

1952

Robert V. Tiller and Mildred Molinari v. Loren G. Norton et al : Brief of Cross-Defendants and Respondents

Utah Supreme Court

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R. Verne McCullough; John D. Rice; Dey, Hoppaugh, Mark & Johnson;

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IN THE SUPREME COURT of the STATE OF UTAH

ROBERT V. TILLER, also known as ROBERT
V. TILLIER, also known as ROBERT V.
SWANN, and MILDRED MOLINARI,

Plaintiffs and Appellants,

vs.

LOREN G. NORTON, LOREN G. NORTON,
Administrator of the Estate of CHARLES
CARSON, also known as H. F. SWANN,
also known as R. C. TILLER, also known as
ROBERT C. TILLER, deceased, and THE
EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., a corporation, and
E. LeROY SHIELDS, as executor of the
Estate of Grace Catherine Carson, deceased,
and E. LeROY SHIELDS,

Defendants and Respondents,

and

LOREN G. NORTON, GLORIA NORTON,
wife of Loren G. Norton, EDITH M. HA-
ZELRIGG and CATHEDRAL OF THE
MAGDALENE CATHOLIC CHURCH of
East South Temple, Salt Lake City, Utah,
also known as ROMAN CATHOLIC
BISHOP OF SALT LAKE CITY, a corpora-
tion sole,

Cross-Defendants and Respondents.

BRIEF OF CROSS-DEFENDANTS AND RESPONDENTS,
EDITH M. HAZELRIGG and CATHEDRAL OF THE MAG-
DALENE CATHOLIC CHURCH of East South Temple, Salt
Lake City, Utah, also known as ROMAN CATHOLIC BISHOP
OF SALT LAKE CITY, a corporation sole.

FILED R. VERNE McCULLOUGH,
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MAR 10 1932 JOHN D. RICE, AND DEY, HOPPAUGH, MARK
& JOHNSON,

*Attorney for Cross-Defendant and Respond-
ent, Cathedral of the Magdalene Catholic
Church of East South Temple, Salt Lake City,
Utah, also known as Roman Catholic Bishop of
Salt Lake City, a corporation sole.*

INDEX

	Page
FOREWORD	1
STATEMENT OF FACTS.....	2
STATEMENT OF POINTS TO BE RELIED UPON.....	4
POINT I.	4
POINT II.	6
POINT III.	6
POINT IV.	8
ARGUMENT	4
CONCLUSION	9

TEXTS CITED

21 Am. Jur., Sections 486, 487, 488 and 490 at pages 653-55....	9
Bancroft's Probate Practice, 2nd Edition, Vol. 4, Sections 1142, 1163, and 1187.....	9
Bancroft's Probate Practice, 2nd Edition, Vol. 4, Sections 1176, 1177, and 1178.....	7
Bancroft's Probate Practice, 2nd Edition, Vol. 4, Section 1170	8
Bancroft's Probate Practice, 2nd Edition, Vol. 4, Section 1176	5

STATUTES CITED

Section 102-9-28, U.C.A., 1943.....	9
Section 102-12-9, U.C.A., 1943.....	9

CASES CITED

Ferguson vs. Ferguson, 58 Cal. App. 2d 811, 137 P. 2d 735....	9
Harrison vs. Cannon, Mont., 203 P. 2d 978.....	9
White's Estate, 69 Cal. App. 2d 749, 160 P. 2d 204.....	9
Moyes vs. Agee, 53 U. 360, 178 P. 753.....	9
Rice's Estate, 111 U. 428, 182 P. 2d 111.....	9

INDEX—(Continued)

