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Stephens, Brayton & Lowe; Thomas C. Cuthbert; Attorneys for Respondents;

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IN THE SUPREME COURT FEB 16 1959

of the  
STATE OF UTAH

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FILED

1 1958

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.*

Clerk, Supreme Court, Utah

Case No.  
8879

BRIEF OF RESPONDENTS

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## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS RELIED ON.....	27
ARGUMENT	
POINT 1. THE RULING OF THE TRIAL COURT THAT DEFENDANT HOLDS THE MINING PROPERTIES CONVEYED TO HIM BY PLAINTIFFS IN TRUST FOR THE USE AND BENEFIT OF PLAINTIFFS SHOULD BE AFFIRMED. ....	29
POINT 2. THE REQUIREMENT THAT DEFENDANT ACCOUNT TO PLAINTIFFS FOR THE PROCEEDS DERIVED FROM THE SHARES OF STOCK RECEIVED BY HIM WAS PROPER. ....	36
POINT 3. PLAINTIFFS ARE NOT GUILTY OF LACHES IN ASSERTING THEIR RIGHTS.....	38
POINT 4. THE MATTERS RAISED IN THIS ACTION WERE NOT BEFORE THE PROBATE COURT AND THE DECREE OF DISTRIBUTION IS NOT RES JUDICATA IN THIS ACTION.....	39
CROSS APPEAL, ARGUMENT	
POINT 1. THE COURT ERRED IN FAILING TO REQUIRE DEFENDANT TO ACCOUNT TO PLAINTIFFS FOR THEIR SHARE OF THE SUM OF \$6,-273.93 BEING THE DIFFERENCE BETWEEN \$13,-603.61 ROYALTIES ACCRUED UNDER VARIOUS LEASES MADE BY DEFENDANT IN 1949 AND 1950, AND \$7,329.71 THE AMOUNT SHOWN TO HAVE BEEN DEPOSITED IN BANK ACCOUNTS BY DEFENDANT. ....	43
POINT 2. THE COURT ERRED IN FAILING TO REQUIRE DEFENDANT TO ACCOUNT TO PLAINTIFFS FOR THEIR SHARE OF THE SUM OF \$6,-560.23 BEING THE PROFIT RECEIVED BY DEFENDANT ON A LEASE FROM CONTINENTAL MINING AND/OR CONSOLIDATED URANIUM MINES, INC. IN 1950. ....	45
POINT 3. THE COURT ERRED IN AWARDING PLAINTIFFS TWELVE TWENTY-FIRSTS INTEREST IN THE PROPERTY AND MONEY AS TO WHICH DEFENDANT WAS REQUIRED TO AC-	

# TABLE OF CONTENTS

	Page
COUNT RATHER THAN THREE-FOURTHS INTEREST. ....	46
POINT 4. THE COURT ERRED IN ALLOWING DEFENDANT A CREDIT ON HIS ACCOUNTING FOR THE SUM OF \$525.00 PAID TO K. K. STEFFENSON AND THE SUM OF \$200.00 PAID TO C. ALLEN ELGGREN, BOTH FOR ATTORNEYS FEES.....	47
CONCLUSION .....	48
CASES AND AUTHORITIES CITED	
CASES	
Burns v. Skogstad, Idaho, 206 Pac. 2d 765.....	34
Edson v. Bartow, 154 N.Y. 199, 48 N.E. 541.....	42
Ehregren v. Gronlund, 19 Utah 411, 57 Pac. 268.....	33, 36
Haws v. Jensen, 116 Utah 225, 209 Pac. 2d 235.....	41
Jones v. Lloyd, 117 Ill. 597, 7 N.E. 119.....	33
McComb v. Frink, 149 U.S. 629, 37 L. Ed. 876.....	40
Meade v. Vande Vorrde, 139 Neb. 827, 299 N.W. 175.....	42
Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 62 A.L.R. 1 .....	31
Peterson v. Peterson, 105 Utah 133, 141 Pac. 2d 882.....	41
Shaw v. Jeppson, 121 Utah 155, 239 Pac. 2d 745.....	35
Strates v. Dimotsis, 110 Fed. 2d 374.....	42
Weyant v. Utah Savings & Trust Co., 54 Utah 818, 182 Pac. 189 .....	42
TEXTS	
33 C.J.S. 1283, Executors and Administrators, Sec. 268(2).....	33
1 Scott on Trusts, Sec. 442.....	36
2 Scott on Trusts, Sec. 170.....	31
2 Scott on Trusts, Sec. 170.25.....	31
2 Scott on Trusts, Sec. 177.....	44
2 Scott on Trusts, Sec. 203.....	37, 45
2 Scott on Trusts, Sec. 207.....	44, 48
2 Scott on Trusts, Sec. 219.2.....	38
RULES	
Rule 8 (c), Utah Rules of Civil Procedure.....	36, 38

# IN THE SUPREME COURT of the STATE OF UTAH

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LINSON BEEBE, NORA E. TOMLIN-  
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TOMLINSON CISNEY and ALTON E.  
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—VS.—

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

*Defendant and Appellant.*

Case No.  
8879

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## BRIEF OF RESPONDENTS

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### STATEMENT OF FACTS

Respondents disagree with appellant's statement of facts in such a large measure that a separate statement followed by specific references to those statements of appellant wherein respondents disagree will be made.

This in an action to have a trust imposed on certain mining property and for an accounting for the proceeds therefrom. The case turns upon the intent and effect of certain quitclaim mining deeds given to defendant by plaintiffs in June of 1952. However, in order to understand and interpret these deeds an understanding of the

background and events leading up to these deeds is imperative.

Defendant is the brother of each of the plaintiffs and all are heirs of A. L. Tomlinson, who died in 1941 (R. 2, 23). At the time of his death, A. L. Tomlinson was the owner of some unpatented mining claims in the Temple Mountain District of Emery County, Utah, known as the Camp Bird Mining claims Nos. 1 to 14.

At the time of Mr. Tomlinson's death, a quiet title action was pending in the District Court of Emery County, Civil No. 1466, the Court records of which are a part of the record on appeal. This record discloses that although prior to his death A. L. Tomlinson was not a party to the action, following his death F. B. Hammond purporting to represent Mr. Tomlinson entered into a stipulation whereby decedent was to receive an undivided 7½% interest in a group of mining claims involved in that action. The Camp Bird claims were not mentioned anywhere in the files of case No. 1466. The stipulation was entered into in May of 1942, some six months after Mr. Tomlinson's death and was therefore of questionable validity. A judgment on this stipulation was not entered until April of 1950, almost eight years later. It appears from the testimony that neither the plaintiffs nor the defendant knew of this stipulation at the time it was entered. In 1950 defendant learned of it from E. G. Frawley, president of Continental Mining and Milling Company with whom defendant was dealing (T-1, p. 257). Plaintiffs did not learn of the stipulation at that time

(T-1, p. 37; T-1, p. 60; T-1, p. 96; T-1, p. 105; T-1, p. 128; T-1, p. 140).

On July 6, 1942, probate proceedings of the Estate of A. L. Tomlinson were commenced. The first administrator had done nothing with the estate whatsoever, and in 1949 he resigned and defendant was appointed on April 6, 1949. (D's Exh. 18)

Nothing of any consequence had occurred on the property between 1942 and 1949, when uranium activity got under way. In June of 1949, a group known as the Hanson group, claiming ownership of some claims on Temple Mountain, commenced a quiet title action, Civil No. 1713, against all parties claiming any interest in claims on Temple Mountain, including defendant as administrator of the Tomlinson estate. The Court files of Civil No. 1713 are included as a part of the record on appeal in this case.

In the meantime, defendant had taken possession of the Camp Bird claims, had shipped certain ores therefrom and in the fall of 1949 entered into several leases for the mining of these claims (D's Exh. 11, 12, 13; T-2, p. 25,80). The court found that from these leases defendant received and deposited in bank accounts for the estate the sum of \$7,329.71. The Court further found that the royalties which accrued under these leases and from the mining of Continental Mining and Milling Company, as hereafter described, during 1949 and part of 1950 amounted to \$13,603.64. Defendant did not attempt to verify the amount of royalties which were due under these shipments, nor did he take any steps to obtain an ac-

counting from the persons shipping the ores, or do anything to collect these additional royalties (Finding No. 10, R. 80).

In addition to the royalties received, defendant obtained money and property amounting to \$335.00 from two of the lessees, which he did not deposit in the estate accounts (T-1, p. 305; T-2, pgs. 63, 66).

