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Lucille Jesse Moffat Thornock, Et Al. v. Lois S. Cook : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

No. 16231

LUCILLE JESSE MOFFAT THORNOCK, et al.,

Plaintiffs-Respondents,

vs.

LOIS S. COOK, et al.,

Defendant-Appellant.

On Appeal from Judgment of the
First Judicial District Court
in and for Rich County,
Honorable VeNoy Christofferson, Judge

BRIEF OF RESPONDENTS
LUCILLE JESSE MOFFAT THORNOCK, et al.

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MAY 1979

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No. 16231

LOIS S. COOK, et al.,)

Defendant-Appellant.)

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is an action whereby plaintiffs-respondents, LUCILLE JESSE MOFFAT THORNOCK, et al., (hereinafter "THORNOCK"), seek to quiet title, pursuant to §78-40-1, et seq., Utah Code Ann. (Repl. Vol. 9A 1977), to all minerals in, upon, or under certain real property located in Rich County, Utah.

DISPOSITION IN LOWER COURT

THORNOCK'S Complaint was filed on January 30, 1978. Thereafter, the court entered its Order Allowing Service by Publication (R. 17-18). Service by Publication was completed on February 23, 1978, (R. 36). COOK filed her Answer on February 21, 1978 and a default

certificate as to all defendants except COOK was entered on April 6, 1978, (R. 38).

Thereafter, THORNOCK moved for Summary Judgment (R. 31-3), in response to which COOK filed an Amended Answer and Counterclaim (R. 43 et seq.).

The lower court held its initial hearing on THORNOCK'S Motion for Summary Judgment on April 17, 1978, and continued the hearing, without date, allowing both parties an opportunity to file additional documents.

A second hearing on THORNOCK'S Motion for Summary Judgment was held on September 5, 1978, at which time the matter was taken under advisement.

Subsequent to this hearing, COOK filed her Second Amended Answer and Counterclaim (R. 339-48).

On October 23, 1978, the lower court entered its Memorandum Decision granting THORNOCK'S Motion for Summary Judgment (R. 349), and entering its Judgment and Decree of Quiet Title (R. 358-61 and 354-57).

On November 28, 1978, COOK filed her "Objection to Plaintiff's Proposed Decree of Quiet Title, Judgment and Order Releasing Lis Pendens and Motion for Re-argument" (R. 368-72). The lower court rendered its Memorandum Decision denying COOK'S Objection and Motion on December 11, 1978, (R. 377). COOK'S Notice of Appeal was filed on December 26, 1978, (R. 380).

RELIEF SOUGHT ON APPEAL

Defendant-Appellant, COOK, seeks reversal of the lower court's Judgment of November 16, 1978, and of that court's Memorandum Decision dated December 11, 1978.

Plaintiffs-Respondents, THORNOCK, seek affirmation of the Judgment of November 16, 1978, the Decree of Quiet Title of that same date and of the Memorandum Decision of December 11, 1978.

STATEMENT OF FACTS

For purposes of this appeal, only those facts which were properly before the lower court pursuant to Rule 56, Utah Rules of Civil Procedure, shall be related. Those facts, which may properly be considered, consist of the documents which constitute the chain of title to the disputed minerals, the testimony of Defendant-Appellant COOK, given at her deposition, and those statements of fact contained in the affidavits filed by THORNOCK. Although COOK'S Statement of Facts, except for characterizations, is largely correct, THORNOCK wishes this court to become aware of certain details set forth below, which were omitted from that Statement.

CHAIN OF TITLE

For purposes of clarity, only those aspects of the Chain of Title which are pertinent to this action,

or which are claimed by COOK to constitute a defect in THORNOCK'S title will be discussed.

Through various conveyances, THORNOCK'S predecessors-in-interest, Joseph Hatch and Catherine Hatch, obtained title to approximately 1,946 acres of real property located in Rich County, Utah.

COOK alleges two of those conveyances, through which Joseph Hatch obtained title, are subject to question.

The first conveyance involves Utah State Patent No. 15259, which purports to convey certain real property to "Joseph E. Hatch and company" (R. 238). This conveyance affects approximately 273 acres of the 2,900 acres to which THORNOCK seeks to quiet title.

The second conveyance questioned by COOK involves Patent No. 15260, dated November 22, 1933, (R. 250) which purports to convey certain real property to "Joseph E. Hatch and Ezra T. Hatch". This questioned conveyance involves approximately 80 of the 1,946 acres in question.

