

1959

Vada J. Tomlinson Acott et al v. Union Carbide Nuclear Company and Leslie A. Tomlinson : Brief of Plaintiffs and Respondents

Utah Supreme Court

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILED

VADA J. TOMLINSON ACOTT, REBA TOMLINSON FULLER, RUBY TOMLINSON BEEBE, NORA E. TOMLINSON SCHOCKLEY, MARGUERITE TOMLINSON CISNEY and ALTON E. TOMLINSON,

Plaintiffs and Respondents,

—vs—

UNION CARBIDE NUCLEAR COMPANY,

*Defendant and Third-Party
Plaintiff,*

—vs—

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

*Third-Party Defendant
and Appellant.*

BRIEF OF PLAINTIFFS AND RESPONDENTS

**STEPHENS, BRAYTON &
LOWE and
THOMAS C. CUTHBERT,
*Attorneys for Plaintiffs and
Respondents***

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IN THE SUPREME COURT of the STATE OF UTAH

VADA J. TOMLINSON ACOTT, REBA
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TOMLINSON CISNEY and ALTON E.
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Plaintiffs and Respondents,

—vs—

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*Defendant and Third-Party
Plaintiff,*

—vs—

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

*Third-Party Defendant
and Appellant.*

Case No.
9115

BRIEF OF PLAINTIFFS AND RESPONDENTS

STATEMENT OF FACTS

This case is supplemental to the case of *Acott, et al v. Tomlinson*, 9 Utah 2d 71, 337 P. 2d 720, (hereinafter referred to as “prior case”), and represents a suit by plaintiffs to enforce the judgment rendered in that action. The judgment in the prior case which was affirmed by this Court did four things:

(1) It imposed a trust upon an undivided 12/21sts of the interest in certain mining claims held by appellant;

(2) Awarded a money judgment to respondents against appellant amounting to \$24,525.07;

(3) Imposed a trust upon 12/21sts of a claim for certain monies appellant had against Therald N. Jensen and Frank B. Hanson; and

(4) Imposed a trust upon 12/21sts of a claim which appellant had against Union Carbide Nuclear Company for royalties on ores produced by that Company under a lease of the mining properties.

The judgment divested title to the property interest and funds from appellant, and vested the interest in respondents. (R. #7468, p. 96-7).

The judgment did nothing as to the 9/21sts interest of record in appellant's name which represented a 2/21sts interest appellant had acquired in his own right as an heir of his father and a 7/21sts interest conveyed outright to appellant by his mother. (R. #7468, p. 85, Finding 31). At the trial of the prior suit on September 13, 1955, Mrs. Lillie Tomlinson, appellant's mother, was called as a witness for appellant, and disclaimed any interest whatsoever to the property she had conveyed to appellant. (Case No. 7468, Tr. 1: p. 186 lines 7-13; p. 197, lines 10-24; p. 199, lines 7-18; p. 203, lines 28-29; p. 204, lines 9-10).

The present suit, as shown by the pleadings, represents an action by the respondents against Union Carbide

Nuclear Company to recover the 12/21sts of royalties then accrued which the prior case determined should be held in trust for respondents. (R. #8005, p. 1-4). In addition, the complaint sought a declaration of the plaintiffs' rights in and to future royalties. As the Third-Party complaint of Union Carbide Nuclear Company shows, the suit was necessitated by a letter to that Company from appellant's attorney, despite the judgment in the previous suit, advising Union Carbide that any monies would be paid to respondents at the Company's jeopardy. (R. #8005, p. 10-12). Feeling insecure in making any payments to respondents, Union Carbide would not pay the money over without a judgment against them. The answer of Union Carbide Nuclear Company alleged that it was ready to make payment of the royalties then on hand and which would accrue in the future and would abide by any Order of the Court as to the disposition of these royalties. Union Carbide brought appellant into the suit (designating him as a third-party defendant although he should properly have been a defendant in an interpleader action) in order that any rights which he might have could be ascertained in the suit and Union Carbide Nuclear Company would be protected. (R. #8005, p. 10-19). Appellant thereupon filed an answer and counterclaim to the third-party complaint alleging, despite the decree to the contrary in the prior suit, that he was the owner of the entire interest in the mining claims and entitled to receive all of the monies held by Union Carbide Nuclear Company. (R. #8005, p. 26)

Between the time this action was commenced and the time that appellant filed his answer and counterclaim, a writ of execution had been issued in the prior suit directing the Sheriff to levy upon the property of appellant in satisfaction of the money judgment. (R. #7468 -2, p. 54) On May 1, 1958 the Sheriff of Emery County sold at public auction "the interest of Leslie A. Tomlinson" in the mining claims above referred to, and at this sale plaintiffs purchased this interest. (R. #8005, p. 28).

