

1958

Hammond v. Calder

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Fred H. Evans; Attorney for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *Acott v. Tomlinson*, No. 8879 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3127

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

Case No. 8879

IN THE SUPREME COURT

UNIVERSITY UTAH

of the

FEB 16 1959

STATE OF UTAH

LAW LIBRARY

FILED

FEB 3 - 1958

Clerk, Supreme Court, Utah

VADA J. TOMLINSON ACOTT, REBA
TOMLINSON FULLER, RUBY TOM-
LINSON BEEBE, NORA E. TOMLIN-
SON SCHOCKLEY, MARGUERITE
TOMLINSON CISNEY, and ALTON E.
TOMLINSON,

Plaintiffs and Respondents,

—vs.—

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

Defendant and Appellant.

BRIEF OF DEFENDANT AND APPELLANT

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*

INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	13
ARGUMENT	13
1. The conclusions and judgment of the trial court that a trust was created must be reversed as a matter of law.	13
2. A trust cannot be imposed on property which is not part of the estate and was not in existence at the time the trust was created.	23
3. The plaintiffs are guilty of laches and are not entitled to equitable relief.	26
4. The probate decree is res judicata and is not subject to collateral attack.	31
CONCLUSION	35

TABLE OF CASES

Anderson v. State, et al., 238 P. 557, 65 Utah 512.....	32
Coray v. Holbrook, et al., 121 P. 572, 40 Utah 325.....	20
Fleming v. Fleming-Felt Company, 7 Utah 2d 293, 323 P. 2d 712.....	20
In re Blodgett's Estate, 70 P. 2d 742, 93 Utah 1.....	19
In the Matter of the Estate of James John Latsis, (sometimes known as "Latses"), Deceased, 284 P. 2d 479, 3 Utah 2d 365	31, 34
Nokes v. Continental Mining and Milling Company, 6 Utah 2nd 177, 308 P. 2nd 954.....	8
Thomas v. Braffet Heirs, 6 Utah 2d 57, 305 P.2d 507.....	31, 34
Weyant v. Utah Savings & Trust Company, 182 P. 189, 54 Utah 181	32
Wright v. W. E. Callahan Construction Company, 156 P. 2d 710, 108 Utah 28	32

INDEX—(Continued)

	Page
TEXTS	
2 Bancroft Probate Practice, sec. 332, p. 277.....	16
2 Bancroft Probate Practice, sec. 334, p. 279.....	17
4 Bancroft Probate Practice, sec. 1176.....	26
I Scott on Trusts, sec. 86, p. 648.....	25
I Scott on Trusts, sec. 86.4, p. 663.....	26
I Scott on Trusts, sec. 40.1	23
I Scott on Trusts, sec. 44.2, p. 322.....	16
II Scott on Trusts, sec. 170.2, p. 1200.....	30
II Scott on Trusts, sec. 173, p. 1293.....	17
II Scott on Trusts, sec. 219, p. 1609.....	29
IV Scott on Trusts, sec. 462.1, pp. 3104, 3105.....	14
IV Scott on Trusts, sec. 462.4.....	26
IV Scott on Trusts, sec. 462.6, p. 3112.....	21
IV Scott on Trusts, sec. 466.1, pp. 3121, 3122.....	27
IV Scott on Trusts, sec. 496, p. 3217.....	22
IV Scott on Trusts, sec. 481.3, p. 3153.....	23
IV Scott on Trusts, sec. 521.4, p. 3335.....	24

STATUTES

Section 75-1-8, Utah Code Annotated 1953.....	33
Section 75-11-37, Utah Code Annotated 1953.....	33

IN THE SUPREME COURT of the STATE OF UTAH

VADA J. TOMLINSON ACOTT, REBA
TOMLINSON FULLER, RUBY TOM-
LINSON BEEBE, NORA E. TOMLIN-
SON SCHOCKLEY, MARGUERITE
TOMLINSON CISNEY, and ALTON E.
TOMLINSON,

Plaintiffs and Respondents,

—vs.—

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

Defendant and Appellant.

Case
No. 8879

BRIEF OF DEFENDANT AND APPELLANT

STATEMENT OF FACTS

This is an action to impose a trust on certain mining claims and for an accounting of the proceeds. The trial court held in favor of the plaintiffs and respondents, and this appeal is taken from the judgment. The parties hereto are the heirs at law of one A. L. Tomlinson, deceased. The plaintiffs and respondents, who will hereafter be referred to as plaintiffs, are the brother and sisters of the defendant and appellant, who was the administrator of the estate of A. L. Tomlinson, deceased,

and will hereafter be referred to as defendant. The mining claims involved herein were known as the Camp Bird Nos. 1-14, and will be referred to herein as the Camp Bird claims. The question of the trust was tried before the court September 13, 14 and 15, 1954, and it is but a small part of the transcript. The matter of the accounting was tried in January and February of 1958, and accounts for the major part of the record. This appeal mainly concerns the issues relating to the trust. The transcript of the testimony is in two volumes. The volume relating to the testimony September 13, 14, and 15, 1954 will be referred to as Volume One and designated as, "(T1)". The volume relating to the testimony January and February, 1958, will be referred to as Volume Two and designated as, "(T2)".

The Camp Bird claims were originally located by the defendant, his father A.L. Tomlinson and the husbands of two of the plaintiffs, (T1. 43, 94, 248). At the time of his death, A. L. Tomlinson was the sole owner of the claims, the other locators having conveyed to him by quit claim deed. The petition for probate was filed in the Seventh Judicial Court, Emery County, Utah, in June of 1942, Probate No. 574, (Exh. 18) (T1. 150). One Alvin Wallace was appointed and qualified as administrator of the estate. The mining claims were subject to conflicting claims of other locators, and in 1942, the Tomlinson interest in the Camp Bird claims was reduced to 7.5 percent interest. The stipulation setting forth the interest is a part of Probate file No. 574, Exhibit 18.

