

1951

Northcrest, Inc. v. Walker Bank & Trust Co. et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NORTHCREST, INC., a corporation,
Plaintiff and Appellant,

— vs. —

WALKER BANK & TRUST COM-
PANY, a corporation, as executor
of the last will and testament and
estate of LUCIE R. THOMAS, who
was sometimes known as L. R.
THOMAS, deceased; JOHN LIV-
INGSTON THOMAS and ADE-
LAIDE R. THOMAS, his wife;
and GERTRUDE THOMAS
GARDNER,

Defendants and Respondents,

HUGH L. THOMAS, JR, unmar-
ried; WALTER WRIGHT; and
H. C. BROWNLEE, Trustee,
Defendants.

Case No.
7735

Brief of Appellant

Appeal From District Court Salt Lake County
Hon. David T. Lewis, Judge

FILED

OCT 22 1951

THOMAS & ARMSTRONG,

Attorneys for Appellant

Clerk, Supreme Court, Utah Salt Lake City, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

NORTHCREST, INC., a corporation,
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— vs. —

WALKER BANK & TRUST COMPANY, a corporation, as executor of the last will and testament and estate of LUCIE R. THOMAS, who was sometimes known as L. R. THOMAS, deceased; JOHN LIVINGSTON THOMAS and ADELAIDE R. THOMAS, his wife; and GERTRUDE THOMAS GARDNER,

Defendants and Respondents,

HUGH L. THOMAS, JR, unmarried; WALTER WRIGHT; and H. C. BROWNLEE, Trustee,
Defendants.

Case No.
7735

Brief of Appellant

STATEMENT OF THE CASE

Quiet title action by Northcrest, Inc., a Salt Lake real estate company.

The lands are two adjoining tracts, roughly 40 acres each, located on the North Bench of Salt Lake City. (Title to some, but not all, of a number of platted lots in

the Southwest corner of the *West* 40 acre tract was stipulated and adjudged in Northcrest. The other lots, however, were litigated and were adjudicated the same as the main tracts. See map Exhibit A.)

Principal defendants were a brother and sister, John Livingston Thomas (and wife), who lives in New York City, and Gertrude Thomas Gardner, who lives in the Virgin Islands. (Tr. 4). A defendant also was their unmarried younger brother, Hugh L. Thomas, Jr., Salt Lake City. He had received \$3,200.00 from Northcrest for a deed to the lands. (Tr. 78). Also defendant was Walker Bank and Trust Company, their mother's executor. She was Lucie R. (L. R.) Thomas. She was the former owner. All parties who claim title claim through her as the common source.

As stated, Hugh, Jr., the younger brother, received \$3,200.00 from Northcrest for a warranty deed from himself to that company. That deed was dated June 11, 1948. (Exhibit C). He had held an earlier deed from his mother, Lucie, to him dated and recorded the year before, September 16 and December 11, 1947. (Exhibit B).

Hugh's brother and sister learned he had sold. They were wroth. They claimed the mother's deed to him was spurious (not being in her own signature). They claimed she had not conveyed but had died owning title and that Hugh's deed—after their mother's death—therefore conveyed only his one-third share as her devisee—no more. (John, Gertrude and Hugh, Jr. were her only children and sole heirs and devisees in equal shares.)

Beleaguered by kin and purchaser both, young Hugh wanted no part of this suit. So he defaulted. (Two others, formal parties only—not important here—did not defend, defendants Wright and Brownlee.)

The trial proceeded. Northcrest was opposed by John, Gertrude and their mother's executor.

But, by then Northcrest did not rest on Hugh's title alone. By then it had become able to trace title back to the mother in two other ways besides: (1) through an early recorded deed by her to Utah Savings & Trust Company and a recent one in turn from Utah Savings to itself, and, also, (2) through an old recorded deed to about *half* of the property (most of the West 40 acre tract) from mother Lucie to H. H. Hempstead and a deed from Hempstead's widow and decree against Hempstead's administrator to that half as well. (Manifestly, Northcrest in proving title could not be limited to evidence of ownership through one specific chain alone. A party may prove ownership by any means he can; and by as many alternate titles as he has. That postulate is, of course, implicit in the law. One alleging title in general terms—not by a specific chain—may prove "whatever title he has". *State vs. Rolio*, 71 Utah 91, 262 P. 987.)

But, the court fell into error as the trial progressed. It let Utah Savings & Trust Company give evidence that its old 1914 records would seem to indicate that they had held a warranty deed from Lucie only as security for a loan now repaid. Too, it heard evidence from the lips

of a notary public herself impeaching her solemn, official, recorded certificate thereon to the contrary, that Lucie had not in fact acknowledged the deed which bore her name and ran to her son, Hugh, the younger brother who had afterward sold to Northcrest. And, it refused to honor, but entirely disregarded, even plaintiff's title to the West half of the property which ran from Lucie-to-Hempstead-to-Northcrest. In fact, the court refused to find upon the *effect* of the Hempstead title at all, its findings only reciting some of the evidence relating thereto.

And when the trial ended, the court decided (1) that the deed from Lucie to son, Hugh, was invalid, (2) that her warranty deed to Utah Savings & Trust Company was only a mortgage, not a deed absolute, (3) that Lucie had not conveyed to anyone at all but died owning the property (what about Hempstead's West 40 acres?), (4) that sons Hugh and John, and daughter, Gertrude, each took a third on their mother's death as her devisees, and, (5) Northcrest could have title only to Hugh's $\frac{1}{3}$ by his deed to them.

The court then adjudicated the title accordingly: Northcrest $\frac{1}{3}$, John $\frac{1}{3}$, and Gertrude $\frac{1}{3}$, subject however, to probate of Lucie's estate and possession by her executor. (Tr. 113). This was error, as we shall see. The court should have awarded the entire fee to Northcrest, not just $\frac{1}{3}$. The judgment, therefore, must be reversed.

STATEMENT OF POINTS**Northcrest's Title Through Utah Savings And Trust Company.**

1. The Evidence Failed To Establish The Deed From Hugh's Mother (And Father) To Utah Savings And Trust Company Was Intended As A Mortgage.
2. The Evidence Was Wholly Insufficient To Establish The Bank's Deed As A Mortgage.
3. The Evidence By Utah Savings And Trust Company Attempting To Prove The Deed A Mortgage Was Incompetent After It Had Conveyed To Northcrest.

Northcrest's Title Through Hugh L. Thomas, Jr.

1. The Notary's Testimony Denying Lucie Acknowledged The Deed To Hugh, Jr. Was Incompetent.
2. Since the Notary's Evidence That Lucie Did Not Acknowledge The Deed To Hugh, Jr. Was Incompetent And Insufficient, The Acknowledgment Stands. The Deed (Exhibit B) Survives.

Northcrest's Title Through Hempsteads.

1. Northcrest Established Title To The West Forty Acre Tract Through H. H. Hempstead, Regardless Of Its Alternate Titles To Both Tracts.

ARGUMENT

NORTHCREST'S TITLE THROUGH UTAH SAVINGS
AND TRUST COMPANY

1. The Evidence Failed To Establish The Deed From Hugh's Mother (And Father) To Utah Savings & Trust Company Was Intended As A Mortgage.

On this proposition, all else aside, we should be willing to rest appellant's case.