By his counterclaim, appellant set out allegations respecting the aforesaid Sheriff's Sale and alleged that because respondents and appellant were brothers and sisters the sale was void. (R. #8005, p. 26). No allegations were made respecting the price paid for the property interest, nor any unfair circumstances attending the sale. He alleged further that Union Carbide Nuclear Company was the Lessee of appellant and that Company owed a duty to appellant to protect appellant's interest in the mining claims against the Sheriff's Sale. He alleged a breach of this duty by Union Carbide Nuclear Company in permitting the Sheriff's Sale to take place and claimed damages against Union Carbide Nuclear Company for the reasonable value of appellant's interest in the properties. (R. #8005, p. 27) Respondents filed a Reply to the counterclaim setting up the defense of res adjudicata and the defense that the Sheriff's Sale cannot be collaterally attacked. (R. #8005, p. 31)

Appellant knew of the Sheriff's Sale before it took

place, inasmuch as he attended the sale in person and served upon respondents a Motion requesting the recall of the Writ of Execution and a temporary restraining order against the Sheriff's selling the properties upon the execution. Apparently appellant abandoned this motion in that it does not appear as having been filed with the Court, and no further action was taken by appellant before the Sheriff's Sale was held.

No proceedings have been commenced in Civil No. 7468 to set aside the Sheriff's Sale of the mining properties as hereinabove set out, nor has any claim adverse to respondents been asserted to any interest in the mining properties or the funds involved in this suit by any one other than appellant.

Respondents thereupon filed a Motion for Summary Judgment based upon the files of the Court in the pending action and the files of the Court in the prior action. This motion was originally heard by the Court on June 30, 1958 and was denied without prejudice to respondents' renewal thereof. Respondents thereupon renewed the motion for summary judgment which was heard October 27, 1958 pursuant to notice thereof served upon each of the parties. No one appeared for either defendant or appellant at the hearing of that motion, (R. #8005, p. 43) and the Court granted plaintiffs' Motion for Summary Judgment.

In connection with the October 27, 1958 Motion for Summary Judgment, although Union Carbide Nuclear Company did not appear to argue the motion, on October

24, 1958 the attorney for Union Carbide Nuclear Company sent a letter to Judge Keller respecting the motion wherein he verified the amounts of royalty accrued by Union Carbide Nuclear Company as alleged in the affidavit of Thomas C. Cuthbert attached to the Motion for Summary Judgment.

The Judgment was entered by the Court on October 31, 1958. As outlined in respondents' Memorandum of Authorities filed with this Court in connection with respondents' motion to dismiss the appeal, eleven days after the entry of judgment, on November 11, 1958, appellant served by mail a pleading designated Motion to Vacate Judgment. This motion was heard June 29, 1959. At the hearing of this motion, the Court on its own motion directed certain minor amendments to be made in the judgment, and the Amended Judgment was entered July 7, 1959, (R. #8005, p. 48) and a Notice of Appeal was filed by appellant on August 4, 1959. (R. #8005, p. 50).

STATEMENT OF POINTS

POINT I.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW ANY MATTERS CONTAINED IN THE JUDGMENT OF OCTOBER 31, 1958 IN THAT NO APPEAL WAS TIMELY TAKEN.

POINT II.

EXTENT OF REVIEW IS LIMITED TO CONSIDERING ERROR IN DENYING MOTION TO VACATE JUDGMENT, OR IN MAKING AMENDMENT.

POINT III.

THERE WAS NO ERROR IN DENYING APPELLANT'S MOTION TO VACATE NOR IN THE COURT'S AMENDMENT OF THE JUDGMENT.

POINT IV.

THE COURT COMMITTED NO ERROR IN ENTERING JUDGMENT ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

ARGUMENT

POINT I.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW ANY MATTERS CONTAINED IN THE JUDGMENT OF OCTOBER 31, 1958 IN THAT NO APPEAL WAS TIMELY TAKEN.