Subsequent to these questioned conveyances and to others through which Joseph and Catherine Hatch obtained title, the entire 1,946 acres was conveyed to their four daughters (R. 245).

Thereafter, by Warranty Deed dated April 25, 1947, the four sisters conveyed the subject property to Aden W. Thornock (R. 217).

On May 14, 1950, a Contract and Agreement was executed by and between Aden W. Thornock, party of the first part, and Lawrence B. Johnson, party of the second part, for the sale of the subject property (R. 218). That Contract provides in pertinent part:

No. 5. The party of the first part herein reserves all rights according to what rights may have been conferred in the patents to the above-described land for all coal, oil and other minerals on the above-described land.
(R. 218)

Pursuant to that Contract, on June 30, 1950, a Warranty Deed (hereinafter the "Thornock-Johnson Deed") conveying the subject property to Lawrence B. Johnson was executed (R. 219). That Deed provides in pertinent part:

Reserving to the grantees herein all coal, oil and other minerals as may have been granted in the original patents to the above-described land. [emphasis added]
(R. 219)

On December 1, 1952, defendant Lois S. Cook and Howland J. Cook, now deceased, obtained title to the surface of the subject property through a Warranty Deed, (hereinafter, the "Johnson-Cook Deed") executed by Lawrence B. Johnson, and his wife, Lois L. Johnson

(R. 220). That Deed contains the identical language of reservation as found in the Thornock-Johnson Deed. It provides:

Reserving to the Grantee herein all coal, oil and other minerals as may have been granted in the original patent to the above-described land.
[Emphasis added] (R. 220)

Thereafter, in order to alleviate any confusion generated by this obvious scrivener error in the reservation clause, Howland J. Cook and Lois S. Cook executed a Quitclaim Deed For Coal Oil and Other Minerals, (hereinafter, the "Cook-Thornock Quitclaim Deed"), on September 2, 1959, thereby conveying their interest in the subject minerals to Aden W. Thornock (R. 224).

It is important to note that the "Cook-Thornock Quitclaim Deed" specifically describes the interest intended to be conveyed as follows:

The Grantors intend by this instrument to convey to the Grantee only the rights reserved to the Grantee for coal, oil and other minerals as may have been granted in the original patents to the above-described land and as reserved . . . [in certain identified documents] . . . in the official records of Rich County, Utah.
(R. 224)

PLAINTIFFS' AFFIDAVITS

The affidavit of Lucille M. Thornock, the widow of Aden W. Thornock, (R. 103-20), establishes

several uncontroverted facts. Briefly, in 1958 and 1959 Aden W. Thornock began leasing the mineral estate which is presently at issue. During that period, he became aware of some "minor problem" with the reservation of the mineral estate in the various conveyances and for that reason requested COOK and her, now deceased, husband to provide him with a quitclaim deed to the mineral estate. To this end, affiant and her husband conveyed an additional forty acres to the Cooks, to no avail.

It became necessary to retain an attorney, M. C. Harris, Esq. of Logan, Utah. Mr. Harris made a formal demand, attached to Lucille Thornock's affidavit as Exhibit "A", upon the Cooks for a quitclaim deed. In response to the demands of Mr. Harris, Mrs. Thornock was supplied with a document entitled "Quitclaim Deed for Coal, Oil and Other Minerals", a copy of which is attached to her affidavit as Exhibit "C" (R. 118-20).

In addition, Mrs. Thornock states that neither herself, nor her late husband, ever retained or consulted Mr. Victor Sagers of the firm of Dahl & Sagers.

The affidavit of Burton H. Harris supports and corroborates the affidavit of Lucille Thornock (R. 121-25). Mr. Harris, the present managing partner of the law firm of Harris, Preston & Gutke of Logan, Utah,

states that M. C. Harris was formally a partner in the predecessor firm of Harris, Preston & Gutke and that the records of the predecessor firm have been maintained in the regular course of business. Mr. Harris states that the documents attached to his affidavit as Exhibits "A" and "B" (R. 124-25) are maintained in the "closed" law office files of the late M. C. Harris. Those documents are copies of the letter of demand and transmittal letter which also are attached to the affidavit of Mrs. Thornock.

DEPOSITION OF LOIS S. COOK

The testimony of COOK given during the taking of her deposition on March 21, 1978, directly contradicts the denials and affirmative allegations of her Second Amended Answer and Counterclaim (R. 339-48).

