

1961

William K. Howard et al v. Mildred M. Howard et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

WILLIAM K. HOWARD, RUTH N.
HOWARD, ROBERT D. HOWARD,
and SHIRLEY L. HOWARD,

Plaintiffs and Respondents.

—vs.—

MILDRED M. HOWARD,

Defendant and Appellant,

MILDRED M. HOWARD,

*Defendant and Third Party
Plaintiff and Appellant,*

—vs.—

WALKER BANK & TRUST COM-
PANY, as Administrator of the estate
of L. W. HOWARD, deceased, WIL-
LIAM K. HOWARD, RUTH N. HO-
WARD, ROBERT D. HOWARD and
SHIRLEY L. HOWARD,

*Third Party Defendants,
and Respondents,*

FILED

OCT 9 - 1961

Clerk, Supreme Court, Utah
Case

No. 9552

BRIEF OF APPELLANT

BACKMAN, BACKMAN & CLARK
MILTON V. BACKMAN

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of the

STATE OF UTAH

WILLIAM K. HOWARD, RUTH N.
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and SHIRLEY L. HOWARD,

Plaintiffs and Respondents,

—vs.—

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LIAM K. HOWARD, RUTH N. HO-
WARD, ROBERT D. HOWARD and
SHIRLEY L. HOWARD,

*Third Party Defendants,
and Respondents,*

Case
No. 9552

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This case is prosecuted to set aside a Warranty Deed given by the grantor during his lifetime to the grantee in which deed the description was not a perfect one but

which appellant contends was sufficient to convey the property intended. Appellant prayed for judgment reforming the description to give effect to the deed.

DISPOSITION OF THE CASE BY LOWER COURT

The lower court adjudged the deed to be of no force or effect and ruled that the property intended to be conveyed remained in the grantor, and denied the prayer of appellant to have the deed reformed.

RELIEF SOUGHT ON APPEAL

That the deed be adjudged good and valid and that title to the property therein described be decreed that of the grantee, or if such judgment is not directed then that the case be remanded to the lower court for trial.

STATEMENT OF FACTS

Respondents herein are children of L. W. Howard, who died intestate in Salt Lake County, Utah, on November 30th, 1955, born of a deceased first wife of said L. W. Howard. Appellant is the surviving widow of said L. W. Howard, the mother of two children by L. W. Howard. During his lifetime, L. W. Howard held title to a tract of land in Holladay, Salt Lake County, Utah from which he and appellant herein conveyed three par-

cels designated on map appended hereto, which parcels are therein designated as Tracts "A", "B", and "C".

On May 9th, 1945, L. W. Howard drafted in his own hand, a warranty deed naming his wife, appellant herein, as grantee, which deed describes the property as follows:

Com at a point 2.07 ch, W. & S. 52°30'E.5.24 ch from Northeast cor. of Northwest ¼ of sec 10 T 2 S R. 1 E S.L.B. & M and running thence N 56° E 3.55 ch. thence S 39° E 6.15 ch thence S 47° W 5.88 ch thence S 54°15'W 214.25 ft. thence N 46° 25'W 404 ft more or less to a point which is South 55°30' W455 ft. thence S 46°25'E 154 ft. thence S43°35'West 160 ft. more or less from beginning
 Less roads
 Less Temple & Woods
 Less Theatre
 Containing 2.75 acres more or less

The deed was delivered to appellant with instructions to place the same of record in the office of the County Recorder of Salt Lake County, Utah, upon the death of L. W. Howard. Appellant did on December 1st, 1955, record said deed in the office of the County Recorder and the same was recorded in Book 1263, page 45 of the county records (R. 43).

On May 13, 1947 the said L. W. Howard made another deed naming his wife, the appellant herein, as grantee, describing a tract shown on the appended map as Tract "D." This deed was also delivered by said L. W. Howard to appellant during the lifetime of L. W. Howard and appellant recorded this deed in the office of the

County Recorder of Salt Lake County, Utah, on December 1st, 1955. The description contained in this deed is a good and sufficient description. (R. 4).

