

1940

Laura Morris and Lucy Pocatello Johnson, Maude Pocatello Racehorse, Josephine Pocatello and Ray Pocatello v. Amasa L. Clark, Joseph E. Robinson, and Box Elder County : Reply Brief of Appellant

Utah Supreme Court

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P. C. O'Malley; George M. Mason; Attorneys for Appellants;

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IN  
**The Supreme Court**  
OF THE  
**State of Utah**

**LAURA MORRIS**, Special Admin-  
istratrix of the Estate of Washing-  
ton Pocatello and Minnie Pocatello,  
His Wife, Both Deceased, and **LUCY**  
**POCATELLO JOHNSON**, **MAUDE**  
**POCATELLO RACEHORSE**,  
**JOSEPHINE POCATELLO** and  
**RAY POCATELLO**, Heirs of  
Washington Pocatello and Minnie  
Pocatello, Deceased,

Plaintiffs and Appellants,

vs.

**AMASA L. CLARK**, **JOSEPH**  
**E. ROBINSON** and **BOX ELDER**  
**COUNTY**,

Defendants and Respondents.

No. 6248

**Appellant's Reply Brief**

**P. C. O'MALLEY**, and  
**GEORGE M. MASON**,

Attorneys for Appellants.

**FILED**

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IN

# The Supreme Court

OF THE

## State of Utah

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LAURA MORRIS, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, His Wife, Both Deceased, and LUCY POCATELLO JOHNSON, MAUDE POCATELLO RACEHORSE, JOSEPHINE POCATELLO and RAY POCATELLO, Heirs of Washington Pocatello and Minnie Pocatello, Deceased,

Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH E. ROBINSON and BOX ELDER COUNTY,

Defendants and Respondents.

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### Appellant's Reply Brief

Respondents in their brief, have not stated whether they agree with the Statement of facts in this case, as set forth in the original and supplemental brief of Appellants, and, not having of-

ferred any controversion of facts, therefore we have right to believe that the statement of facts made by appellants are correct.

In this reply brief Appellants in their citations and arguments will stay strictly within the facts, evidence and instruments contained in the judgment roll, and the facts pleaded in the complaint, and admitted either directly or indirectly by the answer of the respondents to be true and correct, and, found by the Court to be true and correct.

This is an action to quiet title in Appellants to the undivided one-third interest in 80 acres of land, fully described, in the pleadings, and described in the Findings, and in the Decree of the Court. The respondents pleading and praying for affirmative relief of the Court to quiet title in respondents to the said undivided one-third interest.

Appellants base their title to the said premises, upon decrees of the District Court of Box Elder County, Utah, decreeing an undivided one-third interest to the estate of Washington Pocatello, deceased, subsequent to his death, and the respondents claim title to this interest by virtue of a deed executed by Washington Pocatello, and Minnie Pocatello, his wife, for the full 80 acres of land long before it was determined by the Court what interest in the premises Washington Pocatello was entitled to, which said deed was placed in escrow, with the First National Bank of Pocatello, Idaho, to be delivered when the full sum of \$3000, was paid to said Bank, and the property

decreed by the Court, and which deed was delivered long after the death of Washington Pocatello, when only \$1000,00 of the purchase price mentioned in the escrow agreement was paid to the said Bank.

The complaint contains a true and correct copy of the Escrow agreement, in the form of an affidavit or W. E Service, the cashier of the Escrow depositor, which said affidavit was filed of record in Box Elder County shortly after the Deed was placed in escrow. Also the complaint contains true and correct copies of the two decrees of determination of heirship and distribution made by Justin D. Call, Judge of the District Court of Box Elder County, dated November 7th, 1919, decreeing to the estate of Washington Pocatello, then deceased, the said undivided one-third interest. The said decrees of distribution are pleaded in paragraph 6, of appellants complaint (trans 0184 Abs p. 6) as the title of appellants, and true and correct copies of said decrees were attached to the complaint and made part thereof, designated as Exhibits, "C" and "D", (trans 0202 and 0203 Abs 41 to 44). And, respondents in their answer in paragraph 6, admitted all of paragraph 6 of the complaint (trans 0229, Abs, 53). And the Court in its findings No. 8, (trans 0317, Abs 118) set forth verbatim the notice of the escrow agreement, and found that it was filed of record before Washington Pocatello had acquired any title to the premises; the Court having also found in Finding No. 3, (trans 0315- 0316, Abs 113), that Washington