The Judgment of October 31, 1958 was the final judgment from which a timely appeal would have to be taken. A similar situation arose in *U. S. v. Wissahickon*, (CA 2d, 1952) 200 F. 2d 936. The district court had granted a motion for summary judgment against defendants by a written opinion on April 10, 1951. Approximately nine months later, on January 23, 1952, plaintiff had prepared judgments for the court's signature and noticed these up for settlement. Defendants presented motions to file supplemental answers and to reargue certain motions which had previously been denied. On February 1, 1952 the matters were heard, and defendant's motions were denied and the court signed the order and judgment prepared by plaintiff. Defendants appealed from these judgments and complain of the earlier adverse rulings.

The court said, at page 938:

“We may first address ourselves to the question whether or not the appeals taken on March 31, 1952, were timely. They were of course within the proper time, Fed. Rules Civ. Proc. rule 73(a), as appeals from the orders of February 1, 1952, but not from those of April 10, 1951. But the earlier orders were clearly the final judgments. No more explicit mandate for a plaintiff’s judgment than that granting a summary judgment in the amount claimed can be conceived; and notation of the grant in the civil docket on that date became the judgment under the provisions of F.R. 59. * * * * Nor would the date be changed by forms of judgment later submitted by counsel, even if these are signed by the judge.”

Respondents’ Memorandum of Authorities, in connection with their motion to dismiss the appeal heretofore filed and argued, contains most of the authorities and argument in connection with the point that a motion made under Rule 60 does not extend the time for appeal, and these authorities will not be repeated in this brief, since they are already before the Court. This Court has taken respondent’s motion to dismiss the appeal under advisement pending consideration of the case on its merits.

POINT II.

EXTENT OF REVIEW IS LIMITED TO CONSIDERING ERROR IN DENYING MOTION TO VACATE JUDGMENT, OR IN MAKING AMENDMENT.

On June 29, 1959, approximately nine months after entry of judgment, appellant’s Motion to vacate the

Judgment was heard and denied (Tr. 2, Case #8005, p. 3). The Court then, on its own motion, amended the judgment according to the statements made by the court in directing the amendment. The Court apparently made the amendment to clarify the fact that the court was not making a determination as to the rights of any persons who were not parties to the suit.

Unless appellant can show that the court committed prejudicial error in denying his motion to vacate the judgment, or, in making the amendment which it did, then this Court must affirm the lower court. Any question of errors committed by the court in entering its October 31, 1958 judgment are not subject to review on this appeal.

Several cases have so limited the extent of review under the Federal Rules, which are practically identical with Utah Rules.

In *Saenz v. Kenedy*, (CA 5th, 1950) 178 F. 2d 417, the district court had granted defendant's motion for summary judgment by docket entry on August 8, 1948. Formal judgments were entered in the nine cases during September and October, the last being on October 13, 1948. No notices of appeal were filed within thirty days. Motions under Rule 60(b) were filed in January 1949 to have judgments vacated on the ground they were void and involved collusion between the trial court and plaintiffs. These motions were denied and notices of appeal were filed within 30 days from the denial.

The Appellate Court said, at page 419:

“Since the notices of appeal were filed within thirty days of the overruling of the motions to vacate final judgments for collusion and fraud on appeal thereunder would bring up to this Court for review only the propriety or impropriety — the correctness or the error — of the Court below in denying these motions to vacate. It would not bring up for review by this Court the final judgments entered in September, 1948. From these final judgments no appeals were taken within thirty days and this Court, is, therefore, without jurisdiction to review same. The appeals in these causes from such final judgments must be dismissed.”

See also *Tarkington v. U. S. Lines Company* (C. A. 2, 1955) 222 Fed. 2d 358: 7 *Moore's Federal Practice*, pp. 341-2; pp. 331-2, Sections 60.30(3); 60.27.

POINT III.

THERE WAS NO ERROR IN DENYING APPELLANT'S MOTION TO VACATE NOR IN THE COURT'S AMENDMENT OF THE JUDGMENT.

In his brief, appellant makes no contention of error with respect to either of the points which is properly reviewable by this court. However, respondents will discuss them to show the correctness of the trial court's denial of appellant's motion to vacate the judgment and the immaterial effect of the amendment which it made to the judgment.

Considering first the denial of appellant's motion to vacate the judgment, that motion alleged that the

judgment was void; that the pleadings presented material issues of fact, and that respondents' motion had been supported by affidavits based upon information and belief rather than on personal knowledge.