That a deed absolute on its face may be shown to be *intended* only as a mortgage, we cannot deny. It is too late. The rule is universal. Utah agrees. *Coray vs. Roberts* 82 Utah 445, 25 P. 2d 940. *Thornley L. L. Company vs. Gailey* 105 Utah 519, 143 P. 2d 283. *Gibbons vs. Gibbons* 103 Utah 266, 135 P. 2d 105.

The only question in every case is what did the parties *intend*; what was their *intention*.

“Whether a deed absolute in form is to be taken as a mortgage depends on the *intention* of the parties at the time of its execution.” 59 C. J. S. Mortgages § 36.

The *mutual* intention of the parties must be proved. 36 Am. Jur., Mortgages § 132. This implies, *both* parties, grantor and grantee, must intend the deed to be a mortgage.

“In order to convert a deed absolute in its terms into a mortgage it is necessary that the understanding and intention of *both parties*,

grantee as well as grantor, to that effect be concurrent and the same.” (Italics added) Id.

Obviously, therefore,

“A mere secret intention on the part of *one* of the parties, not disclosed or communicated to the other, will not have the effect of changing the character of the transaction. Still less will this result where the parties have directly contradictory *intentions*.” Id.

The evidence here was fatally deficient. That of the *grantee* aside, the intention of the *grantors* was never shown; there was no evidence at all upon the subject of the grantors’ intention; *absolutely none*.

Northcrest claimed through Utah Savings and Trust Company. It proved a recorded deed to both 40 acre tracts (less the small area containing the platted lots) from Lucie R. Thomas and husband to Utah Savings & Trust Company in 1914. (Exhibit D). It was a warranty deed. It said so. And it contained full covenants of warranty. It was upon its face a conveyance absolute. And, Utah Savings later conveyed to Northcrest in 1947. (Exhibit E). This deed to Northcrest was not disputed. It was received without objection. (Tr. 24.)

The respondents claimed Utah Savings had no title to convey to Northcrest. They tried to prove the deed to Utah Savings was really only a mortgage; *ergo*, Utah Savings had nothing to convey to Northcrest and, consequently, Northcrest got nothing by that chain. And so they called an officer of Utah Savings. E. R. McGee,

Assistant Cashier. They questioned him (in 1951) about the deed to Utah Savings (in 1914) before he even worked at the bank. Obviously he knew nothing of the transaction; he said so. (Tr. 66). But, obviously, too, he was called to try and prove nevertheless that the 1914 deed to the bank (Exhibit D) had been *intended* only as a mortgage. Remember, the intention of both parties, *not just one*, must be shown to prove a deed a mortgage. McGee's inability to prove that is self evident. To his credit, however, it must be said he did his best. But it wasn't enough. It just could not be proved. He did not testify to anything about the *grantor's* intention at all. He couldn't. He produced some records of the bank. But they said nothing about the subject. It just wasn't there. (We claim he proved nothing about the intention of the grantee either in respect to *this* particular deed. The bank's record did not refer to any deed in particular. See Page 21 *infra*.)

McGee testified that the bank's old records showed a loan to the grantors, renewed twice afterward; that the bank's cards on the two renewals (white cards 6447 and 7178 of Exhibit 8) indicated the bank had held a warranty deed for security to "part" of Section 29 (but what part?); and that the loan and renewals had been paid. Of course, no deed from Utah Savings back to the grantors was proved. Respondents lament that fact.

If the deed before us (Exhibit D) could be assumed as the one referred to in the bank's card (and we submit it cannot, the possibility of an unrecorded one having

been given and handed back on payment of the loan must not be overlooked) what about *intention* of both parties, grantor and grantee thereto? So that the court may have easy access to McGee's evidence, we reproduce it here in full. Note the entire *lack* of any evidence upon the intention of the grantors; not to mention the utter failure to identify the deed claimed to have been deposited as security. (Tr. 62.)

DIRECT EXAMINATION

BY MR. CHRISTENSEN:

Q. State your name, please.

A. E. R. McGee.

Q. What is your occupation, Mr. McGee?

A. Assistant cashier, Utah Savings & Trust Company.

Q. What are your duties as such?

A. Oh, handling personnel, making some loans, little auditing, and so forth.

Q. Do you have access to the records of the Utah Savings & Trust Company?

A. I do.

Q. I show you three cards, held together by an elastic band, which are marked as "Exhibit 8", and ask you if you know what those cards are.

A. These cards are loan liability records.

Q. Of what?

A. Of Hugh L. and Lucie R. Thomas.

Q. With whom?

A. With the Utah Savings & Trust Company.

Q. Did you withdraw them from the records of that Company?

A. I did.

Q. Are those records of the Utah Savings & Trust company?

A. That is correct.

Q. Now, the first card on which the exhibit markings are made, is a blue card; and in the right hand column is the date, "Nov. 13 13." What does that indicate?

A. That indicates that this loan was made on November 13, 1913.

Q. And opposite those figures is the figure "900". What does that indicate?

A. That would indicate the amount of the loan, 90 day note.

Q. Then immediately below the first date, it shows "10 14" I believe—no, it is a ditto mark—

A. 1-10-14.

Q. 1-10-14. What does that indicate?

A. That would indicate on January 10, 1914 three hundred dollars was paid on this nine hundred dollar loan, leaving a balance of six hundred dollars.

Q. Mr. McGee, does the record indicate whether or not the loan was secured at that time?

A. This record here does not indicate that the loan was secured at that time.

Q. If you will take the next card in order, please. What does that indicate?

A. Well, this next card is dated January 12, 1914 and it is a renewal of this six hundred dollar balance on this first blue card; but it was increased from \$600.00 to \$1,400.00.

Q. Then there is a subsequent date, October 15, 1914, and opposite that the figure "500". What does that indicate?

A. That would indicate a payment on the principal of \$500.00, reducing the loan to \$900.00.

Q. Then "10-20-14", opposite that "900". What does that indicate?

- A. Well, that indicates that the loan was due at that time, and renewed for the same amount, for \$900.00.
- Q. Referring to this second card, January 12, 1914, does it indicate any security?
- A. Apparently, in our security column on this liability card, it has "R. E. Warranty Deed—Part of Sec. 29 Tp. 1 No. Range 1 E, S. L. Mer."

MR. THOMAS: At that point. I didn't anticipate that coming as quick as it did. I move to strike out the witness' answer in regard to the alleged security and description, and object to the same upon the ground it is incompetent, immaterial, irrelevant, and as constituting an attempt on the part of the Utah Savings & Trust Company, the grantor of this plaintiff, to furnish statements and declarations against its ownership, and against the title of the plaintiff after the Utah Savings & Trust Company has parted with title.

THE COURT: They did so by Quit Claim Deed. That is in evidence.

MR. THOMAS: That is right. Exhibit E.
(Argument by counsel.)

THE COURT: I am going to let you proceed. Objection overruled.

MR. CHRISTENSEN: Will you give me the last question and answer.

(Reporter read record.)

MR. THOMAS: Will you read the objection?

(Reporter read record.)

MR. THOMAS: I would like to add to that, if I may; it is also hearsay and not binding on the plaintiff.

THE COURT: Objection overruled.

