

1961

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

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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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.  
HOWARD, ROBERT D. HOWARD  
and SHIRLEY L. HOWARD,

*Third-Party Defendants,  
and Respondents.*

FILED

NOV - 8 1961

Sup. Case No. Utah

9552

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BRIEF OF RESPONDENTS

Appeal from Third District Court  
in and for Salt Lake County  
HON. A. H. ELLETT, *Presiding Judge*

---

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# TABLE OF CONTENTS

|   | <i>Page</i> |
|---|-------------|
| Statement of the Case, Disposition of Case by Lower Court,<br>Statement of Facts, and Relief Sought by Appellant.....   | 1           |
| Statement of Respondents' Points.....   | 2           |
| Argument .....  | 3           |
| Point 1. Decedent intended to do what he did do, to-wit:<br>deliberately execute a void deed. ....  | 3           |
| Point 2. If decedent intended to execute a deed it was<br>with testamentary intent and was not intended<br>as a present conveyance of a present interest.....                             | 4           |
| Point 3. Said deed, as a testamentary disposition of<br>estate, is not susceptible to reformation.....  | 5           |
| Point 4. Intent to make a gift is not sufficient if the gift<br>is not actually consummated during the lifetime<br>of the donor. ....   | 6           |
| Point 5. Equity will not reform a gift deed when to do so<br>will cause gross injustice such as disinheriting<br>the natural heirs of the donor. ....                                     | 7           |
| Point 6. The deed is void because it does not close and<br>shows no intent to close because it does not go<br>back to the place of beginning. (Argued with<br>point 7.) ....              | 13          |
| Point 7. The deed is also fatally defective in that it con-<br>tains an irreconcilable ambiguity. ....  | 13          |
| Point 8. Extrinsic evidence may not be resorted to to<br>reform a deed containing a patent defect unless<br>something in the deed furnishes the key to re-<br>solving the ambiguity. .... | 19          |
| Point 9. Attempted conveyance of a specific portion of a<br>larger tract is void for uncertainty if the por-<br>tion is not specifically defined. ....                                    | 26          |
| Conclusion .....  | 32          |

## I.

# TABLE OF CONTENTS—(Continued)

*Page*

## CASES CITED

|   |        |
|---|--------|
| Baldwin v. Hinton, 90 SE2 316 .....   | 20     |
| Best v. Wohlford, 144 Cal. 737, 78 P. 294.....                                | 20     |
| Blume v. MacGregor, 148 P2 656.....   | 25     |
| Brose v. Boise City, 5 Idaho 695.....   | 15     |
| Carson v. Palmer, 190 S 720, 722.....   | 17     |
| Carter & Bro. v. Ewers, 131 SW2 86.....                                       | 17     |
| Deal v. Cooper, 94 NW 62.....   | 31     |
| Dowding v. Dowding, 152 Neb. 61, 40 NW2 245.....                              | 10     |
| Edwards v. City of Santa Paula, 292 P2 31, 35.....                            | 16, 20 |
| Hazlitt v. Bryan, 192 Tenn. 251, 241 SW2 121.....                             | 10     |
| Launderville v. Mero, 281 P 749, 69 ALR 416.....                              | 11     |
| Losee v. Jones, 120 U 385, 235 P2 132, 137.....                               | 22     |
| Lytle v. Hulen, 128 Ore 483, 275 P 45, 114 ALR 596.....                       | 8      |
| National Cylinder Gas Co. v. Packwood Mfg. Co., 208 SW2<br>825 .....          | 26     |
| North Carolina Self Help Co. v. Brinkley, 215 NC 615, 2<br>SE2 889, 892 ..... | 20     |
| Park v. Wilkinson, 21 U 279, 60 P 945, 946.....                               | 23     |
| Peel v. Calais, 26 SE2 916.....   | 28     |
| Peel v. Calais, 31 SE2 440 .....  | 29     |
| Powers v. Rude, 79 P 89, 14 Okla 381.....                                     | 21     |
| Ransberry v. Broadheads, 174 A 97.....  | 24     |
| Shiver v. Young, 144 SE 129, 38 Ga App 409.....                               | 20     |
| Stanley v. Stanley, 94 P2 465, 97 U 250.....                                  | 5      |
| Stewart v. Cary, 220 NC 214, 17 SE2 29, 144 ALR 1287.....                     | 21     |
| Strout v. Burgess, 112 ALR2 939, 144 Me 263, 68 A 241.....                    | 7      |
| Wharton v. Garvin, 34 Pa 340.....   | 24     |

## II.

# TABLE OF CONTENTS—(Continued)

*Page*

## AUTHORITIES CITED

|  |    |
|--|----|
| A.L.R. Vol. 68, p. 12.....   | 16 |
| A.L.R. Vol. 69, p. 419.....  | 8  |
| A.L.R. Vol. 69, p. 427.....  | 11 |
| A.L.R. Vol. 69, p. 428.....  | 12 |
| A.L.R. Vol. 117, p. 1073.....  | 30 |
| Am. Jur. Vol. 16, 587 n 11.....  | 29 |
| Am. Jur. Vol. 16, p. 588.....  | 30 |
| C.J.S. Vol. 11, Sec. 47, n 9, p. 597.....                                  | 14 |
| C.J.S. Vol. 26, p. 646-647.....  | 19 |
| C.J.S. Vol. 38, p. 793.....  | 7  |
| C.J.S. Vol. 38, p. 798.....  | 7  |
| Patton on Titles, p. 219, n 125.....                                       | 30 |
| Patton on Titles, p. 265, Sec. 74.....                                     | 24 |
| Pomeroy's Equity Jurisprudence (3rd Edn) Vol. 2, Sec. 588,<br>p. 958 ..... | 9  |
| Pomeroy's Equity Jurisprudence (3rd Edn) Vol. 6, Sec. 679,<br>p 1144 ..... | 8  |
| Story's Equity Jurisprudence (14th Edn) Vol. 2, Sec. 982.....              | 8  |
| Tiffany Real Prop. (3rd Edn) Vol. 4, p. 80.....                            | 9  |

