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Joseph G. Toombs v. Jack Donald Toombs et al : Brief of Respondents

Utah Supreme Court

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JAN 28 1958

In the
Supreme Court of the State of Utah

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FILED

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JOSEPH G. TOOMBS,

Plaintiff and Appellant, Clerk, Supreme Court, Utah

vs.

JACK DONALD TOOMBS, ROLAND
J. TOOMBS, individually and as
Guardian ad litem of the said Jack
Donald Toombs, a minor; ALMA
TOOMBS, EDRIS GLASMANN, and
J. M. TOOMBS,
Defendants and Respondents.

Case No.
8665

RESPONDENTS' BRIEF

GEORGE M. MASON,
Attorney for Respondents.

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	9
ARGUMENT	10
POINT I. THE EVIDENCE IN THIS CASE FULLY SUPPORTS THE TRIAL COURT'S FINDING AND CONCLUSION THAT THE PLAINTIFF DID NOT OWN ANY PART OF THE LAND HERE IN QUESTION	9
POINT II. THE EVIDENCE IN THIS CASE FULLY SUPPORTS THE TRIAL COURT'S FINDINGS AND CONCLUSION THAT THERE WAS NO CONSTRUCTIVE TRUST TO BE IMPOSED UPON THE PROPERTY HERE INVOLVED	11
POINT III. THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSAL TO REOPEN THIS CASE	15
CONCLUSION	16

CASES CITED

Beck v. Jeppesen, 1 Utah 2d 127, 262 P. 2d 760	10
Carpenter & Carpenter v. Kingham, 109 P. 2d 463, 56 Wyo. 314	14
Haws v. Jensen, 116 Utah 212, 209 P. 2d 229	16
Jensen v. Howell, 75 Utah 64, 282 P. 1034	12
Malstrom v. Consolidated Theatres, 4 Utah 2d 181, 290 P. 2d 689	10

TABLE OF CONTENTS—Continued

TEXTS CITED	Page
89 C. J. S. § 139 at p. 1022	12
89 C. J. S. § 139 at p. 1024	12
89 C. J. S. § 158 at p. 1079	12

In the
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RESPONDENTS' BRIEF

STATEMENT OF FACTS

The appellant in his statement of facts deals only very generally with the facts of this case and uses this statement to detail the proceedings had in this case and to comment upon the pleadings and the respective claims and allega-

tions of the parties. Under Points I and II of his argument, the appellant attempts to detail the evidence presented at the trial and it must be here noted that, in order to support his contention of error on the part of the trial court, appellant recites only that evidence favorable to him. Even in cases of this kind, it is customary to rely upon the trial judge's findings as to the facts where there is evidence to support those findings as he alone had the opportunity of listening to the witnesses, observing their demeanor and of determining the weight and credence to be given each of them.

On page 2 of his brief appellant details the family relationship of the plaintiff and the defendants and then says "It is therefore *evident* that the defendants are in close relationship one with the other, not only by family but also by reason of their activities conjointly in operating land adjacent to the Cedar Springs land in Box Elder County." It is respectfully submitted that the only evidence of this close relationship in the entire record is the above statement of counsel. The plaintiff fed cattle for the defendant, Alma Toombs, in 1904 and 1905 (R. 45) and worked for this same defendant in those same years (R. 42), and had one real estate transaction with him evidently at about the same time, although the evidence presented does not specify the year (R. 45).

We believe that this statement of facts should contain the facts as presented by the evidence elicited at the trial and that the better way to present them by brief is with reference to the plaintiff's complaint in order that this

Court may have the opportunity to clearly see what was claimed and what was proved and wherein the proof was lacking.

The amended complaint of the plaintiff (R. 500 and 501) alleges that title to the land in question was taken in the name of J. M. Toombs by deed on or about March 21, 1913, and that the plaintiff was and is the owner of a one-third interest in said land; that the said J. M. Toombs openly acknowledged the interest of the plaintiff; that in the month of July, 1948, the said J. M. Toombs, who is the plaintiff's father, conveyed the land by warranty deed to Edris Glasmann, the plaintiff's sister, who was originally a party to this action, and plaintiff alleges that said conveyance was in trust to convey to him the one-third interest mentioned above and to sell to him the remaining one-third for "an amount to be agreed upon between the parties, which said amount was to be the reasonable value of said land and not what the same might be purchased for on competitive bidding." This amended complaint further claimed that Edris Glasmann well knew that plaintiff was the owner of a one-third interest in this land and accepted the trust just above described but thereafter failed to execute the terms of this trust; and the complaint originally sought damages against both the plaintiff's sister and father, Edris Glasmann and J. M. Toombs.