In January of 1950 defendant was contacted by E. G. Frawley who was interested in acquiring the Camp Bird claims. He entered into a contract for the sale of the claims for a purchase price of \$25,000.00 and at least 65,000 shares of the common stock of a corporation to which Mr. Frawley was transferring the contract. This agreement also provided that Mr. Frawley would pay all expenses then due or thereafter to become due in connection with the Tomlinson estate and would prosecute such actions as might be necessary to clear the title to the Camp Bird claims. The agreement provided defendant would obtain quitclaim deeds from the other heirs of A. L. Tomlinson. (Exh. A of P's Exh. O).

In furtherance of this agreement, on January 23, 1950, defendant wrote a letter to each of plaintiffs requesting that they execute a deed of the Camp Bird claims to him, authorize him to discharge F. B. Hammond as attorney for the estate and to employ counsel to prosecute any legal actions which might be necessary to protect the property. The letter expressly stated that he would hold the claims for plaintiffs' use and benefit and would account to them for all monies and stock received therefrom. It further provided that they would not be



charged for any expenses, past or future, in connection with the legal work mentioned. The letter advised them he was going to sell the claims and was to receive 56,000 [sic] shares of stock from Continental Mining and Milling Company (P's Exh. C).

In response to defendant's request, plaintiffs executed quitclaim deeds conveying the Camp Bird claims to defendant. Defendant admitted that he received the claims under these deeds upon an express trust to hold the mining claims for the use and benefit of plaintiffs (T-1, p. 2; T-1, p. 3; T-1, p. 4; T-1, p. 5).

The contract of sale was assigned to Continental Mining and Milling Company who assumed the obligation thereof (P's Exh. H). On March 18, 1950, Mr. Frawley on behalf of the company agreed to pay defendant a royalty of 10% on ores produced by the company until defendant had received \$5,000, and the 65,000 shares of the company's stock (Exh. B of P's. Exh. O).

In the spring of 1950, Mr. Frawley organized Consolidated Uranium Mines, Inc. (T-2, p. 203), an affiliate and successor in interest to Continental, in both of which Mr. Frawley was the president and C. Allen Elggren was secretary (T-2, p. 63). On May 16, 1950, Consolidated entered into a lease of the Temple Mountain properties with all of the parties to the quiet title action with the exception of defendant and a group of claimants who will be designated the Migliaccio group. This lease is contained in the record of Civil No. 1713. It provided that Consolidated would mine the properties and would place a royalty of 10% in escrow in a bank to be paid out ac-

according to the final determination of Civil No. 1713.

Having joined hands with defendant's adversaries by this lease, a suit was then started by Continental against defendant in June of 1950, claiming fraud on defendant's part in the January 1950 contract of sale (P's. Exh. H). Defendant filed no answer to this complaint (T-1, p. 304). Rather he entered into an agreement in July of 1950 with Continental terminating his prior agreements with them and giving Continental an option to purchase the Camp Bird claims for the cash and stock previously agreed to be paid. In this agreement, Continental agreed to pay all of defendant's legal expenses and claims against the estate for legal work, and also agreed to hold defendant harmless for any claims arising out of ores removed from the Camp Bird claims prior to May 16, 1950 (P's. Exh. O).

On December 19, 1950, Continental authorized the issuance to defendant of 32,500 shares of the stock of Consolidated held in its treasury (P's. Exh. V). Coincident with this, defendant executed a document whereby he recognized that he claimed only a five per cent interest in the Temple Mountain claims pursuant to the stipulation in Civil No. 1466, and thereby relinquished his claim to ownership of the Camp Bird claims. This document was executed January 12, 1951 (P's Exh. R), but defendant had agreed to it earlier (T-2, p. 125). Continental dismissed its suit against defendant on January 15, 1951 (P's Exh I).

From May, 1950 to December, 1950, defendant held a sublease of the Camp Bird No. 12 mining claim from

Continental and produced ores therefrom (T-1, p. 308; T-2, p. 61-3). The Court found that he received \$23,804.40 from this production and incurred expenses of \$17,244.17 in connection therewith (Finding No. 29, R. 84).

The quiet title action, Civil No. 1713, continued along without going to trial in 1951. Then, on December 15, 1951, a stipulation and agreement resolving all adverse claims between the parties except the Migliaccio group was entered into. This agreement provided undivided interests in various claims, and gave defendant as administrator of the Tomlinson Estate an undivided 3.53% interest in these claims which covered all of Temple Mountain. It provided that the royalty monies which had been placed in escrow from Consolidated's operation should be disbursed with the exception of 5% thereof to be held for the Migliaccio group, and it waived any claims accounting for ores theretofore removed by the parties (P's Exh. F). The evidence of defendant was that although the agreement was agreed to in December of 1951, it was not executed until March of 1952 (T-1, p. 222).

Pursuant to this stipulation and agreement, Therald N. Jensen gave defendant a check for \$1,077.97 about April 15, 1952 (T-1, p. 223; P's. Exh. E). This was the initial distribution of the escrowed funds from Consolidated's operations.

This background then brings us to June of 1952. This material is largely documentary in character and is not open to dispute. A recapitulation of the defendant's status as administrator and trustee at this time is essen-

tial in evaluating the conflict of testimony relative to the deeds given by plaintiff's to defendant in June of 1952.

Prior to June 1952, defendant had received and deposited from the leases of 1949-50 \$7,329.71. He had received \$335.00 from lessees in side deals. He had produced ores in 1949 which gave him \$560.04. He had received \$1,077.97 as the initial distribution of royalties on Consolidated's operations. He had operated a sublease under Continental or Consolidated in 1950 which had yielded him a profit of \$6,560.23. Continental had agreed to give him 32,500 shares of Consolidated stock, to pay legal costs incurred by defendant, and to hold him harmless from any claims for ores produced prior to May 16, 1950. He had entered into the stipulation and agreement whereby he was to receive 3.53% interest in all claims on Temple Mountain covering a much larger area than the Camp Bird Claims, and the other parties had waived any claims for accountings arising prior to the agreement. The Temple Mountain litigation was at an end with the exception of whether the Migliaccio group would get 5% interest in the whole area or get seven mining claims.

In this setting, while acting as the administrator of the estate, and trustee under the 1950 deeds defendant obtained from his brother and sisters quitclaim deeds of the mining claims covering all of Temple Mountain acquired in the December 15, 1951 stipulation and agreement (P's. Exh. A-1 to A-6, inclusive).

There is a sharp conflict in the evidence offered as to the conversations had relative to these 1952 deeds. The evidence of plaintiffs was to the effect that these

deeds were given to defendant upon his request and assertion that he would hold the property so conveyed for the use and benefit of plaintiffs and would divide any proceeds derived therefrom equally. Defendant on the other hand testified that the deeds were given in order to convey both the legal and equitable title to defendant, and that defendant undertook the risk of distributing to plaintiffs their share of their father's estate and agreed to hold them harmless from any claims that they return the money. The court after hearing this conflicting evidence found that defendant had represented to plaintiffs that he would hold the property in trust for them (Finding No. 33, R. 85). Analysis of the evidence demonstrates there was ample evidence in the record to support this finding.

In May of 1952 defendant mailed a set of Quitclaim Deeds to his mother for each of the plaintiffs to sign (T-1, p. 272). Around the end of May, 1952, Mrs. Cisney after receiving her deed had a conversation with defendant relative to the execution of the deeds. She asked him what would happen to their interest in the claims if they gave him the deeds. Defendant told her that if anything was derived from the claims he would distribute this to all the heirs equally (T-1, p. 14; T-1, p. 30; T-1, p. 32; T-1, p. 44; T-1, p. 47). Following this conversation and before the deeds were executed, Mrs. Cisney relayed this information to the other plaintiffs (T-1, p. 31 to 33, incl.; T-1, p. 77; T-1, p. 122; T-1, p. 134).

Plaintiffs' testimony was to the effect that they had left the management and control of the affairs of the

estate to defendant as administrator and trustee, and had little personal knowledge of any of the affairs of the estate or defendant's dealing with the property (T-1, p. 37; T-1, p. 49; T-1, p. 62; T-1, p. 105; T-1, p. 316). They stated that when defendant requested the deeds they were not suspicious of any ulterior motive of defendant, and since they had previously conveyed the Camp Bird Claims to him so he could deal with them, they believed the deeds covering all the Temple Mountain claims were needed by defendant to enable him to continue to deal with the property. They said they had no reason to suspect he was doing anything but looking out for their best interests (T-1, p. 30; T-1, p. 58; T-1, p. 79; T-1, p. 89; T-1, p. 97; T-1, p. 105; T-1, p. 109; T-1, p. 132). They did not seek advice from anyone as to whether or not they should sign the deeds, relying on their brother and feeling that advice was not necessary (T-1, p. 96; T-1, p. 142; T-1, p. 152; T-1, p. 154). They were trying to co-operate with him and were going along with the rest of the family (T-1, p. 65; T-1, p. 48). Even defendant testified in relating a conversation relative to estate matters that plaintiffs relied upon his judgment (T-1, p. 266).