Thereafter, the Tomlinson interest was reduced to 5 percent, (T1. 125). The 2.5 percent being conveyed to F. B. Hammond, attorney for the estate, in settlement of his claims, (Exh. 18) (T1 125). In February of 1949, the heirs compelled the removal of the administrator and the defendant, Leslie A. Tomlinson, was appointed. The inventory and appraisal filed in said probate proceeding listed the Camp Bird claims as the only asset of the estate, and the claims were appraised at a total value of \$2800.00. Prior to his appointment as administrator, the defendant had relocated the Camp Bird claims because there was doubt as to their validity, (T1. 250). Following his appointment, the defendant, as administrator, entered into several lease agreements for the purpose of mining the ore from the claims. These leases purported to lease the entire interest in the Camp Bird claims, (T1. 250), the administrator not being aware of the stipulation giving other parties 95 percent of the Camp Bird claims. These leases provided for the usual 15 percent royalty to be paid to the Tomlinson estate, and the Atomic Energy Commission, the only purchaser, was advised of the lease agreements, and all the royalty checks were paid to the estate bank account at Grand Junction, Colorado, (Exh. F) (T1. 251; T2. 114). As a result of these operations, \$7,329.80 in royalty monies had been paid into the estate account by April of 1950, (T1. 251-253).

In January of 1950, the defendant entered into a lease arrangement with E. G. Frawley, who assigned the lease to a corporation he organized under the name of

Continental Mining & Milling Company, hereafter referred to as Continental. The lease agreement (Exh. O) (T1. 251-258) recited matters relating to conflicting claims and the stipulation reducing the Tomlinson interest to 5 percent. This was the first the defendant knew of the stipulation, (T1. 257). The agreement contained the recital that the conflicts were without merit and that it was the intention to lease the entire interest in the Camp Bird claims. Upon these representations, the corporation agreed to clear the title. To facilitate the lease arrangement, the administrator obtained quit claim deeds from each of the heirs of the estate. These deeds are referred to as the 1950 deeds. The administrator wrote to the heirs advising them of the contemplated lease and requested the quit claim deeds. The defendant advised them that the claims would be held for their benefit as their interest might appear, (Exh. C). Shortly after the execution of the lease, the lessee, Continental, filed an action against the estate on the grounds that the title to the Camp Bird claims had been misrepresented. This action was never tried, (T1. 288). During the spring of 1950, a substantial part of the owners of other claims on Temple Mountain entered into a lease with Consolidated Uranium Mines, Inc., hereafter referred to as Consolidated, (T2. 122). These parties included some of the persons who had an interest in the Camp Bird claims under the stipulation of 1942 and others who claimed ownership of the ground by reason of conflicting claims, (T2. 122). In January of 1951, the defendant individually

and as administrator of the estate, signed a document purporting to be a joinder to the lease upon certain specific conditions, (Exh. R) (T2. 34). The conditions were that the corporation, subject to an action filed in the District Court of Emery County, Utah, Civil No. 1713, obtain from all the parties to the lease an acknowledgment of the Tomlinson 5 percent interest, and an agreement to pay all accrued royalties according to that interest. In December, 1951, the defendant individually and as administrator of the estate entered into a further stipulation with Therald Jensen and Frank Hanson, attorneys of Price, Utah, who represented the owners of 95 percent of the Temple Mountain property, (T2. 122-125). This stipulation reduced the interest of the Tomlinson estate to a 3.53 percent interest, and committed the Tomlinson interest to the May, 1950 lease with Consolidated, notwithstanding the joinder of January, 1951, (Exh. R). The stipulation and agreement also provided that because of litigation the funds were to be held in a trust account.

In the early part of 1951, the plaintiffs were dissatisfied with the estate, no distribution having been made, and they made repeated requests of the defendant to distribute the monies in the estate, (T1. 39). The defendant informed the plaintiffs that he could not distribute the estate until the conflicts were resolved and distribution was ordered by the court. This matter finally came to a head in June of 1952. Under date of June 2, 1952, the plaintiffs and their mother, Lilie M. Tomlinson, who was not a party to the action, executed quit claim deeds in favor of the defendant, (Exh. A-1 to A-7).

These deeds are referred to as the 1952 deeds. In February of 1953, upon due notice to the plaintiffs, the quit claim deeds were confirmed by the court and the property distributed to the defendant, (Exh. 18).

The plaintiffs had been dissatisfied with the estate matters since the commencement of the probate proceedings in June of 1942. This was the reason for the change of administrators in January of 1949. This dissatisfaction became acute in 1951, the plaintiffs demanding that the administrator distribute the estate property, (T1. 268, 269). To clarify the situation, C. Allen Elggren, the attorney for the estate, addressed a letter to the defendant explaining the controversies and possible liabilities of the estate by reason of the mining operations conducted by the defendant, (Exh. E). The letter was sent by the defendant to his mother in Fruita, Colorado, who in turn showed it to the plaintiffs, (T1. 183). Mrs. Cisney lived next door to Mrs. Tomlinson, and the other plaintiffs lived near by or frequently visiting their mother. This situation continued through 1951, and until the late spring of 1952 when the heirs became insistent that the estate be distributed, (T1. 268). The stipulation of December, 1951, had resolved certain of the conflicts, but the *Hunt v. Bitterbaum* case, Civil No. 1713, was still undecided and other conflicts were undetermined. The defendant and his mother, Lillie M. Tomlinson, testified that the heirs were told that the defendant could not distribute the estate and that the conflicts still hadn't been settled.