Pocatello, died on or about the 27th day of April, 1917, and the Court found in Finding No. 2, that the four Indian plaintiffs, are now the sole surviving heirs of Washington Pocatello, deceased; and, the Court further found in Finding No. 6, "that on the 7th day of November, 1919 that Justin D. Call made and entered the two decrees determining heirship, and of distribution of the undivided one-third interest to the estate of Washington Pocatello, deceased, and the Court further found in Finding No. 6, that the two decrees were filed of record in Box Elder County, Utah, that a true and correct copy of said decrees were attached to and made part of the complaint, marked Exhibit "C" and "D". Therefore a true and correct copy of each decree of the District Court, establishing the highest muniment of title in the appellants is before this Court, and, the fact that certified copies of the two decrees happened to be introduced in evidence at the time of the trial, and admitted as exhibit "F" and "G", and those particular copies are not before the Court, is immaterial, as the evidence of the highest muniment of title in the appellants is before this court as part of the Judgment Roll.

It is elementary law in actions to quiet title, that where plaintiff rely on record title, and is not in possession, all plaintiff has to do, is to show that record title was in himself or his immediate ancestor, to make out a *prima facie* case and put the defendant upon his proof to prove as genuine the title defendant claims under. It is only necessary

for the plaintiff to go back to the patentee when he is relying exclusively upon paper title, and not in possession. A few recent cases upholding this elementary law are:

Babcock vs Dangerfield (Utah) 94 Pac, 2d, 862.

Lillenkamp, et al v Superior Court of Los Angeles 93 Pac, 2d, 1008.

Saman vs Christensen et al, 79 Pac 2d, 520.

Therefore the undisputed and admitted facts, found to be true and correct by the Lower Court, determines and establishes the Appellants as the sole heirs of Washington Pocatello, deceased and they have the highest record title that it is possible to obtain. Consequently there is no weakness what-so-ever in the appellants claim of title. It is another elementary principle of law, that title having once vested in the heirs, it could only be divested either by the act of the heirs or by a valid decree of a competent Court.

That the Deed of Washington Pocatello and Minnie Pocatello was placed in escrow, and the terms of the escrow agreement, was admitted throughout all of the proceedings, and a full text of the affidavit of W. E. Service the Cashier of the Escrow Holder is before this Court, it was pleaded verbatim in the Complaint, admitted by the respondents, and set forth verbatim in the Court's Findings of Fact, Finding No. 8 (trans 0317, Abs 118).



The evidence before this Court is that Washington Pocatello, died on the 27th day of April, 1917; and is so found in the Court Finding No.3.; that the undivided one-third interest in question was not decreed to his estate until November 7th 1919; that the Deed placed in escrow by him before his death was delivered by the Escrow Holder about the 10th day of November, 1919, some 19 months after his death, and long after the title to his property had become vested in his heirs, when only \$1000 was paid for said deed.

There were two elementary principles of law violated by the delivery of this Deed. First: The power of agency having ceased in the Escrow Depositor at the time of the death of Washington Pocatello, and the rights of the heirs having vested the Depositor had no power to deliver the Deed even if the full amount of the purchase price had been paid; Second: that a Deed delivered by the Escrow Holder without a full performance of all the conditions of the Escrow Agreement, is not a valid delivery and passes no title, even in the hands of an innocent purchaser for value.

Another elementary principle of law is that, when it is once shown that an instrument was placed in Escrow, the burden then shifts to the party claiming title to the instrument, or title under the instrument to prove there was a valid delivery of the instrument.