## III.

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,  
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—vs.—

WALKER BANK & TRUST COM-  
PANY, as Administrator of the estate  
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LIAM K. HOWARD, RUTH N.  
HOWARD, ROBERT D. HOWARD  
and SHIRLEY L. HOWARD,  
*Third-Party Defendants,  
and Respondents.*

Case No.  
9552

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BRIEF OF RESPONDENTS

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Respondents agree with Appellant's Statement of the Case, Disposition of the Case by the Lower Court, the Statement of Facts, and that the relief sought by appellant is correctly set forth in her Statement of Relief Sought on Appeal.

## STATEMENT OF POINTS RELIED UPON BY RESPONDENTS

### POINT 1.

DECEDENT INTENDED TO DO WHAT HE DID DO,  
TO-WIT: DELIBERATELY EXECUTE A VOID DEED.

### POINT 2.

IF DECEDENT INTENDED TO EXECUTE A DEED IT  
WAS WITH TESTAMENTARY INTENT AND WAS NOT IN-  
TENDED AS A PRESENT CONVEYANCE OF A PRESENT  
INTEREST.

### POINT 3.

SAID DEED, AS A TESTAMENTARY DISPOSITION OF  
ESTATE, IS NOT SUSCEPTIBLE TO REFORMATION.

### POINT 4.

INTENT TO MAKE A GIFT IS NOT SUFFICIENT IF  
THE GIFT IS NOT ACTUALLY CONSUMMATED DURING  
THE LIFETIME OF THE DONOR.

### POINT 5.

EQUITY WILL NOT REFORM A GIFT DEED WHEN TO  
DO SO WILL CAUSE GROSS INJUSTICE SUCH AS DIS-  
INHERITING THE NATURAL HEIRS OF THE DONOR.

### POINT 6.

THE DEED IS VOID BECAUSE IT DOES NOT CLOSE  
AND SHOWS NO INTENT TO CLOSE BECAUSE IT DOES  
NOT GO BACK TO THE PLACE OF BEGINNING.

### POINT 7.

THE DEED IS ALSO FATALY DEFECTIVE IN THAT  
IT CONTAINS AN IRRECONCILABLE AMBIGUITY.

### POINT 8.

EXTRINSIC EVIDENCE MAY NOT BE RESORTED TO  
TO REFORM A DEED CONTAINING A PATENT DEFECT  
UNLESS SOMETHING IN THE DEED FURNISHES THE  
KEY TO RESOLVING THE AMBIGUITY.



## POINT 9.

ATTEMPTED CONVEYANCE OF A SPECIFIC PORTION OF A LARGER TRACT IS VOID FOR UNCERTAINTY IF THE PORTION IS NOT SPECIFICALLY DEFINED.

## ARGUMENT

## POINT 1.

DECEDENT INTENDED TO DO WHAT HE DID DO, TO-WIT: DELIBERATELY EXECUTE A VOID DEED.

Lucas William Howard, the grantor in the deed which is the subject of this action, is not with us to clarify his intent. His intent can only be determined from what he did. The appellant blithely determines this "intent" to suit herself. Throughout her brief there are many statements such as "it is clearly shown that he intended," "the grantor was intending," "it is evident he intended," "he thought he had," etc. An analysis of the instrument does not show any such intention as appellant claims.

It is the firm belief of respondents that their father intended to do exactly what he did do, viz., make a void deed. Why would he do this? Simply to satisfy his wife and lead her to believe that she had succeeded in obtaining her husband's entire estate, or virtually all of it, thereby depriving her step-children of any share in their father's estate. The decedent did what he did in order that he might have a little peace at home during his declining years. With the knowledge that the deed was void he could keep his wife satisfied and yet feel assured that his children, the issue of his "first love" would partici-



pate, at least to an extent, in his estate. His wife, the step-mother of respondents, had already extracted from him, by means of joint tenancy, a fortune vastly in excess of anything she would require during her remaining lifetime. Had it been the decedent's intent to give her all, that could likewise have been readily accomplished by placing the property in question likewise in joint tenancy. But that he did not do. He was able, by executing a deed, knowingly incomplete, to both satisfy his wife and assure something over for his children.

That this was his intent is further evidenced by the fact that two years after executing this deed, he, apparently having in mind the invalidity of this deed, made another deed to his wife, specifically describing the home, the property thus later conveyed being a portion of the tract partially described in the first deed.

## POINT 2.

IF DECEDENT INTENDED TO EXECUTE A DEED IT WAS WITH TESTAMENTARY INTENT AND WAS NOT INTENDED AS A PRESENT CONVEYANCE OF A PRESENT INTEREST.

That the purported deed was in reality intended as a testamentary disposition and not as a present gift of a present interest is evidence by Appellant's Brief. On page 3 of her brief appellant states: "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." L. W. Howard, the grantor, died Nov. 30, 1955. (App.