Specifically, Mrs. Cook testified that the Cook-Thornock Quitclaim Deed was executed by herself:

Q. [By Mr. Jensen] Was this document, and I am referring to Exhibit 1 . . . [the Cook-Thornock Quitclaim Deed] . . . , executed because of the continual requests of Mr. Thornock, to which you have referred?

A. He hounded us continually and my husband said, "You sign this paper." So I did, but he was after us continually.
(Cook Depo. p.10, lines 11-16)

In addition, in support of the testimony quoted immediately above, Mrs. Cook stated:

Q. [By Mr. Jensen] Referring to the third page of Exhibit "1" . . . [the Cook-Thornock Quitclaim Deed] . . . which is before you, and directing your attention to the signature line, which is signature one--directing your attention to the signature line thereon, does that appear to be your signature?

A. Yes. It looks like it.

Q. And does that appear to be the signature of your deceased husband?

A. I don't know but I would say it looks like it.

. . .

Q. The question is: Do you have any reason to believe that these signatures to which I have directed your attention are anything other than the signatures they purport to be?

A. No.
(Cook Depo. p. 13, lines 19-25, p. 14, lines 1, 2, 13-16)

As to the allegations of coercion, threat and duress contained in COOK'S Second Amended Answer and Counterclaim (R. 340), Mrs. Cook testified:

Q. [By Mr. Jensen] And when you say that he was hounding you for something, can you remember what it was?

A. Well, no. He wanted us to sign some papers and I didn't believe in it.

Q. I understand that, but do you recall what Mr. Thornock said to you?

A. No.

Q. Do you recall what he may have said to your husband?

A. I don't know.
(Cook Depo. p. 19, lines 10-19)

. . .

Q. [By Mr. Jensen] I am referring to Aden Thornock. Did he threaten you with physical violence when he approached you?

A. Oh, no.

Q. Nothing like that?

A. No.
(Cook Depo. p. 21, lines 13-18)

. . .

Q. [By Mr. Axland] I want you to itemize for me each and every incident wherein Mr. Thornock was continually after you to sign something.

[Instruction to the witness by Mr. Oman omitted]

A. I can't do that. That's too many years ago.

Q. I want you to give me your best recollection then, Mrs. Cook, of precisely what Mr. Thornock did.

A. I can't do that. I don't know.
I can't do that.
(Cook Depo. p. 45, lines 15-24)

. . .

A. I can't say the precise things that he said years ago.

Q. Did you have conversations with Mr. Thornock.

A. Not many, only when he came to me.
(Cook Depo. p. 45, lines 3-6)

. . .

Q. [By Mr. Axland] Did anyone force you to sign Exhibit "1" . . . [the Cook-Thornock Quitclaim Deed] . . . to your deposition?

A. No.

Q. Did anyone threaten you?

A. No.

Q. Did anyone coerce you to sign Exhibit "1"?

A. I signed it because my husband wanted me to.

Q. Did anyone, to your knowledge, force or threaten your husband to require him to sign it?

A. I don't know.

Q. Do you have any facts in your possession at this time that anyone, Mr. Thornock or anyone else in the world, threatened your husband to sign Exhibit "1"?

A. I don't know.

Q. Mrs. Cook, do you have any facts in your possession.

A. No.

Q. Did anyone threaten you or your husband, forcing him to sign Exhibit "1"?

A. No.
(Cook Depo. p. 51, lines 19-25,
p. 52, lines 1-13)

. . .

Q. Did anyone use bodily force to require your husband to sign Exhibit "1"?

A. Not that I know of.

Q. Do you have any facts that anyone threatened your husband with any kind of action if he did not sign Exhibit "1"?

A. Not that I know of.

. . .

Q. Okay. Now you have indicated further that Mr. Thornock was not present when Exhibit "1" was signed; isn't that correct?

A. Right.
(Cook Depo. p. 53, lines 2-7,
14-17)

In summary, Mrs. Cook testified that: (1) she signed the Cook-Thornock Quitclaim Deed, (2) the signature which purports to be that of Howland J. Cook appears to be that of her deceased husband, (3) she knows of no facts which would tend to indicate that the signatures which appear on the quitclaim deed are other than what they purport to be, (4) the quitclaim deed was signed at the request of Aden W. Thornock, (5) a

quitclaim deed was the only document which she signed at the request of Mr. Thornock, (6) although she characterized her contacts with Aden W. Thornock as "hounding", she does not recall even the substance of Mr. Thornock's statements during those encounters, (7) she was not threatened or coerced by Mr. Thornock, (8) to her knowledge, her deceased husband was neither threatened nor coerced and, (9) Aden W. Thornock was not present at the time the quitclaim deed was signed.

