

1956

## Warren M. O'Gara v. Archie Findlay : Brief of Respondent

Utah Supreme Court

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Rex W. Hardy; William H. King; Attorneys for Respondent;

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### Recommended Citation

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

UNIVERSITY UTAH

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WILLIAM M. O'GARA, Executor  
of the Estate of NANCY E.  
HIRIGARAY, Deceased,

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Clerk, Supreme Court, Utah

*Appellant,*

Case No. 8527

—VS.—

ARCHIE FINDLAY,

*Respondent.*

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**RESPONDENT'S BRIEF**

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REX W. HARDY,  
WILLIAM H. KING,  
*Attorneys for Respondent.*

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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WILLIAM M. O'GARA, Executor  
of the Estate of NANCY E.  
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## RESPONDENT'S BRIEF

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### STATEMENT OF FACTS

The facts as set forth in the Brief of Appellant are substantially correct.

Sometime prior to April 26, 1949, the Respondent, Archie Findlay, received a letter from his aunt, Mrs. Nancy E. Hirigaray, requesting that he come to Layton because she had some matters to take up with him. In response to this letter, Archie Findlay came to Layton, at which time he was advised that Mrs. Hirigaray wanted to convey her property to him. For this purpose, they went to the Barnes Banking Company in Farmington, Utah, where they talked with Mr. Gailey, who is now the president of said bank. After Mrs. Hirigaray had explained to Mr. Gailey what she desired to do, the record shows that he explained to her that in order to have a valid deed, it had to be delivered. Counsel for the Appellant has attempted to imply that the delivery may have been in trust for the benefit of others. We respectfully submit that this is not an issue before this Court. If, however, in fact, this was a delivery in trust, the Appellant's case would still fail because the sole question before the Court is, to-wit: Was there a valid delivery? A valid delivery can be made in trust as will be more fully set forth under Point I.

From the transcript there can be no doubt but that a delivery of this deed did, in fact, take place. For example, at page 28 of the transcript beginning at line 15, we find the following language by Mr. Findlay while being cross-examined by Mr. Hardy:

Q. What did she say again?

A. She said she understood it. He said when you hand this deed to Mr. Findlay, it is his. It is yours no longer, and she said she understood it.

Q. After Mr. Gailey made that statement, what happened?

A. She gave it to me.

Q. Did she give it to you personally?

A. Yes, Sir.

At page 36 of the transcript beginning at line 6 when the witness, Mr. Gailey, was being cross-examined by Mr. Hardy, he made the following statement:

A. Well, she asked me to draw up a deed. I fixed up the deed and she gave it to Mr. Hirigaray, not Hirigaray, to Arch Findlay and he asked me to keep it for him, to file it away in the vault, which I promised to do. I explained to Mrs. Hirigaray when she gave the deed, I told her it was being delivered to Findlay \*\*\*.

I explained to them that there couldn't be any strings attached to the deed. When it was delivered to Mr. Findlay, it was his deed, and he handed it to me. We were holding it for safe-keeping for him. *It wouldn't be delivered to anyone else than him*, until it is ordered, \*\*\*.

#### POINT I.

THE SOLE QUESTION TO BE DECIDED IN DETERMINING THE VALIDITY OF A DEED IS WHETHER OR NOT THE DEED WAS DELIVERED TO THE GRANTEE. THE FACT THAT THE GRANTOR REMAINS ON THE PREMISES, KEEPS IT INSURED, COLLECTS THE RENT, PAYS THE TAXES AND EXERCISES ALL OTHER INCIDENTS OF OWNERSHIP, HAS NO BEARING ON THE QUESTION OF A VALID DELIVERY.

The case at hand appears to be on all fours with the Utah case of *Woolley v. Taylor, et al.*, 45 U. 227, 144 P. 1094, (1914). In that case, the facts are as follows:

Shortly after acquiring the property, the purchaser moved on to the property where he continued to live with his daughter from that time until his death. He had one son in addition to the daughter who lived on the premises with him. He had drawn a deed conveying the property to his daughter, but the deed was not recorded until the day after his death. Beginning on page 230, line 12, we quote directly from that decision:

“After his purchase, he talked with the conveyancer and expressed an intention to give the property to his daughter, but to retain a life estate, and expressed a wish to make a deed and ‘put it away’ until he was dead, when his daughter could get it. The conveyancer informed him, such a deed would not be good and that:

‘Unless you deliver the deed, she can’t get any title; you must deliver the deed to her now; then she can do as she wants with it—put it away or destroy it or anything else.’