	Page
In re: Evans, 42 U. 382, 130 P. 217.....	9
In re: Howard's Estate, 159 P. 2d 586, at page 590, 108 U. 294	9
Farley vs. Davis, 10 Wash. 2d 62, 116 P. 2d 263, 155 A.L.R. 1302	5-9
Davis vs. Seavey, 95 Wash. 57, 163 P. 35, Annotated Cases 1918 D 314, 113 A.L.R. 1242.....	9
Moritz vs. Horsman, Mich., 9 N.W. 2d 868, 147 A.L.R. 117....	9
Good vs. Herr, 42 American Decisions 236.....	9
Chamberlin vs. Anderson, 195 Iowa 855, 190 N.W. 501, 26 A.L.R. 957.....	9
Russell vs. Davison, 184 Okla. 606, 89 P. 2d 352, 121 A.L.R. 1063	9
Purinton vs. Dyson, 8 Calif. 2d 322, 65 P. 2d 777, 113 A.L.R. 1230 - 1235.....	9
First National Bank and Trust Co. vs. Stonehouse, 67 N.D. 11, 269 N.W. 51.....	6
Clarke vs. Eureka County Bank, 116 Fed. 534.....	6
Clavey vs. Loney, 80 Cal. App. 20, 251 P. 232.....	6
Hewett vs. Linstead, 49 Cal. App. 2d 607, 122 P. 2d 352.....	6-8
Kurtz vs. Ogden Canyon Sanitarium Company, 37 U. 313, 108 P. 14.....	6

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also known as R. C. TILLER, also known as
ROBERT C. TILLER, deceased, and THE
EMPLOYERS LIABILITY ASSURANCE
CORPORATION, LTD., a corporation, and
E. LeROY SHIELDS, as executor of the
Estate of Grace Catherine Carson, deceased,
and E. LeROY SHIELDS,
Defendants and Respondents,

and

LOREN G. NORTON, GLORIA NORTON,
wife of Loren G. Norton, EDITH M. HA-
ZELRIGG and CATHEDRAL OF THE
MAGDALENE CATHOLIC CHURCH of
East South Temple, Salt Lake City, Utah,
also known as ROMAN CATHOLIC
BISHOP OF SALT LAKE CITY, a corpora-
tion sole,

Cross-Defendants and Respondents.

Case No.
7770

FOREWORD

Since this Brief has to do with the Cross-Complaint of the Defendant, The Employers Liability Assurance Corporation, Ltd., a corporation, against Edith M. Hazelrigg and Cathedral of the Magdalene Catholic Church, the said Cross-Complainant does not wish this argument advanced by the said Cross-Defendants in the main brief

of the Defendants, and therefore, the said Cross-Defendants write this brief to argue the following points raised by the said Cross-Defendants on the pleadings and in the trial of the above entitled matter.

STATEMENT OF FACTS

The Cross-Complainant alleges in brief, in paragraphs 4, 5, 6, 7 and, 8 of its Cross-Complaint, the basis of its cause of action against the said Cross-Defendants. The allegation is to the effect that the estate consisted solely of assets distributed to that estate from the estate of her husband, Charles Carson, deceased, and that the distributees knew that the property came to them from the estate of Charles Carson, deceased, and that they were fully advised of all the proceedings, relations, family, heirs and matters concerning and pertaining to the estate of Charles Carson, deceased, and that the Cross-Defendants were aware that the Cross-Complainant had furnished a Bond to the Administrator of the estate of Charles Carson, deceased, and that the Cross-Defendants were aware of the rights and privileges of the said Cross Complainant to so follow and have applied, in accordance with the law, all of the property of Charles Carson, deceased.

Then the Cross-Complainant alleges that if a judgment is taken by the Plaintiffs against the said Cross-Defendant, that the said Cross-Complainant asserts its right, title and privilege, by way of subrogation directly, to the right, title and interest to the estate of Charles Carson, deceased, in and to all property of said estate,

and its right of action for the amount received by the Cross-Defendants.

The Cross-Complainant further asks that if it is called to account as Bondsman, that it will look to the said Cross-Defendants to save the said Cross-Complainant harmless as to such Judgment, and further asks that the Cross-Defendants account for the money received, and to hold the Cross-Complainant harmless from any liability arising out of, or in connection with the Bond executed by the Defendant and Cross-Complainant.

To that pleading the Cross-Defendants made a Motion to Strike, and a Motion to Make More Definite and Certain and a Motion to Dismiss, all of which were denied. It is the contention of the said Cross-Defendants that this was error and that the Supreme Court should decide that the said Motions, and especially the Motion to Dismiss were proper and should have been granted.

After the case was submitted, the said Cross-Defendants moved the above entitled Court to dismiss the Cross-Complainants action, as against them, on the grounds set forth in the (Transcript, Page 743-4-49). The Court ruled that said Motion was premature, (Transcript, Page 750).

