

1940

Laura Morris and Lucy Pocatello Johnson, Maude Pocatello Racehorse, Josephine Pocatello and Ray Pocatello v. Amasa L. Clark, Joseph E. Robinson, and Box Elder County : Supplemental Brief of Appellant

Utah Supreme Court

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P. C. O'Malley and Geo. M. Mason; Attorneys for Plaintiffs and Appellants;

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IN THE  
SUPREME COURT OF THE STATE OF UTAH.

LAURA MORRIS, Special Adminis-  
tratrix of the estate of Wash-  
ington Pocatello. and Minnie  
Pocatello. both deceased. and  
LUCY POCATELLO JOHNSON, MAUD  
POCATELLO RACE HORSE, JOSEPHINE  
POCATELLO, and. RAY POCATELLO,  
Heirs of Washington Pocatello  
and Minne Pocatello. deceased. )

Plaintiffs and Appellants. )

CASE

vs

) NO 6248.

AMASA L. CLARK, JOSEPH E.  
ROBINSON, and. Box Elder County. )

Defendants and Respondents.

\*\*\*\*\*

SUPPLEMENTAL BRIEF OF APPELLANT.

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Attorneys for Defendants and Respondents.

**FILED**

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CLERK SUPREME COURT UTAH



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

**LAURA MORRIS, Special Administratrix  
of the estate of Washington Pocatello  
and Minnie Pocatello, his wife, both  
deceased, and LUCY POCATELLO JOHNSON  
MAUD POCATELLO RACEHORSE, JOSEPHINE  
POCATELLO, and RAY POCATELLO, Heirs  
of Washington Pocatello and Minnie  
Pocatello, deceased;**

**Plaintiffs and Appellants,**

**-vs-**

**AMASA L. CLARK, JOSEPH E. ROBINSON  
and BOK ELDER COUNTY,**

**Defendants and Respondents.)**

**CASE NO.  
6248**

**SUPPLEMENTAL**

**BRIEF OF APPELLANTS**

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BRIEF STATEMENTS OF FACTS FROM  
JUDGMENT ROLL

Yaotes Owa died intestate sometime in the late eighties, leaving surviving her a daughter named Jane and a step-daughter named Bingwa, and at the time of her death she was the owner of 80 acres of land described as the E $\frac{1}{2}$  of the NW $\frac{1}{4}$  of Sec 12, T. 11, N. R. 3, S. 14, in Box Elder County, Utah. Immediately upon her death this property became vested in her heirs, the daughter and step-daughter, both whom died before the property was probated. Upon the death of the daughter and step-daughter, the property became vested in their heirs. On Feb. 2nd, 1917 Washington Pocastello, a son of the step-daughter Bingwa, believing he was the sole surviving heir of Yaotes Owa executed a warranty deed for the full eighty acres of land to one U. F. Ditsman for a consideration of \$5200.00, \$200.00 being paid in cash and the balance \$5000.

to be paid \$100.00 per year on the 20th day of



That Washington Pocatello died on or about the 27th day of April, 1917, as found by the District Court (Ab. 113 Trans. 0316); that upon the death of Washington Pocatello whatever interest he had in the premises immediately vested in his heirs and, also, immediately upon his death all power of the First National Bank, the agent of Washington Pocatello, as escrow depositor ceased, and the only way the deed placed with said Bank could legally be delivered would be under instructions of the heirs or by due process of law, under Section 7741, Revised Statutes of Utah; that the District Court found in Finding No. 6 (Ab. 114, Trans. 0316) that on the 7th day of November, 1919, more than 18 months after the death of Washington Pocatello, that Justin D. Call, Judge of this court distributed and decreed to the estate of Washington Pocatello, deceased, an undivided one-third interest in the above



December each year until the full sum of \$3000. would be paid, and placed the said deed in escrow with the First National Bank of Pocatello, Idaho with instructions written on the front of the envelope containing the escrow, that the bank was to receive the \$300.00 per year and pay the same to Washington Pocatello, and not to deliver the deed until the full amount of \$3000.00 was paid. That on April the 18th, 1917, that W. D. Service the cashier of said escrow depositor, fully incorporated the terms of the escrow in an affidavit, and the said affidavit was filed for record in Box Elder County, Utah, on the 19th day of April, 1917, and recorded in Book F of Misc page 613, (Ab. 11, Trans. 0186), therefore notifying the world that the deed was placed in escrow not to be delivered until the full performance of the conditions. The full text of the affidavit was incorporated in the complaint, and is incorporated in the District Court's Findings of Fact, (Ab. 118, Trans. 0317).