“The father and daughter were both present. The conveyancer thereupon drew a warranty deed conveying the property to the daughter by the father. The father signed and acknowledged it and then in the presence of the conveyancer, handed it to his daughter. After that, improvements were made on the property and were paid for by him. \*\*\* During all that time the property was insured and assessed in his name, and all insurance and taxes paid by him. \*\*\* Under such circumstances, the father living on the premises and making such payments is not inconsistent with ownership of the property in her.”

The Court went on to hold that the deed had, in



fact, been delivered to the daughter.

This, we contend, is precisely what happened in the case at hand. Mr. Gailey advised Mrs. Hirigaray that in order to make a conveyance legal and stand up in Court, it had to be delivered and it was delivered by the decedent to Archie Findlay, who, in turn, delivered it to Mr. Gailey to keep for him, and Mr. Gailey testified *that he would not have delivered it to any other person, but that it was being held by him for Mr. Findlay.*

There is absolutely no evidence in the record from which it could ever be inferred that the deed was not delivered. This is the one place where this case is different from all others where they have held that the delivery was not good. For example, in the case of *First Security Bank of Utah v. Burgie, et ux.*, ..... Utah ....., 251 P. 2nd 297, which is the only case relied on by the Appellant in his Brief, there was definite conflict in the evidence as to the delivery of the deed. On the one hand, the proponents of a valid delivery testified that the deed and bill of sale were in the possession of the defendant grantee and that he kept them, along with other valuable papers, in a red chocolate box over his kitchen sink and that the deceased had made many statements to the effect that in case he should die, everything was taken care of.

On the other hand, the record shows that immediately upon grantor's death, the defendant grantee took possession of grantor's keys, stating that there was a deed in the vault which he intended to get and record as



soon as possible and refused to allow any witnesses to be present when he opened the basement vault. This, of course, strongly indicates that the deed had not been in the possession of the grantee but was, in fact, in the possession of the grantor in his safe and could only be obtained by use of the grantor's keys. In holding that the deed had not been delivered and was still in the possession of the grantor, the Court stated:

“While upon an appeal of a case in equity, this Court may review the Findings of Fact as well as the Conclusions of Law; nevertheless, the findings of the trial Court will not be set aside unless it manifestly appears that the Court has misapplied proven facts or made findings clearly against the weight of the evidence. *Gibbons v. Bryan*, ..... U. ...., 230 P. 2nd 983; *Stanley v. Stanley*, *Supra*, and cases cited therein. The record substantially supports the lower court's findings with respect to non-delivery of the deed and bill of sale.”

It is interesting to note that this case was decided in the lower court by Judge Cowley, the same judge before whom the case at hand was tried.

We strongly contend that had there not been a conflict in the evidence outlined above, the Court would not have sustained the lower court's decision and the result would have been the other way and the acts of ownership by the grantor would not have been inconsistent with the holding of a valid delivery. This conclusion must follow in the light of other decisions upon this same point in the State of Utah.

The Woolley case cited above is one good example

on this point. To point up the problem even more clearly, let us take the case of a delivery of a deed to a third party, for delivery to the grantee after the death of the grantor and not before. In this case, the grantee would not even be aware of the deed being in existence. The grantor would obviously still go on exercising all of the acts of ownership such as paying taxes, keeping the property insured, collecting rents and stating to people it was his and yet the deed would be valid, providing he has placed the same beyond his control to recall it and in this case at hand, Mr. Gailey testified that he was holding the deed in safe keeping for Mr. Findlay and Mr. Findlay only. In the case of *Singleton v. Kelly, et. al.*, 61 Utah 277, 212 P. 63, (1923), the Court quotes with favor from the California case of *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1, as follows:

“It is well settled that a person may make a conveyance of property and place it in the hands of a third party to be delivered to the grantee named in it on the death of the grantor and that such a delivery will be effectual to pass a present title to the property to the grantee, if the intention of the grantor is to make such delivery absolute and place it beyond his power thereafter to revoke or control the deed.”

To the same effect, we have the case of *Losee, et. ux. v. Jones, et. ux.*, 120 Utah 385, 235 P. 2nd 132, (1951). The mother drew up deeds to different parts of her property naming various of her children as grantees. The Court stated as follows:

“The deeds were not delivered to the sons and daughter. However, were placed in a safe

deposit box in a bank by the mother. This box was one held by the mother and one of her daughters jointly. Later on when quite ill, she had the deeds brought to her. She made a correction in one and executed another. She then handed all of the deeds to one of her daughters and instructed her to deliver them, after her death, to the named grantees. The daughter then placed the deeds in a bureau drawer in the same room where her mother was ill. After death, they were delivered. The daughter testified that had the mother requested the deeds, she would have given them back. The Court said:

‘Are these facts sufficient to constitute a delivery? In the case of *Singleton v. Kelly*, 61 Utah 277, 212 Pac. 63, this Court approved the applicable principals which had almost universally acceptance: That where a grantor executes a deed and places it in the hands of a third party for delivery after the death of the grantor, with the intent that the deed and its delivery are absolute, that the title in fact passes and the third party then holds the deed as trustee for the grantee.’”