Q. (By Mr. Christensen) With respect to the third card, Mr. McGee, the date of that is what?

A. October 12, 1914.

Q. And you say that was a renewal?

A. It indicates a renewal of this other card, referring to the particular note number, for \$900.00.

Q. Then the next line shows the date of 7-17-15; opposite that the figure "450". What does that indicate?

A. That would indicate a payment on the principal on that date.

Q. Then there is a subsequent entry of 11-3-15, and also opposite that "450". What does that indicate?

A. That would indicate that was \$450.00, the balance on the loan at that time, and it was paid off.

Q. So it indicates payment in full of the note; is that correct?

A. That is correct.

Q. Was there any interest in connection with this loan?

A. Yes. It has 10 per cent on the first card. It was increased to 12 per cent rate. And the last card was 10 per cent rate.

Q. Is there any place on the cards indicating payment of interest?

A. Yes. Each card indicates payment of interest on the back of the card, for various amounts, various payments.

Q. The entries on the reverse side indicate the payments of interest?

A. Payments of interest on that particular loan.

MR. CHRISTENSEN: We offer in evidence Defendants' Exhibit 8.

You may cross examine.

MR. THOMAS: Are these three all one exhibit, Mr. Christensen?

MR. CHRISTENSEN: Yes.

CROSS EXAMINATION

BY MR. THOMAS:

Q. Were you employed by the bank on the date of these documents, Exhibit 8, in 1914 and 1915?

A. No, I wasn't.

Q. You don't know anything about the transactions which they purport to represent, do you?

A. No, not those transactions.

MR. THOMAS: I object to them, your Honor, as incompetent, immaterial, irrelevant and hearsay, and upon the grounds that the proper foundation has not been laid, and also upon the grounds they are an attempt on the part of the Utah Savings & Trust Company, the grantor of this plaintiff to give evidence in disparagement of its own title to the property in question. That is, I assume they are offered for the purpose of showing the security transaction of the real estate involved here.

MR. CHRISTENSEN: That is right.

MR. THOMAS: I object to them on those grounds.

THE COURT: Objection overruled, and the exhibit will be received.

MR. THOMAS: Are you through?

MR. CHRISTENSEN: Yes.

MR. THOMAS: That is all.

(Witness excused.)

McGee's testimony said nothing upon the subject of what the *grantors'* intention was. And it was inadequate

in another and no less fatal respect besides: It did not identify the deed here (Exhibit D) as being the deed deposited for security. This suggested itself to counsel later, for after the trial had been recessed for several weeks and then renewed, respondent proved the deed in question (Exhibit D) was the only deed *recorded* in the Salt Lake County Recorder's office from Lucie R. Thomas and husband to Utah Savings. We objected. The court remarked that he could not see that the proof was material, but received it anyway. (Tr. 102).

It must *clearly* appear that a deed absolute was intended as a mortgage to make it such. And *both* parties must so intend.

"It must appear to the court beyond all reasonable controversy that it was the intention of not only one, but *all*, of the parties, that the deed should be a mortgage," *Wehle vs. Price*, 202 Cal. 394, 260 P. 878.

Mutual intention is to be determined.

"... The primary inquiry relates to the intention of the parties at the time the transaction was consummated. *Mutual* intent is to be determined..." (Italics added) *Umpqua Forest Industries vs. Neenah-Oregon Land Co.*, 188 Ore. 605, 217 P. 2d 219.

A deed absolute is presumed what it appears to be; *both* parties must intend otherwise to make it a mortgage.

"... the presumption of law is that the transfer is what it appears to be and that he who would assert that it was given as a mortgage must so

show by clear and convincing evidence; and that the intent must be that of both parties and not merely of *one* party.” *Hoffman vs. Graaf*, 179 Wash. 431, 38 P. 2d 236.

There was no proof that the warranty deed referred to on the bank’s records was the one (Exhibit D) produced. But, if we were to assume that it was, McGee’s testimony at its best can only be treated as evidence of the bank’s (grantee’s) intention to regard it as a mortgage. But that is not enough. Respondents here are in the predicament of the respondent who was reversed in *Davis vs. Stewart*, 4 Cal. App. 604, 88 P. 2d 734:

“The respondent shows no more than that one of those who engaged in the transaction had the undisclosed intention to treat it differently. The rule is thus stated in 41 Cor. Jur., page 332: ‘But in order to convert a deed absolute in its terms into a mortgage it is necessary that the understanding and intention of both parties, *grantee as well as grantor*, to that effect be concurrent and the same ’.”

Always, the evidence that a deed is a mortgage must be “clear”, “unequivocal” and “satisfactory.” *Coray vs. Roberts* 82 Utah 445, 25 P. 2d 940.

Thus to convert a deed into a mortgage the evidence (1) must show *both parties so intended*, and, (2) must be clear, unequivocal and satisfactory that they did. Here it was fatally wanting in both respects. There was no evidence upon the subject of the grantors’ intention; none whatever. But the court strained its findings to say both parties intended the deed to be a mortgage, declaring it

“was not intended by either the grantor or the grantee” as a deed absolute. (Tr. 110). But that was not the evidence; at least, not as to the grantors. There was no evidence that they intended any mortgage. Their deed is the only evidence of their intention. It said they conveyed, absolute. The court erred in finding contrary to their *expressed* intention that the deed was absolute. There is just no evidence to sustain that finding.

NORTHCREST'S TITLE THROUGH UTAH SAVINGS AND TRUST COMPANY (Cont'd.)

2. The Evidence Was Wholly Insufficient To Establish The Bank's Deed As A Mortgage.

We have seen that to make a deed a mortgage, both parties must so intend and that there was no evidence at all that the intention of the grantors was otherwise than the warranty deed to Utah Savings (Exhibit D) expressed.

But the evidence was wholly insufficient besides. The deed said it was a conveyance absolute. And a deed fair upon its face is presumed to be exactly that—a deed absolute,

“... and a party alleging that a deed, absolute and unconditional in form, was in effect a mortgage, must meet and overcome the presumption which the law raises from the face of the papers, namely, that the instrument is in legal effect just what it purports to be.” 59 C. J. S. Mortgages § 48.

Evidence to prove a deed a mortgage is to be received with caution. 36 Am. Jur., Mortgages §134.

More than a mere preponderance is required. Various put, the evidence must be :

“... clear, certain, plain, convincing, satisfactory, unequivocal, unambiguous and conclusive.” Id. § 134.

This court has said it must at least be “clear, unequivocal and satisfactory.” *Coray vs. Roberts* 82 Utah 445, 25 P. 2d 940.¹

The general rule is that the evidence must not leave the nature of the transaction in reasonable doubt. 36 Am. Jur., Mortgages §135. The reason is easy.

“The reason for the exaction of this high degree of proof is not far to seek. If a less rigorous rule obtained, no man would be safe in taking a deed of property. When it had doubled or trebled in value it would only be necessary for the grantor to bring witnesses to testify to any agreement that the deed was intended as a mortgage, to enable him, on payment of the purchase price and interest, to redeem.” 36 Am. Jur., Mortgages, § 134.

And the presumption that a deed is a deed, not a mortgage, grows and grows by lapse of time. 59 C. J. S. Mortgages, § 48.

Tested by the foregoing principles and rules, the evidence was wholly insufficient to make this deed a mortgage. There was not only a total failure of proof as to the grantors’ intention. The evidence was all a failure.