The only possible basis for relief from the judgment is under Rule 60(b). Examination of Rule 60(b) in the light of appellant's motion discloses that of these grounds only the contention that the judgment was void comes within the purview of that rule. The other grounds stated, if true, would only constitute error at law, and this is not a ground for relief under Rule 60(b). As to whether or not the judgment is void, the record discloses that the court had personal jurisdiction over all parties to the suit, and that they appeared and pleaded. The trial court had jurisdiction over the subject matter. The court having jurisdiction of the parties and the subject matter, the judgment was not void, no matter how erroneous it might have been. 7 *Moore's Federal Practice*, p. 259, Sec. 60.25(2). Therefore, the trial court had no alternative but to deny the motion to vacate the judgment, which it properly did.

Looking next at the amendment which the court made after denying appellant's motion, it is seen that this was made by the court on its own motion. Rule 60 provides two types of relief from judgments. Rule 60(a) deals with a court by motion or on its own initiative correcting clerical mistakes and errors in judgments arising from oversight or omission. Rule

60(b) relates to relief from judgments for certain specified grounds on motion of a party.

The trial court probably felt it was correcting an error arising from oversight or omission when it ordered the amendment, and hence would have been proceeding under Rule 60(a). On the other hand it may have concluded the amendment was responsive to appellant's arguments on his motion, and therefore ordered the amendment as correcting a mistake, within the purview of Rule 60(b)(1), although this ground was not set out in appellant's motion to vacate.

Although respondents believe the amendment should not have been made, they believe the amendment comes within the provisions of Rule 61, as being harmless error which does not affect the substantial rights of the parties. Since the purport of the amendment was to clarify that the court was not determining the rights of any persons not parties to the suit, the amendment did nothing to the judgment which would not have been done as a matter of general law. The doctrine of res adjudicata is clearly limited to parties to suits or their privies, and for this reason, the judgment could not have any effect upon persons not parties to the suit.

That the effect of the amendment does not prejudice appellant in any way is demonstrated by the statement contained in his brief at page 7, where he says, "The amended judgment accomplishes the same result [as the first judgment]."

For the foregoing reasons, respondents believe that, insofar as the only issues properly before this Court are concerned, there has been no prejudicial error committed which would justify a reversal of the trial court's actions.

POINT IV.

THE COURT COMMITTED NO ERROR IN ENTERING JUDGMENT ON RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

Respondents believe that the foregoing portions of this brief have completely disposed of the matters which should properly be considered by this Court. However, because appellant has devoted his entire brief to matters which he contends were errors committed by the trial court when it granted respondents' motion for summary judgment on October 31, 1958, and in order to dispel any doubts which the Court might have that by affirming the trial court's rulings it might become an indirect party to a grave injustice, consideration will be given to those aspects of the case which were decided by the Judgment of October 31, 1958.

Even assuming appellant had made a timely appeal from the October 31, 1958 judgment, this Court would not be justified in reversing the trial court's action. As stated above, appellant was served with notice of the hearing of respondent's motion for summary judgment, and was thereby given an opportunity to appear and present the arguments which he now advances as error of the trial court. He did not avail himself of this opportunity, and

permitted the judgment to be entered without his appearance. For this reason he may not be heard to complain of errors allegedly committed by the trial court in his absence.

It is well settled that the scope of review on appeal from a default judgment is very limited. 5 *C.J.S.* p. 711, *Appeal & Error*, Sec. 1467. It is held that such review is limited to an examination of the pleadings, and that questions as to the sufficiency of evidence upon which the judgment was based is not open to review, *People v. Taliaferro*, 149 C.A. 2d 822, 309 P. 2d 48; and that an appeal will not lie from a default judgment which is merely voidable or erroneous, *Pacific Savings and Loan v. Bekins*, 146 Ore. 385, 29 P. 2d 816.

It is submitted that the trial court committed no error in entering the summary judgment of October 31, 1958. This judgment is the only result which properly can be reached if one puts himself in the role of the trial court and examines the pleadings and materials it had before it in ruling on respondents' motion for summary judgment.

The trial court had before it the complaint, answer and third party complaint of Union Carbide Nuclear Co., appellant's answer and counterclaim, the motion for summary judgment and the files and records of the prior action.

Consideration of the correctness of the trial court's ruling breaks down into the following facets: (1) Issues

between respondents and Union Carbide; (2) Issues between respondents and appellant as to accrued royalties; (3) Issues between respondents and appellant as to future royalties, and (4) Issues between appellant and Union Carbide as raised by appellant's Counterclaim. These matters will be discussed in that order.

