

1952

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

Utah Supreme Court

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McKay, Burton, McMillan & Richards;

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In the Supreme Court of the State of Utah

ROBERT V. TILLER, et al.

Plaintiffs and Appellants,

vs.

LOREN G. NORTON, et al.,

Defendants and Respondents,

and

LOREN G. NORTON, GLORIA
NORTON, wife of Loren G. Nor-
ton, EDITH M. HAZELRIGG and
CATHEDRAL OF THE MAGDA-
LENE CATHOLIC CHURCH OF
East South Temple, Salt Lake City,
Utah, also known as ROMAN
CATHOLIC BISHOP OF SALT
LAKE CITY, a corporation sole

FILED *Cross Defendants.*

APR 1 - 1952

Clerk, Supreme Court, Utah

McKAY, BURTON, McMILLAN & RICHARDS,

*Attorneys for Defendant and Respondent, The Employers'
Liability Assurance Corporation, Ltd.*

Reply Brief to
Brief of Cross-
Defendants Edith
M. Hazelrigg and
Cathedral of the
Magdalene of the
Catholic Church
of East South
Temple
Civil No. 7770

TABLE OF CONTENTS

MOTION TO DISMISS INTERLOCUTORY APPEAL..	3
STATEMENT OF FACTS	4
STATEMENT OF POINTS RELIED UPON.....	8
POINT NO. I:	
Cross-defendants' motion to dismiss the cross-complaint was premature and the cross-defendants' contentions to this Court are premature	8
POINT II:	
The cross-complaint states a cause of action against the cross-defendants	8
ARGUMENT	8
POINT NO. I.	8
POINT NO. II.	10
CONCLUSION	14

STATUTES

Utah Rules of Civil Procedure, Rule 72(b)	4, 10
Utah Rules of Civil Procedure, Rule 72(a)	9, 10
Utah Rules of Civil Procedure, Rule 8(c)2	13
Utah Rules of Civil Procedure, Rule 8(f)	13

TEXT BOOKS

Barron and Holtzoff Federal Practice & Procedure, Vol. 1, Sec. 282, Pages 526-532	14
Scott on Trusts, Vol. 3, Secs. 507-532, Pages 2431-2602.....	14

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MOTION TO DISMISS INTERLOCUTORY APPEAL

Comes now The Employers' Liability Assurance Corpora-
tion, Ltd., and moves that the Court make and enter an order
dismissing the purported appeal by cross-defendants Edith M.
Hazelrigg 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 corporation sole, on the grounds and for the reasons as follows:

1. That said cross-defendants have failed to comply with the provisions of Rule 72(b) of the Utah Rules of Civil Procedure.

2. That cross-defendants purport to appeal from an order which is not a final judgment against them, and that said appeal fails to comply with the provisions of Rules 72(a) of the Utah Rules of Civil Procedure.

McKAY, BURTON, McMILLAN AND RICHARDS

By GEORGE M. McMILLAN

Attorneys for Defendant and Respondent, The Employers' Liability Assurance Corporation, Ltd.

STATEMENT OF FACTS

Since none of the various briefs have set out the facts material to the issues raised by the brief of the cross-defendants and respondents, Edith M. Hazelrigg and Cathedral of the Magdalene of the Catholic Church of East South Temple, Salt Lake City, Utah, also known as Roman Catholic Bishop of Salt Lake City, a corporation sole, these facts will be briefly set out in this reply brief to the said brief of the cross-defendants.

The cross-complaint by the respondents and defendant The Employers' Liability Assurance Corporation, Ltd., states that the Catholic Church and the cross-defendant Hazelrigg

are residents of Salt Lake County, State of Utah, and that the plaintiffs have filed the present action against the defendant Corporation, as appears from the files and records. The cross-complaint alleges that plaintiffs have alleged fraud in the administration of the Charles Carson estate.