Brief pg 2) The deed was recorded next day, Dec. 1, 1955. (App. Brief pg. 3.)

That said deed was intended to be testamentary only, and was not intended to convey a present interest at the time of execution, is further evidenced by the fact that on May 13, 1947, the decedent made another deed to his wife, describing a portion of the property described in the first (testamentary) deed which was already in existence. (See App. Brief, pgs 3-4.) If the first deed was intended to be other than testamentary, why did he execute the second deed?

The question of law here involved has already been ruled upon by the Utah Supreme Court in *Stanley v. Stanley*, 94 P2 465, 97 U 250, the syllabus of which reads as follows:

“In quiet title action involving question whether testator had delivered deed to widow *with intent to presently pass title*, evidence sustained trial court’s finding that deed had not been delivered with such intent even if widow had been permitted to testify as to the manual delivery of the deed.”

### POINT 3.

SAID DEED, AS A TESTAMENTARY DISPOSITION OF ESTATE, IS NOT SUSCEPTIBLE TO REFORMATION.

Page on Wills, Lifetime Edition, Vol. 1, Chap. 8, page 333, Sec. 167 cites the rule:

“Where the will as drawn and executed varies from testators instructions and actual wishes, disappointed legatees and devisees have frequently invoked the jurisdiction of equity to grant reformation, or some relief analagous thereto. *Equity has regularly refused to grant reformation.*” (Emphasis added.)

Numerous cases, from 16 states, are cited in support of this rule, including new cases cited in the pocket parts.

Continuing, in the same section, discussing the matters which equity will not reform, Page, on page 335, states further:

“For some or all of these reasons equity will not grant reformation in case of misdescription of realty devised, (note 7) or an omission of part of the realty which testator meant to devise. (note 8).”

Further:

“It has been said that a court of equity has no jurisdiction to reform a will and that if such a court enters a decree of reformation, such decree may be attacked collaterally (note 12).”

#### POINT 4.

**INTENT TO MAKE A GIFT IS NOT SUFFICIENT IF THE GIFT IS NOT ACTUALLY CONSUMMATED DURING THE LIFETIME OF THE DONOR.**

C.J.S. cites the following rule on gifts:

“To be effective, a gift must go into immediate and present effect. A mere intention to make a gift, however clearly expressed, which has not

been carried into effect amounts to nothing, and confers no rights in the subject matter of the proposed gift on the intended donee." 38 CJS 793.

Further:

"In any event, a delivery to be sufficient to support a gift must be absolute and unqualified; it must transfer possession to the donee, and vest in him a present and irrevocable title; it must vest the donee with and divest the donor of control and dominion over the property." 38 CJS 798.

That the gift to respondents' step-mother was not consummated is evidenced by appellant's request to the court to reform the deed. No title-examiner would pass a title resting on an ambiguous deed, containing a description which did not purport to close. Regardless of decedent's intent the fact remains that he did not make a valid conveyance, sufficient to pass title, without reformation of the deed.

The court could be certain as to the intent of the grantor, and yet if the grantor did not carry that intent into effect the court would be powerless to consummate the gift.

"Intent alone is not sufficient to create rights, but the intent must be carried into effect by acts which are legally sufficient to accomplish the intended purpose." *Strout v. Burgess*, 112 ALR2 939, 144 Me. 263, 68 A2 241.

#### POINT 5.

EQUITY WILL NOT REFORM A GIFT DEED WHEN TO DO SO WILL CAUSE GROSS INJUSTICE SUCH AS DIS-INHERITING THE NATURAL HEIRS OF THE DONOR.

On page 21 of her brief appellant cites two cases as authority for the statement that equity will reform a description in favor of a donee in a deed of gift. This is the rule only in exceptional cases, but it is not the general rule. These two cases will be later discussed, but first let us set forth the general rule. It is stated by A.L.R. as follows:

“Courts will not reform purely voluntary conveyances.” 69 A.L.R. 419.

In *Lytle v. Hulén*, 128 Ore. 483, 275 P.45, 114 ALR 596 the court quotes with approval, the rule as set forth in Story's Equity Jurisprudence. The court said:

“The rule is stated in 2 Story's Equity Jurisprudence (14th Edn) Sec. 982, thus: ‘The right to correct and reform a written instrument executed by mistake or fraud is one that attaches primarily to conveyances to which the injured party stands as a bona fide purchaser for value and does not apply, as a general rule, where the conveyance is the evidence of the bounty of the grantor, and a mere gratuity as to the grantee. The grantor, if living, could not be compelled to correct the deed; and in the absence of consent of all the parties equity will not grant the relief.’”

This case has been cited with approval in the following later cases: 3 P2 773, 35 P2 250; 40 P2 1015; 73 F2 570; 93 F2 788; 22 S2 226; 12 SE2 210; 6 SE2 26; 29 SE2 674; 56 SE2 342.

Pomeroy's Equity Jurisprudence, Third Edition, Vol. 6, page 1144, Sec. 679 sets forth the rule:

“No relief will be awarded to a grantee in an imperfect conveyance which is not supported by either a valuable or meritorious consideration against either the grantor or his representatives.”