At about the time the 1952 deeds were executed, each of plaintiffs were given a check in the amount of \$500. This money was taken by defendant from the estate bank account and was from royalties earned under the 1949-50 Leases. Some of the plaintiffs testified that they did not know of the \$500 check at the time they executed the deed (T-1, p. 55; T-1, p. 137). At the time the \$500 payments were made to plaintiffs, defendant took a like dis-

tribution for himself (D's. Exh. 21). None of the defendant's own money was ever given to plaintiffs (T-1, p. 324).

The testimony of defendant in this connection offers an interesting comparison. On direct examination, defendant testified that in June of 1952 he advised plaintiffs there was about \$6800 in royalty monies accumulated, and that the Camp Bird claims had been converted into a fractional interest in the whole group of Temple Mountain claims, (T-1, p. 273). He said plaintiffs told him they did not care what claims he got or what money he got, but that they felt the part of the accumulated royalties which had been deposited to the estate account should be distributed to them (T-1, p. 274). He said he had previously advised plaintiffs that there were adverse claimants and he could not distribute this money to them as he believed he might have to give it back as a result of the Migliaccio group's claims in the quiet title action (T-1, p. 277), and that in attempting to find a way to get the money distributed, he suggested that they take this money and he would take the claims and if the Migliaccio group recovered the royalty monies he would absorb this loss (T-1, p. 274, 277).

On cross examination it was developed that he had paid himself an equal amount in the distribution. To this he said the agreement reached was that he was to take the claims, and the money in the account was to be divided equally among all of the heirs (T-1, p. 286). He said that it was also part of the agreement that in addition he was to receive all of the royalty money paid to him by Therald Jensen (T-1, p. 278), and then that the distribu-

tion was to be made only of the money left after he had paid off all the expenses for attorneys fees and the like from the estate account (T-1, p. 285). Defendant later testified the agreement was that plaintiffs were to get \$500 each and for this reason he inserted this figure into the deeds as the consideration for them (T-1, p. 314).

Plaintiffs testified that at no time was there any agreement that defendant was to take both the legal and equitable title to the mining claims and they would take only a distribution of the monies on hand in the royalty account (T-1, p. 64; T-1, p. 75; T-1, p. 90; T-1, p. 338; T-1, p. 339).

Plaintiffs testified and the Court found that at the time defendant obtained the 1952 deeds he did not discuss with plaintiffs, nor did they have knowledge of the progress being made with the estate as to when it might be ready to be closed, the status of the quiet title action involving the property nor the existence of the 1951 stipulation and agreement, the receipt by defendant of the royalty payments from Therald Jensen in the amount of \$1077.97, the receipt of the side payments to defendant from the lessees in 1949-50, the receipts of defendant from his lease operations as sublessee of Continental, the amount of ore produced from the mining claims and the interest of plaintiffs therein, the agreement for defendant to receive the 32,500 shares of stock of Consolidated, or the value of the mining claims insofar as then known to defendant. The Court further found these facts were known by defendant. (Finding No. 37).

Defendant in his evidence did not offer anything



to show that he disclosed to plaintiffs that he received the side payments from the Lessees in 1949-50, that he had leased the Camp Bird No. 12 claim from Continental and mined it, nor that he had an agreement to receive the 32,500 shares of stock of Consolidated. He admitted that, although he had been mining the property and knew of Consolidated's operations, he did not advise plaintiffs as to the value of the property, and, on the contrary, he testified he had told them there was no way to determine the value of the claims (T-1, p. 275). He further testified that he had told plaintiffs that giving the deeds looked like the only way a distribution of the estate money could be made (T-1, p. 274). On cross examination, however, he testified that there had been no change in the quiet title action or the affairs of the estate from June 1952, when he told plaintiffs the money could not be distributed, and February, 1953, when he in fact obtained a decree of distribution (T-1, p. 332).

Relative to defendant's testimony that he undertook to hold plaintiffs harmless against the possibility of having to return the distribution made to them, an examination of the Court records in Civil No. 1713 reveals that in June of 1952, when the deeds were obtained, the Migliaccio group were making no claim for damages for ores removed from Temple Mountain whatsoever. Furthermore, at no time did the Migliaccio group make any claim for damages against defendant. It is noteworthy that until defendant gave up his claim to the Camp Bird claims in Civil No. 1713, and recognized the fractional interest, both he and Mr. Migliaccio had been represented

by the same groups of attorneys, indicating that there was no conflict of interest. Attention is also called to the agreement of Continental to hold defendant harmless against any claim for ores removed prior to May 16, 1950 (P's. Exh. O). All of the money distributed in 1952 was from royalties received prior to that date.

Defendant testified that following the execution of the 1952 deeds, plaintiffs had no interest whatsoever in the property (T-1, p. 316). In spite of this testimony, on July 21, 1952, defendant, in depositing the second royalty payment from Therald Jensen amounting to \$327, made the notation on his bank statement describing this deposit "Royalty to Estate." (D's. Ex. 22). Plaintiff A. E. Tomlinson testified of a conversation in July of 1952 with defendant when defendant said he needed the second set of deeds to keep the property going for the benefit of the estate (T-1, p. 102), and of another conversation with defendant in the spring of 1954, when defendant told him he was receiving a small amount of royalty but not enough to be divided at that time (T-1, p. 103).

Following the execution of the 1952 deeds, defendant made two additional distributions to plaintiffs, the first on July 19, 1952, amounting to \$50, and the second November 31, 1953, amounting to \$42.50. All of these were from the same estate account, and as to each he paid himself as much or more than he gave plaintiffs. (Ps'. Ex. B-1, B-2; Def. Ex. B-8, B-9, B-10, B-11, B-12, B-13, B-14, B-17, B-18; Def. Ex. 21, Def. Ex. N-7, N-4.)

On each occasion that defendant made a distribution payment to plaintiffs, he gave a check in a like amount

to his mother, Lillie M. Tomlinson (Def. Ex. B-15, B-16, N-5).

Based upon the evidence adduced at the hearing, the trial court concluded that defendant had expressly agreed to hold the property in trust. It further concluded that had it not been for this promise, the transaction would have been so unfair and lacking in disclosure of material facts that a constructive trust would have arisen.

Following the execution of the 1952 deeds, plaintiffs testified that they assumed defendant was holding the property for their use and benefit, and were not aware of any contention on his part to the contrary, until November 31, 1953, when Mrs. Fuller was advised by her mother when she was given the last check from defendant that there would be no more money coming to them (T-1, p. 87-89). She advised Mrs. Cisney of this (T-1, p. 52), and the two of them became apprehensive of the situation. They contacted Stephens, Brayton & Lowe, attorneys, who requested an accounting from defendant (T-1, p. 281; T-1, p. 143). In May of 1954, defendant advised plaintiffs' attorneys that he recognized no interest of plaintiffs. This was the first plaintiffs learned from defendant that he did not acknowledge he was holding the property for their use and benefit, and claimed both the legal and equitable title to the property (T-1, p. 30; T-1, p. 64; T-1, p. 84; T-1, p. 104; T-1, p. 139).

As stated above, on December 19, 1950, Continental authorized and directed the issuance to defendant of 32,500 shares of Consolidated stock held in its treasury (Ps'. Ex. V). In his answer defendant admits this stock

was received as a result of transactions relating to the property (R. 16; 24). The stock was sold by defendant for \$23,623.70 (Ps'. Ex. U). Defendant testified that he had been employed as a carpenter and foreman by Mr. Frawley from February to June of 1950 and had not been paid anything for this work but Mr. Frawley had promised him he would receive the stock in payment for his work (T-1, p. 206, 207). He testified this was the *only* reason for his getting the stock (T-1, p. 311).

In direct contravention to this testimony, defendant offered the testimony of C. Allen Elggren, Secretary of Continental, that they had paid defendant an ordinary wage for his work, and that the stock was not given to him for his services as carpenter or foreman (T-2, p. 210, 218).

The number of shares received by defendant was exactly one-half the number agreed to be given to him under the agreements with Continental (Ps'. Ex. O).

