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Beehive State Bank v. Deon Rosquist, Geraldine Rosquist And Ila R. Painter, First Security Bank of Utah, And Fred L. Painter : Appellant's Reply Brief

IN THE SUPREME COURT
of the
STATE OF UTAH

BEEHIVE STATE BANK,
a corporation,
Plaintiff-Respondent,
vs.
DEON ROSQUIST, GERALDINE ROSQUIST, and ILA R. PAINTER, individuals, and CARPETS INC., a corporation,
Defendants,
FIRST SECURITY BANK OF UTAH N.A., a corporation,
Garnishee,
FRED L. PAINTER,
Intervener-Appellant.

Case No. 11951

APPELLANT'S REPLY BRIEF

Appeal from Judgment of Third District Court,
Salt Lake County
Honorable Gordon R. Hall, Judge

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There is no substantial disagreement between appellant and respondent as to the evidence or facts in this case. The appeal therefore can be disposed of on issues of law. As to these issues, respondent argues that the decisions of this court in the former appeal of this case, 21 Utah 2d 17, 439 Pac. 2d 468 and the later case of *Continental Bank & Trust Company v. Kimball,* 21 Utah 2d 152, 442 Pac. 2d 472, establish a rule that if parties enter into a contract ostensibly creating a joint tenancy relationship

with full right of survivorship there arises a *presumption that such is the case* unless and until some interested party shows under equitable rules that the contract should be reformed to show some other agreement of the parties or that the contract is not enforceable because of fraud, mistake incapacity or other infirmity. Respondent quotes language to this effect from the Court's opinion on the former appeal, and then argues that here the appellant made no attempt to reform the contract or to present any evidence of fraud, mistake, incapacity or other infirmity, and that appellant must therefore fail in his claim to the joint deposit account.

This argument calls for consideration of the law of co-tenancy in general and joint tenancy in particular. It calls for study of the language of the bank signature card. That card does not specify the respective contributions of the depositors nor the fractional shares to which they will be entitled in case of controversy between themselves.

Respondent's argument therefore calls for answer to the question: What *presumption* is created by the language of the bank signature card? Is it not merely that, in the absence of evidence to the contrary, the depositiors are presumed to have contributed equally to the joint deposit account? What other presumption arises? Is it that the parties intended to created a right of survivorship? That is expressly stated in the contract, therefore no *presumption* is called for as to that. But since the appellant is the *survivor* of the joint tenancy he is clearly the beneficiary of that part of the agreement, whether it is referred to as creating a presumption or as an express contract.

Respondent relies on the fact that appellant did not attempt to reform the contract or to present evidence to show fraud, mistake, incapacity or other infirmity. Why should appellant ask for reformation of the contract? Why should he try to prove fraud or mistake when the contract by its terms gives him, as asurvivor of the joint tenancy, the entire fund?

These signature cards are furnished by the banks to protect their interests. They specifically provide that the bank is protected in case of withdrawal by either of the joint depositors. But there is nothing on the signature card to show the contributions made by the respective parties or to specify their respective shares in the ownership of the fund. In case of an inter vivos controversy between depositors there is a presumption, in the absence of evidence to the contrary, that they contributed equally. But this is a presumption, and nothing more. As stated by Mr. Justice Cardozo in *Moskowitz v. Marrow,* 251 N.Y. 380, 167 N.E. 506, 512, 66 A.L.R. 870

> "the plain implication is that as between the depositors themselves, the form of the deposit gives rise to a presumption and nothing more, but after the death of either, leaving a deposit then subsisting, the presumption becomes conclusive as to the title of the survivor."

This statement by Mr. Justice Cardozo is quoted in the opinion of the Court on the former appeal of this case, and also in other Utah cases cited in appellant's former brief. It seems however to have been given no consideration by counsel for respondent in their brief.

Furthermore, in relying upon th ecase of *Continental*

Bank and Trust Company v. Kimball (supra), respondent fails to state that the surviving joint tenant was there awarded the fund and that the Court held that the *administrator of the estate of the deceased joint tenant was conclusively bound by the language of the contract creating a right of survivorship.*

Respondent dwells upon the statement in the opinion:

> "Since the appellant is not trying to reform the contract, and is not claiming fraud, mistake, incapacity, or other infirmity, we think it is conclusively bound by the contract as made and cannot show that the parties intended a result contrary to that which the law of joint tenancy relationship imposes."