This is supported by quotations from sixteen cases. The reason for the rule, and the justice of the rule is explained by Pomeroy in Vol. 2 of Pomeroy's Equity Jurisprudence, Third Edition, Sec. 588, page 958, as follows:

“All agreements, so far as the binding efficacy of their promises is concerned, must be referred to one or the other of three causes, — a valuable consideration, a mere voluntary bounty, or the performance of a moral duty. The first alone is binding at law, and enables the promisee to enforce the obligation against the promisor. *The second, while the promise is executory, is a mere nullity, both at law and equity.* The third constitutes the meritorious or imperfect consideration of equity and is recognized as effective by it within very narrow limits, although not at all by the law.”

It will be observed that the gift to the appellant falls in the second classification, which Pomeroy calls “A mere nullity, both at law and equity.

Tiffany, Third Edition, Vol. 4, page 80, declares the rule to be:

“According to the weight of authority it (reformation) will not be given as against the heirs or devisees of a deceased donor by reason of the failure of the language of the conveyance to express the donor's probable intention.”

Ten cases are cited in support of this rule. It would unduly increase this already large brief if the various cases establishing this rule were individually quoted from and discussed. The justice of the rule is obvious. Where the authorities unanimously state the general rule analysis of the individual cases is only cumulative. It is, however in order, for respondent to comment on the two cases cited by appellant.

Appellant first cites the case of *Hazlitt v. Bryan*, 192 Tenn. 251, 241 SW2 121. In this case the court merely discusses the matter of jurisdiction of the equity court and does not give enough facts from which the rights of the litigants might be ascertained, but it does quote with approval, and as authority for its ruling, *Dowding v. Dowding*, 152 Neb. 61, 40 NW2 245, as follows:

“If there is equity in plaintiff’s case as against the rights asserted by the defendants a reformation should be decreed. *If plaintiff’s case is lacking in the elements that go to move the conscience of a court of equity, relief should be denied on that ground*, but not for want of jurisdiction in the court because of the voluntary nature of the conveyance.”

Obviously the Dowding case came under the third classification outlined by Pomeroy hereinabove, “the performance of a moral duty,” and likely, if the facts were known, the Hazlitt case would also fall into that classification.



Let us briefly refer to the equities in this case. If defendant prevails she will receive from the estate of Lucas W. Howard not only all of the joint tenancy property, which was a fortune in itself, including a bank account in excess of \$15,000.00, and not only the statutory one-third which the Utah law considers to be her rightful share of the estate. In addition to these she will receive, for herself, alone, to the exclusion of the children, a tract appraised at \$84,000.00 all of which was owned by decedent long prior to his marriage to appellant. The inventory in the estate lists assets in the sum of \$117,690.00 exclusive of joint tenancy property. Of this \$117,690.00 the appellant claims as her own all but \$17,060.00.

(a) If the deed is reformed appellant will receive this \$100,000.00, plus one third of the remainder, and the balance, if there is any balance at all after paying from this remainder, the taxes, costs of administration, etc., will be divided among the children.

(b) If the deed is rejected as invalid appellant will receive, in addition to the joint tenancy property, one-third of the whole estate, and the children will divide the balance.

Does this justify equity in using its extraordinary powers to make a gift, where it is not even clear that a gift was intended?

The other case cited by appellant, *Launderville v. Mero*, Montana, 281 Pac. 749, 69 A.L.R. 416. ALR, in reporting this case, at page 427 shows that this case is contrary to the general rule, which is stated as follows:

“The weight of authority supports the view that the grantee is not entitled to a reformation of a voluntary conveyance made without any consideration, as against the heirs of the grantor after the latter’s death.”

Particularly is this the case where the grantee is also an heir. Page 428 of 69 A.L.R. states:

“According to the weight of authority, equity will not reform a voluntary conveyance not supported by any consideration, at the suit of the grantee, who is an heir of the grantor, as against the other heirs of the deceased grantor.”

It is not considered helpful here to further prolong this brief by quoting the cases relied upon and cited by A.L.R. There are exceptions to this rule, as in the case cited by defendant at 69 A.L.R. 416 (*Launderville v. Mero*, *supra*) *where the other heirs are provided for, and where the deed to be reformed is one of a group or series*; but that is not the case in the action now before the court, and equity and justice combine to demand that the general rule be followed and the children be allowed to inherit their rightful estate.

Because appellant seeks to lend weight to the Launderville case, by tying it to the footnotes of the Utah code, brief mention of that case is in order. In the Launderville case the grantor deeded all of his lands to his three daughters. All went into possession of their respective tracts. The grantor testified “he didn’t have an acre to his name,” after the conveyances were made. After his

death it was discovered that *one* of the deeds was defective. The court properly amended it to give effect to the series of deeds, and to do equity between the sisters. With that law, as it applied to that case, respondent's have no quarrel. It is another of the type of cases referred to by Pomeroy, where there is "a moral duty." No such equities exist in the case now before the court.

#### POINT 6.

THE DEED IS VOID BECAUSE IT DOES NOT CLOSE AND SHOWS NO INTENT TO CLOSE BECAUSE IT DOES NOT GO BACK TO THE PLACE OF BEGINNING.

#### POINT 7.

THE DEED IS ALSO FATALLY DEFECTIVE IN THAT IT CONTAINS AN IRRECONCILABLE AMBIGUITY.

Points 6 and 7 both pertain to the description in the deed. In order to avoid duplication it is deemed advisable to discuss both together, and at the same time to point out the weaknesses of appellants arguments in the five points relied upon by her, all of which pertain to the description in the deed.