the decrees, which were a part of the complaint marked "Exhibit "C" and "D", was filed of record on the 8th day of November, 1919; (Ab. 115, Trans. 0316); that plaintiffs contend that said decrees established in the heirs of the estate of Washington Pocatello, the highest paramount of title that can be obtained, (see full text of decrees (Ab. 41 to 44, Trans. 0202, 0205), that title has never been transferred by any act of the heirs, or by any order of a court of competent jurisdiction, and by the findings of the District Court in this case, the court has found the highest title that can be obtained to be in the plaintiffs to an undivided one-third interest in the premises; that by the pleadings, and findings of the Court, the first, superior and unimpeachable title to the undivided one-third interest is found by the District Court to be in the plaintiffs, there is no weakness in the plaintiffs chain of title; therefore such title carries with it the presumption of possession;



that the pleadings and the Findings of the Court show beyond any peradventure of doubt, that the title to said undivided one-third interest, has never been transferred in any manner by the plaintiffs, or by any proper court proceedings; that the pleadings and findings show that title is today still in the plaintiffs without any legal transfer; that the District Court has not anywhere in its findings of fact found a legal title in the defendants at any time; that the Court attempted to find that long after Washington Pocatello was dead, that the First National Bank of Pocatello, whose power as an agent had ceased upon the death of Washington Pocatello made a delivery of the deed placed in escrow, and the Court wrongfully and contrary to all legal principles held that made good title in defendants' grantor, we again quote part of the Court's Findings:

**the Court further finds that said warranty deed was by the First National Bank**



of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and that the said deed which on its face recited a consideration of \$3200.00 was regularly filed for record in the office of the County Recorder of Box Elder County, Utah, on November 10th, 1919, at 4.00 P. M. in Book 15 of Deeds at page 440; that said U. F. Diteman and A. I. Grover, or either of them, did not unlawfully, illegally or for the purpose of cheating or defrauding the estate of Washington Pocatello and his heirs out of said property, file the said deed for record in said Box Elder County, Utah but the said deed was regularly filed for record and recorded; that the said I. A. Grover, by the recording of said deed, did not attempt to take from the estate a valuable property right; that said A. I. Grover did from November, 1919, claim ownership of said lands; that said deed was not void but was a valid deed and passed title to the undivided one-third interest of said property to U. F. Diteman; that the depository bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the escrow agreement but the Court finds that the Deed was regular on its face, recited the consideration of \$3200.00 and from the evidence in the case the court finds that the said \$3200.00 recited in the deed was paid to said Escrow Holder and that the transaction with said Bank was not fraudulent; the Court further finds that although



Washington Pocatello had title before the property was decreed to the estate, that it was unnecessary to specifically enforce the Escrow Agreement under the provisions of Section 7741, Revised Statutes of Utah, but the bank upon payment of the consideration aforesaid, was justified in delivering the said Deed to the grantee therein." (Finding #9, Abs. 121, Trans. 0316)

#### Point for Determination

Plaintiffs contend such finding by the District Court is contrary to law and to justice, for a court to find and to hold that an agent 18 months after the death of a principal can change the terms of an escrow, and can deliver a deed that was made for the whole of the premises and cut off the rights of the heirs, and deprive them of the protection of Section 7741 Revised Statute of a hearing before the court, that had decreed to them an undivided one-third of the premises; that such a finding is taking property without due process of law in violation of the Fifth Amendment of the Constitution of the United States and is in violation of



of Section Seven, Article One, of the Constitution of the State of Utah.

#### Argument and Authorities.

The First National Bank of Pocatello, Idaho from the time the deed was placed with it in escrow was the agent of both parties, but more particularly the agent of Washington Pocatello, and such agency ceased immediately upon the death of Washington Pocatello, which as found by the District Court took place about the 27th day of April, 1917, being more than 18 months previous to the Bank delivering the Washington Pocatello deed.