Other than in matters of characterization, the Statement of Facts contained in COOK'S Brief on Appeal appears to be correct with the exception of the statement contained in subparagraph (d) found on page 5 of COOK'S Brief. In essence, COOK has stated she has no recollection of executing the Cook-Thornock Quitclaim Deed. This statement is correct insofar as Mrs. Cook testified to no specific recollection of the immediate circumstances surrounding the execution of the quitclaim deed. However, the court's attention is directed to the fact that Mrs. Cook does not dispute the authenticity of the signatures appearing on that deed, (Cook Depo. pages 37, 38), and that she does recall executing that document at the request of Mr. Thornock and her, now deceased, husband (Cook Depo. p. 10, lines 11-16).

ARGUMENT

Defendant-appellant COOK, in her Brief on Appeal, claims error on the part of the lower court in two respects. One claim involves an alleged question of fact pertaining to the validity of the Cook-Thornock Quitclaim Deed, the other, an alleged error of law in the interpretation of the Thornock's chain of title and a consequent claim by adverse possession. Those issues will be discussed separately.

As COOK makes no objection to the lower court's ruling concerning the scrivener errors found in the reservation clauses of the Thornock-Johnson and Johnson-Cook Warranty Deeds that aspect of this action will not be addressed (see the lower court's first and second Memorandum Decisions, R. 349 and 377).

POINT I

COOK MAY NOT PROPERLY ASSERT A CLAIM BY VIRTUE OF ADVERSE POSSESSION AND MAY NOT RAISE AN ALLEGED DEFECT IN THORNOCK'S TITLE AS A DEFENSE

Two fundamental precepts of the law preclude COOK'S claim to title by adverse possession and her assertion of alleged defects in Thornock's chain of title. Those fundamental considerations are: (1) under Utah law one may claim through adverse possession only under a claim of title, and (2) in defense of an action to quiet title, a defect in plaintiff's chain of title may be asserted only if the defendant claims title by virtue of the defect.

Sections 78-12-8 and 78-12-10 Utah Code Ann. (Repl. Vol. 9A 1977) provide for assertion of title by virtue of adverse possession. Section 78-12-8 provides for adverse possession by those who enter possession under a claim of title founded upon a written instrument or judgment. Section 78-12-10 provides for adverse possession under a claim not founded upon a written instrument or judgment but under a claim of title.

There is no provision under Utah law for assertion of adverse possession where the claimant has entered into possession without claim of title.

Equally basic to the law of real property is the proposition that a defendant in an action to quiet title cannot defeat plaintiff's title by showing a superior title in some third person through whom the defendant makes no claim. As noted by the court in Federal Savings and Loan Insurance Corp. v. Hatton, 156 Kan. 673, 135 P.2d 559 (1943):

In an action to quiet title where it is shown that the plaintiff is in actual possession of the property in controversy, the defendant cannot defeat the plaintiff's action except by showing a paramount right in himself. He cannot defeat such action by showing a superior title in some third person. (135 P.2d at 563)

This basic proposition is perhaps most succinctly stated at 65 AmJur 2d QUIETING TITLE §45 as follows:

One cannot defeat a quiet title bill by showing that the complainant's claim or interest . . . is subject to superior rights in third persons who are not parties to the suit; it is sufficient that the interest asserted by complainant in possession be superior to that of those who are parties defendant. In this regard, it has been said that the court determines the rights of the parties under the pleadings and evidence, grants proper relief, and determines the better title as between the parties to the proceeding, though a title superior to the rights of either party may be held by stranger to the suit.

In the present action, COOK asserts title to approximately 352.88 acres through a simultaneous contradiction of both these basic principles.

In brief, COOK argues that THORNOCK'S chain of title is defective by virtue of the absence of conveyances of approximately 80 acres from Joseph Hatch and Ezra Hatch to Joseph Hatch and Katie Hatch and of approximately 272.88 acres from Joseph E. Hatch and company to Joseph Hatch and Katie Hatch.