In view of defendant's admission that the stock was received from dealings with the property, the time at which the stock was authorized for him, and the direct conflict in defendant's evidence explaining what the stock was given to him for if not for his relinquishing his claims to the Camp Bird claims and accepting the fractional interests in the group of claims, the Court concluded that the shares of stock were received in lieu of the 65,000 shares previously agreed to be given to him, and as a result of his dealings with the property.

On February 10, 1953, pursuant to a petition of defendant a Decree of Distribution in the Estate was

signed by the Court. This recited the fact that plaintiffs had given Quitclaim Deeds to the defendant and made distribution to defendant of all of the residue of the estate. The trial court ruled there was nothing in the probate proceedings which would make the plaintiffs aware of any contention on the part of defendant as to the equitable ownership of the claims, and that from the probate proceedings they would be aware only that the defendant was having distributed to him the legal title to the claims in the estate.

In his accounting defendant claimed credit for attorneys' fees paid to K. K. Steffensen of \$525 and to C. Allen Elggren of \$200 (Def. Ex. 21, T-2, p. 157; Def. Exh. N-3). Plaintiffs contended that these were not properly allowable in view of the agreement with Continental and E. G. Frawley whereby it was agreed that these would be paid for by Continental (Ps'. Ex. O; Ps'. Ex. C), defendant's testimony that he made no effort to collect these from Continental (T-2, p. 168), and the fact that C. Allen Elggren was secretary of Continental. The court allowed these credits.

Each of the statements contained in the foregoing Statement of Facts is consistent with the findings of the trial court in this action. Defendant in his statement of facts ignores entirely that he is faced with a finding of fact of the trial court contrary to the statements therein contained. At no place in his brief does he contend that the trial court was erroneous in making these findings, or that the findings were without support in the evidence.

Rather, the statements of facts of defendant consists only of a repetition of his position in the trial court below.

The specific statements of defendant with which respondents disagree are as follows:

1. On page 2, defendant states that in 1942 the estate's interest in the Camp Bird claims was reduced to 7½% by stipulation with other locators. The stipulation and the files of Civil No. 1466 do not mention Camp Bird claims.

2. On page 3, defendant states that the heirs compelled the removal of the administrator of the Tomlinson estate in February of 1949. There is nothing in the record as to the cause of the removal other than resignation.

3. On page 3, defendant states that leases entered into by defendant in 1949-50 provided for a royalty of 15 per cent and the Atomic Energy Commission, the only purchaser, was advised of the lease agreements and all royalty checks were paid to the estate's bank account at Grand Junction, Colorado. The evidence is that the ores produced under these leases were sold to both United States Vanadium Company and American Smelting and Refining Company as agent for the A.E.C. Ore shipments began as early as October 1949 (Ps'. Ex. N). The only evidence of advice relative to the lease agreements is two letters to American Smelting & Refining Company dated December 7, 1949 authorizing deduction of royalties on ores produced by two of the lessees (D's. Ex. 2, 6). There is nothing in the record to show any such notifica-

tion being sent to U.S.V., or to A.S. & R. before December 7, 1949, or that such notices were sent covering other lessees than those mentioned. Further, there is nothing in the record to show that these authorizations were binding on the purchasers so they could not pay over all the ore proceeds to the producer, and in fact such was the case (Ps'. Ex. N).

4. On pages 3 and 4, defendant states that in January 1950, defendant entered into a lease arrangement with E. G. Frawley and that this agreement recited that conflicts with the Camp Bird claims were without merit. The January 1950 agreement was a contract of sale and not a lease. It contained a recital that defendant was uncertain concerning the status and affairs of the Estate, but on information received he believed the attorney for the estate by stipulation, without authority and after the death of A. L. Tomlinson, had tried to dispose of certain interests in the mining claims (Ps'. Ex. O).

5. On page 5, defendant states that the stipulation and agreement of December 15, 1951 provided that because of litigation the royalty money from Consolidated's operations were to be held in a trust account. On the contrary, the stipulation and agreement provided that the trust monies would be distributed to the parties pursuant to that agreement, and in fact, the monies were so distributed (Ps'. Ex. E; Ps'. Ex. F).

6. On page 6, defendant says that in February of 1953 upon due notice to plaintiffs, the probate court confirmed the Deeds and distributed the property to the de-

fendant. The probate file shows that the notice of the hearing was not received by plaintiff Acott or Fuller (D's. Ex. 18). Further, Mrs. Shockley testified that she was not living at the address to which the notice was sent and did not believe she received any such notice (T-1, p. 76). There was nothing in the order of the Court which confirmed the 1952 Deeds.

7. On page 6, defendant states that plaintiffs had been dissatisfied with Estate matters since June of 1942 and that this was the reason for the change of administrators in January of 1949. There is nothing in the record to support this statement.

8. On page 6, defendant states that plaintiffs were demanding that the administrator distribute the estate property. Defendant's testimony was that they were discussing how the money could be distributed from the Bank, and his words were that plaintiffs were "wondering how we could get that money out" (T-1, p. 268). Defendant further states that the dissatisfaction became acute in 1951. There is nothing in the record relative to any conversations for the distribution of the money prior to the conversation in the spring of 1952 (T-1, p. 268).

9. On page 6, defendant states that the attorney for the estate sent a letter to defendant to clarify the situation as to why the money could not be distributed. Defendant's statement adds that the letter was sent to defendant's mother who showed it to plaintiffs. The testimony of the plaintiffs was that they had not seen this letter. Further, the letter (D's. Ex. E) is a report of the



estate attorney to defendant, the tenor of which would indicate that as early as June 25, 1951 the estate was approaching a point at which it could be closed. The suggestion contained in the letter that the distribution of money be held back relates to a demand of Hansen or Jensen for an accounting of royalties received by defendant and ascribes this as the only reason for keeping the estate open. The stipulation and agreement of December 15, 1951 resolved this when the parties agreed to waive any accounting (Ps'. Ex. F). Defendant's statement goes on that following this stipulation and agreement, the case was still undecided and other conflicts were undetermined and for this reason the estate could not be closed and the distribution made. An examination of the court files in Civil No. 1713 reveals no claim of any party pending in June of 1952, wherein any assertion is made which would require an accounting from the defendant. Further, defendant actually distributed the estate of February 10, 1953 and testified that nothing had transpired in Civil No. 1713 between June of 1952, when defendant obtained the deeds and February of 1953, which made distribution possible on the latter date but not possible on the June 1952 date (T-1, p. 332).

10. On page 7, defendant states that none of the adverse claimants in Civil No. 1713 was aware of the amount of ore removed from the Camp Bird claims by defendant in 1949 and 1950. There is nothing in the record to support this statement and it is submitted that the agreement of December 15, 1951 waiving any claim for an accounting renders this immaterial.

11. On page 7, it is stated that plaintiffs and defendant agreed that defendant would assume all expenses relating to the mining claims and would make no claim against the plaintiffs. The court specifically found this not to be the fact (Finding of Fact No. 49, R. p. 89).

12. On page 7, defendant states that at the hearing of the petition for distribution plaintiff Schockley and Mr. Lawrence Fuller were present in the court room. Defendant testified that none of the heirs was present at the hearing on the Decree of Distribution (T-1, p. 279). Further, there is nothing in the record that Mr. Lawrence Fuller, husband of plaintiff, was present at the hearing.

13. On page 7, defendant states that all of the plaintiffs testified that after June of 1952 they did not evidence any further interest until April 1954. There is nothing in the record to support this statement. Plaintiff A. E. Tomlinson testified that in July 1952 he had a conversation with defendant asking about the deeds and estate matters (T-1, p. 102).

14. On page 8, defendant states that in April 1954 plaintiffs received a letter from John Lowe, plaintiff's attorney, advising them they had an interest in the Temple Mountain properties and that he could recover it for them. This statement is not supported by the record and is completely contrary to the evidence adduced at the hearing (T-1, p. 87 to 89; T-1, p. 52; T-1, p. 281; T-1, p. 143; T-1, p. 30; T-1, p. 64; T-1, p. 84; T-1, p. 104; T-1, p. 139). In view of the inference in this statement that Mr. Lowe is guilty of barratry, counsel as a matter of per-

sonal privilege advises the court that the following are the circumstances of how the representation of plaintiffs came about: An inquiry was received during December of 1953 from the Fullers and Cisneys relative to the representation of plaintiffs in attempting to determine whether or not defendant was acting properly under his trust. Counsel agreed to represent plaintiffs and wrote a letter to defendant requesting that he arrange a time for counsel to review the estate accounts and asking for a reconveyance of the claims in view of the fact that all of the Temple Mountain litigation had been resolved. Defendant wrote counsel the letter which is plaintiff's exhibit K. Following receipt of this letter, counsel again wrote defendant to clarify his position and thereafter received a call from C. Allen Elggren who advised counsel of defendant's position that he did not admit plaintiffs had any interest in the Temple Mountain properties nor was he willing to give an accounting to the parties. Following receipt of this information, and in June 1954, counsel wrote plaintiffs advising them of defendant's position. Counsel states that at no time did they solicit to represent plaintiffs in this action.