Appellants have briefed all of these questions in our original brief, and will not brief them further but calls the Court's attention to the Lower

Court's erroneous finding, namely Finding No. 9, where the Court placed all burdens entirely upon the Appellants, and ignored the proof that only \$1000.00 was paid for the deed and that it was delivered long after grantor's death and, to have this question properly before the Court we insert Finding No. 9, verbatim. (trans 0317, Abs, 119):

"That the plaintiffs offered no evidence at the trial of said cause to the effect that U. F. Diteman Grantee in said Warranty Deed on escrow with the First National Bank of Pocatello, Idaho, himself, or with one A. I. Grover, wrongfully, unlawfully, corruptedly and intentionally, with intent to defraud the Estate of Washington Pocatello and the heirs of the Estate of Washington Pocatello, paid to said Escrow Holder only \$1000.00 on the purchase price of \$3200.00 named in said Deed and Escrow Agreement and wrongfully and unlawfully procured from said depository the said Warranty Deed; that said plaintiffs offered no testimony to the effect that said depository bank did unlawfully, wrongfully and contrary to the express terms and obligations of said Escrow Agreement, accept \$1000.00 and deliver to said U. F. Diteman and A. I. Grover the said Deed; that plaintiffs offered no testimony that at the time of the delivery of said deed, the said U. F. Diteman and A. I. Grover and said depository Bank, all had knowledge that Washington Pocatello was dead for more than a year previous to

the delivery of said Deed and that no administrator had been appointed for said estate and that by reason of the failure to offer evidence on said points heretofore set out in this paragraph, the Court finds against the same; the Court further finds that said Warranty Deed was by the First National Bank of Pocatello, Idaho delivered to U. F. Diteman, or some person for him, and that the said deed which on its face recited a consideration of \$3200.00 was regularly filed for record in the office of the County Recorder of Box Elder County, Utah, on November 10th, 1919 at 4:00 P. M., in Book 15 of Deeds at page 440; that the said U. F. Diteman and A. I. Grover, or either of them, did not unlawfully, illegally or for the purpose of cheating or defrauding the Estate of Washington Pocatello and his heirs out of said property, file the said Deed for record in said Box Elder County, Utah, but that said Deed was regularly filed for record and recorded; that the said A. I. Grover, by the recording of said Deed, did not attempt to take from the estate a valuable property right; that the said A. I. Grover did from November, 1919, claim ownership of said lands; that said Deed was not void but was a valid Deed and passed title to the undivided one-third interest of said property to U. F. Diteman; that the depository bank had no right to deliver the Deed to said property without full compliance with the terms and obligations of the Escrow Agreement but the Court finds that

the Deed was regular on its face, recited the consideration of \$3200.00 and from the evidence in the case the Court finds that said \$3200.00 recited in the Deed was paid to said Escrow Holder and that the transaction with said Bank, was not fraudulent; the Court further finds that although Washington Pocatello had title before the property was decreed to his estate, that it was unnecessary to specifically enforce the Escrow Agreement under the provisions of Section 7741, Revised Statutes of Utah, but the Bank upon payment of the consideration aforesaid was justified in delivering said Deed to the grantee therein."

Finding No. 9, is covered by Appellants Assignments of Error No's. 6, 7, 8, 9, and 10, (Abs, Vol. 2, pages 372 to 379). And it is alleged in each assignment of error, that such findings are contrary to the evidence produced by both plaintiffs and defendants; that the Finding is contrary to the law and the record in the case; that the Court in making such finding ignored the Court's own record in the case. Respondent contends that because the Bill of Exceptions were stricken; that the decrees of distribution, in the estates of Yaotes Owa, and Jane and James Brown, copies of which were introduced at the trial and marked Exhibits "F" and "G", are not before the Court, therefore, that this Court has nothing to pass upon. The fact remains that a true and correct copies of the instruments are before this Court as part of the Judgment Roll, and part of the Complaint marked Exhibits "C" and "D", and the same Decrees

of Distribution, are identified in the Lower Court's Findings of Fact, No. 6, as Exhibits "C" and "D", and the Court found that said instruments Exhibits "C" and "D", were true and correct copies of the originals, and the Court further found they were a part of the complaint, consequently the said decree of distribution made by Justin D. Call, District Judge, are before this Court as evidence of Appellants title.