Appellant claims title to the properties covered by each of said deeds by virtue of the grant therein contained. Respondents instituted these proceedings in the lower court praying that the court decree that the deeds from L. W. Howard to appellant are null and void and of no effect and that the property described in each of said deeds be decree that of L. W. Howard at the time of his death (R. 1-8). Appellant answered the complaint of respondents and also filed her cross-complaint as against Walker Bank & Trust Company as administrator of the estate of L. W. Howard, deceased, and against respondents, praying that the deed bearing date May 9th, 1945 be revised so as to express the true intent and meaning of L. W. Howard, and that appellant be adjudged and decree the owner in fee simple of the land described by said deeds. (R. 16-20)

The case was called for pre-trial at which the lower court held the deed bearing date May 9th, 1945 defective and that it conveyed no property, and entered its judgment from which this appeal is taken. (R. 45) Appellant filed timely objections to the judgment, also a motion to assign the case for trial, a motion to amend her cross-complaint, and a motion for New Trial, all of which were denied by the lower court. (R. 44) (R. 48)

The single question is whether that deed, dated May 9th, 1945, which the trial court held to be defective, con-

tained such description that the land might be identified which was intended to be conveyed and therefore did convey the property. And whether the trial court erred in denying appellant's motion to assign the case for trial and to permit appellant to amend her cross-complaint.

STATEMENT OF POINTS RELIED UPON

1.

THE DEED BEARING DATE MAY 9th, 1945 CONTAINS SUCH DESCRIPTION THAT THE INTENT OF THE GRANTOR IS CLEARLY EXPRESSED.

2.

THE FALSE STATEMENT IN THE DESCRIPTION WILL NOT DEFEAT THE GRANT.

3.

THE DEED CONTAINS A DESCRIPTION WHICH A SURVEYOR COULD USE TO LOCATE THE PARCEL INTENDED TO BE CONVEYED, ON THE GROUND.

4.

AN OMISSION OF PART OF A BOUNDARY OR CALL IS NOT FATAL TO THE VALIDITY OF A DEED WHERE SUCH BOUNDARIES OR CALLS CAN BE SUPPLIED OR THE DESCRIPTION RENDERED CERTAIN.

5.

IF THE DESCRIPTION MAY BE HELPED BY EXTRINSIC EVIDENCE, THEN APPELLANT IS ENTITLED TO A TRIAL AND AN OPPORTUNITY TO PRODUCE EXTRINSIC EVIDENCE.

ARGUMENT

POINT I.

THE DEED BEARING DATE MAY 9th, 1945 CONTAINS SUCH DESCRIPTION THAT THE INTENT OF THE GRANTOR IS CLEARLY EXPRESSED.

By the description as contained in the deed, the grantor definitely established the point of beginning by tying to "the Northeast corner of Northwest $\frac{1}{4}$ of sec. 10 T 2S r. 1 E S.L.B.&M"; he then describes the next four courses exactly as are described in the deed by which he received title, then it is clearly shown that he intended to cut off the west jog and to follow a line on a course N.46°25'W being the same course as described in the deed by which grantor took title after going around the piece protruding on the west. Grantor describes this west line with particularity a distance of 404 feet more or less and it is shown by a portion of that which then follows that the grantor was intending to arrive at the Northeast corner of his property; true he does go off on another angle but the distance he refers to is 455 feet which is the distance from grantor's northeast corner as given in the deed by which he took title and the place of beginning, then grantor goes southeasterly using the same variation as his northwest line of 46°25'West the same distance of 154 feet, then he follows approximately the north line of the tract which it is evident he intended to omit, the same distance which that north line carries. It is further evident that when the grantor inserted the

words "beginning" he thought he had described to the place of beginning.

POINT II.

THE FALSE STATEMENT IN THE DESCRIPTION WILL NOT DEFEAT THE GRANT.

The last calls locate nothing nor do they change the westerly line which the grantor specifically defined and which line did follow the true course. Those calls are surplusage and may be disregarded.

In 2 Devlin on Deeds, Third Ed. Vol. 2, at section 1013a we find the law stated as follows:

"If the land conveyed can be identified by the other calls of the description an impossible or *senseless course* will not be considered," citing

Brose v. Boise City, R.R. 5 Idaho 695.
and at section 1035 we find the following:

"If a description is otherwise complete and accurate, a false statement in it will not defeat the grant."

In Thompson on Real Property, Perm. Ed. Vol. 6, Formal Parts of Deeds at Section 3274, page 445 we find the following:

"Rejection of false or erroneous description. After an accurate description, an inaccurate description following which is merely cumulative will be rejected. Thus, where the deed contains two descriptions, one of which describes the land with

reasonable certainty, and the other is incorrect in some particulars, the incorrect particular will be rejected as surplusage. Where the land is sufficiently described for the purpose of identification after eliminating an incorrect part of the description, the deed is read as if such description were eliminated and effect is given to the remaining part of the description.”