It is apparent from a reading of the Transcript that no evidence was offered at all on behalf of the Cross-Complainant, to prove any of the allegations of the Cross-Complaint, as against the said Cross-Defendants, and that the Motion was proper and timely and should have been granted. See also the objections of the said

Cross-Defendants to the introduction of testimony, (Transcript, Page 172).

STATEMENT OF POINTS

POINT I.

THE DECREE OF DISTRIBUTION IN THE ESTATE OF GRACE CATHERINE CARSON, DECEASED, PROBATE FILE No. 31944, IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, CANNOT BE ATTACKED COLLATERALLY, SINCE THE JURISDICTION OF THE COURT IS NOT ASSAILED, AND THE INVALIDITY OF THE DECREE DOES NOT APPEAR ON ITS FACE.

POINT II.

THAT SAID DECREE MAY BE ATTACKED ONLY IN AN EQUITABLE ACTION AND ~~NOT~~ A DIRECT ACTION AGAINST SAID DECREE ON A PLEADING AND SHOWING OF EXTRINSIC FRAUD.

POINT III.

THE MOTION OF THE DEFENDANTS TO DISMISS THE CROSS-COMPLAINT SHOULD HAVE BEEN GRANTED.

POINT IV.

THE MOTION TO DISMISS, AS AGAINST THE SAID CROSS-COMPLAINANT, MADE AT THE CLOSE OF THE CASE, SHOULD HAVE BEEN GRANTED.

ARGUMENT

POINT I.

The Brief of the Defendants, in the above entitled matter, argues that the judgment of the Court should be

upheld because there was no proof of extrinsic fraud sufficient to justify equitable relief from the Decree of Distribution, in the estate of Charles Carson, deceased. And to support that argument, the Defendants, and especially The Employers Liability Assurance Corporation, Ltd., brief the law and argue that the Decree of Distribution cannot be set aside, because the law requires a showing of extrinsic fraud in the procuring of the Decree, or in the proceedings relative thereto, wherein the Complainant was prevented from having a fair hearing. The Cross-Defendants contend that that rule is even more strongly in the favor of the said Cross-Defendants, both upon the pleadings and the facts as adduced at the trial of this cause. This same rule precludes a collateral attack on the estate of Grace Catherine Carson, deceased, by attempting to have a trust imposed on the sum of money received by the distributees in the Matter of the Estate of Grace Catherine Carson, deceased.

See *Farley vs. Davis*, 10 Wash. 2d 62, 116 P. 2d 263, 155 A.L.R. 1302.

The rule is, that if there is no extrinsic fraud in the procuring of the Decree of Distribution, the Court can no more declare a trust on the property distributed to the distributees than it has the power to direct the probate Court to set aside its Decree.

See *Bancroft's Probate Practice*, 2nd Edition, Vol. 4, Section 1176.

POINT II.

The pleading of the Cross-Complainant, by extreme reasoning, might seem to indicate a desire to impose a trust upon the amount received by the distributees from the estate of Grace Catherine Carson, deceased. If that is the case, the action must be brought directly against the Decree in said estate and not indirectly.

See First National Bank and Trust Company vs. Stonehouse, 67 N.D. 11, 269 N.W. 51;

Clarke vs. Eureka County Bank, 116 Fed. 534;

Clavey vs. Loney, 80 Cal. App. 20, 251 P. 232;

Hewett vs. Linstead, 49 Cal. App. 2d 607, 122 P. 2d 352;

Kurtz vs. Ogden Canyon Sanitarium Company, 37 U. 313, 108 P. 14;

Section 1170 Bancroft's Probate Practice, 2nd Edition, Vol. 4.

POINT III.

It is apparent from a reading of the Cross-Complaint that there is no allegation whatsoever of extrinsic fraud on the part of anyone in the Probate proceedings in the estate of Grace Catherine Carson, deceased and especially in the Decree of Distribution therein. The only allegation is that the devisees knew that the property coming to them, in effect, was from the estate of Charles Carson, deceased and were fully advised of the proceedings, relations, family, heirs and matters concerning and pertaining to the estate of Charles Carson, deceased and the testimony and the matters pursuant to the estate of Charles Carson, deceased; and that they knew that a

Bond had been placed by the Cross-Complainant and asks that in case judgment is taken against the Cross-Complainant, that it have judgment against the Cross-Defendants, and that they save him harmless from any judgment.