Appellants also, in their assignments of error No's. 6, 7, 8, 9, and 10, at different times alluded to Exhibit "I". Exhibit "I", was a certified copy of the affidavit made by A. I. Grover and filed of record on the 10th day of February, 1920, just two months after he secured the Washington Pocatello, Deed and filed it of record. This affidavit was also made part of the complaint, and is marked Exhibit "E", which was also found by the Court in its Findings of Fact No. 10, to be a true and correct copy and to be part of the complaint. Appellants quote the language of the Court's Finding on this fact: (trans 0318, Abs 121).

"that said A. I. Grover did cause his affidavit to be filed on or about February 10th, 1920, and that a true and correct copy of said affidavit is marked "Exhibit 'E' ", and attached to plaintiff's complaint and that as to said affidavit the same was regularly made in connection with the making of a loan by the said A. I. Grover from the State Land Board of Utah for \$7500.00."

The Respondents have admitted in their answer that the said decrees of distribution, and the Affidavit of A. I. Grover attached to the complaint identified as Exhibits "C", "D", and "I", are true and correct copies of the original instruments filed of record, therefore the instruments, referred to in Appellants Assignments of Error as Exhibits "F", "G" and "I", are all before this Court, and are evidence in this case, in fact the said three instruments contain practically all of the evidence necessary to either affirm or reverse the Lower Court.

The Exhibit "5", referred to in the said Assignment of Error, is the Philips Abstract that the respondents offered in evidence as proof of their title and proof of their good faith in purchasing the land without notice of any infirmity in the title, and it is not material one way or the other to the Appellants whether the said Exhibit "5", is before the Court or not. This being an action to quiet title and the respondents having asked for affirmative relief depending on the abstract, the burden is upon them to have the same before the Court.

Now, Exhibit "M", referred to in Appellants Assignment of Error, No's. 6, 7, 8, 9, 10, 11, 15, 17, 20, 23 34 and 35, is the complete Probate File, No. 355, of the proceedings of the District Court of Box Elder County, Utah, in the Estate of Washington Pocatello, deceased, and that complete file Appellants contend, was, and still is a material part of the Court Record in this case, that the Low-

er Court was duty bound to take judicial notice of the contents of the file, whether offered in evidence or not, and that this Appellant Court is now, if it should deem it necessary for an equitable decision in this case duty bound to take judicial notice of it. We will refer to this particular file and argue it later in this brief.

Exhibit "K" referred to in the Appellants Assignments of Error, is a certified copy of the Deed executed by Washington Pocatello and Minnie Pocatello, which was placed in escrow, and wrongfully delivered, and is the Deed upon which respondents rely upon for good title in their grantor A. I. Grover, and it is immaterial as to Appellants contention, whether a true copy of said deed is before this Court or not, it was introduced by Appellants just to show that the Deed was for the whole of the 80 acres of land, and designated Washington Pocatello, as the sole heir of Yaotes Owa. That is the instrument Respondents must rely on for title, and it is Respondents burden to present that instrument to the Court, if necessary.

Again, alluding to the written instrument, that was identified at the trial, as Plaintiff Exhibit "I", which is the affidavit of A. I. Grover, made and filed of record on the 10th day of February, 1920, a true and correct copy of that instrument, is before this Court. It was pleaded in paragraph 10 of the complaint, and a true and exact copy attached to the Complaint, marked Exhibit "E", pleaded for the purpose to show that A. I. Grover respondents grantor, had full knowledge and no-

tice, of the escrow agreement and the terms thereof, and that the Deed was delivered long after the death of the grantor, and that only \$1000.00 was paid of the purchase price named in the Deed and in the Escrow Agreement; and also for the purpose to show that the respondents had notice of everything recited in the said affidavit. The respondents answered paragraph 10, of the complaint in paragraph 10 of their answer, (trans 0230, Abs 55) and we quote the language of the answer on this instrument:

“admit that A. I. Grover filed an Affidavit which was recorded in the office of the County on February 10th, 1920 in Book H of Miscellaneous at page 529, and that a copy of said affidavit is marked Exhibit “E”, and made a part of said complaint.”

