pages is that she deeded the property to the boys and left the deeds in the office of her attorney R. A. Porter and later the boys picked them up. In the case of Ivan, he did not pick up his deed for about a year after the deed was executed and left there for him. (T.P. 86) Had there been any selfish, fraudulent design on his part is it likely he would have left it there a year? If he had urged and unduly influenced her is it not very probable he would have got the deed immediately lest she should change her mind?

The home was in need of repairs about the time the property was deeded by Mrs. Ballard. Bert went to Eva B. Ballard to see if she could help in the expense. She could do nothing; and Eva testified she said to him, "I'm just not able to help out." (T.P. 71). On the following page (72) the transcript shows Eva testified she remembered her "mother saying this to me: "Eva, when you can pay Bert for what he's repaired the home, then you can come in on your third." Then on Page 73 in response to the question: "So as far as deeding the property to Bert is concerned, it was her desire, *her will, her own doings, wasn't it?*" She answered, "Yes". Mrs. Ballard was mentally alert right up to the time of her death August 31, 1943 (T. 1, T.P. 43) No satisfactory proof of undue influence is found in the record.

## REASONS DEEDS WERE GIVEN SONS BY LUCINDA A. BALLARD

We have clear and satisfactory proof in the record



that no undue influence was exercised by the three boys. This is shown when we study the whole record for Mrs. Ballard's reason and motive. When her husband, Frances M. Ballard, died in 1927, the inventory and appraisement shows the total value of all the real estate and water stock was \$3,355.00 This was early in 1928 before the depression of 1929 came along. It is very likely that she could have had all or most of this distributed to her under homestead exemption right without the quit claim deeds by her children. Even though two thirds of all of it had been distributed to her children, it would have been only \$280.00 for each of the eight children. So they could not have thought much about it. (Ex. file No. 4426 next to last paper). Here we had a woman, 71 years of age at the time, with this little property left by her deceased husband. She had her home, of course, in her own name. Someone had to see that she had food and clothing. No doubt, they thought with that property left by her husband it would enable her to live well the rest of her life. It is questionable that they gave any discussion or thought to what they were going to get out of it after their mother's death. They were happy to know that she had some property so they would not have the responsibility of supporting her and were pleased and willing to give the quit claim deeds to her . . .and with no reservations. The whole record bears this out. This Ballard family is an honorable family. The children were not clearing title in her by quit claim deeds and then restricting her the full enjoyment. Mrs. Fricksen said with that property her mother could "live

like a queen'' (T.P. 15). Does a queen have restrictions on her property? Is the independence of a queen taken away from her so she cannot sell, mortgage, give away or do what she wants with her property? Mrs. Ericksen was asked:

“Q And it was your thought and the thought of those present that this property should be *given* to her as you stated, to use as she wished.

A. That's right. That's right.” (T.P. 16).

There was no question but that Mrs. Ballard knew the property belonged to her out right and she could do with it as she wished. It was her desire to be fair and just as she stated in her deposition. We can reasonably assume that she knew much more about her children, their habits, what they had done for her and her husband in years past, how they had treated one another, etc., than the record could possibly show. It will be noted that the inventory shows Mrs. Leah Ericksen and her husband owed the estate of Francis M. Ballard \$1,930.00 and Myrtle Denhalter and her husband owed \$1,000.00.

Izetta B. Kapple Hills was indebted to Bert in the amount of \$1,000.00 plus interest. As a brother he helped her out when she stood to lose her home. It was Mrs. Lucinda A. Ballard's desire that Bert be paid. (T.P. 88). Bert had spent from \$1,000.00 to \$1,200.00 cash on the home. He furnished all the cash for a bathroom, screen porch, plumbing fixtures, sink, drain, cupboards, bins, took off lean too from house and moved it near granary, bricked all the east part of the house, painted the whole



house (2 stories) including the brick, shingled the house with new shingles, remodeled west side of house and refinished the floor. The other two boys Ivan and Melvin assisted with their labor in this rebuilding job. (T.P. 89 and Ex. "A" 14 to 16). Also, they put in two cement porches. None of the other children helped her with any cash. (Ex. "A" 18 and 19).

Mrs. Leah Ericksen at the time of the deposition was still owing \$500.00. (Ex "A" 27). Some of the Denhalter claim had been paid but it is not clear how much. (Ex. "A" 22 to 28). Mrs. Wakefield owed Ivan \$600.00 or \$700.00 which was taken into consideration at the time of executing the deeds to the boys. (T.P. 105 and 106).