To make out a valid description appellant would have the court discard entirely three courses, as "superfluous," extend another course to reach the "intended" corner, and then supply a course entirely missing, to bring the description back to the starting point and make it enclose something. This is an effort to create something out of nothing. There are many cases in the records

where the courts have supplied a missing part, or corrected an incorrect course or distance; but nowhere, at any time, have the courts so completely reconstructed an instrument as appellants now ask.

First of all, may the courts discard the portion of the description which reads: "to a point which is South 55°30' W 455 ft thence S 46°25' E 154 ft thence S 43°35' West 160 feet more or less from beginning"? Such course, if traced back from the point of beginning, would bring one fairly close to the northwest corner of what appellant calls the west jog. Rather than discard this portion of the description the decisions of the court are to the effect that this portion of the description would take precedence over the other courses. The three courses, which appellant would have the court discard, fix a definite point to which the other direction and distance must yield. A line going to a definite fixed point *goes to that point* and direction and distance must yield to this fixed point. Such a point is called a locative call and takes precedence over a directory or descriptive call. See 11 CJS Sec. 47, n. 9, page 597, and numerous cases there cited.

Appellant would have us believe that when decedent wrote "from beginning" he thought he had described "to the place of beginning." Respondents cannot believe that their father was so ignorant that he did not know the difference between "to" and "from." When he wrote "from beginning" he certainly did not believe that he was writing "to beginning."

Respondents have no quarrel with the law cited by appellant in her argument of her Point II, but the application of the law cited to the facts now before the court does not help appellant's position.

The reference to *Brose v. Boise City RR*, 5 Idaho 695 is ludicrous. How can appellant seriously assert that the Howard description after discarding the locative calls "is otherwise complete and accurate"? Or can she assert that this deed "contains two descriptions, one of which describes the land with reasonable certainty"? Is this description made any more reasonable and certain by discarding the locative calls than it would be by discarding any other courses? Discard the claimed surplusage and what is left; only a shoestring, which encloses nothing and which shows no intent on the part of the grantor to enclose anything nor to return to the point of beginning.

Appellant in the lower court, and in her brief, claims that a surveyor could locate the description on the land. Respondents agree with the statement of the law that where that can be done the court may, under some circumstances, but not all, correct the description accordingly. But surveyors are not magicians, and they can no more create something out of nothing than can the members of the court. True, a surveyor could lay out the north line, and the lines along Holladay Boulevard and Arbor Lane; but where does he go from there? Does he go N 46°25' W 404 feet, up through the middle of the tract, or does he go to the point definitely located by the

next three calls? The surveyor has no power to follow the one and reject the other. Who is he to try to divine the mind of the decedent? If the court cannot do it a surveyor cannot do it. This is a *patent* ambiguity which renders the description absolutely void and not susceptible of correction.

In 68 A.L.R. 12 there is an extensive compilation of cases from which the following rule is derived:

“A patent ambiguity in the description of land in a deed or mortgage is such an uncertainty appearing on the face of the instrument that the court, reading the language in the light of all the facts and circumstances *referred to in the instrument*, (emphasis added) is unable to derive therefrom the intention of the parties as to what land was to be conveyed. This type of ambiguity *cannot be removed by parol evidence* (emphasis added) since that would necessitate inserting new language into the instrument, which under the parol evidence rule is not permitted.”

Referring to a patent ambiguity the California Supreme Court held, in *Edwards v. City of Santa Paula* (1956) 292 P2 31, 35:

“A description that is equally applicable to two different parcels is fatally defective.” Authorities cited.

In the case before the court it would be possible, by discarding the locative calls, extending the westerly line, and adding a closing course or courses, to create



a description that would enclose a tract of land; but without doing any greater violence to the deed it would be just as feasible to discard as surplusage the course running N 46°25' W 404 feet, and then add a few courses, and thereby enclose a different tract of land; or by discarding the third course, thereby moving the west line eastward by 6.15 chains, the tract would almost close; but actually where a patent ambiguity exists the court may do none of these things, because, in each case, it would be creating a description where none now exists.

There are numerous cases in support of the foregoing statement of law. Only two will be referred to, by way of illustration. In *Carson v. Palmer* (Fla. 1939) 190 So. 720, 722, the court held:

“A deed which on its face contains two inconsistent descriptions, either of which would identify a different parcel of property from that described by the other, is void for uncertainty; provided there be not other language in the instrument which shows the grantor’s intent sufficiently for the court to determine which piece or parcel was intended to be conveyed.”

In *W. T. Carter and Bro. v. Ewers*, 131 SW2 86 the court states the rule:

“The rule that a description in a deed that is uncertain may be made certain by the aid of extrinsic evidence has no application in the present case, for the reason that the words used by the grantors are themselves indeterminative, and there is no language in the deed which furnishes



a key whereby extrinsic evidence can make certain the extent of the interest purported to be conveyed.”

From the cases previously cited herein, and other such cases, it is obvious that the District Court did not err in declining to assign the case for trial, and in rejecting the proffered testimony of Mr. Bush. Parol evidence not being admissible to clear a patent ambiguity, as above set forth, and Mr. Bush having no authority or ability to say what should be deleted and what should be added to the description in order to create a valid description, there was nothing to be accomplished by a trial. The court could rule upon the matter summarily, as a matter of law, as it did. It may very well be, as appellant contends, that summary proceedings are not favored, but they do definitely have a place in the law, and are to be used by the court where circumstances justify, and this is such a case.