Again in the case of *Burnhan v. Eschler*, 116 Utah 61, 209 P. 2nd 96, (1949), they state:

“That grantor, after the execution of deeds, continued to pay the taxes on the property, carried insurance in her name and expressed to various persons the desire to sell a part or all of the property is not, *when the relationship which existed between the grantor and the grantee is taken into consideration*, inconsistent with the actual delivery of the deed \*\*\*. Nor was the finding of delivery by the lower courts precluded by the fact that Mrs. Schank chose to deliver the deed to a third party instructing him to deliver

the deed to the grantee after her death instead of delivering them directly herself to the grantee.”

It is interesting to note that the relationship which was referred to in this case, was exactly the same as that which exists in the case at hand; i.e., aunt and nephew.

Again in the case of *Wilson v. Wilson*, 32 Utah 169, 89 Pac. 443 (1907), where the father was about to remarry and he conveyed his property to his son, second wife attempted to have the conveyance set aside for lack of delivery in order that she could take her statutory one-third interest. The Court held that where a grantor delivers a deed to a third person absolutely as his deed, without reservation, and without intending to reserve any control over the instrument, though it is not to be delivered to the grantee until the grantor's death, the deed, when delivered, is valid and takes effect on the first delivery.

To exactly the same affect is the case of *Cappmayer, et. al. v. Wilkenson, et. al.*, 53 Utah 236, 177 Pac. 763 (1919). In this case deeds and mortgages were made to grantor's children just before he remarried and he delivered them to the Utah County Abstract Company of Provo, Utah, with directions to deliver the deeds to grantees upon his death. The Court cited the *Wilson v. Wilson* case in sustaining the lower court's language:

“Where a grantor delivers a deed to a third person absolutely as his deed without reservation, and without intending to reserve any control over the instrument, though it is not to be delivered to the grantee until the grantor's death, the deed, when delivered, is valid and takes effect from

the first delivery.”

Cases from other jurisdictions holding to the same rule of law are as follows: *Cox v. McCartney*, 34 Tenn. App. 235, 263 S.E. 2nd 763; *Jobse v. U.S. National Bank of Portland*, 142 Ore. 692, 21 P. 2nd 221; *Jorgenson v. Jorgenson*, 74 S.D. 239, 51 N.W. 2nd 632; *Grouse v. Housner*, 322 Mich. 448, 34 N.W. 2nd 38; *Burton v. Peace*, 206 N.C. 99, 173 S.E. 4; and *Camp v. Guarantee Trust Company*, 262 Mich. 223, 247 N.W. 162.

## POINT II.

THERE IS A STRONG PRESUMPTION IN FAVOR OF A VALID DELIVERY WHERE IT IS RECORDED BY THE GRANTEE AFTER DEATH OF THE GRANTOR. ONE WHO WOULD OVERCOME THIS PRESUMPTION WHICH FLOWS FROM THE RECORDING THEREOF HAS THE BURDEN OF PRODUCING COMPETENT EVIDENCE OF NON-DELIVERY.

At the trial only two witnesses were called by the Appellant to prove their case; the Respondent, Archie Findlay, and the president of the Barnes Banking Company, Mr. J. R. Gailey. Both of these witnesses testified that the deed was delivered by the deceased to Mr. Findlay who in turn delivered it to Mr. Gailey, who held it at Mr. Findlay's direction. There has been no evidence whatsoever introduced to the affect that there was not a delivery but, at best, there has been some inference that the delivery was made in trust which, of course, as indicated, is not an issue before the Court at this time. In the Utah case of *Bertoch v. Gailey, et. al.*, 116 Utah 101, 208 P. 2nd 953, (1949), the Court states:

“One who would overcome presumption of



delivery of deed, which flows from the recordation thereof, had burden of producing competent evidence of non-delivery or show a conditional delivery with the conditions unfulfilled, and mere averment of non-delivery and offer of evidence which created some suspicion, was insufficient to discharge that burden or impose upon the adversary the burden of affirmatively proving actual delivery."

(Incidentally, this is the same J. R. Gailey involved in this case who is the principal witness in the case at hand.)