The actual evidence introduced showed that plaintiff's claimed ownership was based upon work performed for his father during the year 1905 and consisted of feeding cattle for a period of five and one-half months (R. 41 and 42). There is not an iota of other or additional evidence

to support this alleged one-third interest and we earnestly suggest that the claim is as ridiculous as it sounds. All of the evidence introduced in support of the so-called constructive trust negatives this alleged interest. Under the new rules of civil procedure it is apparently possible to take inconsistent positions as far as the pleadings are concerned, but we do not believe it to be proper to maintain inconsistent positions after judgment and upon appeal. However, the plaintiff appellant continues to do so in this case; and his evidence and that of his witness, Arnold Christensen, conclusively show that he was attempting to purchase the entire property from his sister, and the plaintiff at this stage of the proceeding never asserted his alleged one-third interest.

On page 10 of appellant's brief the following statement appears: "Exhibit 3 was admitted in evidence (R. 109-110)." We have carefully read the two pages of the record referred to and do not find that this exhibit was there admitted and on page 111 of the record the trial court with reference to Exhibit 3 states:

"I think I'll take this under advisement and study this for a little while."

Neither the reporter in his index nor the writers of this brief after a careful review of the entire record can find that this Exhibit 3 was ever admitted into evidence. It was, therefore, most improper for the appellant to quote from this Exhibit in his brief and we desire to emphasize this impropriety as it is the only place in this entire record where any person besides the plaintiff himself made any

statement affirmatively as to this claimed one-third interest. And it is only proper to note that the Exhibit was an affidavit made by a ninety year old man on October 18, 1948, some three months after he had executed a warranty deed to this same property to his daughter and some 43 years after the alleged consideration was supposedly furnished to establish this fictitious interest. And the Exhibit does not even mention that the interest was one-third but is silent in this respect. The exhibit was patently inadmissible.

The amended complaint claimed that the plaintiff's sister accepted the conveyance in trust from plaintiff's father to convey to him the alleged one-third and to sell to him the remainder. The evidence of the plaintiff's two sisters, Deo Louise Gale (R. 290-299) and Edris Glasmann (R. 390-415), not only do not support such a trust and its acceptance, but completely negative any such a claim. And finally we must note that, although plaintiff's amended complaint joined both his father and his sister, Edris Glasmann, and sought \$2500.00 damages against them, the file does not show that they were ever served with summons and the record does show that the matter was dismissed as to these two defendants. In connection with the discussion as to constructive trusts, it will be necessary to again refer to this dismissal.

Paragraph 8 of said amended complaint attempts to lay the foundation for the constructive trust by charging Alma Toombs with the making of certain alleged promises (R. 502). Paragraph 9 alleges a confidential relationship, paragraph 10 the breach and paragraph 11 that the

claimed representations of Alma Toombs were fraudulent (R. 503).

With respect to Alma Toombs, he testified that he did go to Ogden for the plaintiff, talked with the plaintiff's sisters and reported to the plaintiff "I told him I wouldn't buy the property for him, because he could buy it just as well as I could" (R. 330). Lillian Toombs, Alma's wife, confirmed this statement (R. 368, 369). As to the alleged confidential relationship, we have heretofore in the second paragraph of this brief commented upon it and again urged that this Court scrutinize this claim most carefully. To us it is apparent that the plaintiff appellant has assumed such a confidential relationship to exist merely because he alleged in his amended complaint that it did. We have searched the record and the evidence is wholly lacking.

This same amended complaint alleges that the promises of the defendant, Alma Toombs, were fraudulent and the record again remains silent as to any proof of fraud. It would require an unbridled imagination to even infer anything fraudulent from the entire record in this case.