In the final portion of appellant's argument on her Point IV she raises a new question. Devlin says that when a deed is uncertain reference may be made to prior deeds. Appellant says the deed by which L. W. Howard took title may be referred to. Respondents cannot see how this can aid the court either to determine whether to cut up through the middle of the tract with the course running N 46°25' W, or whether to go around to the westerly corner of the jog and stop there. Would reference to the deed under which Mr. Howard acquired title clear the patent ambiguity created by a course running

“N 46°25’ W” “to” a point definitely located elsewhere?  
No!

#### POINT 8.

EXTRINSIC EVIDENCE MAY NOT BE RESORTED TO TO REFORM A DEED CONTAINING A PATENT DEFECT UNLESS SOMETHING IN THE DEED FURNISHES THE KEY TO RESOLVING THE AMBIGUITY.

This point has already been touched upon in quotations pertaining to points 6 and 7, *supra*. The rule, as set forth in 68 A.L.R. 12 is quoted on page 16 herein. The rule may also be found in CJS, where it is stated:

“Although such extrinsic evidence must be sufficient to establish the identity of the land sought to be conveyed it must not *add to, enlarge, or in any way change the* description contained in the conveyance, and *the writing itself must furnish the hinge or hook* on which to hang the aid thus afforded, without resorting to any secret or undisclosed intention of the parties thereto.” 26 CJS 646.

Further:

“If the deed contains inconsistent descriptions, either of which is sufficient to identify different parcels of property, and there is nothing to show the grantor’s intention, the deed is void for uncertainty.” 26 CJS 647.

The reason for the foregoing rule is set forth in a Georgia case, *Shiver v. Young*, 144 SE 129, 38 GA App. 409, as follows:

“If the written description is altogether general and does not point the way for definition by extrinsic evidence, use of such evidence would be to add to and enlarge the terms of the written description, and not merely to clarify it.”

In *Baldwin v. Hinton*, 90 SE2 316 the court said:

“The description must identify the land or it must refer to something that will identify it with certainty. Otherwise the description is void for uncertainty. Parol evidence is admissible to fit the description to this land. Such evidence cannot be used, however, to enlarge the scope of the descriptive words. *The deed itself must point to the source* from which evidence aluinde to make the deed complete is to be sought. North Carolina Self Help Co. v. Brinkley, 215 NC 615, 2 SE2 889, 892.”

*Edwards v. City of Santa Paula*, 292 P2 31 has been previously mentioned. A further quotation from that case will explain wherein extrinsic evidence may and may not be used. The court said:

“Parol evidence is always admissible in aid of application of the description to its subject matter, *but not for the purpose of completing a description which is inherently not susceptible of application to the ground.* The distinction is illustrated in *Best v. Wohlford*, supra, 144 Cal. at page 737, 78 P at page 294: ‘Parol evidence will not

be admitted to help out a defective description, or to show the intention with which it was made, or to resolve an ambiguity in its terms; but the rule that the description must be certain and definite and sufficient in itself to identify the land, does not exclude evidence for the purpose of applying the description to the surface of the earth, and thus identifying it with the tract in controversy. If a monument is given as the starting point, evidence may be given to show its location, but *if the direction of the course from that monument is not given, evidence will not be received to show what direction was intended.* If the land is described by some name or designation, evidence will be received for the purpose of showing that the tract in controversy was well and generally known by that name or designation.” *Edwards v. City of Santa Paula*, 292 P2 31, 34.

The Oklahoma Supreme Court stated the rule:

“Equity will never receive parol evidence to both describe the land and then apply the description.” Syllabus. *Powers v. Rude*, 79 P. 89, 14 Okla. 381.

The North Carolina Supreme Court has held:

“Where the language is patently ambiguous parol evidence is not admissible to aid the description.” *Stewart v. Cary*, 220 N.C. 214; 17 SE 2 29; 144 ALR 1287.

Appellant, in her brief cites numerous cases where extrinsic evidence has been permitted in construction of a deed. It is not difficult to find such cases, but a careful examination thereof will show that the evidence never

was admitted to create a description, but merely to explain something to which the deed itself makes reference, and which gives the key to the construction.

Appellant cites *Devlin* and *Deal v. Cooper*, but in the case relied upon by Devlin the missing call could be supplied by reversing the calls, and in *Deal v. Cooper*, the deed afforded "sufficient data to supply the omission." In each case it was a matter of construction of data in the deed, and not a matter of "destruction, extension, and creation" to create a description.

Appellant next quotes voluminously from *Losee v. Jones*, 120 U. 385, 235 P2 132, 137. Respondents believe that an analysis of the Losee case will, rather than support appellants position, show that the District Court was correct in ruling against the appellant. In the Losee case there was a positive delivery of the deeds, a whole *series* of deeds, to a trustee, for delivery to the various grantees. One of the deeds in the series was defective, in that there was a slight gap. It did not close by perhaps 25 to 30 feet, but it did contain positive expression of intent to close, because it concluded "thence East 2.5 chains more or less to the place of beginning." This court held:

"In the quoted phrase is expressed the intention that the tract close by extending the final call to the place of beginning."

No such intention appears in the Howard deed. The court, in the Losee case, held that where "the intent is

manifest and clear that the tract is to close, and the distance call is such that this may be done without violating that call, we conclude that it does close." In the Howard case there is neither intent to close, nor can it be made to close without great violation to the call, nor can it be determined from what point closure should be commenced. The Losee case therefore by implication, indicates the Howard deed is not subject to closure.