#### Authorities.

The latest text on Agency, Corpus Juris Secundum, under the title of agency, lays down the following rule, which is a reiteration of the rules laid down in CYC and Corpus Juris:

"Although the obligations of a deceased person are as a rule binding upon his estate, yet, since the authorized acts of the agent are



in their nature the acts of the principal, and by legal fiction the agent's exercise of authority is regarded as an execution of the principal's continuing will as set forth in Section One of this Title, the rule is well established at common law and by statute the death of the principal terminates the agency as a matter of law in the absence of circumstances giving the agent an authority coupled with an interest. The fact that the agency is in terms irrevocable, or is declared to be binding upon the principal's heirs and personal representatives, or is expressed to be for a definite period, which at the time of the death has not expired, does not prevent its revocation by the death of the principal, and, of course, an attempt to create an agency to begin at the principal's death is nugatory. Accordingly, except, of course, where the agency is renewed by the heirs or representatives of the deceased principal, the acts of the agent purportingly done on behalf of the principal subsequent to his death are not binding upon the estate or the personal representatives of the principal. Also where the agency was not coupled with an interest the death of the principal has operated to revoke authority to draw money on deposit, to open a deposit box, to sell or transfer the principal's property, to convey land, to execute a deed, to occupy land, to execute and deliver a lease, to make collections, to make assignments, to make delivery of a gift and authority



Corpus Juris Secundum Vol. 2, P. 547  
Note 24. C. J. Vol. 2--Section 179,  
p. 546.

The Supreme Court of New York has held:

"It is entirely clear that if he died on the 5th of January, 1860, no title was conveyed by the deed executed by his attorney in fact in July, 1860, the property has descended to his heirs at law upon his death and at that time they were vested with title which could only be divested by a conveyance executed by the heirs at law in whom the title had vested."

Salor v. Token, 114 N.Y.S. 495

"If the grantor dies before the happening of the event or the performance of the conditions, the legal title descends to his heirs subject to the purchasers equitable interest."

C. J. Vol. 21, Sec. 28, 29, page 883.

When Judge Justin D. Call on November 9, 1919 decreed the undivided one-third interest in the premises to the estate of Washington Pocostello, deceased, if U. F. Diteman the grantee named in the deed had an equitable interest in that undivided one-third interest, the only way he could enforce that equitable interest would be



estate under the provisions of Section 7741. Revised Statutes of Utah. The First National Bank of Pocatello, Idaho and the grantee U. F. Ditean, or A. I. Grover who held a power of attorney from U. F. Ditean, could not 18 months after the death of Washington Pocatello, deliver that deed even if the full consideration had been paid, and divest the heirs of the title to that property. The law is so clear on this point that we challenge the defendants to produce just one authority to the contrary. Defendants or their predecessor never had title to the undivided one-third interest, therefore, the Court erred in its findings, "that it was unnecessary to specifically enforce its Escrow Agreement under the provisions of Section 7741 Revised Statutes of Utah (Ab. 121 Trans. 0318)

### Second Point

The Bill of Exceptions having been stricken from the record by this court, the court cannot review the evidence in the record.

However, there is one part of the case



That the District Court, was bound to take judicial notice of regardless of whether it was introduced in evidence or not, and this Appellate Court is now bound to take judicial notice of, and that is the Probate File, No. 385, in the matter of the Estate of Washington Pocatello, deceased. That is a court record and part of this case, it was pleaded by the plaintiffs (Ab. 21, Trans. 0191) and, the defendants admitted it (Ab. 58 Trans. 0231) and rely upon it in their answer as establishing title in them by estoppel (Ab. 65, Trans. 0235) and the District Court has so found in its Findings of Fact, wherein the court found as follows: (Finding No. 15, Ab. 127, Trans. 0319)

"That on December the 3rd, 1919, Charles E. Foxley filed in the probate division of this Court a petition for Letters of Administration on the estate of Washington Pocatello, deceased, which said petition was supported by the Petition and Request of the heirs of said Washington Pocatello, deceased, and after due and legal proceedings the said Charles E. Foxley was regularly appointed Administrator of said Estate and Letters



of Administration were, on the 12th day of January, 1920, issued out of this Court to the said Charles E. Forley on said estates; that the said Charles E. Forley as administrator and as the legally appointed representative of the heirs of said estate failed to take any legal steps to recover the alleged undivided one-third interest in said eighty acres of land from A. I. Grover, although the Court finds that the said Charles E. Forley was appointed at the request of said heirs of Washington Poostello, and said heirs at all times knew that the said Charles E. Forley, as administrator represented them and the estate of Washington