This Cross-Complaint does not state any cause of action against the said Cross-Defendants, either in law or in equity, but especially does not state any cause of action for equitable relief against the Decree of Distribution in the estate of Grace Catherine Carson, deceased. In any event, there is nothing stated in said Cross-Complaint which would warrant introduction of testimony for the granting of relief from said Decree of Distribution on the ground of extrinsic fraud and its procurement. Neither do said allegations warrant any judgment that the Cross-Defendants hold the Cross-Complainant harmless because of the Plaintiffs' action.

See Bancroft's Probate Practice, 2nd Edition, Sections 1176, 1177 and 1178.

The Cross-Defendants respectfully point out that no action is brought by the Plaintiffs against the Executor of the estate of Grace Catherine Carson, deceased and there is no allegation that there has been a judgment entered against the Executor of the estate of Grace Catherine Carson, deceased.

In any event, there is no direct attack in the matter of the estate of Grace Catherine Carson, deceased, and the allegations in a matter involving the estate of Charles Carson, deceased, do not constitute such direct

attack, and said action, if anything, is an attempt to collaterally attack the Decree of Distribution in the matter of the estate of Grace Catherine Carson, deceased.

See *Hewett vs. Linstead*, 49 Cal. App. 2d 607, 122 P. 2d 352;

Section 1170 Bancroft's Probate Practice, 2nd Edition, Vol. 4.

POINT IV.

Since there is no evidence in the record showing any fraud in connection with the estate of Grace Catherine Carson, deceased, the Motion to Dismiss, as against the said Cross-Defendants, should have been granted, since they should not be required to be held to attend trials until the Cross-Complainant determines whether or not he will introduce evidence against them, and that, only when he has determined his position as against the plaintiffs. As Cross-Defendants, the Cross-Defendants should not be required to expend money, time and energy in this matter. If the Cross-Complainant wishes to bring an action directly against the Decree, in the Matter of the Estate of Grace Catherine Carson, deceased, and makes the proper allegations for equitable relief, in a proper, independent proceeding in said judgment, then, of course, the present Cross-Defendants would be proper parties and would then be in a position to defend such an attack on the Decree of Distribution, under which it is claimed they obtained certain money or property.

See: Frguson vs. Ferguson, 58 Cal. App. 2d 811, 137 P. 2d 735;
 Harrison vs. Cannon, Mont., 203 P. 2d 978;
 White's Estate, 69 Cal. App. 2d 749, 160 P. 2d 204;
 Moyes vs. Agee, 53 U. 360, 178 P. 753;
 Bancroft's Probate Practice, 2nd Edition, Vol. 4, Sections 1163, 1142, and 1187;
 Rice's Estate, 111 U. 428, 182 P. 2d 111;
 Section 102-9-28, Utah Code Annotated, 1943;
 Section 102-12-9, Utah Code Annotated, 1943;
 In re: Evans, 42 U. 382, 130 P. 217;
 In re: Howard's Estate, 159 P. 2d 586, at page 590, 108 U. 294;
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 Moritz vs. Horsman, Mich., 9 N.W. 2d 868, 147 A.L.R. 117;
 21 Am. Jur., Sections 486, 487, 488, and 490, pages 653-55;
 Good vs. Herr, 42 American Decisions 236;
 Chamberlin vs. Anderson, 195 Iowa 855, 190 N.W. 501, 26 A.L.R. 957;
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 Purinton vs. Dyson, 8 Calif. 2d 322, 65 P. 2d 777, 113 A.L.R. 1230 - 1235.

CONCLUSION

It is respectfully submitted that no evidence was offered as to extrinsic fraud, as against the Cross-Defendants, mentioned or otherwise.

That the Motion to Dismiss at the end of the trial

should have been granted as against the Cross-Complainant, and that in any event, the Motion to Dismiss the Complaint, as not stating a cause of action against the Cross-Defendants, Edith M. Hazelrigg and Cathedral of the Magdalene Catholic Church, should have been granted.

It is very important that a ruling be made upon these issues raised by the Cross-Defendants, because in the event that the Plaintiffs prevail in this appeal, as against the Defendant and Cross-Complainant, the status of the named Cross-Defendants should be determined.

Respectfully submitted,

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