15. On page 8, defendant states that he assisted Mr. Frawley in locating other claims and relocating existing claims on Temple Mountain. This statement is not supported in the record.

16. On page 8, defendant states that in the fall of 1952 Mr. Frawley gave defendant shares of stock. The record shows this stock was given to defendant by Continental Mining and Milling Company (Ps'. Exh. V).

17. On page 8, defendant states that the stock was given by reason of work he had done over a two-year period. Defendant's testimony was that the stock was given as compensation for his work as foreman and carpenter during the period from February to June of 1950 (T-1, p. 206-7) and for no other reason (T-1, p. 311). Mr. Elggren testified defendant was paid for this work, and that it was not given for this work (T-2, p. 210, 219).

18. On page 9, defendant states that Mrs. Cisney testified she signed the 1952 deed believing it was required to enable defendant to enter into a lease. The testimony of Mrs. Cisney was that she signed the deed upon defendant's statement that he would hold the property for plaintiffs and divide anything received from it equally (T-1, p. 14), and that she was trying to cooperate with defendant (T-1, p. 48).

19. On page 9, defendant states that plaintiffs stated they did not rely on defendant in executing the 1952 deeds. Contrary to this, plaintiffs testified they were relying on defendant (T-1, p. 30; T-1, p. 79; T-1, p. 86; T-1, p. 97; T-1, p. 105; T-1, p. 109; T-1, p. 132).

20. On page 10, defendant states plaintiffs admitted they were told the estate could not be distributed until the title and conflicting claims were settled. Plaintiff deny any such admissions are contained in the record, and contend there was no reason for defendant to withhold distribution of the estate in 1952.

21. On page 10, defendant states that during the trial plaintiffs claimed a privilege as to matters discussed

with their husbands. No evidence was excluded whatsoever upon a husband-wife privilege.

22. On page 10, defendant states that Mr. Cisney, who is not a party, testified he knew the claims had been leased to Consolidated and that defendant had been promised some stock by Mr. Frawley. Mr. Cisney's testimony was that he was on the property in April of 1950. (T-2, p. 48). This was before Consolidated came onto the property, and was immediately after the 1950 deed had been given, when Continental had moved onto the property pursuant to the agreement of January 1950. The stock which Mr. Cisney referred to in his testimony was 56,000 shares of stock through Continental (T-2, p. 51). The only place 56,000 shares of stock is mentioned is in a typographical error in the letter sent by defendant to each of the plaintiffs asking for the 1950 deeds, which all of plaintiffs received (P's Exh. C).

23. On page 11, defendant states the only testimony in the record as to the value of the claims in 1952 is the amount of royalty produced on the claims in 1949-50, which was known to plaintiffs. Defendant testified he had a sublease on the Camp Bird 12 mining claim and produced ores giving him \$23,000 and that he saw the extent of Consolidated's operations. From these two factors, defendant was in a position to have information upon which an opinion of value could be based, which should have been conveyed to plaintiffs but was not.

24. On page 12, defendant makes a statement relative to the testimony of Mrs. Lillie Tomlinson, mother

of the parties. The sum total of Mrs. Tomlinson's testimony reflects that of a very elderly person who has little or no recollection or understanding whatsoever of the events that transpired in connection with the deeds. On cross examination the answers she gave to most of the questions reflected a parroting of the statements defendant's counsel made in connection with objections to questions put to her. It is noteworthy that in a deposition taken by defendant on August 8, 1955, approximately one month before the trial of the case, and in response to questions asked her by defendant's counsel, Mrs. Tomlinson testified, with respect to the 1950 deeds, that the plaintiffs were to have no further interest in the property after the 1950 deeds (T-1, p. 199 to 203), even though defendant concedes that in 1950 the deeds were given to him on an express trust for plaintiffs' benefit. Indicative of the character of the witness and her testimony is a statement of the Court during her redirect examination when plaintiff's counsel objected to a question put to her. The Court said, "Ordinarily, I would sustain that objection, but bearing in mind the witness, why I will let it stay." (T-1, p. 241)

25. On page 12, defendant states that evidence in the accounting offered by plaintiffs discloses the liability which the estate was subject to on June 2, 1952, and that since defendant only had a 5% interest in the Camp Bird claims, the Tomlinson interest in the ores produced in 1949-50 would amount to only \$800.00, with the remainder belonging to the other parties to the 1942 stipulation. This statement ignores entirely the effect of the

December 15, 1951 stipulation and agreement whereby all of the parties he refers to waived any accounting for ores theretofore produced (P's. Exh. F), and the agreement of Continental Mining and Milling Company of July 1950, whereby Continental agrees to hold defendant harmless against all claims for ores produced by defendant prior to May 16, 1950 (P's. Exh. 0).

26. On page 12, defendant states that on June 2, 1952, it was admitted by all plaintiffs that they knew the Tomlinson interest had been reduced to 5%. This is contrary to plaintiff's evidence, which was they did not know of this reduction. (T-1, p. 37; T-1, p. 96; T-1, p. 105; T-1, p. 60; T-1, p. 128; T-1, p. 140.)

## STATEMENT OF POINTS

### POINT ONE

THE RULING OF THE TRIAL COURT THAT DEFENDANT HOLDS THE MINING PROPERTIES CONVEYED TO HIM BY PLAINTIFFS IN TRUST FOR THE USE AND BENEFIT OF PLAINTIFFS SHOULD BE AFFIRMED.

### POINT TWO

THE REQUIREMENT THAT DEFENDANT ACCOUNT TO PLAINTIFFS FOR THE PROCEEDS DERIVED FROM THE SHARES OF STOCK RECEIVED BY HIM WAS PROPER.

### POINT THREE

PLAINTIFFS ARE NOT GUILTY OF LACHES IN ASSERTING THEIR RIGHTS.

## POINT FOUR

THE MATTERS RAISED IN THIS ACTION WERE NOT BEFORE THE PROBATE COURT AND THE DECREE OF DISTRIBUTION IS NOT RES JUDICATA IN THIS ACTION.

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CROSS-APPEAL

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## POINT ONE

THE COURT ERRED IN FAILING TO REQUIRE DEFENDANT TO ACCOUNT TO PLAINTIFFS FOR THEIR SHARE OF THE SUM OF \$6,273.93 BEING THE DIFFERENCE BETWEEN \$13,603.61 ROYALTIES ACCRUED UNDER VARIOUS LEASES MADE BY DEFENDANT IN 1949 AND 1950 AND \$7,329.71 THE AMOUNT SHOWN TO HAVE BEEN DEPOSITED IN BANK ACCOUNTS BY DEFENDANT.

## POINT TWO

THE COURT ERRED IN FAILING TO REQUIRE DEFENDANT TO ACCOUNT TO PLAINTIFFS FOR THEIR SHARE OF THE SUM OF \$6,560.23 BEING THE PROFIT RECEIVED BY DEFENDANT ON A LEASE FROM CONTINENTAL MINING AND MILLING COMPANY AND/OR CONSOLIDATED URANIUM MINES, INC. IN 1950.

## POINT THREE

THE COURT ERRED IN AWARDING PLAINTIFFS TWELVE TWENTY-FIRSTS INTEREST IN THE PROPERTY AND MONEY AS TO WHICH DEFENDANT WAS REQUIRED TO ACCOUNT RATHER THAN THREE-FOURTHS INTEREST.

## POINT FOUR

THE COURT ERRED IN ALLOWING DEFENDANT A CREDIT ON HIS ACCOUNTING FOR THE SUM OF \$525.00 PAID TO K. K. STEFFENSON AND THE SUM OF \$200.00



PAID TO C. ALLEN ELGGREN, BOTH FOR ATTORNEYS' FEES.

## ARGUMENT

### POINT ONE

THE RULING OF THE TRIAL COURT THAT DEFENDANT HOLDS THE MINING PROPERTIES CONVEYED TO HIM BY PLAINTIFFS IN TRUST FOR THE USE AND BENEFIT OF PLAINTIFFS SHOULD BE AFFIRMED.