The only daughter of the five daughters who did not owe someone in this family complication was Eva B. Martin. Mrs. Ballard wanted at first to see Eva share in part of the home property that was deeded to Bert. Eva said Bert had put a lot of money in the home to make it comfortable for their mother. (T.P. 67). So as related above she told Eva "when you can pay Bert for what he has repaired the home, then you can come in for your third." This Eva could not do. (T.P. 91). Therefore, Mrs. Ballard decided to and did deed the home to Bert. She wanted also to straighten up what Izetta owed Bert. (T.P. 68).

Mrs. Ballard gave Mrs. Ericksen her unpaid note and said to her, "I am giving that to you as your portion of the estate." (T.P. 23).

At the time of the father's death in 1927, the home

property was worth from \$1,500.00 to \$2,000.00 (T.P. 79). The Nebeker property was sold for taxes from 1932 to 1943 and there was \$1,700.00 pavement taxes owing on it. When Melvin took that property over he assumed those taxes. He bought the tax title from the County in the name of his wife and his mother deeded him the legal title. (T.P. 80). At the time of the father's death this Nebeker property was not worth more than \$1,000.00 to \$1,500.00. It would not have sold for enough to pay taxes and assessments. (T.P. 93).

When Mrs. Ballard deeded Ivan the property as she did, Ivan said she "just wanted to equalize things up between them all so that we could all get an equal share of it:" "According to her best judgment." (T.P. 92 and 93). There were back taxes from 1932 to 1943 on the farm property, also Ivan bought the tax title to that in the name of his boy Sterling and Paid \$473.00. Mrs. Ballard deeded the legal title to Ivan (T.P. 84, 85, Ex. "A" 3, 4 and 5).

I want to call the court's attention to the following as a small part of testimony given by the only surviving son, Ivan, about these properties:

"A. Well, my brother Melvin didn't have a home; he was in poor health; he had worked hard on the farm with father all of his life. Mother felt that boy needed protection. She felt that he had done enough through his hard work and efforts to merit that home, at that time, and the lots that border on the highway, just as you're entering Payson.

Q. And so she deeded that property to him?

A. That's right.

Q. Was there anything said — well, I'll withdraw that. Now what about the piece of property that you got down there, the Nebeker — or the farm, how many acres is that?

A. There's about 12 and 68/100.

Q. And how much was that property worth in 1927?

A. Well, I don't believe you could have sold it for a hundred dollars an acre. There was property bought there, better property than that, that hadn't been under weed control for three or four years, for a hundred dollars an acre.

Q. Did it go down in price in the depression?

A. Yes, sir.

Q. Now, was there any debt on that

A. On the 13 acres?

Q. Yes.

A. Back taxes.

Q. When you say 13, you mean 12 and a fraction?

A. Yes. We all called it 13 acres.

Q. How many years taxes was there owing on that?

A. About 10 or 12.

Q. About 10 or 12 years?

A. Right.

Q. And there was — did your sister know about that?

A. My mother was very confidential with all of us, and I believe she informed all of my brothers and sisters that there was back taxes on the Nebeker property, and that there was back taxes on the farm.

Q. Now, did any of the sisters make any effort to assist your mother in paying up some of those taxes?

A. No, sir.

Q. Did any of your sisters assist your mother in furnishing her money to live on?

A. No, sir. They might have slipped in with a five very seldom. Some of them never come to see my mother within a year and a half or two years.

Q. Who did help your mother?

A. My brother Bert and Me — I'll give Mrs. Hills credit for going and seeing Mother often — contributing more to her comforts than any of the rest of them.

Q. And what assistance did Bert do for her?

A. Bert always seen that Mother had money.

He always seen that she had groceries."

It is very enlightening of what Mrs. Ballard had in mind when she deeded the property to her three boys to read her own testimony in the deposition 15 days before she died. Mr. Young questioning her about the property deeded Bert on page 21 of Ex. "A" we have:

"Q. You understood that you deeded that property to him, and that he was going to let you use it as a home, until you died, is that correct?

A. Yes.

Q. That was the full consideration, wasn't it?

A. Well, he had said, "Mother, the home is yours until you die."

Q. Well that was the full consideration?

A. Yes.

Q. And you didn't figure he had any particular interest in the home by reason of being an heir to your husband's estate, or anything like that, did you?

A. Well you know this has been planted in my memory: "Boys care for their wives, and when my daughter is married, their husband was supposed to care for her; and when my son is married, they are supposed to care for their wives.

Q. Yes, and that was the thing that you had in mind, when you gave all of the property to these children?

A. Yes, these three boys, and so you see, I cut my girls off from everything and they accepted that very graciously, too, Mr. Young, and they never complained about to me what I had done."

From the foregoing it can be seen there were many reasons why she deeded the property to her three boys. It is further observed that no undue influence was exercised. Everything went along nicely for her. She lived happily in the home property for over seven years after she executed the deeds.