First. There was no evidence offered or suggested about *any* deed being a security except a meagre two-line memo penned on the bank’s two white cards relating to the two renewals of the original loan. The first card

¹It now says “clear, definite, unequivocal and conclusive.” *Thornley Land & Livestock Co. vs. Gailey* 105 Utah 519, 143 P. 2d 283.

relating to the original loan was a blue one. (These three cards make up defendants' Exhibit 8.) It was not claimed the original loan was secured at all. That was five months before this deed (Exhibit D) was ever made. But the two renewal cards (the white ones) bear the following which is all the evidence, and the *only* evidence, at all about security:

“Security

R. E. Warranty Deed

“Description of Property

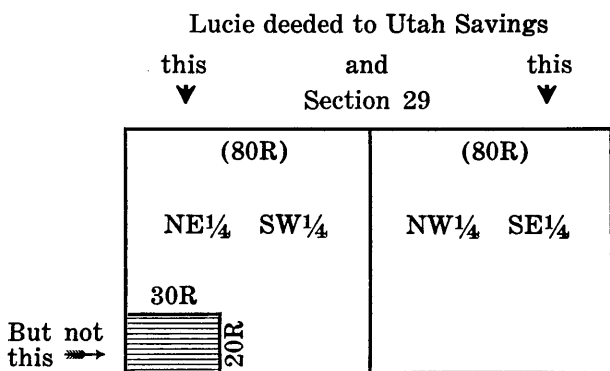
*Part of Sec. 29 Tp. 1 No
Range 1 E, S. L. Mer”*

(Italics indicate handwriting.)

Second. This meagre reference did not specify *this* particular warranty deed at all. There was no specific reference to *it*. True counsel will say (1) the deed (Exhibit D) and the first renewal card bore the same date—January 12, 1914, (2) both referred to the same amount of consideration—\$1,400.00, (3) the reference to the property on the card is only “part” of Section 29, and the deed (Exhibit D) covers only part of Section 29, too. (But bear in mind the deed is specific, i.e., it describes the part covered, the card does not.) This, and that no other deed to any land in Section 29 from Lucie R. Thomas and husband to Utah Savings has ever been recorded (Tr. 101) proves, respondents say, that this is the deed which was meant for security.

Not so. Lucie owned other property in Section 29. She owned the 32 "yellow" lots so called in the Southwest corner of the West tract. (See map Exhibit A). They were claimed for her by respondents at the trial (Tr. 19) and the court held they passed to her devisees on her death.¹

Now, her yellow lots, all 32 of them, were "part" of Section 29. They and Northcrest's 33 "white" lots were in Capitol Heights second filing which fit into a 30 x 20 rod corner in the Southwest corner of the West 40 acre tract. The deed to Utah Savings did not include that 20 x 30 rods. It specifically excepted it. (Exhibit D.) So it left Lucie her 32 lots in Section 29. The deed described a tract which excepted the 20 x 30 rod corner like this:



Her 32 yellow lots were within the shaded area
not covered by her deed.

¹The decree awarded both 40 acre tracts (less Northcrest's 33 stipulated "white" lots) $\frac{2}{3}$ to John and Gertrude and $\frac{1}{3}$ to Northcrest as Hugh, Jr.'s grantee. The award had the effect of holding mother Lucie died owning the 32 yellow lots. (See map Exhibit A.)

The result is that Lucie owned more than just one “part” of Section 29. She owned (1) the “part” she deeded to the bank by Exhibit D and also (2) the “part” she kept. The part contained in the warranty deed referred to on the loan card without identifying the deed itself could well have been the yellow lots. A warranty deed to them (or part or only some) would satisfy the reference to “part” of Section 29 scribbled on the cards. And that deed might well have never been recorded but simply returned when the loan was paid. That hypothesis is equally as compelling as the conclusion that the warranty deed and “part” were Exhibit B and the “part” described therein.

Remember, respondents are the ones who are trying to prove the mortgage. The deed itself says it is a conveyance absolute. Respondents have the burden here, not Northcrest. They had to prove *this* deed was a mortgage; this *very* deed Exhibit D, itself. Northcrest didn’t have to prove anything. And respondents had to prove the mortgage by evidence which was *clear, unequivocal and satisfactory*. *Coray vs. Roberts, Supra*. “Loose and random statements or facts and circumstances of doubtful import” will not suffice. 36 Am. Jur., Mortgages §134.

Lucie never made claim that the deed was a mortgage. It was made in 1914. She died in 1948. She had 34 years to make that claim and never did. Had she intended a mortgage, she could have given one. And had this deed actually been the deed intended as a mortgage, she would have demanded a re-conveyance when she paid

the loan. And, likewise, presumably, the bank would have re-conveyed. Remember, the rule of law says a deed which looks and speaks like a deed is presumed to *be* a deed, and—

“this presumption is strengthened by lapse of time . . . and the clearness and weight of evidence (to upset it must be correspondingly increased)”. (Parentheses supplied.) 59 C. J. S. Mortgages § 48.

Why should Lucie deed property to the bank outright? Northcrest cannot be required to furnish a reason. The burden is not on it. Respondents must bear the burden of proof. Like McGee, Northcrest had nothing to do with the transaction and knows nothing, of course, about it. Nor need the court supply an answer, either. For it to hold some other *unidentified* deed was given as a mortgage does not call for explanation why this *identified* deed was given. Perhaps another debt to the bank was thereby paid. Who knows?

But respondents have failed in their burden of proof. The mind is far from clear, the evidence far from unequivocal and satisfactory, that this deed and its contents were the actual deed and the actual “part” in Section 29 referred to in the memorandum on the loan card. The evidence was insufficient and the court erred in holding *this* deed was but a mortgage.

NORTHCREST'S TITLE THROUGH UTAH SAVINGS AND TRUST COMPANY (Cont'd.)

3. The Evidence By Utah Savings And Trust Company Attempting To Prove The Deed A Mortgage Was In- competent After It Had Conveyed To Northcrest.

“A grantor should not have it in his power to deprive his grantee of the property conveyed by making statements after the grant.” 20 Am. Jur., Evidence § 606.

Sometimes statements of former owners are received in evidence as against the title of a grantee. The theory is (1) they are admissions against interest, and, (2) the grantee being successor in interest is charged with the admissions of the former owner. 20 Am. Jur., Evidence §604.

But, a statement of a grantor to be admissible must have been made while he was owner, *not afterward*.

“One of the conditions under which the statement of a former owner against his interest is admitted in evidence against his successor as an admission binding on the latter is that the statement be one made while he had a proprietary interest in the property. Accordingly, the declaration of a former owner made before he acquired title or *after* his conveyance of the property ordinarily is not admissible against his grantee.” 20 Am. Jur., Evidence § 605.

“*Statements after alienation.* Declarations of a grantor, made after he has parted with his title, are not admissible against his grantee or

other persons claiming under the grant. . . ." 31 C. J. S. Evidence § 325.

The rule has been recognized for over fifty years in Utah. *Snow vs. Rich*, 22 Utah 123, 61 P. 337.

Utah Savings and Trust Company conveyed to Northcrest December 16, 1947. (Exhibit E). That was more than three years before the trial in February 1951. (Tr. 11). Yet, the bank was allowed to declare at the trial by its records and its officer McGee that it once held a warranty deed to part of Section 29 as security for a loan (an equitable mortgage) to Lucie R. Thomas and husband.