The defendant testified that none of the adverse claimants, including the parties to the stipulation and agreement of 1951, were aware of the amount of ore removed from the Camp Bird claims by the defendant in 1949 and 1950. The mother, Lilie M. Tomlinson, testified that the plaintiffs insisted that they take their share of the estate and convey the mining claims to the defendant upon the condition that if any monies were required to be repaid as a result of the conflicting claims, the defendant would assume that liability, (Tl. 192). It was also agreed that the defendant assume all expense relating to the mining claims, and would make no claim against the plaintiffs, (Tl. 269). As a result of these conversations, the attorney for the estate drafted the deeds and they were sent to Mrs. Tomlinson at Fruita. The defendant was not present when the plaintiffs executed the deeds except the plaintiff Alton Tomlinson, who testified that he signed the deed at his mother's home and that the defendant was asleep on the couch, (Tl. 108). All of the deeds were returned to C. Allen Elggren except one, and he sent them for recording. The one not returned to Mr. Elggren was the deed signed by Mrs. Cisney, which was recorded at her request, (Exh. A-2). At the time the petition for distribution was heard, Mrs. Lilie M. Tomlinson was present in court as well as the plaintiff Schockley and Mr. Lawrence Fuller, husband of the plaintiff Fuller. Mrs. Fuller and Mrs. Cisney both live in Fruita, Colorado, and testified that they had frequent conversations about the estate. All of the plaintiffs testified that after June of 1952, they did not evidence any further interest

until April, 1954, (T1. 180). At this time, they received a letter from John Lowe, one of the attorneys for plaintiffs, advising them that they had an interest in the Temple Mountain properties and that he could recover it for them, (T1. 64). This inquiry to the plaintiffs was made at the suggestion of Mr. Lawrence Migliaccio, (T2. 46). Mr. Migliaccio had been responsible for the reduction of the Tomlinson interest and was a constant antagonist of Mr. Frawley and Consolidated and other persons connected with that company, (T2. 45). The circumstances surrounding the contact with the plaintiffs is not entirely unlike the situation presented to this court in *Nokes v. Continental Mining and Milling Company*, 6 Utah 2d 177, 308 P. 2d 954.

Early in 1950, the defendant assisted Mr. E. G. Frawley, president of Consolidated, in an attempt to commit the various owners of the Temple Mountain properties to a lease with Consolidated, (T2. 125, 206-209). During this time, he assisted in locating other claims and relocating existing claims on Temple Mountain. He also worked as a foreman for Consolidated on Temple Mountain claims owned and located by that company and Continental. The defendants association with Mr. Frawley continued until 1953. In the fall of 1952, Mr. Frawley gave the defendant 32,000 shares of the common stock of Consolidated, (T1. 306). This stock was given by reason of the work he had done for Consolidated over the past two years. In 1953 and 1954, the defendant sold

the stock. The plaintiffs in their complaint asked that a trust be imposed on the proceeds of the sale of the stock.

The testimony of the plaintiffs relating to the circumstances surrounding the execution of the 1952 deeds adds up to one fact; they were completely ignorant of all matters relating to the estate and the properties of the estate. On direct examination, each testified that they did not know the condition of the estate, when it might be closed, their interest in the estate as an heir, the status of the titles of the mining claims, what claims were in the estate, the litigation with relation to the claims, the value of the mining claims, the extent that mining had been conducted on the claims, the amount of royalty paid into the estate nor the matters relating to the stock of Consolidated. This testimony is summarized on pages 26 to 30 of the transcript, Volume One. On cross examination, the plaintiffs testified that at the time they signed the 1952 deeds they had in mind that they had previously executed deeds, and the circumstances relating thereto, (T1. 47, 108). The plaintiff Cisney testified that she signed the deed believing it was required to enable the defendant to enter into a lease and that the defendant agreed to divide the claims equally, (T1. 43, 85). All of the other plaintiffs stated that they relied on what Mrs. Cisney had told them in executing the deeds, and specifically stated they did not rely on the defendant, (T1. 65, 77, 96, 132, 135). Each of them stated in identical words that the defendant had agreed to divide the claims

equally. On cross examination, the plaintiffs also admitted they were told the estate could not be distributed until the title and conflicting claims were settled, (T1. 96, 256, 265, 266). They also admitted that they knew there was \$5,000.00 or \$6,000.00 in the estate bank account, (T1. 73, 100), and they were entitled to an equal share in the claims as an heir, (T1. 44, 77). In executing the 1952 deeds, they stated that they did not read them except to note that the Camp Bird claims were listed, (T1. 52). During the trial in September, 1954, these plaintiffs claimed a privilege when asked if they had discussed the matters relating to the estate with their husbands. In subsequent hearings in January and February of 1958, Lawrence Cisney, the husband of Marguerite Cisney, took the stand as a witness on behalf of the plaintiffs. On cross examination, he admitted that he and his wife and the plaintiff Fuller were on the claims in 1950 and had talked to Mr. Frawley, (T1. 82); that Mr. Frawley told them they would soon begin to get something from the mining claims, (T2. 53). He also testified that they knew the claims had been leased to Consolidated and that the defendant had been promised some of Consolidated's stock by Mr. Frawley, (T2. 53). Of the matters which plaintiffs claimed they had no knowledge, only two are not admitted. These two matters are the status of the titles of the mining claims and the value of the mining claims. The defendant called as a witness Therald Jensen, an attorney of Price, Utah. He testified that the title of the Camp Bird claims was very questionable and he regarded them as having only a nuisance

value, (T2. 122). The only testimony in the record as to the value of the claims in 1952 is the amount of royalty that the mining operations had produced, a fact known to the plaintiffs. The defendant was asked if he knew the status of the titles of the mining claims and the value of the mining claims, over the objection of the defendant that this called for a conclusion, the defendant testified that he was advised that the validity of the Camp Bird claims was questionable, (T1. 275). He further stated that he did not have any idea as to the value of the mining claims, (T1. 275). As to all matters the plaintiffs admitted or it was shown by evidence that they had equal knowledge with the defendant. While five of the six plaintiffs were women, three of them, Beebe, Cisney and Fuller, were married to men who had an acquaintance with mining activities, two of whom had been locators of the Camp Bird claims. One of the plaintiffs was in business for herself, (T1. 133), and all the others had an education superior to that of the defendant, (T1. 248). The plaintiff Alton Tomlinson was a rancher and admitted familiarity with business dealings and the manner in which real estate is transferred and the effect of a quit claim deed, (T1. 107-110). The defendant was a carpenter by trade, having little or no formal education. His first contact with mining was after the death of his father when he attempted to relocate the claims. He had no experience which qualified him as a business man, earning his livelihood as a manual laborer, (T1. 247, 248). The plaintiffs referred to him as, "Tight old Les." In contrast to the testimony of the plaintiffs, their mother,