As these parcels are included in the property conveyed to COOK by Johnson, COOK, of course, has been in actual possession of the surface since the date of conveyance.

COOK argues that neither THORNOCK nor her predecessors-in-interest held title to this small portion of the land due to the alleged defects and

further that she has obtained title to the same through adverse possession. For purposes of clarification, a simplified diagram of the chain of title with emphasis on the alleged defects is attached hereto as Exhibit "A".

As is apparent from the diagram attached as Exhibit "A", COOK'S claim of title is derived through Aden W. Thornock. COOK has no claim of title by virtue of any interest which may reside in Ezra Hatch or in Joseph E. Hatch and company. Therefore, she derives no interest from the alleged defects in title.

For these reasons, COOK is placed in the incongruous position of either denying her own claim of title or admitting the validity of THORNOCK'S title.

An essential element of COOK'S adverse possession is an assertion that she possesses the property under a claim of title. That claim of title is derived through Aden W. Thornock. By asserting this claim of title COOK simultaneously concedes the validity of THORNOCK'S title.

In short, Cook has attempted to simultaneously deny and assert the validity of THORNOCK'S title.

Unlike Joseph Heller's famed "Catch-22", there is an avenue of escape from this logical labyrinth. COOK may not claim title by adverse possession for the reason that an essential element of her assertion is

self-defeating. In fact, any allegation that THORNOCK has no title to the questioned 300 acres also serves as a denial of COOK'S claim of title to the same parcel, thereby rendering her a stranger to the title and defeating any claim by adverse possession.

Similarly, COOK may not raise the alleged defects in THORNOCK'S chain of title in defense of this quiet title action. By asserting those defects, she, of necessity, denies her own title to the questioned 300 acres, thus becoming a stranger to the title. As a stranger to the title she has no standing to attack THORNOCK'S title.

In summary, COOK must concede the validity of THORNOCK'S title as a prerequisite to an assertion of adverse possession, and for that reason the claim by adverse possession must fail. In addition, she may not raise the alleged defect in THORNOCK'S chain of title as a defense to the quiet title action because by doing so, she becomes a stranger to the 300 acres thus precluding her attack on THORNOCK'S title as to that portion.

POINT II

SHOULD THIS COURT FIND COOK'S CLAIM BY ADVERSE POSSESSION VALID, TITLE TO THE MINERALS REMAINS IN THORNOCK

Should this Court find COOK'S claim by adverse possession to approximately 300 of the 1,946 acres involved in this action to be valid, THORNOCK still

retains title to the minerals, for two distinct reasons. The doctrine of after-acquired title is applicable to the reservation of minerals in the Thornock-Johnson and Johnson-Cook Deeds and also to the Cook-Thornock Quit-claim Deed.

The lower court has ruled that the language of reservation found in the Thornock-Johnson and Johnson-Cook deeds serves to reserve all rights to minerals to the grantors (R. 349 and 377). COOK does not contest that portion of the court's decision.

The effect of this reservation of title to minerals is to "reconvey" the minerals from the grantee back to the grantor.

This basic distinction between a reservation and an exception is noted at 23 AmJur 2d DEEDS §262, where it is stated:

Where the terms are used in their strict or accurate sense, there is an important distinction between a "reservation" and "exception" in a conveyance of land. A "reservation," on the one hand, is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant. On the other hand, an "exception" operates to withdraw some part of the thing granted which would otherwise pass to the grantee under the general description . . . A reservation is the taking back of a part of that already granted . . . In short, an exception excludes some

part of the thing from the conveyance and the title to that part remains in the grantor by virtue of its original title, while a reservation creates a new right out of the subject of the grant and is originated by the conveyance.

This Court has recently recognized this important distinction in Burton v. United States, 29 Ut.2d 226, 507 P.2d 710 (1973) where the court stated:

An exception excludes from the grant the property or estate therein described. If a conveyance contains a reservation, the entire property or estate described passes to the grantee, subject to the right, estate, or easements reserved. The reservation creates a new right issuing out of the property granted, which did not exist as an independent right before the grant [emphasis added] (507 P.2d at 712).

As a reservation creates a new and independent right issuing from the grantee back to the grantor, it must be treated as a conveyance.