Therefore, the full contents of the A. I. Grover affidavit is before this Court, and it is immaterial that the copy of said Affidavit, which was marked Exhibit “I”, is not before the Court.

Referring to Exhibit “H”, that was referred to in a number of appellants assignments, but particularly referred in Assignment of Error No. 11, this refers to a power of attorney made by U. F. Diteman to A. I. Grover and filed with the First National Bank of Pocatello, Idaho, the Escrow Depositor, and was referred to only to show that A. I. Grover had full knowledge and notice of the rights and status throughout the whole transaction of his grantor U. F. Diteman. The contents



of this power of attorney is not before this Court, but the positive evidence that such a Power of Attorney was given to A. I. Grover by U. F. Diteman, and the date of said instrument and the same was filed with the Escrow Depositor, and is a part of the papers retained by the Escrow Depositor is before this Court, in the form of a Stipulation, prepared and filed in this case by the Respondents, and appears in the Judgment Roll, (trans 0245, Abs 97), describing the papers pertaining to the Escrow and paragraph No. 6, of that stipulation reads as follows:

“6. photographic Special Power of Attorney for U. F. Diteman to A. I. Grover, date November 8th, 1918.”

Respondents are bound by their own stipulation, and it was evidence and proof before the Lower Court and is evidence before this Court that A. I. Grover did have full knowledge and notice that his grantors U. F. Diteman and wife had no legal title to the undivided one-third interest because the deed was obtained long after Washington Pocatello was dead, and only \$1000.00 was paid for same, and the Lower Court's Finding No. 10, wherein the Court found as follows is error:

“That said A. I. Grover did not have knowledge that his grantors in said Quit Claim Deed had no legal title to the undivided one-third interest in said property; that said A. I. Grover did not connive and conspire with U. F. Diteman to secure the Warranty Deed left in escrow without paying the just con-

sideration for the same; that A. I. Grover did not unlawfully and wrongfully file said Deed for Record and did not admit that it was obtained without full compliance with the obligations of the escrow agreement;"

Such finding is contrary to the evidence, record and law in the case, as asserted by Appellants in their assignment of error, No. 11.

Again referring to the File in the Probate Proceedings in the estate of Washington Pocatello, deceased, being File No. 355, of the Probate Division of the District Court of Box Elder County, Utah, which is not before this Court unless the Court will take Judicial notice of same and request its filing with this Court. If not judicially noticed the essential facts disclosed by such record is practically all before this Court and contained in the Judgment Roll of this case which discloses three essential facts:

First: that the District Court of Box Elder County did on the 12th day of January, 1920, issue Letters of Administration to Charles E. Foxley on the estate of Washington Pocatello, deceased, and that said estate has never been settled or closed, and is still on the Court calender of the District Court of Box Elder County, and still under the complete jurisdiction of said Court, and has during all of the 20 years that has elapsed since said appointment been lying dormant on the Court's calender, this fact is pleaded by respondents as a defense yet the Lower Court found in its Finding of Fact, No. 15:

“that there was no evidence offered to the Court as to the whereabouts of Charles E. Foxley, and the Court finds that the proceedings in the Estate of Washington Pocatello were regular insofar as administered and that from January 12th, 1920, the date of the appointment of the said Charles E. Foxley to the date of the filing of the complaint herein, the said Charles E. Foxley was the duly appointed, qualified and acting administrator of said Washington Pocatello, deceased, and represented the said heirs of said estate.”