In the case of *Knighton v. Manning, et. al.*, 84 Utah 1, 33 P. 2nd 401, (1934), Tilda Larson and Oscar B. Berglund lived together for ten years but were not married. Three days after death of Tilda, Oscar recorded a deed to her property to himself. The Court held that the deed being in his possession and properly executed by the decedent, gave rise to a presumption that there was a valid delivery and one attempting to prove otherwise had the burden of sustaining proof. Citing *Chamberlin v. Larson*, 83 Utah 420, 29 P. 2nd 355, and *Fish v. Poorman*, 85 Kan. 237, 116 P. 898, *Jones v. Betz*, 203 Iowa 767, and other cases. Also, recently in the Utah case of *Morgan v. Sorenson*, 3 Utah 2nd 428, 286 P. 2nd 229, (1955), the Court even went further and held that where a deed, executed and acknowledged, is found in the hands of the grantee, its invalidity can be established only by clear and convincing evidence.

The plaintiff has offered no evidence which would even tend to establish that the deed in question was not

actually and physically delivered. On the contrary, as pointed out, the only two witnesses called, both stated unequivocally that the deed was executed and delivered by the decedent to Archie Findlay, who in turn gave it to Mr. Gailey, who held it subject to Archie Findlay's order. We submit that the case at hand is much stronger than any case previously argued before this Court and that the decision of the lower court should be sustained.

### POINT III.

THE DEAD MAN'S STATUTE DOES NOT APPLY IN A SITUATION WHERE THERE IS A THIRD PARTY WITNESS TO THE TRANSACTION WHO CAN SUBSTANTIATE THE PARTY WHO WOULD OTHERWISE BE DISQUALIFIED UNDER THIS LAW.

It is extremely difficult for me in reading Section 74-24-2 UCA (1953), to know just what class of witnesses the legislature intended to exclude under the "Dead Man" section of our code. The confusion, however, is removed in the case of *Maxfield v. Sainsbury*, 110 Utah 280, 172 P. 2d 122, wherein they state:

"The purpose of the statute is to guard against the temptation to give false testimony in regard to a transaction with a deceased person by the surviving party when the transaction is involved in a law suit and death has sealed the mouth of the other party. Furthermore, the statute seeks to put the two parties upon terms of equality in regard to giving evidence of the transaction. 3 Jones ev. 790; *Miller v. Livingston*, 31 Utah 415, 88 P. 338. It was never intended that this section should be used for the purpose of suppressing the truth. On the contrary, the statute's sole purpose is to prevent the proving by



false testimony of claims against the estate of a deceased person.”

Peter M. Lowe, attorney for the estate, has objected to the testimony of Mr. Findlay pertaining to the conversations which took place at the time the deed in question was executed and delivered and specifically to his testifying as to what Mr. Gailey stated at that time. It should be borne in mind that the witness was called by Mr. Lowe himself and on direct examination, all of these specific points were opened by him. For example, on page 18 of the transcript, beginning at line 30, we find the following language:

Q. Did you have any discussion with Mrs. Hiri-garay before that document was given to you?

A. I did.

Again on page 24 of the transcript beginning at line 17, we find the following question propounded by Mr. Lowe:

Q. Now getting back to the day, I think we identified it as April 26, 1949, when that document was made, when you were at the Barnes Banking Company, do you recall what the conversations were at that time?

Again on page 25, line 1, the following question:

Q. Do you remember other conversations at that time when the deed was made at the Barnes Bank by anyone?

Can the party who on direct examination opens all of the questions pertaining to the conversations which

may normally fall within the provisions of the Dead Man's Statutes, object to the same matters being inquired into on cross-examination? I feel, obviously not. Furthermore, where there were other witnesses present at the time the statements were made, it is apparent that the possibilities of falsification vanish and, therefore, the only reason for excluding the testimony, would be for the purpose of suppressing the truth, which the court in the Mansfield case expressly stated should not be tolerated.

### CONCLUSION

The sole issue before this Court is the one of delivery. Was the deed delivered by the grantor to the grantee?

The lower court after reviewing the evidence and memorandums submitted by the counsel for the parties, made the following Findings of Fact:

"That prior to the execution and delivery of said deed, the decedent was advised by the witness, J. R. Gailey, that before the deed would be valid, it would have to be delivered.

"That the said Nancy E. Hirigaray executed said deed and then and there delivered the same to the defendant, who then handed the same to the witness, J. R. Gailey, for safekeeping."

From said findings, the Court made the following Conclusions of Law:

"That on or about April 26, 1949, the decedent, Nancy E. Hirigaray, was the owner in fee simple of the real property described above, to-

gether with the water rights, improvements and appurtenances thereunto belonging, and that on said date she executed a valid deed to said property conveying the same to her nephew, Archie Findlay, the defendant herein.

“That upon the execution of said deed, the decedent made a valid delivery thereof to the defendant.”

There is no evidence in the record which will refute these Findings of Fact or give rise to any other Conclusions of Law. The Appellant's have failed to sustain the burden of proving non-delivery of the deed in question and the decision of the lower court should be sustained.

Respectfully submitted,

REX W. HARDY,

WILLIAM H. KING,

*Attorneys for Respondent.*

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