

1961

William K. Howard et al v. Mildred M. Howard et al : Reply Brief of Defendant-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,*

Case
No. 9552

REPLY BRIEF OF DEFENDANT-APPELLANT

Appeal from Third District Court
in and for Salt Lake County,
Hon. A. H. Ellett, Presiding Judge

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IN THE SUPREME COURT
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WILLIAM K. HOWARD, RUTH N.
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MILDRED M. HOWARD,
*Defendant and Third-Party
Plaintiff and Appellant,*

—vs.—

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PANY, as Administrator of the estate
of L. W. HOWARD, deceased, WIL-
LIAM K. HOWARD, RUTH N.
HOWARD, ROBERT D. HOWARD
and SHIRLEY L. HOWARD,
*Third-Party Defendants,
and Respondents.*

Case No.
9552

REPLY BRIEF OF DEFENDANT-APPELLANT

Respondents agree with appellant's statement of fact in which appellant states the single question is whether that deed dated May 9th, 1945 which the trial court held to be defective, contained 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. Respondents however, inject into their brief and argue matters not considered by the lower court and which could not have been considered by the lower court without the taking of testimony; namely as respondents contend, (1) lack of delivery of the deed, and (2) the inequities which would be brought about were the deed to be reformed. We contend the argument of these points at this time is most unfair to appellant and improper. This is repetitious of the tactics used by respondents in the lower court and which we think influenced the decision in this case.

The judgment entered and from which this appeal is taken, recites that the deed is void for uncertainty. There is no mention therein of lack of delivery or of the question of equities. Therefore we shall dwell but little in answer to this part of respondents' brief.

Had appellant been afforded the opportunity to produce evidence in the case the evidence would show that respondents had, during the lifetime of their father, received monies and properties to such extent that the equities would weigh more favorably to appellant than to respondents. Respondents will probably take the position that their arguing the question of lack of delivery and equities is to show lack of intent on the part of the grantor, but respondents have gone far beyond such

showing and they have included in their argument, statements which are not before the court in the pleadings or otherwise as to the amount and value of property covered by the deed, and values of other properties which they state were received by appellant from her husband. Respondents would have the court believe appellant was a wife who married the deceased grantor late in life for one purpose only, to acquire the property and estate of the deceased as against the children of deceased by a former marriage, but the pleadings do not support such contention. On the contrary, it is shown by the pleadings that appellant bore children by deceased, that one son of decedent and appellant was at the time of the death of the decedent, seventeen years of age. Therefore, it is evident from the record of the case that decedent and appellant were living together as husband and wife for in excess of seventeen years, and they were living together as husband and wife at the time of the death of decedent. It is clearly evident from such record that the grantor did not intend to make a defective deed as respondents contend. Where do respondents find one word in this record indicating even remotely that appellant made life so miserable for decedent that in order to have a little peace at home decedent led his wife to believe he was deeding property to her when in fact he was intentionally making a defective deed?

As to respondents argument under their point 2 that the deed was not intended as a present conveyance of a present interest because appellant stated she was in-

structed to place the deed of record upon the death of the grantor. If the question were properly before the court, which we contend it is not and could not be without the taking of evidence, this court has held in the *Losee* case 120 U. 385, 235 P. 2d 132, cited in appellant's original brief, and in many other cases, that the delivery of the deed is the determinative act and not the recording of same. This court held in the *Losee* case, where the grantor made deeds to children and delivered them to one of her daughters with instructions to deliver them to grantees after grantor's death, grantor even having access to the deeds, and the daughter to whom the deeds were delivered testifying she would have given the deeds back had the grantor changed her mind, constituted a valid delivery passing title. Here appellant alleged in her cross complaint that decedent made, executed and delivered to her the deed describing the property herein, and the lower court was obliged for the purpose of the motion for judgment on the pleadings to assume those allegations as true.

Respondents cite and rely on the case of *Stanley vs. Stanley*, 94 P. 2d 465, 97 U. 250. It is interesting to note in the *Stanley* case the court refers to the case of *Mower vs. Mower*, 64 U. 260, 228 P. 911 and at page 467 quotes as follows:

“Since delivery is essentially a matter of intent, which intent is to be arrived at from all the facts and surrounding circumstances, we believe the better rule is to include in those facts and circumstances declarations of the grantor

both before and after the date of the deed, at least where it appears that the declarations are made fairly and in the ordinary course of life.”

The court will we think, follow the better rule as announced in the *Mower* case and determine the case from the facts and surrounding circumstances put into evidence, not from bald statements which are not evidence.

As to error on the part of the lower court in not affording appellant the opportunity to produce evidence in the case we again refer to the *Stanley* case, page 467 wherein the court said:

“With respect to the delivery of the deed, the trial court excluded evidence offered by the defendant as to the formal act of delivery as being incompetent under the provisions of Sec. 104-49-2, R.S.U. 1933. However, she was permitted to testify that she first saw the deed on May 19, 1906, in the testator’s hands and next saw it in her own hands after which she immediately placed it in a tin box; that when she first saw the deed the testator was removing it from his pocket, remarking that he had a present for her, and handed it to her, and that she paid him a dollar, requesting however, that the deed be not recorded until after his death, and that thereafter it remained in her possession.”