In his brief appellant contends that the conclusions and judgment of the trial court that defendant holds the mining properties received by him in trust for plaintiffs must be reversed as a matter of law.

He discussed several propositions in this connection which will be discussed in the order presented by appellant.

(a) Defendant argues that an express trust and a constructive trust cannot exist as to the same property at the same time. Without pursuing the academic considerations raised by this argument, the question may be resolved simply by an examination of the Conclusions of the trial court whereby it can readily be seen that this is not the position taken by the court.

It concluded in paragraphs one and two of the conclusions that an express trust arose under both the 1950 and the 1952 deeds. There can be no question as to the correctness of the conclusion that the conveyance of the mining claims under the 1950 deeds was under an express trust, since this was admitted by defendant (T-1, p. 2-5). The conclusion that an express trust arose under the 1952 deeds results from the Court finding that in obtaining

the 1952 deeds defendant declared he would hold the mining properties for the use and benefit of plaintiffs and in trust for them (Finding Nos. 33, 34). That this finding was amply supported by the evidence will be discussed hereafter.

In Conclusion 3, the Court said :

“Because of his fiduciary position as administrator of the Tomlinson Estate, and as trustee under the 1950 deeds, and because of the trust and confidence placed in him as plaintiff’s brother, defendant owed to plaintiffs and each of them the duty of dealing with them with absolute fairness. *If* defendant, in obtaining the deeds from plaintiffs in June of 1952, intended to acquire their interests for himself and not in trust for plaintiffs, he owed them the duty of fully disclosing to them all material facts known to him which would have any bearing upon plaintiffs’ decision to convey their interest. Since he failed to disclose the matter set forth in Finding of Fact No. 37, all of which are material facts, *if* he intended to obtain their interest absolutely and not in trust for plaintiffs, he *would have been* taking unfair advantage of plaintiff’s trust and confidence in him and in violation of his fiduciary duties, so that, *apart from any express trust*, a constructive trust for plaintiffs’ use and benefit *would* result.” (Emphasis added.)

From this it can be readily seen that the Court concluded that there was an express trust, but that even without the statement of defendant that he would hold the property in trust for plaintiffs under the evidence presented to the Court, the transaction was so unfair and there was such a lack of disclosure of the material

facts which defendant was under a duty to disclose, that a constructive trust would result from the transaction.

It is well settled in the law that whenever a fiduciary attempts to obtain the property in his trust from the beneficiary, he must disclose to the beneficiaries all the material facts which he knows or should know, must not use the influence of his position to induce the consent of the beneficiary, and the transaction must be in all respects fair and reasonable. 2 *Scott on Trusts*, Sec. 170.25, p. 909; Sec. 170, p. 856.

(b) Appellant next argues that respondents did not in fact have trust and confidence in defendant, and claims they were negligent in not checking up on their brother. This is contrary to Finding of Fact Nos. 34 and 44, and the evidence of plaintiffs. Further, it ignores the duties imposed as a matter of law upon persons acting in fiduciary capacities which regulate their conduct. It is submitted that a more rigid fiduciary duty than that which appellant had to respondents is hard to imagine. It flows from three separate and distinct sources: (1) Defendant's duty as administrator of the Tomlinson Estate; (2) Defendant's duties as trustee under the express trust created at the time the 1950 deeds were obtained, and (3) the duties arising from the confidential relationship existing between members of a family.

Indicative of the duty which defendant owed plaintiffs arising out of these fiduciary relationships is the statement of Justice Cardozo in the case of *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 62 A.L.R. 1, quoted in 2 *Scott on Trusts*, p. 909, where he said:

“Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unending and inveterate. Uncompromising rigidity has been the attitudes of courts of equity when petitioned to undermine the rule of undivided loyalty by the ‘disintegrating erosion’ of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.”

Defendant’s argument as to the fiduciary relationship appears to lack only the words “caveat emptor” in being a complete renunciation of the fundamental duties of a fiduciary. His argument proceeds from a premise which is contrary to the findings of fact of the trial court relative to plaintiffs’ reliance upon defendant, and then continues that the lack of knowledge of plaintiffs was due to their negligence. The argument ignores the fact that even defendant’s testimony did not demonstrate that he had disclosed to plaintiffs that he had been getting money on side deals from the lessees, that he had made substantial sums of money subleasing the property from Continental, that Continental was giving him \$23,000 worth of stock, that he had passed on to them what information he had upon which an opinion of the value of the claims could be based testifying that he told them the value couldn’t be determined. He misrepresented to them

that the money in the estate might have to be given back because of the Migliaccio group's assertions in the lawsuit. From defendant's own testimony, if it were believed in its entirety, there would be established a case for the imposition of a constructive trust arising out of defendant's fiduciary duties.

(c) In his third proposition, appellant argues that the character of plaintiff's evidence is such as requires a reversal of the trial court's ruling.

He argues that plaintiffs had a burden of proving its case by clear and convincing evidence, supposing that the problem is one of establishing defendant's fraud. Rather than the plaintiffs having to prove their case by clear and convincing evidence, the burden of proof is upon the defendant to establish the adequacy of the consideration for the purchase and the fairness of the transaction.

In 33 C.J.S. 1283, Executors and Administrators, Sec. 268 (2) relative to purchases by executors or administrators from heirs, it is said that the court should "strongly presume against the validity of such a purchase and require the fiduciary to show affirmatively adequacy of consideration and the general fairness of the transaction".

In *Ehregren v. Gronlund*, 19 Utah 411, 57 Pac. 268, p. 270, this Court quoted from *Jones v. Lloyd*, 117 Ill. 597, 7 N.E. 119, as follows:

"Where a trustee sets up a bargain with his cestui que trust, or a release from him, the burden of proof is upon the former to vindicate the transaction from any shadow of suspicion, and to show

that it was perfectly fair and reasonable in every respect.”

In *Burns v. Skogstad, Idaho*, 206 Pac. 2d 765 at 769, in a case remarkably close to the case at bar, the Court said:

“\* \* \* it was the duty of the executor in dealing with these legatees to make a full disclosure of all relevant facts and to treat them with utmost frankness. 3 Bogart Trusts and Trustees, Sec. 493 and 544. The burden was upon the defendants to show that this duty was performed. This the defendants have not done. The record is silent as to what disclosures, in any, were made by the executor as to the condition, or value of the estate, or as to the interests of the legatees therein.”

Defendant in his brief cites a comment of the trial judge relative to the burden of proof, and says this was made in his oral decision. Respondents submit that appellant has taken this statement out of context. The comment was made during an oral discussion between the court and counsel at the second hearing, some eighteen months after the initial hearing, as the Court was refreshing its recollection as to what defendant should account for. It had nothing to do with the clarity or convincingness of the proof of establishing a trust.

Respondents contend that they have more than carried any burden of proof they might have had in establishing the existence of an express trust arising out of the 1952 deeds, and that defendant did not sustain his burden of proof that the transaction was completely fair and made after a full disclosure of all material facts.

(d) Although defendant does not argue that the evidence presented at the hearing does not support the findings of fact of the trial court, and in fact ignores entirely that the court made any findings of fact, he does argue the matter of the weight which should be given to plaintiffs' evidence. He categorically states that plaintiffs were advised as to all material facts except the value of the interest in the claims and the title situation without explaining upon what he bases this statement. The Court found that the disclosure of a large number of material facts was not made by defendant prior to obtaining the 1952 deeds (Finding No. 37). This finding was consistent with the testimony and evidence offered by plaintiffs. Counsel for defendant at the trial stipulated that plaintiff Cisney didn't know anything about the matters (T-1, p. 20) but in his brief argues that she did know of all material facts save the two mentioned.

It is well settled that although this court on appeal will review the evidence, it will not disturb the findings of the trial court unless they are against the weight of the evidence. *Shaw v. Jeppson*, 121 U. 155, 239 P. 2d 745.