Now, as explained in earlier parts of this brief, the security deed mentioned was *not* shown to be the deed in evidence here (Exhibit D) at all; nor was the "part" of Section 29 mentioned by the bank's records shown to be the "part" contained in the specific deed, Exhibit D. For these reasons alone, the deed in suit (Exhibit D) was not established as a mortgage. No "clear, unequivocal, satisfactory, definite and conclusive" evidence thereof—in fact no evidence at all about *that* deed being a mortgage—was given. *Coray vs. Roberts, supra, Thornley Land & Livestock Co. vs. Gailey, supra.*

But, regardless of the utter insufficiency thereof, the bank's testimony which was aimed at trying to show this deed to be a mortgage was incompetent since it constituted statements by a grantor disparaging its former ownership after it had parted with title and conveyed to Northcrest.

Northcrest's objection was clear. McGee testified for respondents that the loan card (Exhibit 8) showed a warranty deed had been held for security. He said (Tr. 64, this Brief 12):

“Apparently, in our security column on this liability card, it has ‘R. E. Warranty Deed—Part of Sec. 29 Tp. 1, No. Range 1 E, S. L. Mer’ ”.

Northcrest thereupon objected:

“MR. THOMAS: At that point. I didn't anticipate that coming as quick as it did. I move to strike out the witness' answer in regard to the alleged security and description, and object to the same upon the ground it is incompetent, immaterial, irrelevant, and as constituting an attempt on the part of the Utah Savings & Trust Company, the grantor of this plaintiff, to furnish statements and declarations against its ownership, and against the title of the plaintiff after the Utah Savings & Trust Company has parted with title.”

The court seemed inclined to agree, then wavered and overruled the objection (Tr. 65):

“THE COURT: They did so by Quit Claim Deed. That is in evidence.

“MR. THOMAS: That is right. Exhibit E.”
(Argument by counsel.)

“THE COURT: I am going to let you proceed Objection overruled.”

After further explanation thereof by the bank officer, the loan cards (indicating *some* warranty deed had been held for security) were offered. McGee at that point

denied knowledge of the transactions himself, saying he had not worked for the bank that early. Northcrest then objected but the cards were let in. (Tr. 54, this Brief 15).

“MR. THOMAS: I object to them, your Honor, as incompetent, immaterial, irrelevant and hearsay, and upon the grounds that the proper foundation has not been laid, and also upon the grounds they are an attempt on the part of the Utah Savings & Trust Company, the grantor of this plaintiff, to give evidence in disparagement of its own title to the property in question. That is, I assume they are offered for the purpose of showing the security transaction of the real estate involved here.”

“MR. CHRISTENSEN: That is right.”

“MR. THOMAS: I object to them on those grounds.”

“THE COURT: Objection overruled, and the exhibit will be received.”

Respondents will say that Northcrest gave nothing for the deed (Exhibit E) from Utah Savings to it. But it did. A good consideration passed.

Young Hugh received \$3,200.00 from Northcrest. (Tr. 78). When Northcrest dealt with him its counsel found the deed from Lucie to Utah Savings and Trust Company recorded and outstanding. (Tr. 76). Northcrest then told Hugh they expected a deed from Utah Savings (Tr. 78), that whatever Northcrest paid Hugh was to include such a deed; Northcrest would insist on it. That was part of the purchase price. (Tr. 79). This was sufficient consideration to support the deed.

“From or to Whom the Consideration Must Move.

—Consideration may move to the promiser or to a third person. It may be added that it is not essential that the consideration be given by the promisee; *a consideration moving from a third person is sufficient.*” 12 Am. Jur. Contracts § 76.

And anyway the rule rejecting statements by a grantor after he has conveyed was never related to the question of consideration.

“It has been repeatedly held, without specific discussion of the effect of a lack of consideration, that the declarations of a *donor* in disparagement of title, made subsequent to the full execution of a deed of gift, being mere hearsay, and neither a part of the *res gestae* nor declarations against a present interest, are not admissible to defeat the completed gift, either against the donee or his privies, or in favor of the grantor or others claiming under him, it being held incompetent for him to affect, or to make evidence in reference to the title conferred . . . In fact, the rule has been laid down that the law does not recognize that derogatory declarations of a grantor, made after parting with title, are more likely to be true where the transfer was without consideration than where the conveyance was based upon a valuable consideration.” 2 Jones, Commentaries on Evidence (2d Ed. § 913).

But, if no consideration had been present and if Utah Savings simply made a *gift* to Northcrest of the deed, the result would be no different. “Statements by grantors of gift deeds may not be received after they have parted with their title.” 1 A. L. R. 1240. The rule applies to gifts of personality, too. *Id.* 1241.

The testimony of Utah Savings and Trust Company by its officer aimed at proving they had title only as a mortgage was incompetent and erroneously received. It was the only evidence upon the subject. The findings and judgment based wholly upon that incompetent evidence cannot survive but must be set aside.

**NORTHCREST'S TITLE THROUGH
HUGH L. THOMAS, JR.**

**1. The Notary's Testimony Denying Lucie Acknowledged
The Deed To Hugh, Jr. Was Incompetent.**

“... There is a diversity of opinion as to the admissibility of testimony of the certifying officer to impeach his own certificate, and as to its weight if admitted. A *majority*, perhaps, take the view that it is against public policy to allow a public officer by oral testimony to undermine his official certificate.” 1 Am. Jur. Acknowledgments § 154.

The office of notary public is of ancient origin, both in Roman law and common law as well. It has been known to practically all of the Christian nations for centuries. 39 Am. Jur., Notaries §3. 66 C. J. S. Notaries §1.

A notary public, as the name implies, is a public officer. *Id.* In Utah notaries are appointed by the Governor for 4 year terms, must give bond of \$500.00 and take the “Constitutional Oath”. Title 63, U. C. A. Their powers are to administer oaths, acknowledge instruments of writing, take affidavits and depositions, etc. §63-1-5. §78-2-1, U. C. A. A notary must annex his certificate of acknowledgement to instruments of conveyance. §78-2-4. And such conveyances may then be recorded in the County Recorder's office. §78-3-1.

Notaries may acknowledge a private writing and a notary's certificate thereon is *prima facie* proof of its execution. §104-48-12. §104-25-7, Supp. And every

instrument affecting real estate so acknowledged (or the record or a certified copy) is received in evidence without further proof. §104-48-14. §104-25-13, Supp.

Here Northcrest proved another separate chain of title. This was (1) a deed from Lucie R. Thomas to Hugh L. Thomas, Jr. in 1947 (Exhibit B), and, (2) a deed from him to Northcrest in 1948 (Exhibit C). This chain as limited by the deed from Lucie to Hugh (Exhibit B) covered both 40 acre tracts *less* a strip containing Northcrest's 33 "white" lots and Lucie's 32 "yellow" lots (so called) in the Southwest of the West 40 acre tract where the "20 x 30 rod" strip is located (but slightly longer). See map (Exhibit A).