Citing *Vaughn v. Continental Royalty Co.*, 116 Fed. (2d) 72;

Hanlon v. Western Loan, 46 Cal. App. (2d) 580, 116 P. (2d) 465;

Mizell v. Osmon, 324 Mo. 321, 189 SW 2d 306;

State v. Franco-American Soc. (Tex.) 172 SW 2d 731;

Copeland v. Carpenter, 206 Ga. 822, 59 SE 2d 245;

DeLong v. Starkey, 120 Ind. App. 288, 92 NE 2d 228.

In 2 Devlin on Deeds, Third Ed., Vol. 2, at section 1012, p. 1916 it is said:

“What is a sufficient description. A deed is not void for uncertainty because there may be errors or an inconsistency in some of the particulars. If a surveyor, by applying the rules of surveying can locate the land, the description is sufficient and the deed will be sustained. And generally, the rule may be stated to be that the deed will be sustained if it is possible from the whole description to ascertain and identify the land intended to be conveyed.”

“As that is certain which can be made certain, the description if it will enable a person of ordinary prudence acting in good faith and making inquiries which the description would suggest to him, to identify the land is sufficient.”

Citing Ford, S.D. 124 NW 1108.

Hayes v. Martin, 144 Ala. 532, 40 So. 204.

In Thompson on Real Property above cited, Section 3271 Pocket Supp. at page 60 it is said:

“When the description in a deed is erroneous, that which is intended to be conveyed, rather than that which is described, is conveyed. A subsequent erroneous addition will not be permitted to limit or impair what has been definitely described in the deed.” (Italics added.)

Citing U.S. v. Big Bend Transit, 42 Fed. Supp. 459;

Bruni v. Viduarri, 140 Tex. 138, 166 SW 2d 81.

POINT III.

THE DEED CONTAINS A DESCRIPTION WHICH A SURVEYOR COULD USE TO LOCATE THE PARCEL INTENDED TO BE CONVEYED, ON THE GROUND.

By the affidavit attached to appellant's motion for New Trial it is stated that appellant was prepared to offer the testimony of C.C. Bush of the engineering firm of Bush & Gudgell to the effect that he could locate the land on the ground from the description contained in the deed. By the court's granting judgment on the pleadings the appellant was not afforded the opportunity to introduce such evidence.

The granting of judgment on the pleadings without a trial of this case is, we contend, no more favored by our courts than are Summary Judgments, this because litigants are prevented from fully presenting their case to the court. Such was the holding in *Brandt v. Springville Bank*, 10U 2d 350, 353 P2d 460 in which the court said:

“For the reason that a summary judgment prevents litigants from fully presenting their case to the court, courts are, and should be, reluctant to invoke this remedy.”

And in *Morris v. Farnsworth Motel*, 123 U. 289, 259 P2d 297 our court said:

“The party against whom the summary judgment is granted is entitled to the benefit of having the court consider all of the facts presented.”

That statement of law followed the ruling of our court in *R. J. Dawn Const. Co., v. Child*, 122 U. 194, 247 P2d 817.

The same rule of law applies in this case where judgment has been granted on pleadings. Applicant has a defense to the action and she pleaded it.

The rule if a surveyor, by applying the rules of surveying can locate the land, the description is sufficient and the deed will be sustained is announced in 2 Devlin on Deeds, Third Ed., Vol. 2, Section 1012 at page 1916, which rule is also followed in *Blume v. MacGregor*, (Cal.) 148 P2d at 661, *Best v. Wohlford*, 144 Cal. 733, 78 Pac. 293; *Thompson v. McKenna*, 22 Cal. App. 129, 132, 133 P. 512, and 16 Am. Jur. Deeds, Sec. 263, p. 586.

In the *Blume v. MacGregor* case we find the following statement at page 661.

“In general if a competent surveyor can take the deed and locate the land on the ground from the description contained therein, with or without the aid of extrinsic evidence, the description will be held to be sufficient.”