Lilie M. Tomlinson, related the conversations she had with Cisney and the other plaintiffs. She testified that it was the understanding of everyone that they were conveying the claims to Les for whatever he might gain or lose, and they were not to be responsible in any way, (T1. 190). In their complaint, the plaintiffs did not join Mrs. Tomlinson as a party plaintiff, but in the prayer of the complaint asked that the trust be imposed upon the mining claims for her benefit. Mrs. Tomlinson refused to be a party, and the complaint was amended eliminating her from the prayer for relief, (R. 9). The evidence in the accounting introduced by the plaintiffs disclosed the liability which the estate was subject to on June 2, 1952. The plaintiffs own accounting claimed \$16,000.00 should have been paid to the estate as royalties to May, 1950, (Exh. N). At that time, it was undisputed and admitted by all of the plaintiffs that they knew that the Tomlinson interest had been reduced to 5 percent. Of the amount of royalty claimed according to plaintiffs evidence, they are only entitled to \$800.00, the remaining belonging to the parties to the 1942 and 1951 stipulations. The \$16,000.00 royalty was based on contracts providing for a payment of 15 percent of the mill returns. Therefore, the plaintiffs evidence show that the estate was liable for over \$100,000.00 by reason of the trespass if the title to the Camp Bird claims was upset. The plaintiffs never stated that the disclosure of any of the facts claimed to have been withheld would have compelled them to act differently.

STATEMENT OF POINTS

POINT I.

THE CONCLUSIONS AND JUDGMENT OF THE TRIAL COURT THAT A TRUST WAS CREATED MUST BE REVERSED AS A MATTER OF LAW.

POINT II.

A TRUST CANNOT BE IMPOSED ON PROPERTY WHICH IS NOT PART OF THE ESTATE AND WAS NOT IN EXISTENCE AT THE TIME THE TRUST WAS CREATED.

POINT III.

THE PLAINTIFFS ARE GUILTY OF LACHES AND ARE NOT ENTITLED TO EQUITABLE RELIEF.

POINT IV.

THE PROBATE DECREE IS RES JUDICATA AND IS NOT SUBJECT TO COLLATERAL ATTACK.

ARGUMENT

POINT I.

THE CONCLUSIONS AND JUDGMENT OF THE TRIAL COURT THAT A TRUST WAS CREATED MUST BE REVERSED AS A MATTER OF LAW.

The consideration of the correctness of the trial court's conclusion with respect to the trust has several facets. First, the nature of the trust, secondly, the fiduciary relationship of the parties, and thirdly, the character of the evidence required to sustain the conclusion of the trial court.

The nature of the trust imposed in the instant case, is found in conclusions 1, 2, and 3 of the Conclusions of Law, (R. 91, 92). In conclusions 1 and 2, the court concluded that the defendant held the property upon an express trust for the benefit of the plaintiffs. In conclusion 3, the court concluded that the defendant held the property upon a constructive trust for the benefit of the plaintiffs. It is difficult to understand how an express and constructive trust can exist at the same time, as to the same property and for the benefit of the same persons. The distinctions between the trusts are clear and the creation of one must necessarily negative the creation of the other. The distinctions are spelled out in *IV Scott on Trusts*, sec. 462.1, pp. 3104, 3105:

“Sec. 462.1. Constructive trusts distinguish-
ed from express and resulting trusts. An express
trust is a fiduciary relationship with respect to
property, arising as a result of a manifestation
of an intention to create it and subjecting the per-
son in whom the title is vested to equitable duties
to deal with it for the benefit of others. On the
other hand, a constructive trust arises where a
person holding title to property is subject to an
equitable duty to convey it to another on the
ground that he would be unjustly enriched if he
were permitted to retain it. In both cases the
person who has the title to the property is under
an equitable duty to deal with it for the benefit
of another person. To this extent the two types
of trust are similar. In other respects, however,
they differ. An express trust arises because the

parties intended to create it. A constructive trust is not based upon the intention of the parties but is imposed in order to prevent one of them from being unjustly enriched at the expense of the other. In the case of an express trust the trustee ordinarily has active duties of management. In the case of a constructive trust, the duty is merely to surrender the property. A constructive trust, unlike an express trust, is not a fiduciary relation. The circumstances which give rise to a constructive trust may, but do not necessarily, involve a fiduciary relation.

* * *

“From what has been said it will be seen that it is useless if not mischievous to attempt to phrase a definition of a trust so as to include both express trusts and constructive trusts. They are distinct concepts. They are not two species of a single genus.”

From the foregoing statement, it would appear that one might plead an express trust and as an alternative a constructive trust, but to say that both coexist as a conclusion of law upon which a judgment is based would appear to be such a contradiction that as a matter of law the judgment must be reversed. The importance of this objection to the determination of the trial court is more serious than a claim of error upon technical distinctions, but is an integral part of the other facets above specified. The trusts imposed herein are based upon a fiduciary relationship. The nature of the relationship is important because it influenced the conclusion that an express and constructive trust were created. And more

important the decision of the trial court was based entirely on the single fact of a fiduciary relationship. No express trust was proven and the conduct of the defendant was not sufficient to raise a constructive trust even in the presence of a fiduciary relationship. The defendant does not believe that a fiduciary is a highway that persons blind and ignorant to their rights, negligent in protecting them, tardy in objecting to them, can travel to recover what they have neglected and cast away. The fiduciary relationship is of obvious importance because in the words of Professor Scott, the truth of the matter is that whenever a court wishes to compel a transferee to reconvey the property, it can do so by laying stress on the confidential relation, and it is as much a matter of truth that if the court desires to deny relief it can lay stress upon the policy of the Statute of Frauds and emphasize the possibilities of fraudulent claims which might be made if relief was given. *I Scott on Trusts*, sec. 44.2, p. 322. In substance, the fiduciary relationship is a two-way street, and not restricted to travel by only the plaintiffs. The fiduciary relationship might be said to be twofold. First, the duty by reason of being administrator of the estate, and secondly, by reason of the family relationship between the parties. That duty as it relates to the office of administrator is defined as follows:

2 Bancroft Probate Practice, sec. 332, p. 277:

“An administrator is said to be more the representative of the creditors than of the heirs. He holds the estate as a trust fund for the payment of debts. He does, however, to a large extent

also represent the heirs or devisees, as is indicated by the fact that they are often dependent upon his diligence for the maintenance of their rights."