In Paragraph 4 of the cross-complaint it is alleged that the estate of Grace Catherine Sweeney Carson consisted solely of assets distributed to the estate from the estate of Charles Carson, and that all the benefits from the Grace Catherine Sweeney Carson estate came from the estate of her deceased husband. The paragraph further states, "that all of the cross-defendants were devisees of Grace Catherine Sweeney Carson and received as such devisees and legatees certain benefits, moneys and properties from said estate; that each and all of them were well and truly advised and had full and complete knowledge of the fact that all of such sums, properties and devisees so received by them were in effect coming to them from the estate of Charles Carson and were each and all of them fully advised of all of the proceedings, relationships, family, heirs and matters concerned and pertaining to the estate of Charles Carson.

"That particularly all of said cross-defendants were aware of the matters contained in and the various proceedings conducted and testimony introduced in the various proceedings and matters pursuant to the estate of Charles Carson."

It is then alleged that all of the devisees knew of the appointment of the surety company as surety in the Charles Carson estate. It is then alleged in general terms that in the event the defendant Bonding Company should have judgment

entered against it, it should have judgment against the persons who received the estate to the extent that these persons benefitted from the wrongful distribution. It is alleged that the bondsman is entitled to look to the property of the estate and "to each of the defendants to save the said The Employers' Liability Assurance Corporation, Ltd., harmless as to any such judgment" (R. 62-65).

The prayer of the cross-complaint is that in the event the plaintiffs have judgment against The Employers' Liability Assurance Corporation, Ltd., the said defendant and cross-plaintiff have judgment against each of the cross-defendants for the amounts, sums and benefits received by each of said cross-defendants "in connection with or arising out of the estate of either Charles Carson and/or the estate of Grace Catherine Sweeney Carson; and further, that the Court make and enter its order requiring said cross-defendants and each of them to hold this cross-plaintiff harmless from any and all liability arising out of or in connection with the administration of the estate of the said Charles Carson." There is also a prayer for general relief.

The effect of this pleading is to bring before the Court the beneficiaries of the Grace Catherine Sweeney Carson estate, which persons are the same beneficiaries as the Charles Carson estate, and to ask the Court to impose a trust upon the property which the plaintiffs claim was wrongfully distributed. In other words, the surety company says in substance that it denies that there was any fraud committed in the estate of Charles Carson, and that is its position in the present appeal of the order dismissing the complaint. However, if there was

fraud, and if, as plaintiffs allege, that fraud was committed by Mrs. Carson and/or the administrator which she appointed, then the property distributed to the executor of Mrs. Carson's estate and through that estate to the various devisees was in fact received by all with notice of all infirmities, and the real heirs are entitled to recover the property. In the event of recovery against it, the surety company is entitled to be subrogated to the position of the heirs and their right to follow such assets.

This defendant in its alternative pleading against the cross-defendants alleges that they had notice of the same facts which were before the Court in the Charles Carson estate, and that if there was any fraud in the procurement of the decree of distribution these cross-defendants had knowledge of the fraud. In any event, they were not takers for value because, as appears from the probate file of Mrs. Carson, they were only devisees and legatees of her estate. All the assets of her estate consisted of the assets of the Charles Carson estate. That being so, the Company alleges in substance and effect that it is entitled to recover over against the cross-defendants to the extent of the value of the property which they received.

The trial court denied the motion to dismiss and motion to strike of the cross-defendants and the case went to trial upon their answers. At the conclusion of plaintiffs' evidence, the defendant surety company made its motion to dismiss plaintiffs' complaint and the present action on the various grounds stated, including that the plaintiffs had not proved extrinsic fraud (R. 744 et seq.)

The cross-defendants there upon made a motion to dismiss the cross-complaint (R. 749 et seq.) The Court ruled that the motion to dismiss the cross-complaint was not timely because a determination had not been made at that time as to whether the plaintiffs had proved any theory which justified any relief against the defendants, and the motions were premature (R. 750-752). Employers did not rest on its cross-complaint against cross-defendants (R. 759).

The brief of Edith M. Hazelrigg and Cathedral of the Magdalene Catholic Church of East Temple was filed without a petition for an intermediate appeal, despite the fact that there has been no judgment against them on the merits.