Appellants in their Assignment of Error No's. 20 and 21, assert that such finding is not supported by the law and evidence in the case; that the court by such finding, is ignoring its own record, and ignoring its own duty. The complaint and the answer and the admissions of the respondents, and the findings of the Court is the evidence before this Court, that the District Court of Box Elder County, Utah, assumed jurisdiction over the estate of Washington Pocatello, deceased, on the 12th day of January, 1920, and retains such jurisdiction to the present day, and the administrator was an officer of the Court, and it was the Court's duty to see that the Administrator performed his duties. It was the Court's duty and function to see that the estate was properly and promptly administered and after 20 years of neglect and inadvertence, the Court can not aid those who wrongfully obtained title to the property, by throwing the blame onto the Administrator and the heirs, and appellants contend that is the very

reason why this Appellate Court is duty bound to take judicial notice of the Probate File in the case of Washington Pocatello, deceased.

Second: The Judgment Roll Exhibit M. discloses that the Probate file does disclose the administrator Charles E. Foxley, reported to the Court that he received \$995.00 from the First National Bank of Pocatello, Idaho, on this contract of sale made by Washington Pocatello, and that was all the funds he received as belonging to the Washington Pocatello estate, and asked the Court to set a hearing on the matter and either approve or disapprove his act, all of those facts are evidenced by the pleadings and found by the Court in its findings of fact to exist, and are before this Court. Appellants in their complaint in paragraph 9, allege that A. I. Grover "paid to the Depositor only \$1000.00 and the Depositor wrongfully and unlawfully delivered the said Deed to A. I. Grover, and that A. I. Grover filed the Deed of record and by virtue of same claimed ownership to the said undivided one-third interest." (trans 0187, Abs 13). Respondents answered this paragraph of the complaint, denying the allegation only on lack of information and belief, but admitted that Charles E. Foxley, was appointed administrator of the Washington Pocatello Estate on the 12th day of January, 1920, and that he took no action to recover the property, (trans 0231, Abs 58).

In paragraph 18 of the Complaint appellants pleaded that Charles E. Foxley reported that he had received \$995.00 belonging to the estate, (trans

0195, Abs 29). Respondents in their answer to paragraph 18 of the complaint among other allegations alleged:

“that the defendants are now for the first time further advised and upon such information admit that Charles E. Foxley reported certain cash from the sale of the premises as being an asset of the Estate of Washington Pocatello, deceased.”

Respondents are bound by the allegations of their answer, and that is an admission that only \$995.00 was received by the Administrator from the First National Bank of Pocatello, and was positive proof before the Lower Court, that only \$1000.00 was paid for the Deed, and is evidence before this Court that only \$1000.00 was paid for the deed, as it is reasonable to presume the Escrow Depositor charged \$5.00 for its service, and that the Lower Court erred in its Findings of Fact No. 9, as heretofore set out. The foregoing quoted allegation of the answer is an admission that only about \$1000.00 was paid by A. I. Grover for the Washington Pocatello, Deed, as alleged by plaintiffs. And Appellants Assignments of Error, No's. 6, 7, 8, 9, 10 and 11, that the Court's Findings of Fact, No's. 9, 10 and 11, is contrary to the evidence, record and law in the case, is supported by the facts set forth and admitted as appears in the Judgment Roll, and it is immaterial whether Exhibits “F”, “G”, “H”, “I”, and Defendants Exhibit “5” that were introduced in evidence is before the Court or not. Also, the fact that Charles E. Foxley

was appointed administrator of the Estate of Washington Pocatello, deceased, and that he received only \$995.00, for the undivided one-third interest that was decreed to the Estate of Washington Pocatello, deceased, and that he reported such to the District Court of Box Elder County, Utah, and that the Court never took any action on the report of the estate other than to appoint the Administrator, and that the estate was never closed and is still pending on the calender docket of said Court, and that Washington Pocatello was dead 19 months before the deed was delivered, are all found by the Court to exist, and all such facts are admitted by the respondents and are before this Court.