(e) Defendant argues that although there need not be consideration for the 1952 deeds to be effective, in fact there was consideration because defendant agreed to protect the plaintiffs from any judgment or demand and to repay any funds ordered repaid by the Court, and to bear all expenses of the estate. Finding of Fact No. 45, which is supported by the Record of Civil No. 1713, shows no adverse claims were ever asserted against defendant. Finding No. 49 which is supported by the evidence, shows

that defendant did not agree with plaintiffs to assume the costs and expenses of the probate of the estate, nor agree to repay any funds. If defendant had undertaken these things as he contends, he would have been under the additional duty to tell the heirs that the 1951 stipulation and agreement in Civil No. 1713 had waived any claim for accountings (Ps'. Exh. F) and that Continental Mining and Milling Company had agreed to pay the expenses, and to hold them harmless from any demands for ores removed from the claims (Ps'. Exh. O.). As set forth above, the question is not whether there was consideration, but whether the fiduciary has vindicated a self dealing transaction "from any shadow of suspicion" and shown that "it was perfectly fair and reasonable in every respect." *Ehregren v. Gronlund*, 19 Utah 411, 57 Pac. 268.

(f) Defendant argues that the statute of frauds prohibits the creation of an express trust. The statute of frauds is an affirmative defense and must be pleaded. It was not pleaded and was therefore waived. Rule 8(e) Utah Rules of Civil Procedure. Further, when the parties are in a confidential relationship to one another, the courts will enforce an oral promise to hold property in trust even in the absence of fraud on the part of the promisor. 1 *Scott on Trusts*, Sec. 442, p. 322.

## POINT TWO

THE REQUIREMENT THAT DEFENDANT ACCOUNT TO PLAINTIFFS FOR THE PROCEEDS DERIVED FROM THE SHARES OF STOCK RECEIVED BY HIM WAS PROPER.



Defendant argues that a trust cannot be imposed on property which is not a part of the estate and which was not in existence at the time the trust was created. His argument relates to the court's order requiring defendant to account to plaintiff's for the proceeds derived by defendant on the sale of the 32,500 shares of stock received by defendant from Continental Mining and Milling company.

The trial court held that the stock was received by defendant as a result of his dealings with the mining property, and was in lieu of the 65,000 shares of stock which defendant was to receive under the January 1950 agreements. The court did not hold that a trust existed over the stock itself. Rather it held that defendant was trustee of the mining properties, and must account to plaintiffs for all things derived therefrom. This in essence is a holding that the income and profits derived from trust assets must be accounted for by a trustee.

Just as appellant argues, there must be a trust res in order for a trust to exist. In this case, the trust res consisted of the mining properties. It is obvious that there is no rule of law that income or accretions from the trust res must be in existence at the time the trust is created in order to be a part of the trust. In this case, defendant might just as well argue that he is not accountable for the royalties derived from the mining claims since they were not in existence at the time of the creation of the trust.

See 2 *Scott on Trusts*, Sec. 203, p. 1093, quoted below.

There is no issue as to whether or not the stock was

given as a result of defendant's dealing with the mining property. By his answer defendant admitted this was the case (R. 16; 24) and the Court so found.

### POINT THREE

PLAINTIFF ARE NOT GUILTY OF LACHES IN ASSERTING THEIR RIGHTS.

Defendant argues that plaintiffs are barred by laches. This defense was not raised by defendant in the court below and for this reason cannot be presented to the court on appeal for the first time. Further, laches is an affirmative defense which must be pleaded. Rule 8(c), Utah Rules of Civil Procedure.

The evidence at the hearing discloses that plaintiffs did not delay in filing suit. It was not until June of 1954 that plaintiffs learned defendant was not recognizing the trust (T-1, pp. 30, 64, 84, 104, 139). Suit was commenced September 24, 1954.

2 *Scott on Trusts*, Sec. 219.2 states:

“A beneficiary is not barred by laches from holding a trustee liable for breach of trust if he did not know or have reason to know of the breach of trust.”

Defendant had made a payment to plaintiffs as late as November 31, 1953, and they would have no reason to know of any breach of trust prior to that time.

Defendant does not show a change of position, his argument boiling down to the statement that plaintiffs were “negligent” in trusting defendant. This suit is evidence of the fact that they should not have trusted

their brother, but this is certainly not a basis for applying the doctrine of laches.

#### POINT FOUR

THE MATTERS RAISED IN THIS ACTION WERE NOT BEFORE THE PROBATE COURT AND THE DECREE OF DISTRIBUTION IS NOT RES JUDICATA IN THIS ACTION.

Defendant argues that the probate decree in the Tomlinson estate is res judicata and determinative of the rights of the parties in this action. Judge Keller was sitting as the trial judge in this action and was the probate judge in the Tomlinson estate matter.

In his findings in this case he ruled, and we submit correctly so, that all the probate decree did was to pass *legal* title from the deceased to the grantee of all of the heirs. He said:

“There was nothing in these probate proceedings which would make plaintiffs aware of any contention on the part of the defendant as to the equitable ownership of the claims, but they would be aware only that defendant was having distributed to him the legal title to the claims in the estate.”

He ruled further that the matter and things contained in plaintiff's complaint and amended complaint were not before the court on that hearing and plaintiffs were not aware of any contention of defendant relative to his owning the equitable title until after the decree was entered in the probate proceedings and after the distribution of monies to them by defendant in December of 1953.

Both the 1950 and 1952 deeds were given to defendant so that he could handle the property unfettered by the problems of joint ownership. To have the distribution made to himself as grantee under the deeds was certainly a material requirement of this design, in that without this he could not negotiate with the property without getting confirmation of the probate court since the legal title to the property would be in the decedent's name.

The probate record shows that all of plaintiffs were nonresidents at the time the decree was entered. It further shows affirmatively that some of plaintiffs did not receive notice of the hearing on the decree. None of them was present in the court at the time the matter was heard. But even if they had received notice and all been in the court they would not have raised any objection to the distribution of the legal title to defendant because that would be the very thing that plaintiffs as well as defendant would want done.

It is submitted that the issues which are presented to the Court by this case, which deal entirely with the equitable title to the property, in seeking to have the court impose and enforce a trust were outside the purview of the probate proceeding. See *McComb v. Frink*, 149 U. S. 629, 37 L. Ed. 876, wherein the court, in holding the doctrine of res judicata is applicable as to only those matters which are in issue in the case, discusses the inapplicability of a judgment in an action at law to an action in equity.

This case is one in equity to impose and enforce a

trust upon property the legal title to which is unquestionably in defendant not only by reason of the probate decree but also the deeds given by plaintiffs. It is submitted this case does not represent a collateral attack on the decree of the probate court, since its purpose is in no way designed to interfere with that decree.

In two recent Utah cases, this Court has imposed a trust upon property the legal title to which has passed through probate proceedings. These are: *Peterson v. Peterson*, 105 Utah 133, 141 P. 2d 882, and *Haws v. Jensen*, 116 Utah 225, 209 Pac. 2d 235.

The latter case involved a mother who conveyed property to her daughter in fee, orally expressing the intention that the daughter should hold it for all of the mother's heirs. The mother died and then the daughter died. The daughter's husband probated the daughter's estate and obtained a decree of distribution to himself. The other heirs of the mother sued the distributee to impose a trust on the property, the legal title to which he had acquired through the probate decree. This Court imposed a trust saying:

“\*\*\* But the plaintiffs urge that since the probate division of the court had decreed legal title to the entire property to be in the defendant, the subsequent decree made by the court below was necessary to nullify the original decree. In order that the defendant's interest in the property be protected, the lower court's decree ordering the defendant to convey the property to Verba Haws who should hold the property as trustee for the use and benefit of the heirs at law of Mrs. Haws

is modified [to protect defendant's interest as an heir]."

Defendant cites several cases to support his position, most of which are not in point in that they did not involve trusts, so the distinction between the effect of the judgment or decree upon the equitable title is not involved.

The only case cited by defendant which involves a trust is *Weyant v. Utah Savings & Trust Company*, 54 Utah 818, 182 Pac. 189, and in that case the court imposed a trust upon the property which the probate court had distributed, and it therefore lends support to the position of plaintiffs rather than defendant.

The case of *Edson v. Bartow*, 154 N.Y. 199, 48 N. E. 541, 61 Am. St. Rep. 609 was one in which a judgment in an action to construe a will determining that bequests to the executors vested in them, as individuals, absolute ownership of property unaffected by any trust was held not to bar an action against the individual executors seeking to impress upon the property in their hands, as legatees, a trust for the benefit of the next of kin by virtue of circumstances extrinsic to the will.

The case of *Meade v. Vande Vorde*, 139 Neb. 827, 299 N. W. 175, held that a timely action in equity by heirs to declare a trust on personal property still in possession of the administrator, who at a grossly inadequate price sold same to himself at his own sale without notice to the heirs is properly brought even though the administrator's final account was approved by the court and no appeal was taken.

