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Jerry Sine and Dora Sine v. Mildred Iona Harper : Reply Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

JERRY SINE and DORA A. SINE,
Respondents,

vs.

MILDRED IONA HARPER, Ad-
ministratrix of the estate of Cath-
rine Jensen, deceased,
Appellant.

Case No.
7386

REPLY BRIEF OF APPELLANT

GRANT MACFARLANE
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INTRODUCTION

The purpose of this brief is not to argue further the points covered in arguments I through V in appellant's brief, but rather to answer respondents' arguments advanced in support of their three cross-assignments of error. These cross-assignments have reference to the admission in evidence by the court of conversa-

tions with the deceased Cathrine Jensen, both "shortly" after and "long" after the sale to the respondents, and to the court's refusal to strike some of said conversations. Appellant's answer to said cross-assignments is herein propounded under one proposition as follows:

THE UNSWORN DECLARATIONS OF THE DECEASED CATHRINE JENSEN, BOTH "SHORTLY" AFTER AND "LONG" AFTER THE TIME OF SALE WERE ADMISSIBLE AS EITHER DIRECT OR CIRCUMSTANTIAL EVIDENCE OF AN INDEPENDENTLY RELATIVE FACT, TO-WIT, HER INTENT OR STATE OF MIND, AN EXCEPTION TO THE HEARSAY RULE.

Plaintiffs alleged in paragraph 7 of their complaint, as amended at the trial; the following (R. 2):

7. That plaintiffs have information which they believe and therefore allege as a fact that defendant [referring to Cathrine Jensen] in signing Exhibits "A" and "B" did so in the belief and with the understanding that she was selling to plaintiffs the property described in Paragraph 3 hereof and that she later discovered the mistake that had been made, which discovery was made on or about November 24, 1947.

In answer thereto defendant denied the allegation and alleged affirmatively as follows (R. 11):

4. That never at any time did defendant [referring to Cathrine Jensen] sell, contract to sell, either orally or by writing, or intend to sell Parcel 2 to plaintiffs.

which allegation was denied in plaintiffs' reply.

These pleadings plainly raise as an issue Cathrine Jensen's intent or state of mind at the time she negotiated with the plaintiffs' agent and entered into the earnest money agreement and also at the time she signed the uniform real estate contract. Under the exception to the hearsay rule that unsworn declarations concerning independently relative and probative facts are admissible, the conversations had by defendant and defendant's witnesses with the deceased Cathrine Jensen were properly admitted.

The statements made by Cathrine Jensen to the effect that she wanted Mr. Biddinger, her former husband, to build a small two-room house to live in or a little lunchstand on the 25½ foot piece, that she thought he was a good cook, that his daughter could help him and that it was plenty large for a little five-cent place and that it would be nice since there were tourist cabins around, as testified to by the defendant, Mrs. Harper (R. 152-153), her sister, Mrs. Freeman (R. 172), Mr. Biddinger (R. 179-180) and Mr. J. C. Jensen (R. 185), were all offered and admitted not for the purpose of proving the truth of the statements, that is, that the 25½ foot tract is large enough for a two room house or lunchstand, or that Mrs. Freeman was a good cook, etc., but rather for the purpose of establishing the fact that Mrs. Cathrine Jensen's state of mind or intent at the time she made those statements was that she presently owned and had not sold the 25½ foot tract,

which in turn is competent circumstantial evidence of the fact that at the time of entering into the agreement in controversy she had no intent to include the 25½ foot tract in the sale. The testimony of Verda Wheeler at T. 165 and T. 166 concerning the declarations of her mother, Cathrine Jensen, the day of the sale, likewise was not offered for the purpose of proving that the Sines were not buying all of the property, that Cathrine Jensen didn't buy the 25½ foot piece with the rest of the place and that that was her reason for not selling it with the place, or that she wanted to put a hamburger stand some place on it, etc., but rather for the purpose of directly establishing Cathrine Jensen's intent and state of mind with reference to what was included in the sale at the time of the transaction.

Corpus Juris Secundum carries the following discussion of this exception to the hearsay rule in Volume 31, page 1007, as follows:

“Sec. 256 — Intent and Intention. Declarations may be relevant evidence as to the existence of a particular intent or intention in the mind of the declarant. Such declarations are admissible if, and not unless, the existence of the particular mental state at the time to which the declarations relate is a relevant fact; and are to be excluded where the intent does not affect the legal result of the transaction. The declarations are not direct evidence of the facts asserted, but merely circumstantial evidence as to the existence of some relevant and material fact. Such evidence is admissible, not as a part of the *res gestae*, but as

a fact relevant to a fact in issue, although, as hereinafter pointed out in Section 403, a statement forming a part of the *res gestae* may also be admissible to disclose intent or intention."

and continuing at page 1009 of 31 C. J. S.:

"Time of declaration. A declaration of intent or intention is not necessarily admissible because made contemporaneously with relevant acts; existence of the particular mental state at that time must itself be a relevant fact. On the other hand, no requirement exists that the making of a declaration indicating intent or intention should be contemporaneous with the time when its existence is relevant, but the test is logic rather than time, and, within limits prescribed by the rules as to remoteness, prior or subsequent, as well as accompanying, statements are competent.