The record in this case is uncontradicted that the defendants, Alma Toombs and Roland Thomas, each paid one half of the purchase price of this property when the same was sold by Edris Glasmann and title thereto taken in the name of the defendant, Jack Donald Toombs (R. 268 and Exhibit F). And Jack Donald Toombs has since repaid his grandfather, Alma Toombs, a good part of the purchase price so advanced by him (Exhibits M and N). But a most careful reading of the amended complaint filed by the plain

tiff in this cause reveals that Jack Donald Toombs and Roland Toombs are named as defendants in the title of the case, are mentioned in paragraphs one and two where the parties and their residences are delineated, are mentioned in paragraphs four and twelve in connection with a claimed eviction of the plaintiff of which no proof was offered, and Jack Donald Toombs is named in paragraph ten as the party in whose name the deed was taken. Neither of these defendants is charged in the complaint with having done a single act as far as the plaintiff is concerned; and, at the best and giving plaintiff credit for everything he testified to, the only claim that can be made against these defendants was that they had been informed that the plaintiff made some claim to the land in question. But the plaintiff's sister, who was selling this property, did not even recognize this interest.

We believe the fair inference of all of the evidence clearly supports the ruling of the trial court in refusing to impose a constructive trust in this case. First, he was entitled to believe the defendant, Alma Toombs, and the witnesses who corroborated him, to the effect that he advised the plaintiff that he would not bid for him as he could do it just as well himself. Second, there was not a scintilla of evidence, nor was there any pleading, under which any type of constructive trust could be imposed as to the defendants, Jack Donald Toombs and Roland J. Toombs. They made no promises to the plaintiff and were under absolutely no obligation to him. At this point we would ask the Court to observe the two letters sent from A. L. Glasmann to the plaintiff and to the defendant, Roland Toombs, each dated

October 14, 1948, and marked Exhibits "A" and "J", respectively. The defendant, Roland Toombs, testified that the plaintiff showed him Exhibit A, being the letter sent the plaintiff, and that he read to the plaintiff the letter he had received which is Exhibit J (R. 427). This testimony is not contradicted.

The two letters above referred to both stated that an offer had been received for the property and that it was the intention to complete the sale on October 19, 1948; and both the plaintiff and the defendant, Roland Toombs, were advised that this was in effect their last opportunity to bid on this property. Roland's testimony (R. 426) is to the effect that he told the plaintiff that he did intend to bid further on it and to the further effect that the plaintiff informed him that he was not interested, that the price was too high and that he would not bid further. This evidence is consistent with and is supported by these letters; the plaintiff's attempted denials of this conversation are not worthy of belief and the letters themselves show that his memory in this respect was faulty and very inaccurate. Again we would urge upon this Court that the findings of the trial judge should not be easily set aside in a case of this kind as the weight and credence to be given the testimony of each witness can only be determined by the trier of the fact.

Referring again to Exhibit J, it is our contention that the plaintiff could not possibly have been thereafter further misled. This letter and the conversation between Roland and the plaintiff when they read this letter could have no

other effect than to have put the plaintiff on notice that Roland proposed to bid further on this property. And again we urge the Court to remember that the plaintiff has never charged the defendant, Roland Toombs, with having made and thereafter breached any promise of any kind or with having at any time committed any wrongful act.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE IN THIS CASE FULLY SUPPORTS THE TRIAL COURT'S FINDING AND CONCLUSION THAT THE PLAINTIFF DID NOT OWN ANY PART OF THE LAND HERE IN QUESTION.

POINT II.

THE EVIDENCE IN THIS CASE FULLY SUPPORTS THE TRIAL COURT'S FINDINGS AND CONCLUSION THAT THERE WAS NO CONSTRUCTIVE TRUST TO BE IMPOSED UPON THE PROPERTY HERE INVOLVED.

POINT III.

THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSAL TO REOPEN THIS CASE.

ARGUMENT

POINT I.

THE EVIDENCE IN THIS CASE FULLY SUPPORTS THE TRIAL COURT'S FINDING AND CONCLUSION THAT THE PLAINTIFF DID NOT OWN ANY PART OF THE LAND HERE IN QUESTION.