In *Harrison v. Everett*, 308 P2d 216, citing *Wheeler Perry Co. v. Mortgage Bond Co. (Ariz.)* 17 P2d 331 involving question of priority of lien of mortgage as against judgment where debtors had filed Homestead Declaration describing therein Lots 13 and 14, Mount Pleasant tract and omitting the Block No. 4 from the description, as a result the judgment creditor contended that because of the erroneous description the declaration was ineffectual, the court said:

“A description of the property is essential to a valid declaration of homestead but the description need not be more particular than is required in the case of a deed.” Then follows citation of many of the authorities heretofore referred to. The court going on further said: “It will be seen from the foregoing that the description of the land as embodied in the declaration was sufficient to afford a means of identification and therefore fulfills the requirements of a particular description.”

POINT IV.

AN OMISSION OF PART OF A BOUNDARY OR CALL IS NOT FATAL TO THE VALIDITY OF A DEED WHERE SUCH BOUNDARIES OR CALLS CAN BE SUPPLIED OR THE DESCRIPTION RENDERED CERTAIN.

The intention of the parties is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then to give effect to such intention if practical, when not contrary to law. 2 Devlin on Deeds, Third Ed. Vol. 2, section 836, p. 1508.

In *Holleys Ext. v. Curry*, 58 W. Va. 70, 51 SE 135, 112 Am. St. Rep. 944, and in 18 CJ 180, 181, 26 CJS Deeds, Sec. 30 and 100, pp 210 and 357, and in *Sanders v. Baker*, 231 SW 2d 106 (Ark.) it is said that the office of a description in a deed is not to identify the land but to furnish means of identification.

This rule is also announced in *Thompson on Real Property* (Perm. Ed.) Vol. 6, Pocket Supp. Sec. 3268.

Section 1013d, 2 Devlin further says :

“The principal purpose of the construction is to ascertain the true intent of the language and when that intent has been ascertained, it should be allowed to have paramount force and great liberality is always exercised in constructing that part of the deed in which the property conveyed is described and the description will be sufficient if it supplies the means for identifying the land to be conveyed.”

And in 26 CJS, Secs. 30 and 100, pp 210 and 357 the law is stated as follows :

“A deed will not be held void for uncertainty of description if by any reasonable construction it can be made available.”

In Devlin at section 1013 it is further said :

“Where the description is uncertain, reference may be made to prior deeds conveying the same land.”

The deed by which L. W. Howard took title may be referred to.

POINT V.

IF THE DESCRIPTION MAY BE HELPED BY EXTRINSIC EVIDENCE, THEN APPELLANT IS ENTITLED TO A TRIAL AND AN OPPORTUNITY TO PRODUCE EXTRINSIC EVIDENCE.

We find Tiffany on Real Property, Third Ed., section 997 reads as follows :

“With the exception of the broad principals that a conveyance will not be declared void for insufficiency in its description of the property which it purports to convey if it is possible by any reasonable rule of construction, *aided by extrinsic evidence*, to identify the property intended, it is impossible to give any general rules by which to determine whether in the case of any particular conveyance the description is sufficiently operative. The court will, if possible, *with the aid of evidence introduced for the purpose*, find a particular piece of land which the description serves to differentiate from other land.” (Italics added.)

In Devlin it is said that the fourth side of a rectangle may be supplied where the intent of the parties is clear, and the grantee has entered into possession. Respondents will probably contend that our description is not that of a rectangle, this we concede but our description is more

than a rectangle and all the more shows the intent of the grantor, he having specifically followed the variances and distances to the closing line.

Devlin also states at section 1013b:

“A description is sufficient where there is but one line to find to locate the land as the land conveyed may be identified by extrinsic evidence.”

In the instant case there is but one line to find, that is the closing line.

And at Section 1031a Devlin states:

“If a deed omits one of the calls in the field notes, yet if, by the description given and reversing the calls in the field notes, the missing call can be supplied, and the land to be conveyed ascertained, the deed is not void for uncertainty.” Citing *Montgomery v. Carlton*, 56 Tex. 431.

In *Deal v. Cooper*, 94 Mo. 62, 6 SW 707 the court held that if it appears there is an obvious omission in the description but the deed affords sufficient data to supply the omission, the defect will be cured by construction.