The court then, in the Losee case, quotes from the *Park v. Wilkinson* case, 21 Utah 279, 60 P. 945, 946, in which case also a line was supplied. There was a missing course, but the next course followed up Canyon Creek, and the other courses then went on around, back to the point of beginning. All that the court added were the words, "more or less to the center of Canyon Creek" thereby extending, slightly one course.

The Losee case illustrates the point heretofore mentioned, that when one of a series of deeds fails for want of a sufficient description the course will amend the incorrect deed in order to effect justice and so that one heir will not be deprived of his estate while the other heirs receive theirs because the other deeds in the series are correct. Again, this comes under the rule stated by Pomeroy, that reformation may be had in "performance of a moral duty." Where, as here, justice does not demand reformation of the deed, then the general rule, as stated by Patton, and quoted in the Losee case, will prevail, to-wit:

“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.” *Losee v. Jones*, supra, quoting Patton on Titles, Sec. 74, pg 265.

Reference is made by appellant to *Ransberry v. Broadheads*, 174 A 97 (Pa 1934) cited in *Losee v. Jones*, supra. There the place of beginning was a stone on the east bank of the creek. The end of the description was “thence crossing the creek \* \* \* (sic) to a post on the east bank of said creek; thence down the same \* \* \* (sic) to the place of beginning.” The court properly held that such a description meant that the east bank of the creek was to be the boundary line. The intent to close and the means of establishing the closing line are apparent.

The venerable *Wharton v. Garvin* case, 34 Pa 340 (Pa. 1859) is next cited by appellant. Had appellant read through the Wharton case she would not have relied thereon. There the west boundary was the only boundary in question. The deed itself defined the west line as “North 35 degrees east 238 perches up along near said river to a post.” One side contended this line ran along the river. The other side maintained it did not reach the river. Far from establishing or creating an arbitrary



line the court held that the line must be placed exactly where the deed said it was, “near” the river, and not “along” the river as the other side contended. The court said: “A call, to stand as a boundary, must be indicated to be such with sufficient certainty to show that it was so intended.”

The *Blume v. MacGregor* case cited by appellant falls into that class of cases where there is, on the face of the deed, such information as will clear up the uncertainty. As appellant states the court held: “In view of the fact that this 1884 conveyance was expressed to be of ‘a strip of land’ and ‘for the right of way of its (grantee’s) 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 a uniform width.” 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; but this case can not be held to authorize a closing when the point from which the closing should commence is itself uncertain.

With the remainder of the quotations of general law from *Blume v. MacGregor*, respondents have no quarrel. They are correct statements of the law as applied to certain situations, but not as applied to the Howard deed—except the last paragraph which will be discussed under Point 9.

## POINT 9.

ATTEMPTED CONVEYANCE OF A SPECIFIC PORTION OF A LARGER TRACT IS VOID FOR UNCERTAINTY IF THE PORTION IS NOT SPECIFICALLY DEFINED.

Appellant states on page 18 of her brief, if the description is indefinite a statement of the quantity may help to locate the boundaries. Appellant states, "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." THIS STATEMENT IS WRONG AND MISLEADING. The deed, if closed by ignoring the west jog, would cover approximately TWICE 2.75 acres, and if the west jog is included it would cover 6.58 acres.

If the grantor intended to convey anything, which respondents deny, then all he intended to convey was 2.75 acres. The "more or less" cannot be held to permit twice the specified acreage to pass. More or less is limited to small quantities. In *National Cylinder Gas Co. v. Packwood Mfg. Co.*, 208 SW2 825 (Mo App.) the court held:

"More or less is a term used to cover small errors of surveying appportionate to size of tract and in case of small city lot it cannot be construed to include 15.95 additional feet."

If it should be conceded that L. W. Howard intended to convey 2.75 acres the question is WHAT 2.75 acres?

An attempted conveyance of an undefined portion of a large tract is void for uncertainty, as will be shown by authorities hereinafter set forth.

Simple arithmetic shows that appellant, by raising the question of acreage, puts her finger on still another fatal ambiguity in the deed. Even assuming, as appellant so strenuously argues, that the last portion of the description should be discarded; even assuming the most favorable position appellant can claim, and which she seeks to have the court establish, to-wit: running a straight line from the end of the fifth course to the place of begining, we would have left a description far in excess of 2.75 acres. Actually the square footage of the tract appellant proposes is 270,914.6 square feet. Now deduct from this the Temple and Woods description, 160x150 feet or 24,000 square feet, and the theatre feet, or more than five acres. Which two and a half acres did he NOT INTEND to convey? How can the court; how can anyone *guess* what he intended to convey and what he intended to retain. It simply cannot be done. Appellant, incidentally, cannot exclude the Continental Oil tract. That was not deeded until 1951, six years after the execution of the deed which appellant seeks to reform. Now, if we add the west jog, the total acreage is 6.38 acres, almost two and a half times the expressed 2.75 acres.

The courts cannot expand a man's generosity by construing a gift to cover more than he said it was to cover.

Furthermore, when a grantor attempts to convey a portion of a larger tract, and unsuccessfully attempts to define the particular acreage to be conveyed, the recitation of the acreage will not help.

In *Peel v. Calais*, 26 SE2 916 an effort was made to sustain a deed where the description did not return to the point of beginning. The last portion of the description read:

“To a stake 300 feet from John Peel’ line: thence with said line to the river, containing 22 acres more or less.”