Sec. 334, p. 279:

"In general, his duties are to preserve the estate until distribution, to collect and safely keep the property, to pay the indebtedness of the deceased and the charges of administration and to put the estate in such condition that distribution may be had, and, when claims are satisfied, to pass the estate pursuant to order of court on to those entitled."

II Scott on Trusts, sec. 173, p. 1293:

"Sec. 173. Duty to furnish information. The trustee is under a duty to the beneficiaries to give them upon their request at reasonable times complete and accurate information as to the administration of the trust. The beneficiaries are entitled to know what the trust property is and how the trustee has dealt with it. They are entitled to examine the trust property and the accounts and vouchers and other documents relating to the trust and its administration. Where a trust is created for several beneficiaries, each of them is entitled to information as to the trust."

The duty of brother to sister has always been regarded as requiring fair dealing, however, not to the extent of giving advise and counsel. This may or may not be the situation as a practical matter. It must be accepted as a common occurrence that the relationship is at times

characterized by suspicion and distrust, by an attitude of wariness and more frequently of envy and jealousy. Where these occur, the fiduciary relationship is insecure and the words, "We trust him," are most abused.

The plaintiffs in this action are adults, none of whom are under a physical or mental disability, and who had education and experience superior or equal to the defendant. Their attitude towards the defendant bordered on contempt referring to him as, "Tight old Les," because of his ability to accumulate a little money and property from the wages of an ordinary laborer. In addition to this, the appointment of the defendant as administrator was not indicative of any trust. The defendant was the only heir living in the State of Utah and had a statutory preference. In the final analysis, the plaintiffs demonstrated the nature of their trust by accepting the solicitation in 1954, brought about by Lawrence Migliaccio, who, with his attorneys John W. Lowe and Thomas C. Cuthbert, were primarily responsible for the reduction of the Tomlinson interest to a 3.53 percent. (*Hunt v. Bitterbaum*, Civil No. 1713 in the District Court of Emery County, State of Utah.) The trust they claim to have had in the defendant did not extend to the courtesy of a personal inquiry before accepting the assistance offered by the attorneys. If this fiduciary relationship is to be emphasized to the extreme necessary to sustain this judgment, the truth is more callus than Professor Scott implied.

By reason of the fortuitous or unfortuitous event of being an heir, a person is not relieved of the necessity of making decisions with respect to the rights that event created. This court has announced this principle.

In re Blodgett's Estate, 70 P. 2d 742, 93 Utah 1:

“His duty as administrator went to the obligation to take into possession and disclose all estate property and all information to those interested in the estate as to estate matters, thus putting them on the same plane as he was as to such information regarding all the assets and transactions, but, when that is done, he has performed his duty to a party in regard to whom he is in controversy as to their respective interests. In that relationship, after they are on an even plane as to all estate matters, she must exercise the decisions as to whether she will stand firm or recede in the controversy between them as to differences of opinion regarding their rights.”

The plaintiffs rely on a total absence of knowledge of the facts. They testified that they never took any interest in the estate. In executing the deeds, they did not rely on representation of the defendant, but did rely on the statement of one of the plaintiffs who, inspite of the claim of total ignorance, advised the other heirs to execute the deeds. Taking into consideration the fact that their entire testimony was negative except a single statement deemed necessary to create an allusion of express trust, i.e., the defendant had agreed to divide the claims equally; that the only testimony offered in support of their cause was their own testimony necessarily colored

because of their direct pecuniary interest. It must be concluded that as a matter of law, no trust was proven. This court has considered the proposition as follows :

Coray v. Holbrook, et al., 121 P. 572, 575, 40 Utah 325 :

“* * * One seeking to have rights declared and enforced, founded upon a verbal or written agreement, and involving or growing out of an alleged trust or confidential relation, is required, among other things, to show, with at least reasonable certainty, the terms of the agreement and the character and extent of the trust or confidential relation. These things cannot be left to loose or flexible language, or to vague or indefinite terms. The court, from the language used, from the acts and conduct of the parties, and from all the facts and circumstances surrounding the alleged agreement, and under which it was made, must be able to ascertain, with at least reasonable certainty, the essential terms of the agreement and the character and extent of the alleged trust or confidential relation.”

The character of the plaintiffs evidence requires consideration of the proof necessary to establish a trust. The accepted rule as to the burden or proof in fraud cases is that the person seeking to impose a constructive or an express trust has the burden of establishing the facts that give rise to such a trust. He must establish such facts by clear and convincing evidence, it is not enough to establish them by a mere preponderance of the evidence. *Fleming v. Fleming-Felt Company*, 7 Utah 2d 293 323 P.

2d 712. The court in its oral decision at the beginning of the January hearings, states, "but the proof in the other case satisfied me, or by a fair preponderance of the evidence," (T2.6). The case should be reversed upon this alone, but defendant's case is based on a more fundamental principle than what might be characterized as an academic distinction between a mere preponderance and clear and convincing evidence. The defendant contends that in absence of any affirmative proof whatsoever, as a matter of law a constructive trust cannot be created or imposed and an express trust is not established, *IV Scott on Trusts*, sec. 462.6, p. 3112.