Marguerite Clayton is a notary public. She knew Lucie R. Thomas for 15 years. (Tr. 57). She was the notary who certified to the acknowledgment on the deed from Lucie to son, Hugh, September 16, 1947. (Exhibit B). Therein, as a public officer who had sworn to the "Constitutional Oath . . . to discharge the duties of my office with fidelity" (Constitution of Utah, Article IV, §10), she certified as a notary public in her solemn, official capacity as such that Lucie acknowledged the deed (Exhibit B) before her. And she signed the certificate of that acknowledgement in her official capacity as a public officer and also affixed here official seal thereto. That deed was thus entitled to be recorded, which it was, and also to be received (or a certified copy thereof) in evidence at this trial (as a copy was) without further proof (Exhibit B). But respondents disputed Lucie's

signature to the deed and denied that she had actually acknowledged it. So they brought the notary to testify. (Tr. 57). Over Northcrest's repeated objections, respondents' counsel and the court both took a hand at questioning her and finally wrung from her a simple negative "no" as to whether Lucie actually did appear and acknowledge the deed. (Tr. 60). The court, being curious as to why, then, she had certified to Lucie's acknowledgment, she explained simply "it looked like her signature to me. I had seen it." (Tr. 61).

This notary *lied*. Either she lied (1) when she solemnly certified on the deed that Lucie appeared before her and acknowledged the instrument, or, (2) when she swore on the witness stand that Lucie did not. She lied at one time or the other. She admittedly violated one oath or the other, her Constitutional Oath to "discharge the duties of her office (as notary) with fidelity" or her oath as a sworn witness to tell "the whole truth and nothing but the truth." §104-49-27. §104-24-17, Supp.

So the case for respondents on the question of acknowledgment rests entirely on the infirm testimony of the witness who, by her own lips, proved she is not to be believed. Evidence like that shows why "a majority perhaps, take the view that it is against public policy to allow a public officer by oral testimony to undermine his official certificate." 1 Am. Jur. Acknowledgments §154 *supra*.

The authorities are not numerous. But those prohibiting the testimony reason wisely (1) that allowing

such evidence is against public policy, (2) that, being made at the time of the acknowledgement and being the solemn declaration of an officer in his public and official capacity under his hand and seal, the certificate is more likely to be true than the memory and testimony of the witness years afterward, and, (3) persons who have dealt and paid in reliance on the truth of the certificate should be protected against the contradictory statements of the notary made afterward. 1 Am. Jur. Acknowledgments. §154.

Idaho will not allow a notary to testify and renounce his certificate. *First National Bank vs. Glenn* 10 Idaho 224, 77 P. 623.

“No notary should be allowed to come into court . . . and give testimony impeaching his certificate to the mortgage which is being foreclosed . . . The certificate is made at the time of acknowledgment and is the solemn declaration of the official in his official capacity as to the truth and accuracy of the statements it contains, and it is much more likely to be true and correct than the memory of the person in years afterward . . . after persons have relied upon the faith and correctness of his official statement, and invested their money, and rights have grown up thereunder, the person who acknowledged as such official and made such certificate should not be heard in a court of justice disputing its correctness.” Id.

A justice of the peace who takes an acknowledgment has not been allowed afterward to impeach his official certificate. *Woodridge vs. Woodridge* (W. Va.) 72 S. E.

654. And even in states where notaries are allowed to testify and renounce their certificates, it is agreed that their testimony is of little value.

“Generally, testimony of the officer tending to impeach his certificate is given little weight.”
1 C. J. S. Acknowledgments § 142.

In weighing the testimony of the notary against his own certificate, the latter as the New York court points out, should be entitled to as much, if not more, weight than the officer's testimony, especially after a lapse of 2 years (as here). *Sparker vs. Sparker* 274 N. Y. S. 454. 152 Misc. 867¹.

The certificate should be given great weight and cannot be lightly overcome. In fact, it has been said “that it makes a *prima facie* case, and that it is equivalent to the sworn testimony of one apparently disinterested, credible witness.” 1 C. J. S. Acknowledgments §141.

It will not be overthrown by a mere preponderance of the evidence. There must be a *decided* preponderance. 1 Am. Jur. Acknowledgments §155.

Respondents produced a handwriting expert, J. Percy Goddard, and also two other witnesses, Fisher

¹“The certificate is made evidence under the statute. It should, therefore, be entitled to as much, if not more, weight than the evidence of the officer who executed it, when offered to impeach its validity. If courts accept the uncorroborated testimony of officers taking acknowledgements to deeds to impeach their certificates, titles to real property would indeed be insecure. Against the solemn certificate executed by the notary herein, his recollection, at this late date (two years after taking acknowledgment) should not prevail.” *Sparker vs. Sparker*.

Harris and Vernon W. Mackay, who said the signature to the deed (Exhibit B) was not in Lucie's hand; was not written by her. (Tr. 32, 46, 41, 42). Northcrest *admits* that Lucie herself did not write the signature on the deed.

But a grantor may *adopt* his signature as written by another by acknowledging the deed before a notary. Respondents' expert and other witnesses testified only that the signature was not Lucie's. But that was not enough. That goes only to who *wrote* the signature, not to whether Lucie afterward *acknowledged* the deed as her own and thereby *adopted* the signature thereon. This will be discussed presently in the next part of this brief, page 37.

So, on the question of acknowledgment, the notary's certificate must be weighed solely against the uncredit-able testimony of the officer who afterward renounced it. As seen, it cannot be overcome by her simple renunciation. *Sparker vs. Sparker*, *supra*.

It was error by the weight of authority for the notary to be permitted to impeach her certificate of acknowledgment to the deed (Exhibit B). Furthermore, her testimony proved she was not to be believed and so her certificate outweighs her testimony to the contrary. The acknowledgment to the deed survives and the deed from Lucie to son, Hugh, must stand.

**NORTHCREST'S TITLE THROUGH
HUGH L. THOMAS, JR. (Cont'd).**

- 2. Since The Notary's Evidence That Lucie Did Not Acknowledge The Deed To Hugh, Jr. Was Incompetent And Insufficient, The Acknowledgement Stands. The Deed (Exhibit B) Survives.**

We have just seen that the majority rule forbids a notary to testify and impeach or renounce his certificate of acknowledgment on a deed, and even in States where he may do so, that such testimony is given "little weight", the certificate being entitled to as much, if not more, weight than the notary's testimony, especially after a lapse of time (2 years) as here. *Sparker vs. Sparker* (N. Y.) *supra*.

By the weight of authority, therefore, the trial court erred in receiving the incompetent testimony of the notary denying Lucie acknowledged the deed (Exhibit B) to her son, Hugh. Moreover, that evidence was insufficient, too.

Northcrest *admits* Lucie personally did not sign the deed, that she did not write the signature herself. But she could have *adopted* the signature as written by someone else by *acknowledging* the deed before a notary.

"The fact that the name of the grantor was signed by another person is of no importance if the instrument was acknowledged in due form."
1 Am. Jur. Acknowledgments § 23.

Remember, a notary does not certify that the grantor *signed* before him, but only that he *acknowledged* the signature as his.

“The officer does not certify that the signature was affixed by the grantor. By appearing and declaring that the signature is his, the grantor recognizes and adopts it as his own.” *Id.*

The rule applies even where forgery is asserted.

“The rule has been applied where it was claimed that the name was a forgery or was written without request.

“A grantor can *adopt* his name written on an instrument by another, where he makes his mark as his signature, by making a formal acknowledgment of the instrument before an officer, although he is able to write his own name.

“As against any person who without knowledge has acted thereon, the grantor is estopped to deny that the signature is his.” 1 Am. Jur. Acknowledgments § 23.