In the brief of appellant under the argument on this point, counsel use a total of twenty-four pages to detail and summarize the evidence favorable to them on both this point and the succeeding one, and in these twenty-four pages no authority of any kind is cited. We have under the statement of facts in this respondents' brief summarized the evidence favorable to the respondents. And, although it is repetitious, we maintain that the only evidence, other than the appellant's own statement, is contained in the affidavit quoted in appellant's brief which affidavit was never admitted in evidence.

It would be proper to conclude the argument under this point with the statement that this Court has many times stated and held that it will not on appeal disturb the findings of the trial court if there is any substantial evidence supporting those findings and we submit here that there was a complete lack of evidence to support any other finding. This Court has also recently stated that the evidence must be viewed in the light most favorable to the respondent upon appeal. *Beck v. Jeppesen*, 1 Utah 2d 127, 262 P. 2d 760, and *Malstrom v. Consolidated Theatres*, 4 Utah 2d 181, 290 P. 2d 689.

POINT II.

THE EVIDENCE IN THIS CASE FULLY SUPPORTS THE TRIAL COURT'S FINDINGS AND CONCLUSION THAT THERE WAS NO CONSTRUCTIVE TRUST TO BE IMPOSED UPON THE PROPERTY HERE INVOLVED.

Appellant commences his argument on this point with reference to the alleged promise of the defendant, Alma Toombs, to buy this property for appellant. We believe the record fairly and reasonably shows and supports a finding that, if any such promise had been made, it was rescinded. But, and of much more significance is the question as to what appellant proposes to do with the defendant, Roland Toombs, who was at least a joint purchaser. No where in his argument does he request that a constructive trust be imposed as against Roland and in the entire brief of appellant there is not one reference to Exhibits A and J which have been mentioned many times in this brief.

Corpus Juris Secundum in its treatise on trusts contains three general statements, all supported by a multitude of cases, and any one of these three statements wholly and completely and conclusively sustains the judgment entered by the trial court on the facts as here presented.

The first statement reads as follows:

“More precisely, some fraudulent or unfair and unconscionable conduct is essential to create a constructive trust, and there must be some unjust enrichment on the part of the trustee by something passing from the beneficiary or from someone else

on the beneficiary's behalf." 89 C. J. S. § 139 at p. 1022.

We submit that the trial court was entitled to find that no evidence was presented sufficient to fulfill this requirement.

The second statement is this:

"Likewise, a denial that any trust exists, or a resort to the statute of frauds to defeat the enforcement of a parol trust or obligation, is not such a fraud as to give rise to a constructive trust." 89 C. J. S. § 139 at p. 1024.

This statement needs no elaboration other than the comment that the statute of frauds itself is intended to discourage frauds and perjuries that would otherwise be committed by reason of the vagaries of the human mind and memory.

And finally the statement is made that:

"A high and extraordinary degree of proof is required in order to establish a constructive trust, and the evidence must be clear, definite, unequivocal and satisfactory, or such as to lead to but one conclusion, or as to leave no reasonable doubt as to the existence of the trust." 89 C. J. S. § 158 at p. 1079.

We cannot too greatly emphasize that the entire record falls far short of the requirement thus imposed and would support only the result reached by the trial court.

The Utah case of *Jensen v. Howell*, 75 Utah 64, 282 Pac. 1034, holds that:

"* * * The general rule also is that, to establish a trust by parol, the evidence must be clear,

unequivocal, and explicit, the property which is the subject-matter of the trust clearly and distinctly, and the purposes of the trust plainly, indicated, as well as the person or persons who are to be the beneficiaries. *Skeen v. Marriott*, supra; 1 *Perry on Trusts*, supra; *Beach on Trusts*, § 52. And, as expressed in many of the adjudicated cases, the evidence must be 'clear, satisfactory, and convincing.' *Sheenan v. Sullivan*, 126 Cal. 189, 58 P. 543, and cases there cited." * * *

And, in this same case on page 1039 of the Pacific Reporter, the Court makes the following observations as to the evidence in that case:

"Though the admissions as testified to by plaintiffs should be regarded as having been made, yet the testimony with respect thereto is as frail and ineffectual to establish a trust in the property in question as is the testimony of the plaintiffs as to the declarations of the grantor prior to the making of the transfers. The admissions as testified to are just as equivocal, indefinite, and uncertain as to the property, the subject-matter of the trust, the nature, degree, and tenure of interest granted the wife, and as to what was to be given the plaintiffs. Such vague, indefinite, and enigmatical expressions and statements as testified to as admissions, unsupported as they are by other facts and circumstances, or by conduct of the parties, cannot be regarded as being sufficient to create a trust and especially not to overcome the admitted written evidence of the conveyances and transfers of absolute and unconditional title of property possessed and controlled by the grantee as her own for these many years, and thereby divest her or her heirs of such title. Even though the whole of the evidence on behalf of the plaintiffs, when considered together, be regarded as

sufficient to support a finding of the alleged trust, yet, when the whole of the evidence in the record, that of the plaintiffs and of the defendants, and all the facts and circumstances shown therein, are considered together, we think it manifest that such a finding is against the clear weight of the evidence."

In the case of *Carpenter & Carpenter v. Kingham*, 109 P. 2d 463, 56 Wyo. 314, the Supreme Court of Wyoming states:

"If we assume, however, that Kingham made the statement that he would protect plaintiff along with himself, the statement is altogether too vague and indefinite upon which to found a constructive trust. Counsel for defendant thinks that it means that defendant would protect plaintiff in the pending suit, but that there was nothing to protect. Perhaps so. We might conjecture numerous other meanings. In *Dunn v. Dunn*, 59 Idaho 473, 83 P. 2d 471, 474, the court stated that 'a constructive trust cannot arise out of vague, indefinite, ambiguous or casual statements or declarations. It must be established by reasonably clear and definite statements or declarations or equally clear and definite evidence of acts and conduct to that effect.' In *Rubin v. Midlinsky*, supra [321 Ill. 436, 152 N. E. 219], the court stated that 'while counsel do not clearly state the character of trust which they contend exists here, we gather that it is sought to establish a constructive trust. While such trust may be established by parol testimony, the proof must be clear and convincing, and so strong, unequivocal, and unmistakable as to lead to but one conclusion.' 3 Bogert on Trusts and Trustees, § 472, states: 'As with the proof of express and resulting trusts, so in the case of the establishment of constructive trusts, the courts have announced that they require "clear

and convincing” evidence. Other judicial expressions are even stronger in their demands. “If the evidence is doubtful or capable of reasonable explanation upon a theory other than the existence of the trust, it is not sufficient to support a decree declaring and enforcing the trust.” Sometimes the requirement is stated to be that the facts leading to the decree establishing the constructive trust must be proved “by greater weight than the mere preponderance of the evidence” or beyond a reasonable doubt. These statements reflect judicial caution in accepting oral evidence which is intended to contradict absolute conveyances in deeds and wills and overturn record titles.’ ”

Under all of the circumstances of this case and the authorities above quoted, we respectfully urge that it would have been error for the trial court to have imposed a constructive trust here.

POINT III.

THERE WAS NO ERROR IN THE TRIAL COURT’S REFUSAL TO REOPEN THIS CASE.

We have carefully read appellant’s argument concerning this point as set forth in his brief and we are of the opinion that he has answered it himself. If counsel for one side or the other believe that their opposition is dilatory in the preparation of such findings, the rules clearly permit such counsel to prepare and submit the findings of their own. We respectfully submit that the motion to reopen was directed to the sound discretion of the trial court and nothing has been here presented to show an abuse of that discretion.

On page 52 of appellant's brief appears the statement "the trial court manifestly abused its discretion in refusing to reopen the matter after more than five years had elapsed from the submission of the case to it." Appellant again assumes that there are facts in the record to support such a contention whereas there are none.

CONCLUSION

This Court, in the recent case of *Haws v. Jensen*, 116 Utah 212, 209 P. 2d 229, said:

"The scope of the review of facts in equity cases has long been settled in this jurisdiction. In *Stanley v. Stanley*, 97 Utah 520, 94 P. 2d 465, 466, we quoted with approval from *Olivers v. Eleganti*, 61 Utah 475, 214 P. 313, 315, where we stated that in equity cases, 'the findings of the trial courts on conflicting evidence will not be set aside unless it manifestly appears that the court has misapplied proven facts or made findings clearly against the weight of the evidence.' "

We respectfully submit that the judgment of the trial court is entitled to the full affirmance of this Court.

Respectfully submitted,

GEORGE M. MASON,
Attorney for Respondents.