P  
Poostello; the court finds that there is no proof that Charles E. Forley, as administrator of said estate or otherwise conspired and conspired with A. I. Grover, and the Court therefore finds that said A. I. Grover did not fraudulently conspire and conspire with the said Charles E. Forley, as administrator of the estate or otherwise, and that said Charles E. Forley did not improperly accept from the First National Bank of Poostello, Idaho, any money with intent to cheat and defraud the heirs of Washington Poostello, deceased; that said Charles E. Forley did not conspire and conspire with A. I. Grover to file a copy of Letters of Administration with the First National Bank of Poostello, Idaho, for the purpose of obtaining the said Dead of Washington Poostello and Minnie Poostello, his wife covering said property; that there is no evidence offered to the Court as to the whereabouts of Charles E. Forley and A. I. Grover  
that the proceeds of the estate of Washington Poostello, deceased, were paid to the



as administered and that from January 12th 1920, the date of the appointment of the said Charles E. Foxley to the date of the filing of the complaint herein, the said Charles E. Foxley was the duly appointed, qualified and acting administrator of said Washington Pocatello, deceased, and represented the said estate and the heirs of said estate"?

That such finding by a District Court whose most sacred duty is to protect and administer the estates of deceased persons, in the face of its own Probate Court Record, No. 355, in the matter of the Estate of Washington Pocatello, deceased, cannot be construed otherwise, than a deliberate attempt on the part of the Court to make a title for the defendants, in this case, when it is plain that the defendants never had assemblance of title, and to take the property of the deceased from the heirs and give it to strangers. The Probate Court record in the case of Washington Pocatello, deceased, shows that Charles E. Foxley was appointed by the said Court on the 12th day of January, 1920, as administrator of the Estate



of Washington Pocatello, deceased, and from that date the said estate was in the Custody of the Court; the estate has never been administered, for 20 years the District Court of the State of Utah, in and for Box Eld & County has failed, refused, and neglected to perform its duty, the title of that one-third interest during all the years, still stands in the heirs, the estate still stands on the Court's docket unacted upon, and then the Court by such finding attempts to throw the burden upon the heirs, and the administrator that was upon the Court to perform its duty and rightfully administer the estate. The District Court was bound, and this Appellate Court is now bound to take Judicial notice of the Probate Proceedings in the estate of Washington Pocatello, deceased. This Court cannot administer justice otherwise. That Court record shows that Charles E. Foxley, as Administrator reported to the Court, that only \$1,000 was paid to the escrow holder for



judicial departments of this state  
and of the United States."

The acts of the Court in appointing an administrator in the estate of a deceased person, and the administration of the estate of a deceased person, and the administration of the estate is a public act of the Court, and all of the files in the estate, is a public record on file of the administration of the estate, and in all actions pertaining to that estate, or for the final settlement of the estate, the District Court, and the Appellate Court must take judicial notice of the proceedings and files in the case, as it is part of the Court's own records, in the matter of the administration of the estate.

"Courts take judicial notice of their own records, in a case where it is proper to invoke such notice, including records in cases tried in and removed from another court; that is to say that such records need not if relevant be introduced in evidence, but will when produced and identified on the inspection of the judge or by evidence be accepted by the court as establishing their own existence."



the grantor's death and that he had that \$1,000 and asked the Court to set the matter for hearing and either approve or disprove what he had done, and the Court, including the Court that made the finding, for more than 20 years, failed, refused and neglected to take any action in the matter, and now the Court refuses to recognize its own record and conduct only in so far as to make it favor the defendants, and place all the burden and duty upon the heirs, when the law does not place any duty on their part. Therefore, plaintiffs assert that this Appellate Court is duty bound to take judicial notice of the Probate File and proceedings, in the Estate of Washington Bonatello, deceased, notwithstanding that the Bill of Exceptions has been stricken:

#### **Authorities.**

Section 104. 46 -1, Revised Statutes of Utah, 1953, Courts take Notice of Certain Facts Enumerated; Section (3), provides as follows:

**"Public and private official acts of  
the legislature, executive and**



"In a case on trial in any court its records are actually or constructively before the judge. He will take judicial notice of them and the facts which they establish."

23 C. J. Sec 1918, P. 110.

"An appellate court is not precluded from judicially noticing a particular matter merely because the trial Court has failed to do so, even though such action would result in a reversal of the judgment below, except when it has no power to pass upon the facts. On the other hand, an appellate court must take notice of everything which the court whose judgment it is reviewing was bound to notice, and will not interfere with the trial court's action based upon its judicial knowledge, unless it has manifestly erred."