STATEMENT OF POINTS RELIED UPON

POINT NO. I

CROSS-DEFENDANTS' MOTION TO DISMISS THE CROSS-COMPLAINT WAS PREMATURE AND THE CROSS-DEFENDANTS' CONTENTIONS TO THIS COURT ARE PREMATURE.

POINT NO. II

THE CROSS-COMPLAINT STATES A CAUSE OF ACTION AGAINST THE CROSS-DEFENDANTS.

ARGUMENT

POINT NO. I

CROSS-DEFENDANTS' MOTION TO DISMISS THE

CROSS-COMPLAINT WAS PREMATURE AND THE CROSS-DEFENDANTS' CONTENTIONS TO THIS COURT ARE PREMATURE.

Rule 72(a) of the Utah Rules of Civil Procedure provides that an appeal may be taken to the Supreme Court from all final judgments in accordance with the rules provided. The only procedure for an appeal from an interlocutory order is provided in Rules 72(b).

In the case at bar the cross-defendants made their motion that the cross-complaint against them be dismissed before the cross-plaintiff had even put on any evidence, much less before it had rested. The cross-defendants now allege as error that the cross-complaint was not dismissed, despite the fact that no justiciable issue has been yet raised by the evidence against the cross-defendants in support of the cross-complaint of The Employers' Liability Assurance Corporation, Ltd. The cross-plaintiff has not rested its case or, indeed, even submitted evidence in support of its cross-complaint.

It is, of course, true that if this Court affirms the decision of the district court, defendant, The Employers' Liability Assurance Corporation, Ltd., will have no claim except the possibility of claiming costs for the writing of this brief on appeal against these particular cross-defendants. The only allegation that is made against Hazelrigg and the Magdalene Church by The Employers' Liability Assurance Corporation, Ltd., is that if there was fraud, and if plaintiffs are able to show that the property which went into the Grace Catherine Carson estate was fraudulently obtained, then the surety company

being subrogated to plaintiffs' rights, is entitled to follow that property. If this Court holds that the property was not fraudulently obtained, there is, of course, no claim against these cross-defendants. Undoubtedly cross-defendants properly joined in defendants' motion to dismiss the complaint, but until it was determined that the Employers Company was liable, the alternative pleaded by the corporation did not even raise an issue against the cross-defendants.

It is submitted that the motion to dismiss the cross-complaint was premature.

Moreover, the cross-defendants have no decision of which they can complain at the present time in this court. They have not had a final judgment entered against them; they, therefore, cannot appeal from a final judgment pursuant to the provisions of Rule 72(a). They have not filed a petition for interlocutory appeal, and apparently do not even purport to claim any right to appeal under the provisions of Rule 72(b).

It is submitted that the questions raised by the cross-defendants' briefs are premature and should not be passed upon by the Court at this stage of the proceeding.

POINT NO. II

THE CROSS-COMPLAINT STATES A CAUSE OF ACTION AGAINST THE CROSS-DEFENDANTS.

Cross-defendants, Hazelrigg and Church of the Magdalene Catholic Church, argue that the cross-plaintiffs attempt

to attack collaterally the Decree of Distribution in the estate of Grace Catherine Sweeney Carson. The cross-defendants do not refer to the allegations of the cross-complaint on the subject. It seems clear that if there had been a careful reading of the cross-complaint and of the theory which it presents to the Court, cross-defendants would not have made their arguments on this point.

The plaintiffs' theory in this case, as stated in the brief submitted to the Court, is that the administrator of the Charles Carson estate and the widow are guilty of extrinsic fraud in the particulars enumerated, and that the extrinsic fraud resulted in the estate being distributed to the legal successors in interest of Grace Catherine Sweeney Carson. Plaintiffs allege that in fact the estate should have been distributed in whole or in part to them. If plaintiffs successfully establish this proposition, they will have been able to require the bondsman of the administrator to pay to them a money judgment for the value of the property thus wrongfully distributed. The bonding company will, of course, be subrogated to plaintiffs' rights. If, assuming that the plaintiffs establish extrinsic fraud, plaintiffs could have followed the assets wrongfully distributed to the distributee of the Charles Carson estate and to any other persons except bona fide takers for value, and there is no reason in principle why the bonding company cannot pursue the same remedy in this action. That is precisely what the bonding company pleads in the cross-complaint.