Not every transaction between administrator and an heir can be made the subject matter of a constructive trust. And where the transaction is entirely between heirs, none of whom are acting under an incapacity, the circumstances of the fraud should be clear and convincing. Beginning with line 26, page 139 to line 16 on page 141 of Volume One of the transcript, counsel for the plaintiffs summarized the entire testimony of all of the plaintiffs. This summary was the direct examination of Vada J. Tomlinson Acott, and in the direct examination of every other plaintiff, including Mrs. Cisney, the same answers are found. In the testimony on the pages indicated, the plaintiffs simply answer, "No" to matters which would be common knowledge to a person claiming an interest in property. Each of the plaintiffs testified that they relied entirely on the plaintiff Cisney when they signed the deeds in 1952. It is difficult to understand why a person knowing absolutely nothing would

advise her brother and sisters, who also knew absolutely nothing, to sign quit claim deeds. Of the questions asked on the pages above referred to, the record disclosed that they were advised of all but two matters in June of 1952; the value of the interest and the title situation. These two matters were also beyond the knowledge of the defendant. The title being still in litigation and the only gauge of value being the royalty. Thus, as a matter of fact, the plaintiffs knew all there was to know about the estate. Under such circumstances a constructive trust cannot arise.

IV Scott on Trusts, sec. 496, p. 3217 :

“Sec. 496. Effect of consent of beneficiary. As has been stated, where a trustee purchases trust property for himself individually with the consent of the beneficiary, or purchases for himself the interest of the beneficiary, the transaction cannot be set aside by the beneficiary if he was not under an incapacity, and the trustee made a full disclosure to him, and did not induce the sale by taking advantage of his position or by other improper conduct, and if the transaction was in all respect fair and reasonable. A similar principle is applicable where other kinds of fiduciaries deal with their beneficiaries. It is probably true that in some fiduciary relations the consent of the beneficiary will prevent his setting aside the transaction, although under the same circumstances the beneficiary of an express trust would not be precluded from setting aside the transaction.”

The nature of the fiduciary and the character of evidence is important in considering the plaintiffs claim that there was no consideration. This is believed immaterial because a gratuitous conveyance may be proper, but the consideration was more than adequate. The plaintiffs claimed that all proceeds shown by Exhibit M had been received by the defendant. The defendant agreed to protect the plaintiffs from any judgment or demand, as well as any repayment of funds ordered by the court, and to bear all expenses of the estate.

Considering the three matters above set forth, the plaintiffs are faced with a dilemma. It is impossible to see how the transaction can be both an express and constructive trust. They rely on the deeds of 1952 as an express trust and it must fail because the trust is not evidenced by an agreement or a memorandum of an oral agreement as required by the Statute of Frauds, *I Scott on Trusts*, sec. 40.1. (Conclusions of Law, paragraph 2, R. 91). They rely on the deeds of 1950 as the creation of a constructive trust, (Conclusions of Law, paragraph 3, R. 91), which fails because the only purpose or effect that could be given the 1952 deeds is that they extinguish the 1950 trust whether constructive or express. *IV Scott on Trusts*, sec. 481.3, p. 3153.

POINT II.

A TRUST CANNOT BE IMPOSED ON PROPERTY WHICH IS NOT PART OF THE ESTATE AND WAS NOT IN EXISTENCE AT THE TIME THE TRUST WAS CREATED.

In September of 1952, the defendant was given stock of Consolidated by Mr. Frawley. The court imposed a trust on the proceeds of the sale of the stock as an asset of the estate. The stock was sold in July of 1953, April, 1954 and July, 1954. There is no evidence in the record tracing any property or assets of the estate into the stock, (Exh. U). It is difficult to understand on what theory the plaintiffs claim this an asset of the estate. There was never any contention that this stock was part of the original estate of A. L. Tomlinson, deceased. The inventory and appraisement in the probate proceedings listed only the Camp Bird claims. The only document relating to any stock is the lease with Continental in 1950, which that company as lessee repudiated. The only property right the Tomlinsons ever had by reason of the estate was committed to the lease with Consolidated in 1950 by the agreement, Exhibit F. No part of the estate is missing, no part of the estate was sold by the defendant and it has never been claimed that the defendant purchased the stock with assets of the estate.

IV Scott on Trusts, sec. 521.4, p. 3335:

“Sec. 521.4. Where no property of the claimant was received by the wrongdoer. By the weight of authority the claimant is not entitled to a preference where, although the wrongdoer received property of the claimant, he subsequently dissipated it. It would seem to be even more clear that the claimant is not entitled to a preference where no property of the claimant was ever received by the wrongdoer. In such a case, there is no property of the wrongdoer which is in any sense the

product of the claimant's property, no property upon which the claimant can enforce an equitable lien or constructive trust. It has been so held in a case decided by the Supreme Court of the United States." Citing *McKee v. Paradise*, 299 U.S. 119, 122, 57 S. Ct. 124, 81 L. ed. 75, 3 U. Chicago L. Rev. 515.

If nothing of the estate is missing, and it was committed to a lease upon a royalty basis identical to all other mining claimants, which lease the plaintiffs have confirmed, it is difficult to see how a trust could be imposed or one could trace any assets of the estate into stock. In addition to this, all authorities are of the same mind that a trust cannot be imposed on nonexisting property. In order to create a trust on the stock, it would have had to have been received by the estate at the time the trust was created.

I Scott on Trusts, sec. 86, p. 648:

"Sec. 86. After-acquired property. It is obvious that a person cannot create a trust of property in which he has no interest. The mere fact that he hopes and expects to acquire the property in the future does not give him any interest of which he can be trustee, or of which he can make another trustee, before he acquires it. Where he purports to create a present trust of property which he does not own but which he expects thereafter to acquire, no trust is presently created. This is true whether he purports to make a transfer in trust or to declare himself trustee."

Sec. 86.4, p. 663:

“An interest which has not come into existence cannot be held in trust. Thus if a person declares himself trustee of shares of stock in a corporation to be formed, no trust is created at the time of the declaration, and even if the corporation is later formed and he received shares of stock in it, he does not automatically become trustee of the shares. At most he has made a promise to become trustee in the future, and the promise is not enforceable if gratuitous.”