The Authorities cited by Respondent do not hold and are not in point, that this Court in this case should not take judicial notice of the Probate File No. 355, of the District Court of Box Elder County, Utah for the reason that not one of the cases cited involve proceedings that is a part of the matter submitted to the Appellate Court for its decisions. Appellants contention is that the Probate Proceedings, in the Washington Pocatello, Estate, is a part of this Action to Quiet Title, and for an accounting of the rents and profits of the Estate; that the Appellate Court has concurrent jurisdiction with the District Court, under the laws of Utah, in the administration of estates and when such case as this is lodged with the Supreme Court, that Court has the same Powers as the District Court, and the entire proceedings is in the hands of this Court, and they have a right to take

judicial notice of every proceeding that has taken place, for the reason that Probate proceedings are indivisible as fully briefed in our former briefs. Appellants further contend that the Lower Court, by its Finding No. 15, (trans 0319 Abs, 127), again made the entire Probate Proceedings in the Estate of Washington Pocatello, deceased, a part of this case.

Said Finding of Fact, No. 15, is set forth verbatim, in Appellants supplemental brief commencing at bottom of page 13, therefore, we do not repeat it.

This very finding by the Court establishes the fact that the Estate of Washington Pocatello, deceased, is still in the hands and under the jurisdiction of the District Court, then how can it be said that the files in the probation of the estate is not part of this action. The Appellate Court is now substituted for the District Court, the Respondents pleaded as defense that Appellants are estopped by virtue of the Appointment of the Administrator, and the Court found in Finding, No. 18, (trans 0321, Abs 132, 133); that it was Justin D. Call, then Judge of the District Court that selected Charles E. Foxley to represent those ignorant Indians, and that Justin D. Call did appoint Foxley as Administrator of the estate and, for the convenience of this Court we quote Finding of Fact, No. 18, verbatim, as follows:

“That Minnie Pocatello and four of her children appeared in Court on or about November 1st, 1919 at the time of the hearing in Petition

for Settlement of the Account and Distribution in the Estate of Yaotes Owa, deceased; that at said time Hon. Justin D. Call, then Judge of said Court, fully advised them of the nature of the probate proceedings then pending and the said Court then requested said Charles E. Foxley to consult with said Minnie Pocatello and the plaintiffs herein; that a conference was thereafter had between said parties and the plaintiffs herein, and their mother then signed a request in the matter of the Estate of Washington Pocatello, deceased, requesting the Court to appoint Charles E. Foxley as Administrator of said Estate, the said request is attached to and made part of the Petition for Letters of Administration in the Estate of Washington Pocatello, deceased; that pursuant to said request and after due and legal notices said Charles E. Foxley, was, as heretofore found, duly and regularly appointed as Administrator of said estate and thereafter qualified and Letters of Administration were issued to him and that said Letters have never been revoked; that in the summer of 1921 Superintendent Donner called Minnie Pocatello and her two oldest daughters, plaintiffs herein, in his office and advised them that Charles E. Foxley reported he had about \$995.00 belonging to the Estate of Washington Pocatello and that after deducting attorney's fees and costs there was left about \$490.00 for the heirs, the exact manner of acquiring said money being not



explained to said parties; that Superintendent Donner then advised said heirs that he did not approve of the settlement of said estate without knowing more about it and spoke something about having the matter investigated; that several months later said heirs were informed from the Superintendent's office that nothing further could be done in the matter, that at different times thereafter the said heirs appealed to the Superintendent's office to make an investigation of the settlement, but they were always told that nothing could be done; that said heirs did nothing further in the said matter until the death of Minnie Pocatello when the heirs again sought an investigation but received no encouragement from the Indian Agency and were told nothing could be done and said heirs took no further action until the filing of this suit."

We ask this Appellate Court, the question; What was the District Court of Box Elder County, Utah, doing all those years toward the proper administration and final settlement of the Estate of Washington Pocatello, deceased?. The conduct of District Courts in performing their most solemn duty to see that the estates of deceased persons is properly administered, is a matter of Public Policy, not only in the State of Utah, but in every State of the Union, and when questions involving such estates are appealed to an Appellate Court, it is the duty of the Appellate Court to take judicial notice of all the procedure and conduct of the