The court held such description to be void for uncertainty. It said:

“The call for the river is as the terminus of a line and not as a natural boundary. There is no language used sufficient to extend the line from that point so as to enclose locus in quo. Even if we concede that the general description adjoining the lands of John Peel, Griffin and others’ is sufficient, by resort to extrinsic evidence to supply the line from the original beginning point to the river on the western side of the land in controversy, the fact still remains that *there is no attempt to close the calls*, (emphasis added) so as to embrace the land along the river. Hence the deed does not set forth any subject matter certain in itself.”

The same case was again presented to the North Carolina Supreme Court, in an effort to make the description good BECAUSE OF THE REFERENCE TO

ACREAGE. At a later hearing, in *Peel v. Calais*, 31 SE2 440, the court rejected this effort saying:

“While acreage may at times be material, it is not sufficient here to overcome the vagueness and uncertainty in other respects.”

Appellant, at page 19 of her brief, quotes from American Jurisprudence a general rule that a conveyance of a given number of acres out of a specified tract is not void for failure to locate the part conveyed. That, however, is not the situation in the Howard deed. There the attempt was, if a valid conveyance was even intended, to describe a specific tract, and the addition of the acreage was incidental only. This is vastly different from a deed expressly conveying a specified number of acres out of a specific larger tract. It is to conveyances of this kind that American Jurisprudence applies the rule cited by appellant. The rule applicable to the Howard deed is likewise referred to in the quotation from American Jurisprudence, in the following words:

“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 ineffectively attempts to locate specifically the land conveyed.*” (16 Am. Jur. 587, n. 11)

Far from there being but a few cases so holding, there are innumerable such cases. Patton assembles a number of such cases under the rule:

“For instance, a conveyance of a certain number of acres or of a certain number of feet of a tract, without giving the location in the tract, of the part conveyed, is generally held void for uncertainty.” Authorities cited. Patton on Titles, page 219, note 125.

The paragraph quoted by appellant from 16 Am. Jur. 587, continues on the following page, page 588, as follows :

“The rule that a description of land, merely as a part of a tract sufficiently definite, does not apply, however, *where the grantor intends to convey a specific part of a tract of land precisely described by metes and bounds, and puts in the conveyance a description of a specific tract which is ineffectual to convey that specific tract; in such cases, where the obvious intention is to convey a particular part of some tract definitely marked out, and nothing else, and a description of that part is insufficient, the conveyance fails altogether.*”

Contrary to the so-called general rule, cited by appellant from 16 Am. Jur. 587, but which Am. Jur. itself qualifies, both in a later part of the same paragraph and in the pocket parts, the correct rule is the statement from 117 A.L.R. 1073, which reads as follows :

“Notwithstanding occasional statements of contrary import the decisions as a whole clearly show that a deed which, being so drawn as to have in contemplation as the subject of conveyance a specific part of a tract of land presumably owned by the grantor, does not attempt definitely to locate the part, referring to it merely as so many

acres or other indicated quantity of land of the larger tract, is to say the least, ineffective as a legal conveyance, if not utterly void for all purposes."

C.J.S. states the rule thus :

"A deed conveying part of a tract must contain a description of the part intended to be conveyed so as to identify that part definitely. Where there is no attempt to locate the part intended the deed may be construed to convey an undivided interest in the larger tract ; but *this rule does not apply to an indefinite description of the specific portion intended.*" 26 C.J.S. Sec. 30, pg. 649

Actually, from an examination of the Howard deed it becomes obvious that he did not intend to convey 2.75 acres out of a larger tract. The addition of the acreage was incidental only, and as stated in *Peel v. Calais*, supra, the addition thereof "is not sufficient here to overcome the vagueness and uncertainty in other respects."

Appellants reference to the ordinance in the Central Mission Oil illustrates the extremes to which appellant has had to resort to find authority. Being unable to find a single deed which the courts have upheld where there was no call going back to the place of beginning, she finally found an ordinance. But her quotation is self-defeat-

Appellants' reference to the ordinance in the Central ing. The reference therein to *Deal v. Cooper*, 94 NW 62, shows that an omission may be supplied where "there is



sufficient data furnished by the deed to supply this omission." This cannot help the Howard deed where there is nothing in the deed itself to help supply the omission or to indicate any intent to go back to the place of beginning.

## CONCLUSION

From the admissions of appellant, the deed which is before the court, and the foregoing statement of authorities, the following facts appear:

The decedent, L. W. Howard, ten years before his death, made a deed to be recorded after his death. Deliberately, or by accident, this deed contained a description which did not purport to close, and which contained a fatal ambiguity. Two years after this first deed he made another deed, with a correct description, covering a small part of the same tract. After his death both deeds were recorded by the widow, stepmother of respondents. If the defective deed is reformed by the court almost the whole of decedents estate will go to the widow, and the children of the first marriage will be virtually disinherited.

From these findings of fact the following conclusions of law arise:

1. There are no facts before the court indicating the decedent intended to make a present gift of a present interest to appellant.
2. The deed, containing patent ambiguity and patent defect in not purporting to close, is void for uncertainty.
3. The deed, being a testamentary disposition of estate, is not susceptible to reformation in equity.

4. Even if it were possible for an equity court to reform the deed it would not be equitable to do so where the effect would be to cause injustice and inequity.

5. The deed, containing nothing giving the key to extrinsic evidence, there was no point in setting the matter for trial and the District Court properly granted Judgment on the Pleadings in favor of respondent.

Respectfully submitted,

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