(1) As between respondents and Union Carbide, the only genuine issue raised by the pleadings was a question of what mining claims respondents had acquired an interest in from the prior suit. Union Carbide claimed it owned the Temple mining claims, except for the portions passing to respondent's and their co-owners by a lease of May 1950. In the motion for summary judgment, respondents acknowledged this and claimed only an interest in the royalties accruing under that lease. This eliminated the only material issue between respondents and Union Carbide. Its counsel thereupon advised the court he would not appear to resist the motion and verified the amounts of royalties accrued under the lease up to the time of the motion. These amounts were exactly the same as set forth in the affidavit attached to respondent's motion and the amounts on which judgment was entered. These became the first two items of the October 31, 1958 judgment.

It is noteworthy that Union Carbide, the judgment debtor has not appealed, indicating the correctness of the lack of issues between respondents and that company.

(2) As to issues between appellant and respondents, these are best broken down into two categories,

namely, as to royalties already accrued and as to the future rights to royalties. By appellant's answer it is seen that he was claiming the entire interest in the royalty income for himself. This had been the question resolved by the prior action in which the court established a 12/21sts interest in this royalty income in respondents, and appellant was left with 9/21sts interest. That judgment in Civil No. 7468 was res adjudicata of the rights of the parties until their rights changed by virtue of the Sheriff's execution sale. Royalties accrued up to that time were divided in the judgment with respondents obtaining judgment for only 12/21sts thereof. Appellant cannot contend for anything contrary to this.

(3) By their complaint respondents asked for a determination of their rights to future royalties under the lease. At the time the complaint was filed, any determination would have required a ruling that respondents were entitled to a 12/21sts interest in the Tomlinson portion of those royalties. This would have been in keeping with the judgment of the prior action. However, by his answer to the third party complaint and counterclaim, appellant brought before the Court the fact that a Sheriff's sale had been had pursuant to a writ of execution at which respondent's had purchased all of the remaining interest appellant had in the property. A copy of the Sheriff's Certificate of Sale was attached to Appellant's pleading. From this the matter of respondents' interest acquired by the May 1, 1958 execution sale came into the suit.

In connection with appellant's answer, he had alleged the Sheriff's sale was void. To support this he alleges only that respondents were the brother and sisters of appellant and that because of this relationship the sheriff's sale on writ of execution is void. (R. 8005, page 26.) By his pleadings he makes no contention that the price paid was inadequate or that there was any unfairness in the conduct of the sale. These latter contentions first appear in appellant's brief.

The motion for summary judgment therefore necessitated an examination of whether or not there was any genuine issue of any material fact concerning the Sheriff's sale and if not what interest respondents acquired thereby as a matter of law.

As to the facts concerning the Sheriff's sale there was no dispute: Respondents had purchased all the remaining interest of appellant at a sheriff's sale on a writ of execution and had paid \$3,000.00 for that interest. All of the records relating to that sale are a part of the record of Civil No. 7468, which was before the court on the motion.

In this state of the pleadings, as a matter of law the Court had to reject the contention that a person may not levy execution upon the property of his brother against whom he has a judgment. Facing an allegation that the sale was void, it would then be incumbent upon the Court to examine the proceedings of the sale to see if there was anything about the sale which made it void on its face. There being nothing of this nature, the Court

could not do otherwise than rely upon the validity of the sheriff's sale, which it did.

The next question to be resolved by the trial court after determining the validity of the sheriff's sale was the extent of the interest respondents had in future royalties. By the prior action, respondent's had obtained the 12/21sts interest in the 3.7158% royalty interest. By the sheriff's sale, respondents acquired all the remaining interest that appellant had.

The files and records of Civil No. 7468 show that at the time of commencement of the prior action, appellant had the legal title to the entire interest to the property, subject only to the possible equitable interests of respondents and Mrs. Lillie M. Tomlinson, the mother of the parties. These possible equities would arise only by reason of the understanding and agreements of the parties at the time the legal title was conveyed by respondents and their mother to appellant. The determination of those equities was the precise question involved in the prior suit.

In the trial of that suit, Mrs. Lillie M. Tomlinson testified as a witness and disclaimed any interest in the property she had conveyed to appellant. (Tr. 1, No. 7468, pp. 186, 197, 199, 203, 204). It therefore becomes apparent that at the conclusion of the prior suit, appellant was left with 9/21sts interest, and by reason of Mrs. Lillie Tomlinson's disclaimer by her testimony there is no question that he held the entire beneficial interest in that 9/21st interest. The sheriff's deed therefore resulted

in a conveyance of a 9/21st interest to respondents, and respondents thereupon became the owners of the entire 3.7158% interest in the mining properties and were such at the time of the motion for summary judgment.