And this Court in *Losee v. Jones*, 120 U. 385, 235 P2d 132 at page 137 in speaking of an omission said:

“Appellants next raise the contention that the deed from the mother to Elenora Jones Bingham is void by reason of an erroneous description whereby the calls fail to close. In their brief they quote from Patton on Titles, Sec. 74, p. 265, as follows:

“Either as actually described or construed, the lines themselves must be continuous, one commencing where the other leaves off, and the final line returning to the point of beginning. Otherwise, they do not inclose, and therefore do not describe any tract of land.”

“This may be due to omission of one of the lines from the description or to a mis-description of one of the lines. To a certain extent, however, this situation has been overcome by the fact that the courts will supply the line by intendment when by so doing the boundaries will be complete and will close approximately the acreage called for in the description. Also, a manifest error in the calls may be corrected even to the extent of reversing the direction of a line. Even when the lines are continuous, they may fail to enclose any tract of land owing to failure of the final line to return to the starting point. Unless the description as stated, or as it may be allowably construed, can be made to close, the grant must fail.”

“In the construction of boundaries, we again find that the intention of the parties is the controlling consideration. *Machado v. Title, Guaranty & Trust Co.*, 15 Cal. 2d 180, 99 P. 2d 245; *Park v. Wilkinson*, 21 Utah 279, 60 P. 945. In the present case, we believe the Elenora Jones Bingham deed capable of such construction as to form an enclosure in accordance with the intent expressed therein. The deed fixes a definite and clear point of beginning, continues by courses and distances to the last corner, and then concludes: “* * * thence east 2.5 chains more or less to the place of beginning.”

“As stated by this court in the case of *Park v. Wilkinson*, 21 Utah 279, 60 P. 945, 946: ‘The

words used in the deed should be construed so as to ascertain the intention of the parties making it, and when the intention of the parties can be ascertained therefrom, nothing remains to effectuate that intention.'

"But when there are no natural monuments or lines called for by which the closing line is to be fixed or ascertained, and no line on the ground, it follows, of necessity, that the survey is to be closed by a direct line between the termini of the lines on the ground, or as fixed by the courses and distances returned to ascertain those termini."

It is conceded that in the Losee case while the description as given did not close it recited "to the place of beginning." However we contend the principal of law as laid down by said case is applicable inasmuch as the court in the Losee case refers to *Ransberry v. Broadhead*, a Pennsylvania case, 174 Atl. 97 which was a case to test title to part of a stream and land adjoining, the description of the property did not close and one of the defenses set up was defective description in that it failed to close. In quoting from the case we find the following:

"Appellant urges that the description in the Stites' deed will not close. The court said the course, the metes and bounds must be considered, they should be followed and, if possible, made to close, but as indicated in *Wharton v. Carvin*, 34 Pa. 340, 342, where there are no natural or artificial monuments by which to close the line, it follows of necessity that the survey should be closed by direct line between the termini of the line established on the ground. That is what was done in the case and we see no error in it."

From *Wharton v. Garvin*, 34 Pa. 340, cited in above case we quote the following:

“Generally a survey is to be carried to its calls, unless there are actual lines on the ground excluding them. In that case the lines on the ground will control the calls, for they constitute the survey. *But when there are no natural monuments or lines called for, by which the closing line is to be fixed and ascertained, and no line on the ground, it follows of necessity, that the survey is to be closed by a direct line between the termini of the lines on the ground, or as fixed by the courses and distances returned, to ascertain these termini.* It was ascertained in this case, that the north and south boundaries, by their courses and distances, did not reach the river by the number of rods already stated. And if we are to discard the river as a call, then the west boundary must necessarily be closed by a straight line from point to point of the side lines. There is no other process by which it may be done.” (Italics added.)

The above wording is adopted by the Utah court in *Park v. Wilkinson*, *supra*.

An interesting case in point where there is neither call for the last course or the words, “to beginning,” is that of *Blume v. MacGregor*, (Cal.) 148 P2d 656 in which we find the court stating at page 660:

“The true issue as to the ten foot strip as developed at the trial arose from the fact that the description of the land conveyed in 1884 by Pacific Improvement Co. to California and Nevada Railroad Company omitted certain courses and distances and if followed literally described an ir-

regular parcel varying in width from approximately 14 feet at its narrowest, to over 80 feet at its widest, and would only close by drawing an arbitrary line from the end of the last course given to the point of beginning. In view of the fact that this 1884 conveyance was expressed to be a strip of land for the right of way of its railroad, the missing courses and distances fairly suggest themselves on the face of the deed, bearing in mind the well-known fact that railroad rights of way are commonly strips of land of uniform width."