“This testimony would undoubtedly justify an inference that the deed was delivered and should be considered *prima facie* sufficient for that purpose.”

While the law above quoted from the *Stanley* case is applicable to the instant case we find the reason the court found the deed had not been delivered with intent to presently pass title was that the evidence showed the grantee filed a will upon the death of the grantor of the deed, which will named the grantee as beneficiary. In the petition for probate of the will the grantee who was the petitioner alleged in a verified petition that the testator owned the property in question at the time of his death. A second and later will was found giving the property described in the deed to an adopted son who filed a petition for probate of the later will. Thereupon the grantee filed the deed of record and claimed title by virtue of the deed. The facts as pleaded in the instant case are not even remotely like those of the *Stanley* case.

Under point 3 respondents cite *Page on Wills*. We have no argument with the law as stated as it pertains to wills but such is not the law as to reformation of deeds. Page does state that it has been said, a court of equity has no jurisdiction to reform a will but says it has been said that reformation would be granted if the will had been executed in accordance with a contract to make a will.

For the reasons heretofore stated, point 4 has no place in the argument. Neither has point 5 regarding equities. There is nothing in the record supporting the argument of respondents as to equities. Who knows what the evidence will show? Who knows but what appellant might have contributed much toward the preservation of the property, in the payment of taxes and

upkeep, etc. Neither is there any evidence as to values of properties before the court.

In the *Carson vs. Palmer* (Fla. 1939), 190 So. 720 case relied upon by respondents it appears the deed involved contained two inconsistent descriptions, either of which would identify a different parcel of property from that described by the other. The facts are not at all like the instant case.

Respondents argue that Mr. Bush, a civil engineer, if called by appellant would have no authority to say which should be deleted or what should be added to make a valid description. Appellant does not contend Mr. Bush would have such authority. From the affidavit contained in the record, Mr. Bush would testify that he could locate the property by the description contained therein by applying the rules of survey. This is all that is necessary to be shown according to the authorities cited by appellant in her original brief.

Respondents state the west call, N. 46° 25' W. runs through the middle of the tract included in the deed. This is not so, that line is located toward the westerly line and cuts off the small tract protruding, shown at the lower left hand corner of the plat attached to appellant's original brief.

As to the original deed by which Mr. Howard acquired title to the tract and appellant's referring to same, appellant has a right to refer to that deed, it helps to show the intent of the grantor in the deed here in question in following the identical calls with those contained in the deed by which Howard took title to the

tract. The rule of law is that the whole of the document (the deed here in question) is to be taken together so as to give effect to every part, each clause helping to interpret the others.

The law announced in 68 ALR page 12 relied upon by respondents referring to patent defects is not in point. It is evident from those authorities that which is considered as patent defects is for example where the description states, "home lot" in a given lot, block and ward, or "27 acres in fractional 15, in Vandenburg County, Indiana." The law given in such cases is to the effect that there must be such an uncertainty appearing on the face of the deed that the court, *reading the language in the light of all the facts and circumstances referred to in the instrument*, is unable to derive therefrom the intention of the grantor as to what land was to be conveyed. We contend that from the facts and circumstances and from a reading of the description given in the Howard deed, the intention of the grantor is clearly shown. (Italics added).

Respondents argue the *Losee* case does not help appellant because there was in that case a positive delivery of the deed. So too was the Howard deed delivered. How can respondents contend there was no delivery in this case? The court in granting this judgment must assume there was a positive and unconditional delivery of the deed.

At page 25, respondents say, "It is obvious that where there is on the face of the deed, such information

that the missing courses and distances fairly suggest themselves the deed may be upheld." This is appellant's contention, such admission on the part of respondent is decisive of the case.

Under point 9 respondents argue the reference to acreage is of no assistance to appellant because the acreage in the tract is in excess of 2.75 acres, as stated by the grantor in the deed, 2.75 acres more or less. The reference to acreage is important. It shows the grantor by his deed was not intending to convey a small parcel out of a large tract but he was conveying a large tract out of which he excepted small tracts theretofore conveyed by him. It is evident the grantor intended to convey all that was left out of the original tract.

Respondents ask, "What did the grantor intend to retain?" The answer is he did not intend to retain any part of the tract which was left after having conveyed the Temple and Wood and theatre tracts and omitting the small piece at the lower left hand corner which protrudes westerly from the large tract.

The conclusion set out in respondents' brief states among other things, from the admissions of appellant, if the defective deed is reformed, almost the whole of decedent's estate will go to the widow and the children of the first marriage will be virtually disinherited. We submit there is nothing in the pleadings or admissions as a basis for such statement. Neither is there anything in the record of this case which shows injustice or

inequity if the deed is reformed, this question could only be before the court, if evidence were taken.

CONCLUSION

The deed is so evident of the intention of the grantor the same should be reformed and judgment should be so entered.

Respectfully submitted,
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