By virtue of the provisions of Section 57-1-3 Utah Code Ann. (Repl. Vol. 6A 1974) a grant of fee simple is presumed unless it appears from the conveyance that a lesser estate was intended. No language evidencing an intent to convey a lesser estate is found in the reservation clauses of either the Thornock-Johnson or Johnson-Cook deeds; therefore, a reconveyance of all minerals to the grantor in fee is presumed.

Because the reconveyance of minerals is in fee simple, the provisions as to after-acquired title found in Section 57-1-10 Utah Code Ann. (Repl. Vol. 6A 1974) are applicable.

Therefore, should the court find that COOK obtained title to the questioned 300 acres by adverse possession, title to the minerals passed immediately, through application of the doctrine of after-acquired title, from COOK to Johnson and immediately from Johnson to Aden W. Thornock and thence to his heirs.

The doctrine of after-acquired title is similarly applicable to the Cook-Thornock Quitclaim Deed, but on a somewhat different basis.

In her Brief on Appeal, COOK has ably cited those cases and authorities which stand for the general proposition that the doctrine of after-acquired title is inapplicable in the context of a quitclaim deed. However, Cook has failed to note the rationale for this general rule and hence the exception to that rule which is presently applicable.

The general proposition, as well as the exception, are stated at 23 AmJur 2d DEEDS Section 303 as follows:

A conveyance, although using the terminology of a quit-claim deed, may be regarded as something more than such a deed and operate to estop the grantor from asserting an

after-acquired title, when it recites further that a definite estate is conveyed thereby, or when the circumstances clearly indicate that, as between the parties thereto, a particular interest or estate was intended to be passed by the instrument.

This exception was implemented by the court in McAdams v. Bailey, 169 Ind. 518, 82 N.E. 1057 (1907) where the court held that a distinct recital in a quitclaim deed, evidencing that the parties proceeded on the theory that a particular interest was thereby conveyed, may be as effective to create an estoppel as a warranty.

Brief examination of the Cook-Thornock Quitclaim Deed reveals an obvious intent to convey a particular, identifiable, presently existing interest.

That deed provides in pertinent part:

The grantors intend by this instrument to convey to the grantee only the rights reserved to the grantee for coal, oil and other minerals as may have been granted in the original patents to the above-described land and as reserved in . . . [various indentified documents] . . . in the official records of Rich County, Utah. (R. 224)

This identification of a particular interest could not be more absolute. In addition, the intent to convey a definite estate is clear on the face of the document.

Due to these factors, the doctrine of after-acquired title is applicable. Therefore, should the court find COOK obtained title to the questioned 300 acres through adverse possession, title to the minerals therein immediately vested in the heirs of Aden W. Thornock through application of the doctrine of after-acquired title.

In brief, as the doctrine of after-acquired title is applicable to both the reservations of minerals found in the Thornock-Johnson and Johnson-Cook deeds as well as to the Cook-Thornock Quitclaim Deed, should the court find that COOK has obtained title to the questioned 300 acres through adverse possession, title to the minerals is vested in THORNOCK.

POINT III

THERE IS NO QUESTION OF FACT AS TO THE VALIDITY OF THE COOK-THORNOCK QUITCLAIM DEED

In her Brief on Appeal, COOK questions the validity of the Cook-Thornock Quitclaim Deed and impliedly asserts that a question of fact exists as to the circumstances of its execution. However, absent the unfounded allegations contained in Cook's Second Amended Answer and Counterclaim (R. 339-48) and in Cook's Brief on Appeal, she has failed to produce any evidence which would tend to support her allegation of the existence of a question of fact.

The allegations and conclusions contained in COOK'S Second Amended Answer and Counterclaim may not properly be considered by this court. Rule 56(e), Utah Rules of Civil Procedure provides, ". . . affidavits shall . . . set forth such facts as would be admissible in evidence . . ." The legal conclusions found in the Second Amended Answer would not be admissible in evidence at the time of trial and therefore may not be considered in the context of a Motion for Summary Judgment.

In addition, the testimony of Lois Cook given at her deposition directly contradicts the Conclusions and Allegations of the Second Amended Answer.

In her Answer, COOK has denied executing the Cook-Thornock Quitclaim Deed (R. 380). However, at page 10, lines 11-16 of her deposition, she admits that she signed that deed at the request of her husband.