## THE MISUNDERSTANDING THAT CREATED FAMILY CONFUSION

It was Mothers Day in May, 1943, when out of the goodness of his heart and motivated by the natural affection of a son that Bert went to Payson and brought his mother to visit with him in Salt Lake City. After staying at his home for a few days, she felt like she wanted to go and live with her daughter, Mrs. Hills at Payson. She was not feeling well. Bert wanted her to go to the hospital but she would rather be with her daughter. It was arranged for Mrs. Hill to come and get her. It was about this time that Mrs. Ballard told Bert because of her age and physical condition she felt she could not live at the home any more but wanted to live with her daughter, Mrs. Hills. For that reason she gave him to understand that he should rent the home. With no malice or ill feeling towards his dear old mother and thinking he was doing just what she wanted him to do he rented the home. Some weeks later not remembering what she had instructed her son to do, <sup>she</sup> got provoked at his renting the home. Mrs. Hill thought she should be paid \$150.00 per month for taking care of her mother. Mrs. Ballard got the idea that Bert had not held faith with her when he rented the house and was willing to go to court to set him right. One day her daughter, Mrs. Hill, came to her and said she had a first class lawyer who would fight the case. (Ex. "A" 32, 33, 36, 37 and 38). It was because Bert rented the house that she brought the law suit she said and that only. (Ex. "A" 38). This simple misun-



derstanding was the match which touched off the fires of litigation lasting over a period of more than six years involving four law suits by Mrs. Ballard against her three sons, three amended complaints by the plaintiff administratrix and then the action before the court now. In reality eight law suits arose out of a simple misunderstanding. After her deposition was taken on August 16, 1943, Mrs. Ballard's health failed fast until she passed away 15 days later August 31, 1943. Bert, the son with whom she had the controversy, never lived to tell his side of the affair and Melvin also past on to the great beyond before the trial.

## STATUTE OF LIMITATIONS

The last deed, the one to Melvin, was given April 28, 1937. Mrs. Ericksen knew of them within four months after they were given. She told her sisters about her mother deeding the property some short time after. (T.P. 20 to 23). If they were going to sue, in fairness to everybody concerned the daughters then should have started. Four months from April, 1937 would be August, 1937. They waited till May, 1948. I should think that would be a bit too late. "Well," they say, "we started in July, 1943." Even that would be a bit too late. Six years in an equity case would be a little long would it not? In fact, it is 11 years. This suit is not on the same cause of action as the other actions. Dismissal without prejudice "does not prevent a new action *for the same cause of action*. 104-30-7 Utah Code Annotated 1943. "The 'same cause of action' is where the same evidence will support



both actions.” Words and Phrases Perm. Ed. Vol. 38, pake 211. The first actions were upon the ground that the sons had agreed to support Mrs. Ballard for the rest of her life. This was alleged to have been the consideration of the execution of the deeds. This agreement it was alleged was entered into when the deeds were executed in 1936 and 1937. Suppose the defendants should say, “Yes, we did enter into such an agreement.” Would that be sufficient to support the present action which is one for violation of a trust agreement eight or nine years before the agreement upon which the old actions were founded. The last action is no more the same cause of action than would be an action upon a note for \$100.00 dated in 1936 would be the same cause of action for a note for \$100.00 executed and delivered by the same parties in 1927. For further enlightenment upon the question of limitations and of the impressions of the court from the evidence in the case, I refer the court to Judge Dunford’s Memorandum Decision. (T. 46 to 60).

While the facts in the case in my humble opinion clearly show there was no mutual agreement as alleged, at the same time I fail to see that if there had been such an agreement as alleged in paragraph 5 of the complaint why the four years statute of limitations would not apply — either Section 104-2-23 or Section 104-2-30 as pleaded in defendants’ answer. Under section 104-2-30 note 19 the following seems to be in point:

“When a trustee, denies the trust or denies the liability under the trust relation, and the beneficiary has notice of such repudiation, then

the statute of limitations attaches, and under this section an action to recover the interest of a beneficiary in the proceeds of a sale made by such trustee after four years had elapsed *was barred by limitations.*" Felkner v. Dooly. 28 Utah 236, 78 P. 365.

Therefore, I see no reason why section 104-2-30 should not apply to this case as against all the defendants. The plaintiff's own evidence shows all of the alleged beneficiaries personally knew of Mrs. Ballard deeding to her sons by August, 1937. Not only that but the said deeds were all recorded in the County Records Office of Utah County by or before January 10, 1938. The first action by Mrs. Ballard was not started until July, 1943 — which is five years and six month after the last deed was recorded. The action on the alleged trust agreement as stated was not started until May, 1948, over ten and one half years after the last deed was recorded.

The defendants submit the judgment of the District Court should be affirmed with costs to the respondents.

Respectfully submitted,

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