Lower Court in its administration of the estate in support of the Public Policy of the state, and especially in the State of Utah, where the probation of estates is placed in the hands of the District Court, and administered by a District Court Judge. The Judgment Roll in the case at bar discloses that the District Court of Box Elder County, Utah, appointed Charles E. Foxley, as administrator of the Washington Pocatello, estate, and issued Letters of Administration to him on the 12th day of January, 1920, and the Judgment Roll also discloses that the said Administrator made a report back to the District Court that he had accepted \$995.00 from the First National Bank of Pocatello, Idaho but the Judge of the District Court at that time, and all succeeding Judges including the Honorable Lewis Jones, the Judge that made the foregoing Finding of Fact, never took any action in the said matter, and now after 20 years the same Court attempts to charge the plaintiffs with laches and negligence, and that they are estopped by their acts and the statute of limitations from calling upon the Court to do its duty, when no duty whatsoever is imposed by law upon the heirs of an estate at any time, and especially at any particular time, to take any action in the matter.

Respondents in their reply brief, in answer to Appellants contention, that, the Statutes of Limitations do not run against Indians, and the further contention of Appellants, that in this case there is no ground to invoke the Statute of Limitations even if the plaintiffs were white persons,

and possessed of the highest education, that it would be possible to obtain in this enlightened land, limited their argument to the question that the Appellants having come into the Courts of Utah they subjected themselves to the jurisdiction of the courts of Utah. There is no such question in contention before the Court in this case. We answer that argument, by first asserting that plaintiffs never came into the Courts of Utah of their own volition, the judgment roll and the Findings of the Court disclose that for more than 30 years, none of the heirs of Yaotes Owa ever paid any attention to this property, until the artful and designing white man dragged them into the Courts of Utah in an effort to practically steal the property from them, by trying to obtain legal title to their interests through Probate Proceedings for less than one-third its real value. And, now that they were dragged into the District Court of Box Elder County, Utah, for that purpose, they are entitled to receive justice from the hands of the Court. And the questions raised by the Appellants is whether under the Laws of the United States an Indian can give a valid Deed, being wards of the government without the approval of the Government, and furthermore being wards of the Government, and it being a settled rule of law that a state statute of limitations never runs against the Government, can it run against the Wards of the Government. Both those questions Appellants have fully briefed in their original brief under Statutes of Limitations and Co-Tenancy, commencing on page 162

of Appellants Original Brief, and we will not pursue the subject further.

In Conclusion, Appellants summerize that the Facts disclosed by the Judgment Roll, imposed upon the Respondents four different and distinct burdens, none of which respondents even attempted to meet.

First: It being admitted that the plaintiffs were, and are, full-blooded Indians, and Wards of the Government, and it was shown that they were not only the presumed owners of the undivided one-third interest in the land, but the legal owners, the burden is placed upon the white man that claims that property to prove good title to it, and we quote the United States Statute on this point.

“Trial of Right of Property; burden of proof:

“In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.” Act of Congress, June 30, 1834, c 161, Sec. 22, 4 Stat, 763, R. S. Sec. 2125, U. S. Code Compact Edition, Sec. 194.

Second: The judgment roll discloses, and the Court found, the very highest muniment of title to have vested in the Appellants,

then the burden of proof, no matter who the person, is placed upon the respondents to prove the validity of the title they claim under.

Third: When it is shown or admitted as in the case at bar that a Deed was placed in escrow, the burden is upon the parties claiming under the Deed, to prove valid delivery of the Deed.

Fourth: That in all actions to quiet title, where the defendants seek affirmative relief, the burden is upon the defendants to prove the validity of their title, and they can not rely on any weakness in the plaintiff's title.

That the respondents have failed to assume any one of the burdens, is clearly established by the Judgment Roll.

Therefore Appellants have no hesitancy to say to this Court that under all principles of law, evidence, and justice as disclosed by the Judgment Roll, the decision of the Lower Court should be reversed, and title quieted in the Appellants for the undivided one-third interest in the said eighty acres of land, and that respondents be ordered to make full accounting to the Administratrix of the Estate of Washington Pocatello, deceased, beginning with the season of 1925, and ending with the season of 1940.

Respectfully Submitted,  
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 GEORGE M. MASON,  
 Attorneys for Appellants.