The court there further said:

"Such interpretation must be given to a deed as to make it effective rather than to defeat it." Hall v. Bartless, 158 Cal. 638, 642, 112 P. 176; 9 Cal. Jur. 258-9.

"An omission of part of the boundaries or calls is not fatal to the validity of a deed, where such boundaries or calls can be supplied or the description rendered certain."

26 CJS Deeds, Sec. 30, p. 220; 18 C.J. 185, and numerous cases there cited.

"If the description is indefinite, as by the omission of a line, then a statement of the quantity may help to locate the boundaries. 4 Cal. Jur. 404; 9 Cal. Jur. 314-5."

The grantor conveyed to defendant 2.75 acres more or less. In order to convey this acreage it is necessary to surround a tract of land. By supplying the last call, grantor would have conveyed approximately the acreage called for by the deed. Then too, grantor expressly conveyed a tract out of which he had previously conveyed

the Temple and Woods and theatre tracts. From a reading of authorities on Deeds and conveyancing it is clearly evident that had the grantor, L. W. Howard simply described 2.75 acres, more or less the starting point commencing at a point 2.07 ch. W. and S.52°30' E.5.24 ch from Northeast cor. of Northwest $\frac{1}{4}$ of sec. 10, T2 SR.1 E.S.L.B.&M. out of a tract from which the Temple & Woods and the theatre tracts had been conveyed, it would have been sufficient. This is the only tract owned by L. W. Howard in this particular area. It is to be noted too that the abstractors in the County Recorder's Office were able to determine that property intended to be conveyed, having indexed the property in NW $\frac{1}{4}$ NE $\frac{1}{4}$ & NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 10-2S-1E. (See notation on left side of deed (R. 43).

In 16 Am. Jur. Deeds, Sec. 265 at page 587 we find the following statement of law :

“It may be laid down as a general rule that a deed conveying a part of a tract of land or a given number of acres out of a tract is not void for uncertainty although it does not attempt to locate the part of the tract conveyed. In a few cases, however, conveyances have been held to be ineffectual and void for uncertainty where the land is described merely as a fractional part of a designated tract or where in addition to giving the acreage the deed ineffectually attempts to locate specifically the land conveyed. Even under this view, a conveyance of a specified number of acres designated as being located at a given corner of a designated lot or tract is sufficient to sustain

the deed which will be construed as conveying a tract containing the designated number of acres in a square form.”

In *Jones v. Mabrey*, 225 SW2d 561 (Tenn.) it was held that a deed purporting to convey a stated number of unlocated acres, bounded by general specifications, out of a larger tract of land presumably owned by the grantor is not void.

We find an interesting case in which the last call of the description of a proposed new ordinance was omitted and no reference contained carrying the description to the place of beginning, in that of *Central Mission Oil & City of St. James*, 111 SW2d 215, 232 Mo. App. 142.

“An action was brought to test the validity of the ordinance extending the limits of the city of St. James. Plaintiffs objecting to the ordinance claimed that it was invalid because the call on the east line was omitted. The court said that although there is a manifest omission in the description of the new line as it passes around the ball park, yet there is sufficient data from which the omission can be easily supplied and the description hereby rendered certain. The description shows clearly the omission of the line running from the eastern terminus of the line on the north side of the ball park to the beginning of the line running west on the south side of the ball park; *the call omitted being ‘thence south 551 feet along the east side of ball park to pin.’* We think it is obvious that it was the intention to surround the ball park. Three sides are accurately described, all the corners defined and located, and it seems to us that a person of common *understanding can*

readily supply the omitted line. The same rule applies to descriptions in extension proceedings as applies to descriptions in deeds. The court there further says: 'Our Supreme Court in Deal v. Cooper, 94 NW 62, said, "When the deed applied to the subject matter shows a manifest omission in the description and there is sufficient data furnished by the deed to supply the omission, the omission will be supplied by construction." Numerous other cases supporting this rule of law are therein cited. (Italics added.)

The question might arise whether the law and cases herein contained apply to a deed of gift, one without consideration. On this point we cite Hazelett v. Bryan, 192 Tenn. 251, 241 SW2d 121 which held that equity will reform a description in favor of a donee in a deed of gift. See also 69 ALR, p. 416. Thompson on Real Property (Perm. Ed.) Vol. 6 Pocket Supp. Deeds. Sec. 3275.