Ency. of Evidence, Vol. 7, P. 882

"The rule is well settled that a county court in determining the sufficiency of a petition for the removal of an administrator should take judicial notice of its records and prior proceedings in the administration of the estate."

Knight vs Hamaker 87 P. 109, 40 Ore. 424

In the case at bar the District Court manifestly erred, in its foregoing Finding, for the main reason that the Administrator had

reported to the Court just what he had done and



said in that report that only \$1,000 had been paid for the deed, and asked the court to have a hearing on the report, and the court never acted on the administrator's report, but permitted the said report to lie upon its docket unacted upon for more than 20 years, and the lower court further erred, in its finding No. 27, wherein the court found:

" That A. I. Grover is now dead, that Albert Saylor is long since dead, that U. F. Diteman is no longer a resident of this state and is now aged and infirm and is unable to remember or testify to the facts in this case; that the First National Bank of Pocatello, Idaho, is insolvent and has been liquidated and that all instruments in connection with the escrow Agreement, except as offered in evidence, have been destroyed; that by reason of lapse of time, nearly twenty years, the parties hereto are unable to procure testimony in support of their claim or to refute the same; that the claims of plaintiffs herein are now stale claims; that if the First National Bank of Pocatello, Idaho, escrow holder, made an unauthorized delivery of said deed, then the administrator of said Washington Pocatello's estate, and the heirs of said estate, by their subsequent acts,



waived the performance of the conditions and ratified said delivery, and by said subsequent acts raised a presumption of ratification of said delivery and are now estopped by reason of laches, silence and other conduct on their part and on the part of the administrator herein, as heretofore found, from at this time prosecuting this action." (Ab 141, Tr.

Plaintiffs contend that the Court not only erred in making such finding, but deliberately placed the blame of the Court's own utter disregard of its duty, upon the administrator, who had made a report to the court of what he had done, which from the time of filing that report placed the whole matter in the hands of the court, and the court for twenty years failed, refused and neglected to do its duty. The Court found "if the said First National Bank of Pocatello, escrow holder, made any unauthorized delivery of said Deed". A court cannot indulge in propositions in taking property from one person and giving it to another, a court must make its findings on facts. To use the court's own proposition, if the Deed was wrongfully delivered--which without a shadow of



doubt it was--as the court had found that Washington Poostello was dead 18 months before the delivery, then no title could pass, the title to the property, and the right to the property remained during all the years, in the heirs. And the Court having appointed an administrator to the estate, and the administrator having reported to the court what he had done, and the court not having acted during all the years, the property is still in the custody of the court, and since the appeal was perfected, the property and administration of the estate of Washington Poostello, deceased is now in the hands of this court, and this court is bound to take judicial notice of the Probate Proceedings and files in the Estate of Washington Poostello, deceased. That such proceedings establishes that the deed of Washington Poostello, deceased was delivered by the First National Bank of Poostello, Idaho some 18 months after his death, and that only \$1,000 was paid to said Bank for the

Deed.



In conclusion, plaintiffs' have covered those same points quite fully in their main brief, but the same having been compiled and filed previously to the dismissal of the Bill of Exceptions, plaintiffs desired to bring out those two points more fully, in support of plaintiffs' contention that on the judgment roll, and the record in the Probation of the estate of Washington Peostello, deceased, that the Findings of Fact, Conclusion of law, and decree made by the lower court must be reversed. This Court has held by a long line of well defined decisions, that the defendants cannot rely upon any weakness in the plaintiffs' title, but must prove good title in themselves. The judgment roll establishes the very highest title that can be obtained in the plaintiffs. That defendants have no title and never had a title, that the property has been in the custody of the District Court of Box Elder County during all the years, that the defendants had full notice that their grantor



had no title; and that the property was in the custody of the court when they purchased same; that the burden was on defendants to prove their grantor had good title; that the defendants during all the years were tenants in common with the heirs and with the administrator of the estate that the Findings and decree is deliberately taking property from the heirs of an estate and handing it over to strangers without any sanction whatsoever of the heirs and without any due process of law, contrary to the Constitution of the United States, and of the State of Utah, and in direct violation of all principles of law.

Respectfully submitted.

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