"Death of declarant. An otherwise relevant declaration is not rendered incompetent by reason of the fact that the declarant is dead. It has also been declared that such a declaration, to be admissible, must appear to have been made in a natural manner, and not under circumstances of suspicion.

"Declarations favorable to declarant. If a declaration of intent or intention is relevant, the declarant is entitled to the benefit of it, even though it be in his favor."

These principles are supported by many other text writers, such as Jones, Commentaries on Evidence, Section 1088; Wigmore, 3rd Edition, Vol. 4, Section 1729; Chamberlayne, The Modern Law of Evidence, Vol 4, page 3619 et seq.; and 1 Greenleaf on Evidence, Section 162c and d.

As examples of this doctrine there have been a few Utah cases concerning the question of intent of an alleged donor at the time of delivery. In the case of *Mower v. Mower* (1924) 64 Utah 260, 228 Pac. 911, the trial court excluded evidence of extrajudicial declarations of a decedent to the effect that he had made deeds and put them in his box so that his wives could get them upon his death, etc., upon the ground the declarations were self-serving and hearsay. This court holding that the declarations were admissible inasmuch as they had a bearing on the question of intent to deliver the deeds, quoted part of the above quotation from *Corpus Juris*, and said further:

“In line with the above quotations and authorities, we remark that in this case the proffered testimony was not offered to prove the truth of the declarations that his wife upon his death could go and get the deeds, or that it was the best way to keep his house in order, or that he had deeded a part of his land away and it would be necessary for him to change his deeds to make it equal, or the truth of the statements made in his application to the Forest Department, but was offered as additional circumstances, along with all the other acts and conduct and surrounding circumstances, to determine whether or not there was a delivery of the deeds in question. We conclude that the offered evidence should have been received and that its rejection was error.”

This case has been cited as good law and followed in *Stanley v. Stanley*, 97 Utah 520, 94 Pac. 2d 465 (1939),

Schultz v. Young, 37 N.M. 427, 24 Pac. 2d 276; and Crenshaw v. Crenshaw, (1948) 68 Ida. 470, 199 Pac. 2d 264. Similar declarations as evidence concerning the question of delivery were held admissible in Troseth v. Troseth (1947) 224 Minn. 35, 28 N. W. 2d 65.

This principle is also applied in cases of fraud, to show both bad faith of the defendant and scienter of the plaintiff. See Bigelow on Fraud, Vol. 1, Chapter X, Section 7. Unsworn declarations of a victim prior to a homicide to the effect that he was going over to the defendant's house were held admissible in State v. Mortensen (1903), 26 Utah 312, 73 Pac. 562 as proof of his intention or design, as circumstantial evidence that he was there at the time of the killing. In Parry v. Harris (1937), 93 Utah 317, 72 Pac. 2d 1044, the court was concerned with the issue of damages in a breach of promise suit, and held that evidence of plaintiffs unsworn declarations to third persons to the effect that she was embarrassed to go out among people because they would talk about her as "the girl who was supposed to marry Harry Bransford" was admissible as proof of her mortification, although not admissible for the purpose of proving the truth of the statements. And in Wetmore v. Mell, 1 Ohio St. Rep. 26, in a suit for breach of promise, plaintiffs unsworn statement to her sister as well as her conduct in preparing her trousseau were held admissible for the purpose of proving her acceptance of the offer of marriage. The court in Burrell Engineering and Construction Co. v. Grisier (1922), 111 Tex. 447, 240 S. W.

899, held that a statement by an employee to the defendant's superintendent that machinery was defective, was admissible, not to show the truth of the fact that the machine was defective, but to show that the superintendent was put on notice of the likelihood of a defect, and therefore negligent in not having it repaired.

The above examples, particularly the Utah cases dealing with the question of intention to deliver, serve to show the applicability of the above exception to the hearsay rule in instances such as the principal case where the intention or state of mind of a person at a particular time is a material issue to be determined. It is therefore submitted that the evidence of Cathrine Jensen's statements in the conversations with her daughters, Mr. Biddinger and Mr. Jensen, had at a time before any claim of mutual mistake was made, were properly admitted as showing her state of mind or knowledge of what she included in the sale at the time of the transaction with Mr. Dowell. The appellant respectfully urges this court to consider this evidence, as it may do in equity actions, together with all of the other competent evidence, records and files in this case, to reverse the lower court and to direct that judgment denying reformation be entered in favor of the defendant, and for whatever other relief to the court seems equitable.

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