COOK further alleges that she signed the quitclaim deed under "threats, coercion and duress." However, at page 19, lines 10-19 of her deposition she testified that she had no recollection of statements made by Mr. Thornock and that she had no knowledge of statements he may have made to her husband. She further testifies at page 21, lines 13-18 that there were no threats of physical violence, and at pages 51, 52 and 53 of her deposition, Cook acknowledged she was

not forced to sign the quitclaim deed, that she was not threatened, that she was not coerced and that she has no knowledge of any threats or coercion directed at her husband. In addition, she acknowledged that Aden Thornock was not present at the time the quitclaim deed was signed.

The testimony of Lois Cook, as contained in the transcript of her deposition, is the only evidence properly before the court concerning the issue of the validity of the quitclaim deed. A review of her testimony clearly indicates that, as a matter of law, the execution of the quitclaim deed was not obtained through threat, coercion or duress.

COOK attempts to raise an additional issue concerning the presence of a handwritten insertion on the first page of the Cook-Thornock quitclaim deed. There is no evidence before the court concerning that insertion other than that it is present. COOK acknowledges that the only surviving witness to the execution of that document, Mrs. Cook herself, has no specific recollection of the circumstances surrounding its execution (COOK'S Brief on Appeal, page 11). Due to this absence of evidence, COOK may only speculate as to the presence or absence of the insertion at the time of the execution of the quitclaim deed. Clearly, summary judgment may not be set aside on the sole basis of

speculation, especially where, as in the present case, there is no possibility that additional evidence might be obtained.

As to COOK'S reference to the manner of the taking of her deposition, THORNOCK assumes, as does this Court, that the interests of appellant were protected by competent counsel.

In summary, on the record, the only hint of duress, coercion or estoppel is COOK'S characterization of Aden Thornock's requests as "hounding", however, her specific testimony as to Mr. Thornock's conduct demonstrates that, as a matter of law, neither duress, threat, nor coercion were present.

CONCLUSION

COOK'S claim by adverse position to 300 of the approximately 1,946 acres involved in the present action must fail for the reason that a prerequisite to the assertion of that claim is an acknowledgment of the validity of the title of Aden W. Thornock to the same parcel. As COOK does not contest the lower court's ruling concerning the reservations of minerals in the Thornock-Johnson and Johnson-Cook deeds, acknowledgement of the validity of the title of Aden W. Thornock constitutes an admission of THORNOCK'S claim to quiet title.

The alleged defects in THORNOCK'S chain of title may not properly be asserted by COOK as she claims no interest in the land by virtue of those defects and for the further reason that a defendant cannot defeat an action to quiet title by showing a superior title in some third person.

As is apparent from a review of the transcript of the deposition of Lois S. Cook, there is no question of fact, on the record, as to the validity of the Cook-Thornock Quitclaim Deed.

Finally, even should the court find COOK'S claim to 300 acres by adverse possession to be valid, the title to the minerals therein has vested in Thornock by virtue of application of the doctrine of after-acquired title.

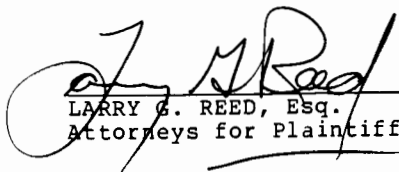
Plaintiffs-respondents, THORNOCK, respectfully request that this Court affirm the Judgment, and Decree of Quiet Title, and Memorandum Decision of December 11, 1978 of the court below.

DATED this Nth day of May, 1979.

Respectfully submitted,



LEROY S. AXLAND, Esq.



LARRY G. REED, Esq.
Attorneys for Plaintiffs-Respondents

State of Utah
Patent No.
15260 (80 A.)

Joseph Hatch and
Ezra Hatch

No Conveyance

State of Utah
Patent No.
15259 (273.88 A.)

Joseph E. Hatch
and company

No Conveyance

various irrelevant conveyances

Joseph Hatch and Katie Hatch

FOUR SISTERS
(Lota Kennedy, Leatha Spencer,
Vera Pearl, and Thelma McKinnon)

Aden W. Thornock

(with reservation of minerals)

Lawrence Johnson

(with reservation of minerals)

Howland Cook and Lois Cook

(Quit Claim for Minerals)

Aden W. Thornock

EXHIBIT "A"

CERTIFICATE OF HAND DELIVERY:

This is to certify that two copies of the foregoing Brief of Respondents were hand delivered this 14th day of May, 1979, to Milton A. Oman, Attorney for Appellant, Fifth Floor, American Savings Building, Salt Lake City, Utah 84111.