Where a woman claimed her name was forged, the court held her acknowledgment of the deed rendered her claim of forgery unimportant. Look:

“It is of no importance who put her name to the deed, so long as it is of record that she acknowledged the signature.” *Kerr vs. Russell* 69 Ill. 666, 18 Am. Rep. 634.

But no claim of forgery was made in our case. All respondents proved was that the signature was not in Lucie’s hand. (Whose hand? Respondents did not say and did not prove. Their findings also declined to name

the signer.) Proof only that a signature is not in the handwriting of a named signer does not establish forgery. Even the latter's testimony (1) that he did not sign, and, (2) that the signature is not his handwriting, is not enough. There must be proof also that the signature was not *authorized*. *State vs. Jones* 81 Utah 503, 20 P. 2d 614.

“It is not forgery for one to write another's name with authority.” Id.

“To establish falsity it must be made to appear not only that the person whose name is signed to the instrument did not sign it but also that his name was signed without authority.” Id.

The rule is :

“The law . . . thinks no evil. Perhaps there is no presumption more highly favored in the law than the presumption of innocence.” 1 Jones Commentaries on Evidence, P. 82.

And,

“The presumption of innocence is of constant application in civil actions . . . (and) where the proper issue is involved, the legal presumption that men are not guilty of fraud or dishonesty and, more strongly, that they do not commit criminal offenses, comes into play.” Id. P. 88-9.

As to deeds :

“One may adopt a deed which has been executed in his name by another. He does this by acknowledging and delivering such deed as his own, and he will not afterwards be allowed to deny that the signature is his. This rule obtains

in cases where the person's signature is affixed *without* his knowledge." 7 Thompson, Real Property, § 3881.

It is clear, therefore, that proof simply that a signature is not in the hand of the named signer is wholly insufficient. That will not even prove forgery. For the signing may have been authorized.

But, although not authorized, the signature may be *adopted* afterward by the true named signer, and, as shown, the grantor thereby makes the signature his own. *Acknowledging* the signature to a notary adopts it, as the authorities unanimously show. On this, there can be no dissent. The postulate is self evident.

This deed (Exhibit B) was not signed by Lucie herself. But, even so, she had a right to acknowledge and thereby adopt it and the signature for her own. Marguerite Clayton, notary public, certified that she did. By that certificate the deed was proved to be the deed of Lucie R. Thomas "as a conveyance of real property." §104-48-12. By that certificate the deed was likewise "read in evidence . . . without further proof." §104-48-14. §104-25-13. Supp.

But the notary now stultifies herself. She would now assert the deed was not in fact acknowledged. That evidence, contrary to the notary's official certificate on the deed, will not be accepted by the weight of authority. 1 Am. Jur. Acknowledgements §154. But, even where received, it is entitled to but little weight. 1 C. J. S.

Acknowledgements §142. The certificate is entitled to “as much, if not more, weight than the officer’s testimony,” *Sparker vs. Sparker*, supra; it is even to be counted, as one authority suggests, equivalent to the sworn testimony of one apparently disinterested, credible witness. 1 C. J. S. Acknowledgments §142.

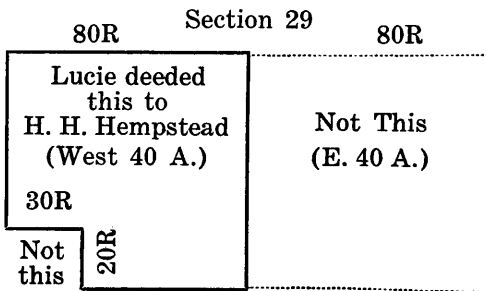
The trial court erred. Marguerite Clayton should not have been allowed to testify. But when she did, she proved she was not worthy of belief for she *certified* once the deed was acknowledged, later *swore* that it was not. Her evidence was wholly contradictory and unworthy of belief. Her certificate must stand. Lucie must be taken to have acknowledged the deed (Exhibit B) and adopted the signature.

NORTHCREST'S TITLE THROUGH HEMPSTEADS

1. Northcrest Established Title To The West Forty Acre Tract Through H. H. Hempstead, Regardless Of Its Alternate Titles To Both Tracts.

As we have shown, the evidence established title in Northcrest alternately (1) through Utah Savings & Trust Company, and, (2) through Hugh L. Thomas, Jr. Those alternate titles related to *both* 40 acre tracts (less the 20 x 30 rod corner in the West Tract).

As stated at the outset (P. 3) when the trial came on Northcrest, by then, was able to trace title back to Lucie R. Thomas through those 2 chains. But, it was also able to trace back to her through a third chain as well: (3) Through H. H. Hempstead on the *West* 40 acre tract alone. It had the right to prove "whatever title it had." *State vs. Rolio* 71 Utah 91, 262 P. 987. So, proof of Northcrest's title to the whole aside, it proved alternately, as will now be shown, title nevertheless to the West 40 acre tract (less the 20 x 30 rods) through Hempstead. This title came from Lucie-to-Hempstead-to-Northcrest. We will speak of its as the West 40 acres. It is thus:



Northcrest set up the Hempstead chain by supplemental complaint after the action was commenced. It alleged (1) that it had owned the West 40 acre tract (less 20 x 30 rods) when the suit commenced, but, if not, (2) that it had since acquired that tract. (Tr. 8).

The Hempstead title started with Lucie R. Thomas and ran from her to Hempstead to Northcrest. Northcrest proved the same by the following:

1. A warranty deed from Lucie R. Thomas to H. H. Hempstead December 16, 1908. (Exhibit F).

2. A deed from Lucy S. Hempstead (Hempsteads widow, sole heir and devisee) to Northcrest November 29, 1950. (Exhibit G.)

3. A Salt Lake County District Court Decree by Northcrest against Hempstead's administrator (and also his widow) quieting Northcrest's title January 26, 1951. (Exhibit H.)

So, it is plain that regardless of Northcrest's two other alternate chains to the *whole*, it proved title to the West *half* (West 40 acres) at least, through the Hempsteads. The documents were not disputed. Respondents objected only that they were "not within the issues of this case". (Tr. 24). The court found, as it was bound to do on the record, (1) that the deed from Lucie R. Thomas to Hempstead was made and recorded, Tr. 108, (2) that Hempstead's widow conveyed to Northcrest, and, (3) that Northcrest quieted title against Hempstead's administrator and widow. (Tr. 109). But the court stopped there. It totally ignored the *effect* of those findings, it

found nothing as a fact and concluded nothing as a matter of law to avoid their result. The court explained futilely in an earlier finding that Northcrest and Hugh, Jr. had thought (“agreed” was the word used) that Lucie’s deed to Hempstead was “no more than a cloud” which ought to be removed. (Tr. 108).

But Northcrest’s and Hugh’s “agreed” *thoughts* about his mother’s deed to Hempstead could not alter its legal effect one whit. That is too plain for argument. That is *was* a deed from Lucie to Hempstead is not denied and was specifically found as stated by the court in findings prepared and submitted by respondents. And that this deed conveyed title to Hempstead is undeniable, too. The deed to Northcrest from Hempstead’s widow, sole heir and devisee is not disputed either. It was found to have been made and given, as was also Northcrest’s quiet title decree against Hempstead’s administrator and his widow. (Tr. 108, 109).