The trust in this case was created in 1950 or 1952, which, is uncertain. If an express trust was relied on, it was created in 1952. If it was a constructive trust, the plaintiffs say it was created in 1950. In either event, it was long before the receipt of the stock. *IV Scott on Trusts*, sec. 462.4; 4 *Bancroft Probate Practice*, sec. 1176.

POINT III.

THE PLAINTIFFS ARE GUILTY OF LACHES AND ARE NOT ENTITLED TO EQUITABLE RELIEF.

The plaintiffs are before the court on one of two propositions. Either they transferred their interest in 1952 with full knowledge of all the facts, or they are guilty of laches such as to shock the conscience of a court of equity.

It is well established that people who claim rights cannot act so negligently in relation thereto that it would lead the ordinary person to believe that they had abandon

their right or never claimed a right. This is particularly so where the defendant substantially changes his position because of their conduct. *IV Scott on Trusts*, sec. 466.1, pp. 3121, 3122. In 1949, the plaintiffs participated in the removal of the administrator originally appointed. This action would compel an ordinary person to be more vigilant. In spite of this warning, the plaintiffs again closed their eyes to all the matters until 1952 when the image of dollars captured their entire interest. Having received the only thing they were interested in, they again slumbered as to matters relating to the estate. They were awakened a third time in 1954 when the letter from John Lowe again presented the golden image. A court of equity might be tolerant and understanding of a person once sleeping on his rights, if not for too long, however, where a person sleeps on three separate occasions it would appear that tolerance and understanding should be replaced by critical observation and require convincing justification for repeated offenses. It may also be stated that a court of equity might be tolerant and understanding where a person once conveys his property away and attempts to recover it on the statement that they did so under the belief that it would be held for them in trust. If a person conveys away his property, or permits its alienation on three occasions, it would appear that tolerance and understanding should again be replaced by critical observation. In 1950, the plaintiffs executed quit claim deeds absolute in form upon the understanding that the conveyance was in trust. In 1952, the plaintiffs again conveyed the same property by deed absolute in form

and claimed it was held in trust. In 1953, after having notice of the fact that the petition for distribution would be heard on a day certain, they permitted a third alienation of their property and now claim it to be subject to a trust. In the 1950 instance, they received an explanation spelling out the trust, (Exh. C), and in 1952, they testified they were told nothing. The only excuse offered was blind trust. In 1953, two of the plaintiffs sat in the courtroom and heard the court distribute the claims to the defendant as his sole and separate property. They were again silent. In 1949 when the first awakening occurred, the potential value of uranium mining claims was not realized. In 1950, the plaintiffs Cisney and Fuller were physically present on the mining claims and were told by Mr. Frawley that they would begin to get something out of the property, a time at which the potential value of uranium was becoming noticeable. In 1952, uranium entered upon the most spectacular inflation since John Sutter brought to life an empire for a small sack of coins, some wheat, beans and tallow. In February, 1953, uranium mining claims were being bought and sold for millions. Still the plaintiffs slumbered while a decree of distribution was entered. The plaintiffs story of their awakening by the letter from John Lowe in 1954 was an incident exceeded only by the awakening of Sleeping Beauty by the gallant prince.

The defense of laches is clearly stated by Scott on Trusts:

II Scott on Trusts, sec. 219, p. 1609:

“Sec. 219. Laches of the beneficiary. A beneficiary may be barred by his laches from holding the trustee liable for a breach of trust. He is so barred if he fails to sue the trustee for the breach of trust for so long a time and under such circumstances that it would be inequitable to permit him to hold the trustee liable. Among the circumstances which are of importance are the length of time during which the beneficiary has delayed in bringing a proceeding against the trustee; the reasons for such delay; the character of the breach of trust; the change of circumstances, if any, between the commission of the breach of trust and the bringing of the proceeding, such as the death of witnesses or parties, or a change of position by the trustee. Underlying the notion of the barring of suit because of laches is the general idea that it is in accordance with public policy that suits should be brought with reasonable promptness. There is also the idea that after the lapse of a long period of time it is difficult to ascertain the truth. There is also the idea of hardship to the defendant in pressing stale claims against him, although the hardship to him may be outweighed by the hardship to the plaintiff in denying him redress.”

In imposing the trust the conduct of the plaintiffs must be considered. The court should take into consideration that the defendant changed his position. Following 1952, he justifiably treated the property as his own, which made identification of funds subsequently received difficult to trace. His earnings as a laborer were tinged with the threat of being construed as trust funds. He justifi-

ably spent money and every expenditure was questioned. Consideration should be given to the fact that the properties involved sky-rocketed beyond imagination. It should be considered that the plaintiffs were so careless and negligent that the ordinary person would be led to believe that they claimed no interest. It should also be considered, that having grossly neglected their rights they now want to be forgiven entirely upon negative testimony. These circumstances should prevent recovery.

II Scott on Trusts, sec. 170.2, p. 1200:

“Defenses of the trustee. The beneficiaries may be barred from setting aside a sale by the trustee to himself where, with knowledge of the facts, they have acquiesced in the sale. On the other hand, they are not bound by such acquiescence where they had no knowledge of the facts. The beneficiaries, having the choice of affirming the sale to the trustee or setting it aside, must act with reasonable promptness after they learn of the facts. If they delay in making objection to the sale for an unreasonably long time, they will be barred by laches. There is no fixed rule as to the extent of the delay which will preclude the beneficiaries from setting aside the sale. This depends on many circumstances, such as whether the trustee acted in good faith, whether he has made expenditures on the property with the knowledge of the beneficiaries, whether the property was of fluctuating value, or whether there are other circumstances making it only fair that the beneficiaries should act promptly.”

POINT IV.

THE PROBATE DECREE IS RES JUDICATA AND IS NOT SUBJECT TO COLLATERAL ATTACK.