*Strates v. Dimotsis*, CCA 5th, 1940, 110 F. 2d 374,

cert. den. 311 U.S. 666, was a case in which property was sold by an administrator, who then proceeded to close the estate and then bought the property. A judgment for the heirs to impress a trust on the property was affirmed. The court found no merit in a contention that the proceedings constituted a collateral attack on the judgment and orders of the probate court, and pointed out that the action was not to attack the orders and judgment of the probate court, or to set aside or invalidate the sale made under its authority, but to impress a trust upon the property.

Defendant having promised to hold the claims in trust, and having given no indication to plaintiffs that he was doing otherwise prior to June of 1954 gives answer to appellant's arguments that plaintiff's should have appeared to object to the decree of distribution. Until such time as they were made aware of defendant's contention that he held both the legal and equitable title, there was no reason for them to attempt any action.

## CROSS APPEAL

### POINT ONE

THE COURT ERRED IN FAILING TO REQUIRE DEFENDANT TO ACCOUNT TO PLAINTIFFS FOR THEIR SHARE OF THE SUM OF \$6,273.93 BEING THE DIFFERENCE BETWEEN \$13,603.61 ROYALTIES ACCRUED UNDER VARIOUS LEASES MADE BY DEFENDANT IN 1949 AND 1950 AND \$7,329.71 THE AMOUNT SHOWN TO HAVE BEEN DEPOSITED IN BANK ACCOUNTS BY DEFENDANT.

Defendant is accountable for all royalties payable in the absence of proof that with the exercise of due diligence the same would not be collectible.

The Court in Finding of Fact No. 10 found as follows:

“10. These Lessees produced and sold ores from the Camp Bird Mining Claims during 1949 and 1950, and Defendant received and deposited in special bank accounts the sum of \$7,329.71 from this production. The royalties which accrued under these shipments and those of Continental Mining & Milling Company, as hereinafter set out, amounted to \$13,603.64. The evidence does not support a finding that Defendant actually received more than the \$7,329.71. Defendant did not obtain any accountings from any of the lessees nor take any steps to attempt the collection of any other royalties than those paid to him nor to verify the amount of royalties due.”

2 *Scott on Trusts*, paragraph 177 sets forth the following propositions of law:

“177. Duty to enforce claims. A trustee is under a duty to the beneficiaries to take reasonable steps to realize on claims which he holds in trust. If he fails to take such steps as are reasonable he is subject to a surcharge for such loss as results from his failure to act\* \* \* The trustee is subject to a surcharge where he fails to take proper steps to collect rent due from a tenant.\* \* \*

If a debtor fails to pay a debt due to the estate, it is ordinarily the duty of the trustee to bring an action to enforce payment.\* \* \* If the trustee has made no effort to collect the claim, however, the burden is upon him to show that such effort would have been unavailing.”

In addition, interest thereon should be awarded.

2 *Scott on Trusts*, paragraph 207.



## POINT TWO

THE COURT ERRED IN FAILING TO REQUIRE DEFENDANT TO ACCOUNT TO PLAINTIFFS FOR THEIR SHARE OF THE SUM OF \$6,560.23 BEING THE PROFIT RECEIVED BY DEFENDANT ON A LEASE FROM CONTINENTAL MINING AND MILLING COMPANY AND/OR CONSOLIDATED URANIUM MINES, INC. IN 1950.

The obtaining of the sublease from Continental Mining & Milling Co. and/or Consolidated Uranium Mines, Inc. amounted to self dealing by defendant as trustee with the trust property.

Finding of Fact No. 29 is as follows:

“29. Defendant obtained a lease of certain of the Camp Bird mining claims from Continental Mining and Milling Company and/or Consolidated Uranium Mines, Inc., and mined the same during 1950. Under said lease Defendant received the sum of \$23,804.40 for ores produced therefrom and incurred expenses in producing said ores amounting to \$17,244.17.”

2 *Scott on Trusts*, Sec. 203 provides in part as follows:

“A trustee who makes a profit through a breach of trust is accountable to the beneficiaries for the profit. Even though the profit is not made through a breach of trust, however, the trustee is accountable for it if it was made in the administration of the trust. Thus where a trustee deposits trust funds in a bank and receives interest on the deposit, he is accountable for the interest received even though he was not under a duty to make the money productive. The trustee is accountable for any profit made on the purchase and sale of trust securities or for any profit

made through the use of the trust property, whether he uses it himself or receives payment from a third person for the privilege of using it. Similarly, if he receives a commission or bonus he is accountable for it even if he does not commit a breach of trust in receiving it.”

Respondents contend that this profit derived from the mining of the Camp Bird Claim No. 12, during 1950, while defendant was acting as trustee of the mining claims, should be included in defendant’s accounting.

When the opportunity arose for obtaining a sublease of the mining claim, it was defendant’s duty as trustee to obtain this sublease for and on behalf of the beneficiaries of the trust, and he is therefore accountable for the profit derived therefrom.

### POINT THREE

THE COURT ERRED IN AWARDING PLAINTIFFS TWELVE TWENTY-FIRSTS INTEREST IN THE PROPERTY AND MONEY AS TO WHICH DEFENDANT WAS REQUIRED TO ACCOUNT RATHER THAN THREE-FOURTHS INTEREST.

When defendant obtained the deeds from plaintiffs, he declared that he would hold the property thereby acquired in trust for the heirs of A. L. Tomlinson in equal shares (T-1, pgs. 14, 30, 31, 44, 47). There were in all eight heirs, so that each would be entitled to one-eighth interest. Plaintiffs constitute six of the heirs, and should therefore be entitled to three-fourths interest. The Court awarded them a twelve twenty-firsts interest.

Throughout the Tomlinson dealings this equal division had been the arrangement which all of the parties

had agreed to. In making the distribution of the estate monies, defendant distributed the monies equally among all of the heirs, and he testified that the agreement of the parties had been that the division was to be equal among all the heirs (T-1, p. 286).

The testimony of plaintiffs, supported as it is by the conduct of the parties in handling the estate affairs on an equal basis among all the heirs, is indicative that the trust was for each heir to have an equal share, and the trial court should have made the award consistent with this agreement.

#### POINT FOUR

THE COURT ERRED IN ALLOWING DEFENDANT A CREDIT ON HIS ACCOUNTING FOR THE SUM OF \$525.00 PAID TO K. K. STEFFENSON AND THE SUM OF \$200.00 PAID TO C. ALLEN ELGGREN, BOTH FOR ATTORNEYS' FEES.

Continental Mining and Milling Company agreed to pay all of defendant's expenses in connection with legal work for the Estate or claims for legal work asserted against the Estate (P's. Exh. O) and defendant made no effort to have Continental Mining and Milling Company pay the same or to obtain reimbursement from said Company.

Finding of Fact No. 17 is as follows:

"17. There is no evidence sufficient to base a finding that Continental Mining and Milling Company paid any royalty monies to defendant pursuant to the January 22, 1950 agreement nor that they reimbursed him for expenses incurred by him in obtaining counsel to handle the affairs

of the estate or establishing title to the Camp Bird Mining Claims. Defendant incurred expenses in the amount of \$525.00 to K. K. Steffenson in connection with the title suit and \$200.00 to C. Allen Elggren, secretary of Continental Mining and Milling Company, for handling the probate proceedings of the Estate. Defendant made no effort to collect any royalties from Continental Mining and Milling Company nor to obtain reimbursement of the said expenses from that Company."

As set forth under POINT ONE a surcharge should be made against a trustee who fails to take such steps as are reasonable to realize on claim. 2 *Scott on Trusts*, paragraph 207.

It is noteworthy that C. Allen Elggren, to whom \$200.00 was paid was Secretary of the company which had agreed to furnish the legal fees, and defendant should have refrained from paying him in accordance with the Continental agreement, Plaintiff's Exhibit O.

## CONCLUSION

Much of this brief has been devoted to the contentions argued by appellant relative to a constructive trust. It is emphasized however, that the Trial Court found on the evidence adduced at the hearing that in receiving both the 1950 and 1952 deeds defendant agreed to hold the mining property for plaintiffs' use and benefit, and that defendant holds the properties under an express trust. This finding was supported by the evidence and should be affirmed.

The considerations of whether or not the facts would support the imposition of a constructive trust for plaintiff's use and benefit due to the unfairness of the transaction and the non-disclosure and misrepresentation of material facts by defendant is therefore largely of academic importance in this case. If the trial court's finding of an express trust is correct, and we submit it is, there is no need to further consider the question of whether or not the facts would warrant the imposition of a constructive trust in the absence of such an express promise.

Respectfully submitted,

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