So, Northcrest proved and the court found upon the Hempstead title exactly as we stated: (1) a deed from Lucie R. Thomas to Hempstead, and, (2) a deed from Hempstead’s widow, sole heir and devisee to Northcrest. Those two deeds proved Northcrest’s title without more. But the proof and findings added more, i.e., (3) a decree by Northcrest against Hempstead’s administrator (and his widow) besides. The effect of these documents is not to be denied. They effectively vested title in Northcrest.

It will not do for the trial court to explain, as it did, that Northcrest and Hugh *thought* the Hempstead deed

was no more than a cloud. That is only an exposition of a misplaced thought. It will not avoid the legal effect of the deed. Neither will the fact that Northcrest was so fortunate as to be wrong about it at the time! So, when Northcrest acquired Hempstead's title—as it *had a right to do*—it acquired the property.

The court erred. The West 40 acre tract (less 20 x 30 rods) was Northcrest's and should have been so adjudged irrespective of Northcrest's title as otherwise alternately claimed and established to both 40 acre tracts.

CONCLUSION

Lucie R. Thomas was the former owner of the property in suit. But Northcrest traced title back to her by 3 alternate chains: To the two 40 acre tracts, (1) through Utah Savings and Trust Company, and, (2) through her son, Hugh, and, (3) to the *West* 40 acre tract through H. H. Hempstead as well.

The 33 "white" lots (within the 20 x 30 rods) were stipulated and adjudged to be Northcrest's. But the rest of the two 40 acre tracts (including the other 32 "yellow" lots) were adjudged never to have been conveyed by Lucie in her lifetime and to have passed by will upon her death to her three children, John, New York; Gertrude, Virgin Islands; and Hugh, Jr., Salt Lake City. Since Hugh afterward conveyed to Northcrest, only the $\frac{1}{3}$ share said to have reached him on his mother's death was adjudged to have passed to Northcrest, no more. But upon this record, that was error. The whole of the property should have been adjudged as Northcrest's except the 32 "yellow" lots (within the 20 x 30 rods) which were properly awarded $\frac{1}{3}$ to Northcrest and $\frac{2}{3}$ to John and Gertrude.

Appellant submits:

1. The evidence failed to establish the warranty deed from Lucie R. Thomas to Utah Savings and Trust Company (Exhibit D) was only a mortgage. Intention rules; intention of *both* parties, grantor and grantee. McGee, the bank's officer, was the only witness on this point. The grantee's intention aside, there was no evi-

dence at all upon the intention of the *grantors*; none whatever. And there was no proof that the warranty deed referred to in the bank's old records was in fact the deed here. (Exhibit D).

2. The evidence was insufficient altogether to establish the deed (Exhibit D) to be a mortgage. A deed absolute is presumed to be just that; a conveyance, *not* a mortgage. A party asserting a deed is a mortgage has the burden of proof. More than a preponderance is required. The evidence must be "clear, definite, unequivocal and conclusive." *Thornley L. L. Co. vs. Gailey* 105 Utah 519, 143 P. 2d 283.¹ It must not leave the transaction in reasonable doubt. 36 Am. Jur. Mortgages §135. But the evidence offered here was simply a reference on the bank's loan card (Exhibit 8) to *a* warranty deed to part of Section 29, no more. What *deed* and what *part* was not specified. Lucie, remember, also owned the 32 "yellow" lots in Section 29. So she owned more than one *part* in that Section. A deed to the 32 lots—or only some of them—would have satisfied the reference to "part" of Section 29 Respondents had the burden. That burden required them to prove this very deed itself (Exhibit D) not just *some* deed was intended as a mortgage. But they failed. Lucie herself had 34 years to claim the deed was but a mortgage and to demand a re-conveyance. But she did not. The presumption that a deed absolute is a conveyance is strengthened by lapse of time. 59 C. J. S. Mortgages §48. It grows

¹To same effect see *Pender vs. Anderson* (Utah) just decided and contained in the Pacific Reporter advance sheet October 5, 1951, 235 P 2d 360.

and grows. It had surely outgrown respondents' feeble proof long ago.

3. The evidence by Utah Savings and Trust Company through its officer, McGee, aimed at proving the deed, (Exhibit D) to be a mortgage, was incompetent. Statements of a grantor made, as here, after parting with title are not admissible to disparage the grantor's former ownership. The rule applies without regard to consideration, even in cases of gift. Northcrest paid a consideration to Hugh, Jr. for a deed from Utah Savings. Consideration may always move between third parties. But if it couldn't, and if Utah Savings had made an outright gift of its deed (Exhibit E) to Northcrest, the result is no different. The rule prevents grantors from belittling their former titles after they have conveyed, consideration or no consideration.

4. The notary's testimony denying Lucie acknowledged the deed to her son Hugh (Exhibit B) was by the weight of authority *incompetent*. 1 Am. Jur. Acknowledgments §154. But, if this court is to uphold the trial court in the opposite view, the testimony was *insufficient*. In States where the notary is allowed to renounce his certificate his testimony is entitled to but "little weight". 1 C. J. S. Acknowledgements §142. On the other hand, the certificate should be given great weight and cannot be lightly overcome. *Id.* §141. A mere preponderance will not suffice. 1 Am. Jur. Acknowledgements §155. This notary once *certified* Lucie acknowledged the deed; later *swore* she did not. She is not to be believed. Her certifi-

cate is entitled to as much, if not more, weight than her simple testimony to the contrary, especially after a lapse of 2 years' time, as here. *Sparker vs. Sparker*, supra.

5. Since the notary's evidence was incompetent and also insufficient, the acknowledgment stands and Lucie's deed to her son, Hugh, (Exhibit B) survives. Although the signature was not signed by her personally, the acknowledgment of the deed *adopted*, the signature as already written thereon. Proof only that Lucie did not sign does not destroy the deed. Her acknowledgment certified on the deed makes the signature her adopted one.

6. Were all else to fail, Northcrest's title through H. H. Hempstead is good. The deed from Lucie to Hempstead, the deed from Hompstead's widow to Northcrest, and Northcrest's quiet title decree against Hempstead's administrator and his widow, are not denied. They are proved and are firmly established by the court's findings. Yet, because the court explained that Northcrest and Hugh *thought* Hempstead's deed was only a cloud, it denied the legal effect thereof as a conveyance. But thinking will not make a deed a cloud. Respondents cannot deny Northcrest's right to be so fortunate as to have been wrong in that particular. The deed was a deed, not a cloud. The cloud, for respondents, has vanished. The Hempstead title which thus passed to Northcrest covered the West 40 acres (less 20 x 30 rods). See Sketch Page 42.

7. The court properly adjudged to Northcrest the stipulated 33 "white" lots in the 20 x 30 rod strip. It

also properly adjudged to Northcrest a one-third interest in Lucie's 32 "yellow" lots which she had not conveyed and which passed to Hugh by Lucie's will and went to Northcrest under Hugh's deed to it of *all* the property (Exhibit C.) But, it should have adjudged the rest of the property to Northcrest, too. But it did not. It gave Northcrest only $\frac{1}{3}$ thereof and gave $\frac{2}{3}$ to John and Gertrude. This was error. The judgment must be reversed with directions to enter judgment for Northcrest to all of the property and quieting its title thereto, except the undivided two-thirds of the "yellow lots" which passed to John and Gertrude by Lucie's will; and for costs.

Respectfully submitted,

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