The fraud which the plaintiffs allege relates entirely to the execution of the quit claim deeds in 1952. There is no allegation that a fraud was practiced upon the plaintiffs in obtaining the decree of distribution entered in 1953 in Probate No. 574. All of the acts of which the plaintiffs complain could have been raised by appropriate objection to the petition for distribution. At that time, the slightest objection by one of the plaintiffs would have caused the court to withhold its decree until all of the plaintiffs had an opportunity to be heard. No objection being made and the petition clearly stating that the heirs had conveyed their interest to the defendant, the court ordered the distribution. This court held in *Thomas v. Braffet Heirs*, decided December 27, 1956, that a decree distributing the property of the estate pursuant to family settlements and stipulations could not be collaterally attacked by the heirs. *Thomas v. Braffet Heirs*, 6 Utah 2d 57, 305 P. 2d 507, In the matter of the *Estate of James John Latsis* (sometimes known as "Latses"), deceased, on petition for rehearing, this court reversing its decision on appeal and affirming the judgment of the trial court stated:

"There must come an end to probate, and action of the court which is intended to close the proceedings and settle finally the rights of all parties does so, even though some individuals may be prejudiced by that action. Since the order here

in question fails to put the inquirer upon notice that there are conditions precedent to its becoming final, it demands the respect to which a final decree is entitled under the statute." *In the Matter of the Estate of James John Latsis, Deceased*, 284 P. 2d 479, 3 Utah 2d 365.

The nature of the fraudulent acts which this court requires to obtain a decree collaterally attacking a former judgment has been the subject matter of many decisions. In *Anderson v. State, et al.*, 238 P. 557, 65 Utah 512, this court set forth the nature of the fraud required in attacking a judgment and added that the parties seeking relief must have been free from negligence in the trial of the case in which the judgment was rendered. *Weyant v. Utah Savings and Trust Company*, 182 P. 189, 54 Utah 181; *Wright v. W. E. Callahan Construction Company*, 156 P. 2d 710, 108 Utah 28. In the *Wright* case, it was held as follows:

"It is well settled that a court will not grant relief and set aside a judgment unless such judgment was obtained by extrinsic fraud; that is where the fraud practiced in obtaining the judgment prevented the parties from having their day in court and the issues involved from being tried. The failure of a party to have used due diligence in presenting all the facts in the case to the court or in failing to meet any perjured testimony is not such fraud on the court as will be redressed in a suit directly attacking the judgment. Where the issues involved in a case have been fully tried, even though the judgment was procured by perjured evidence and but for such perjury the result might have been otherwise, the judgment will not

be set aside. To do otherwise would make for endless litigation. See *Cantwell v. Thatcher Bros. Banking Co.*, 47 Utah 150, 151 P. 986; *Mosby v. Gisborn*, 17 Utah 257, 54 P. 121; *Anderson v. State*, 65 Utah 512, 238 P. 557; *Pico v. Cohn*, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am. St. Rep. 159; *United States v. Throckmorton*, 98 U.S. 61, 25 L. Ed. 93; *LaSalle v. Peterson et al.*, 220 Cal. 739, 32 P. 2d 612."

In addition to the cited cases, the Utah statutes are clearly in **accord** with the principle of the integrity of judgment. Section 75-11-37, *Utah Code Annotated* 1953; Section 75-1-8, *Utah Code Annotated* 1953. The defendant did not conceal any facts to obtain the decree. The defendant was and still is of the conviction that the heirs conveyed title free and clear of their interest. At the time of the entry of the decree in 1953, he had no notice or any suspicions that the plaintiffs would claim that the property was subject to a trust. The only persons who had any knowledge of this fact and who failed to bring it to the attention of the court were the plaintiffs.

In addition to the failure of the plaintiffs to object at the time of the distribution of the estate, they did nothing within the time for appeal or the statutory period permitting a direct attack upon a decree of a probate court. They cannot dispute the fact that in June of 1952, they were aware that proceeds were being received from the operation of the mining claims. This is for the obvious reason that they received a distribution of these accumulated funds. From June, 1952, to February, 1953,

they made no inquiry or any further demand relating to royalties paid to the defendant. After having notice of the petition for distribution, and two of the plaintiffs being present in court at the time the petition was heard, they still did not within six months after the entry of the decree make inquiry or demand what they now claim. Fourteen months later, it still had not occurred to the plaintiffs to seek their equal share as a result of the express trust they now claim. It was not until Migliaccio, apparently without their knowledge, procured an attorney for their use that they became aware of what they now say they claimed at all times. If there was ever a case in which a person was negligent in the assertion of his rights in a judicial proceedings, this must be the classic example. It is a reasonable conjecture that absent the charitable interest of Migliaccio and his attorneys, the plaintiffs would now be sleeping on rights they cherished. It is said that a judgment can be attacked collaterally if one acts within a reasonable time, meaning that equity aids the vigilant. Under the circumstances of this case and the increase of property values, the plaintiffs should have been aware of their rights by 1952, certainly by 1953, but to have to be awakened in April of 1954 is a circumstance suggestive of the very reason why a court of equity refuses to listen to stale demands. If the decree of the probate court in this case can be collaterally attacked under such circumstances, the finality of judgments considered so important *In the Matter of the Estate of James John Latsis, supra*, and *Thomas v. Braffet Heirs, supra*, will be a discredited principle.

CONCLUSION

When the plaintiffs executed the 1952 deeds, they had only one purpose; to get the available money while they had the chance and under circumstances where they would not have to repay. They were people of average intelligence and understanding of property rights. To say that they signed the deeds to obtain the estate money or to permit the commitment of the claims to a lease which had been entered into two years prior thereto and ratified and confirmed on two occasions, is difficult to believe. There was no failure to disclose any matter let alone one which would have caused them to refuse to sign the 1952 deeds. The royalty rate was the same before and after, and the properties were no more valuable in 1954 than they were at any other time. Their value had been settled in 1950 when they were committed to the lease. Where money is involved, the carefree members of a family find it easy when they have neglected their inheritance to charge the diligent member of the family with cheating. If a party can claim a trust under the circumstances in this case, the purpose of equity and the policy of the law is ill served.

Respectfully submitted,

FRED H. EVANS

*Attorney for Defendant
and Appellant*