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Vada J. Tomlinson Acott et al v. Leslie A. Tomlinson : Brief of Appellant in Answer to Cross-Appeal

Utah Supreme Court

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Case No. 8879

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED
- 1959
Clerk, Supreme Court, Utah

VADA J. TOMLINSON ACOTT, REBA TOMLINSON FULLER, RUBY TOMLINSON BEEBE, NORA E. TOMLINSON SCHOCKLEY, MARGUERITE TOMLINSON CISNEY, and ALTON E. TOMLINSON,

Plaintiffs and Respodents

—vs.—

LESLIE A. TOMLINSON, Individually and as Administrator of the Estate of A. L. Tomlinson, Deceased,

Defendant and Appellant.

APPELLANT'S BRIEF IN ANSWER TO CROSS APPEAL

Appeal from the District Court of the Seventh Judicial District, in and for the County of Carbon State of Utah

HONORABLE F. W. KELLER, *Judge*

FRED H. EVANS
Attorney for Defendant and Appellant

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STATEMENT OF THE CASE

The respondents' answer and argument on cross appeal, for the most part, is contained in the statement of facts, pages 1 to 28 of their brief. They state that appellant did not correctly relate the facts by showing that the record contains other testimony. Appellant will not argue shades of gray as respondents have done, but reasserts the position that, regardless of the various contexts in which the testimonies of respondents can

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be placed, the judgment of the trial court should be reversed as a matter of law.

STATEMENT OF POINTS

RESPONDENTS FAIL TO SET FORTH ANY BASIS TO SUPPORT THEIR CROSS APPEAL.

ARGUMENT

Very little is said by respondents with reference to their cross appeal. The factual basis is woven within the restatement of the facts. The premise appears to be that mere disagreement with respondents' position constitutes reversable error. Their first assignment of error suggests that appellant should have been required to pay the respondents monies he never received. The only argument in support of the contention is that the court failed to so conclude. The statement of the court relating to respondents' point 1 is as follows:

> "I think that under the circumstances of this case that it isn't shown to my satisfaction by a *fair preponderance* of the evidence that he received any greater sum then seven thouand twenty-nine fifty-one. It does appear that he should have collected other amounts. He may have been guilty of some negligence in not collecting, but I think that the Plaintiff there has, in taking the position that they are going to recover the profits or benefits that have accrued his dealings with the property, that they are bound to suffer some of the losses that may have accrued from his negligence. Then I have another reason there, that they haven't been as diligent as I think the circumstances warrant, that they should have

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been in checking on those things." (Emphasis added) (T2. 246).

Conclusion No. 5 is amply supported by the finding, and insofar as it relates to the item complained of is quoted as follows:

> "5. Defendant in his accounting should be charged with the sum of $7,329.71 for royalties received by him and for the sum of $335.00 received from L. B. Wright and Gordon Babbel making a total charge of $7,664.71 for these items." (R. 92.)

In the above statement, the court points out that respondents' testimony doesn't meet the burden of a fair preponderance. This is more than fair to respondents because they should be required to meet the burden of clear and convincing proof. The court also indicates that the respondents have been guilty of laches, ignoring matters which should have concerned them, the position of appellant in his opening brief.

Respondents' second complaint is that appellant should be charged with the earnings he obtained in working a lease granted to him by Consolidated. The mining claims in question had been leased to Consolidated, and they were in its complete control and sole possession. The lease provided for the royalties to be paid all parties, including respondents; and if appellant can be charged with these monies, he is being penalized for pursuing a lawful occupation not related to any trust. The proceeds appellant received as a result of his work as a miner for Consolidated was not a part of the estate. The respond-

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ents have ratified the lease to Consolidated on several occasions, and under its terms they were only entitled to the royalty and nothing more. The mere fact that the appellant obtained the right to work does not give the heirs the right to claim his earnings as an asset of the estate. This position is typical of respondents. So long as there is a possibility of obtaining money and property without work or pay, consistency is no obstacle.

Under point 3, the respondents ask that the estate be settled equally, contrary to the statutes of the State of Utah and apparently upon the basis of an oral agreement. Respondents failed to cite authorities for such a proposition. Their failure to cite the Statute of Frauds, must have been an oversight. They do not mention any specific finding or conclusion that was erroneous. The exact basis upon which the respondents claim error as to their point 3 is difficult to determine, and might be described as nebulous. Nebulous claims like negative testimonies are difficult to meet when under a canopy of a fiduciary, which is the only strength of respondents' case.

The appellant has always taken the position that there was no trust upon which the respondents could claim any relief, and this includes the relief set forth in their cross appeal. It, of course, cannot be disputed that the only property in the estate was the mining claims. No other assets, either cash or property, are claimed. In May of 1950, when the mining claims were committed to the lease, the trust terminated; and it is difficult to

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understand the basis of the claims respondents assert in points 2 and 3 of their cross appeal.

Appellant believes point 4 is completely unfounded. No authority is cited and no error is assigned either in fact or in law except that respondents claim that the mere presence of a fiduciary relationship entitles a cestui to demand a complete transfusion of assets without regard to origin, relation to the trust property or the duties of the trustee, and ignoring any distinction between the trustees individual and the trust property.

CONCLUSION

Authorities have been cited in appellant's opening brief covering the points raised by respondents on cross appeal. For that reason, they are not restated. It is respectfully submitted that the cross appeal of the respondents does not present any basis for consideration by the court.

Respectfully submitted,

FRED H. EVANS

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