Cross-defendants assert that there must be a showing of extrinsic fraud in the Grace Catherine Sweeney Carson estate.

This, however, is a complete misconception of the theory of the cross-complaint. The bonding company alleges in substance that in the event the plaintiffs prove extrinsic fraud, then the distributee of the Charles Carson estate, viz: Grace Catherine Sweeney Carson, or her legal successor, had distributed to them property tainted with fraud. Certainly no one could dispute the proposition that if Mrs. Carson had been alive at the time of the decree in her husband's estate, the plaintiffs in this action could have followed the assets and obtained a decree declaring themselves to be the owners of the property. In this case Mrs. Carson died before the estate was distributed to her. The property, instead of being distributed to her directly, went to her legatees. If fraud be proved, it was still tainted with the same fraud; it still could be recovered by the plaintiffs in the same way unless the distributees were bona fide takers for value. The necessity for establishing extrinsic fraud certainly does not apply to a situation where all property in an estate is tainted with the fraud.

If I acquire blackacre by fraud or breach of trust, or any other device which gives the true owner a right to maintain an action against me to recover it, and before the action is brought I die, who can assert that the true owner loses his right to follow the property and maintain the judgment against my legal successors in interest? The entire hornbook principle of the right of the equitable owner being cut off only in the event of transfer to a bona fide purchaser stands as a barrier to this notion.

Cross-plaintiffs in the case at bar do not assert that there was any fraud in the Grace Catherine Sweeney Carson estate.

They assert simply that if there was fraud in the Charles Carson estate, all of the property that went into Mrs. Carson's estate was tainted by fraud, and that the cross-defendants who received the property took the property with knowledge of the same facts, and are liable to the rightful owner to the extent of the property received. Cross-plaintiffs standing in the place of the rightful owners by right of subrogation are entitled to assert this right.

There can be no objection to this position because it is an alternative one or because it is hypothetical. Rule 8(c) (2) of the Utah Rules of Civil Procedure provides:

"A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both." * * *

Rule 8(f) provides:

"All pleadings shall be construed as to do substantial justice."

Discussions of this provision in the Federal Rule indicate that the very purpose of it was to provide for a situation of this kind.

See Barron and Holtzoff *Federal Practice & Procedure*, Vol. 1, Sec. 282, Pages 526-532.

Under the present practice there is provision for both alternative joinder of parties and alternative statement of claims for relief.

It is submitted that the cases cited by the cross-defendants in their brief are absolutely inapplicable and inappropriate to the issues raised by the cross-plaintiffs' cross-complaint. The principles ther contended for to the effect that the extrinsic fraud is a prerequisite to the setting aside of a decree are not denied. The proper construction of the pleadings, however, does not involve this question of law, but instead involves the application of the principles of constructive trusts and following the rest.

The Court's attention is invited to *Scott on Trusts*, Vol. 3, Sections 507-552, Pages 2431-2602, on that subject. It is not believed that citation of authority for the principles contended for is necessary.

CONCLUSION

It is respectfully submitted that the points raised by the Magdalene Catholic Church and Hazelrigg in their brief are premature. The assertions made are in the nature of a cross-appeal, despite the fact that no determination on the merits has been made against them and there has been no petition for intermediate appeal. Moreover, the position of these parties entirely ignores the issues tendered by the cross-

complaint. This Court should not pass upon the issues prematurely raised. The decision of the trial court on the merits should be affirmed.

Respectfully submitted,

McKAY, BURTON, McMILLAN & RICHARDS,
*Attorneys for Defendant and Respondent, The Employers'
Liability Assurance Corporation, Ltd.*