But that language was addressed to an appellant administrator of the estate of the *non-survivor* of the joint tenancy.

In this case the appellant is the *survivor* of the joint tenancy which expressly created a right of survivorship. He can claim under the contract. He had no need for reformation or to plead mistake or fraud.

Referring now to the presumption of equal contributions to the joint deposit, no statute or any rule of law required appellant to prove otherwise than by a preponderance of the evidence that his wife, Ila, had not made any contribution to the deposit.

The presumption that she had contributed to the deposit ceased to have any effect when evidence was presented as to the facts and circumstances.

> "Wherever the facts or circumstances are shown concerning which the presumption is indulged, the presumption ceases and the controversy, is to

be *decided by the weight of the evidence* adduced."
Ryan v. Union Pacific R. R. Co., 46 Ut. 530, 151 Pac. 71

Furthermore if the Court should think to indulge a presumption that the appellant intended his deposits in the joint account to be gifts to his wife, there is no statute or rule of law which requires anything more than a preponderance of the evidence to overcome such presumption. Here, the appellant testified that he established the joint account for convenience in paying household expenses and to give his wife ownership of the balance remaining in the fund in case she survived him. That testimony stands wholly uncontradicted. Likewise testimony that the wife is now deceased.

Appellant submits that the trial court and counsel for respondent have misinterpreted the opinion of the court on the former appeal herein and have given no effect to that part of the opinion wherein this Court said:

> "The courts usually hold that a judgment creditor's rights are limited to the amount of the funds in the account equitably owned by the debtor depositor and do not extend to funds equitably owned by the other depositor. Thus the view has been expressed that if the evidence shows that the depositors have an equal right to the funds in the joint account, a garnishing creditor of one of them may recover one-half of the moneys in such account. . . ."
> *Beehive State Bank v. Rosquist* (supra) page 469.

Also, respondent and the trial court failed to give effect to the direction of this Court:

> "The interest of Ila R. Painter in and to the fund while she was alive, *if any she had,* should be

applied toward satisfaction of appellant's judgment against her." (*Italics supplied*)

Appellant further submits that both the trial court and respondent have failed to give effect to the rule established by former decisions of this Court referred to in appellant's former brief and have relied entirely upon statements of the court to the effect that the recitals in a bank signature card cannot be contradicted or overcome except by proof of fraud, mistake, incapacity, etc. Respondent has failed to differentiate between a situation where a *survivor* of a joint tenancy is standing upon his right as a survivor and the case where an administrator or executor of a*deceased* joint tenant is claiming as *against a surviving joint tenant.* When the Utah cases are studied with due regard to such distinction, it is clear that the appellant here in is entitled to prevail and without any reformation of the contract or any proof of fraud, mistake, incapacity or other infirmity. Appellant can claim under the express language of the contract — and that too whether the former rule of *Holt v. Bayles,* 85 Utah 364, 39 Pac. 2d 715, or the later rule of *Tangren vs. Ingalls,* 12 Utah 2d 388, 367 Pac. 2d 179 is followed. It is unnecessary in this case to attempt a reconciliation of those cases or to choose between the conflicting views expressed in the majority and minority opinions. The appellant here is entitled to recover regardless of which view is followed. He is the survivor of the joint tenancy. He was the sole contributor to the fund. He can claim under either right. The rights are not inconsistent.

Appellant repeats what was said in his former brief:

"The cases dealing with the question are harmoni-

ous in holding that a wife's creditor has no right to levy against a bank account maintained jointly in the names of husband and wife but in which all of the funds belonged to the husband."

11 ALR 3d 1487

(Citing U.S. vs. Third National Bank & Trust Co., 111 F. Supp. 152.)

Appellant again asserts that it will have far-reaching evil consequences if this Court should hold that a creditor of one of two or more persons shown as owners of a joint bank account with right to survivorship may levy by garnishment or attachment or execution against such bank account, regardless of equitable rights of the depositors and regardless of the right of survivorship to which they have in writing agreed.

Respectfully submitted,

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