It appears that the legislature of the State of Utah has not enacted laws which might act as a guide on this point, as have some of the states. We do find however, in the footnotes to Section 57-1-12, UCA 1953 on the form of Warranty Deed, a reference to 69 ALR 423 on reformation of conveyance, right to as depending upon consideration. This annotation is found following the case of Launderville v. Metro, Montana, 281 Pac. 749, which is in point and in which case the plaintiff brought action to reform a deed which had been given to her without consideration passing as against another heir of the deceased grantor. The question was raised in the defense to the action as to the right to have the deed reformed as it was

but a voluntary deed and the mistake was not a mutual mistake as the grantee had no knowledge of the deed having been executed. The court held that the reason for the rule that equity will not reform a voluntary deed as against the donor does not exist in favor of his heirs, and that a court of equity has inherent power in a proper case to reform a voluntary conveyance so as to have the deed express the intention of the grantor, even though, strictly speaking, the mistake is not mutual. The above case is an old case and appears to have been followed repeatedly to the present day.

In *Harth v. Roper*, 88 SE 2d 142, 242 N.C. 489 the court said the fact that there were five calls in the deed and that if the calls were surveyed as called for in the deed, lines would not close, did not render the description incomplete.

And in *White v. Spahr*, 59 SE2d 916, 207 Ga. 10 it is said:

“The description of land contained in a deed is not void for uncertainty if it furnishes a key to identify the land.” See also *Lewis v. Bowen*, 75 SE 2d 422.

In *Blue Ridge v. Telfair*, 54 SE 2d 608, 205 Ga. 808 the court said:

“Where it can be gathered from words employed in a deed that intention of grantor was to convey the whole of a tract of land owned by him, *even a vague description of the tract will suffice if by aid of competent parol evidence its precise*

location is capable of ascertainment and its identity can be established.” (Italics added.)

And in *Brown v. Hurley*, 90 SE 2d 324, 243 N.C. 138 the Court held that *even if a boundaries description does not go entirely around the land* it does not invalidate the description.

It is stated in 16 Am. Jur. Deeds page 585 that *the courts are extremely liberal in construing descriptions of premises conveyed with the view of determining whether these descriptions are sufficiently definite and certain to identify land and make the instrument operative as a conveyance.* (Italics added.) Following this rule of law we find in *Nolen v. Henry*, 190 Ala. 540, which, while an old case appears to be one repeatedly followed by courts of other jurisdictions, the court said:

“It is of course, well settled that the law leans against the destruction of a deed for uncertainty of description, but will construe the deed, where it can be done consistently with legal rules, so as to give effect to the intention of the parties, and not to defeat it. *Every deed ought to be so construed, if it can, that the intent of the parties may prevail and not be defeated.*” (Italics added.)

In closing we cite 16 Am. Jur. Deeds, Sec. 263, p. 586 as follows:

“The fact that parts of the description given of the property are incorrect or incomprehensible will not destroy the operative effect of a conveyance, if a sufficient part of the description remains for purposes of identification.”

and Sec. 288. "An uncertain general description will also be controlled by a more specific and certain description."

CONCLUSION

That description contained in the deed placing the northwest corner of the property clearly out of the course followed by the definite north south line on the west is surplusage and is not to be considered. The last course carrying the description to the place of beginning which must be supplied to enclose the property, defendant is entitled to have supplied under her reformation action in order to carry out the intent of the grantor. This may be done by the court as pointed out by our own Supreme Court in *Park v. Wilkinson*, 21 Utah, at page 284 heretofore referred to wherein the court quoted from one of the accepted rules of law as follows :

"But when there are no natural monuments or lines called for by which the closing line is to be fixed or ascertained, and no line on the ground, it follows of necessity that the survey is to be closed by a direct line between the termini of the lines on the ground, or as fixed by the courses and distances returned to ascertain those termini."

While it appears the distance of the west line as given in the deed of 404 feet did not quite reach the Northwest corner of the land as described in the deed by which L. W. Howard received title, it is clearly apparent that Mr. Howard intended to go to that corner as he gave this call as 404 feet more or less. Following the rule of law above stated and the northwest corner being

established by the deed by which L. W. Howard took title the line should continue to that corner then the last call or closing call should extend from the termini of that corner to the place of beginning.

Respectfully submitted,

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