Although it goes without saying that the only persons bound by the judgment are those who are parties to the suit or their privies, the trial court felt constrained to amend the judgment in this respect in order that no question of *res adjudicata* might be raised if Lillie M. Tomlinson should in the future attempt to assert an equitable interest in the property in a later action she might bring against respondents. As to this point, however, see *Faulkner v. Dooly*, 28 U. 236, 78 P. 365; *Wood v. Fox*, *Whitney v. Fox*, 8 U. 380, 32 P. 48, *aff'd*. 66 U.S. 648, 41 L. Ed. 1149, for cases holding that even apart from her disclaimer she would be barred from asserting any interest at this time because of laches and the statute of limitations. Regardless of the outcome of any such possible later action by the mother, legal title to the entire interest is in respondents by virtue of the judgment in the prior action and the Sheriff's sale.

(4) There remains only to consider appellant's counterclaim against Union Carbide. The allegations of the counterclaim are that Union Carbide was the lessee of the mining properties involved in the suit and that by reason thereof it owed a duty to protect appellant's interest from the Sheriff's sale under writ of execution. (R. 8005, p. 27) There is no allegation of any duty except as arises from Union Carbide's leasing the premises.

These leases between appellant and Union Carbide are part of the record (R. 2, No. 7468, pp. 10-36), and they show there was no duty imposed on the lessee such as contended. Appellant was aware of the forthcoming sheriff's sale, having served a motion to recall the writ of execution and for a temporary restraining order against the sheriff's conducting the sale. Having known of the sale and having attended it in person, he was fully capable of protecting any rights he had in the property.

Conceding all of the facts alleged in appellant's counterclaim as true, the proposition then becomes one of law of whether or not a lessee, merely by reason of his status as such, owes a duty to his lessor to prevent a sheriff's sale of the property pursuant to a writ of execution where the lessor knows of the sale himself. There can be no such recovery on facts such as those alleged as a matter of law.

From the foregoing, it is seen that there was no genuine issue of any material fact for the court to resolve by trial, and that the court as a matter of law was correct in granting respondent's motion for summary judgment.

Two other matters raised by appellant in his brief should be briefly mentioned. First, appellant contends the affidavit of Thomas C. Cuthbert was based on information and belief and the granting of a judgment based upon this constitutes reversible error. Apart from Union Carbide's counsel's verifying these figures to the court, examination of the affidavit shows a statement of an admission against interest made by counsel for Union

Carbide. This statement is not based upon information and belief, and is competent evidence of the facts stated therein. The affiant states that based upon the admission against interest as to the fact, he believes the truth of the amounts of accrued royalty set out in the affidavit. It is further submitted that appellant is not prejudiced in any way by the affidavit, since it goes to the amount to be paid out by Union Carbide, which has not appealed from the judgment against it.

Next, appellant argues that respondents did not give him an opportunity to object to the form of the amended judgment before it was entered. Examination of the transcript of proceedings reveals that the Court directed respondents' counsel to prepare an amended judgment and file it. If appellant desired to object, he would have an opportunity to do so by a motion to strike. A copy of the amended judgment was mailed to appellant on July 7, 1959, the date it was entered, and he made no motion respecting that judgment as the Court had proposed. For this reason he cannot contend he was prejudiced in any way by this procedure.

CONCLUSION

It is therefore respectfully submitted that this Court must dismiss the appeal now before it on the following grounds: It has no jurisdiction to decide any of the issues raised by appellant's brief. The judgment of October 31, 1958 now complained of by the appellant became final and no appeal was taken within the time pre-

scribed by the Utah Rules of Civil Procedure. The trial court committed no error in the entry of that judgment and the same was proper. If there was any error committed by the Court, it was in amending the judgment on July 7, 1959, when it had no jurisdiction to make an amendment for other than an error of omission. Such amendment, since it merely eliminates any effect the prior judgment might have had on persons not parties to the suit, is not prejudicial to the rights of any of the parties and is therefore harmless error. The errors complained of by appellant, if they were in fact errors, constituted harmless errors which must be disregarded. It is noteworthy that this litigation and its antecedent have been in the courts for over five years, and have involved expenditures of time and money disproportionate to the amounts in controversy. Respondents respectfully urge that this Court should endeavor to bring this litigation to a close without further controversy.

Respectfully submitted,

STEPHENS, BRAYTON &
LOWE and
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Respondents*