

1951

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

Utah Supreme Court

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Case No. 7735

**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 **ADEL-
AIDE R. THOMAS**, his wife; and
**GERTRUDE THOMAS GARD-
NER**,

Defendants and Respondents,

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

FILED
DEC 11 1935

Clerk, Supreme Court

BRIEF OF RESPONDENTS

**MORETON, CHRISTENSEN &
CHRISTENSEN**

Attorneys for Respondents.

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IN THE SUPREME COURT of the STATE OF UTAH

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

— 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 Respdonents,

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

Case No.
7735

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

A. Preliminary Statement

The brief of appellant does not fully reflect all of the essential facts of this case, and for that reason we deem it necessary to set forth a statement of facts

in full. We cannot hope to match the brief of the appellant in dramatic appeal, but we shall attempt to compensate for this deficiency with a straightforward comprehensive and unvarnished recital of all of the relevant facts of the case.

This action was brought by the plaintiff to quiet its title to two quarter-quarters sections of land described as follows:

The Northwest quarter of the Southeast quarter and the Northeast quarter of the Southwest quarter of Section 29, Township 1 North, Range 1 East, Salt Lake Meridian. (R. 1, 2).

Plaintiff's exhibit "A" well illustrates the lands involved.

For purposes of this law suit, it is necessary to treat the lands in question as three separate tracts by reason of the fact that plaintiff's claims to the various tracts do not all arise out of the same chains of title. The first tract is the Northwest quarter of the Southeast quarter of Section 29, and will hereinafter be referred to as the East 40. The second tract consists of the Northeast quarter of the Southwest quarter, except a strip about 20 rods north and south by 30 rods east and west, in the southwest corner thereof. The second tract will be hereinafter referred to as the west tract. The third tract is the small southwest corner of the west tract above described, and is hereinafter referred to as Capitol Heights Second Filing.

Capitol Heights Second Filing is subdivided into

Lots and Blocks. Certain of these lots were never owned by any of the defendants and the plaintiff's title thereto is not in dispute. These lots are known and designated as Lots 1 to 8 inclusive, Block 1, Lots 2 to 7, inclusive and Lots 15 to 21 inclusive, Block 2, and Lots 2 to 6 inclusive and Lots 15 to 21 inclusive, Block 2, and Lots 2 to 6 inclusive and Lots 15 to 21 inclusive in Block 3, Capitol Heights Second Filing. (R. 106, 107). On plaintiff's Exhibit A, these lots are shown in white. They are referred to in appellant's brief as the "white lots" and we shall employ the same terminology. The other lots in Capitol Heights Second Filing are shown on Exhibit A in yellow, and in these lots the respondents claim an interest. We shall follow appellant's terminology and refer to these lots as the "yellow lots."

The Court's Decree quieted plaintiff's title in and to the white lots, and to an undivided one-third interest in and to all of the rest of the property in suit, subject to the probate of the estate of Lucie R. Thomas, deceased. The Court also quieted the title of defendant John Livingston Thomas to an undivided one-third interest and the title of the defendant Gertrude Thomas Gardner to an undivided one-third interest each to all of the lands in suit except the white lots, subject to the probate of the Estate of Lucie R. Thomas, deceased. (R. 113-115). Appellant now concedes that the Court was correct in awarding to each of John Livingston Thomas and Gertrude Thomas Gardner, an undivided one-third interest in the yellow lots, but contends that it was error to award those defendants any interest in

the balance of the property, and claims that plaintiff should have been awarded title to the whole thereof. (Appellant's brief, pp. 46, 50).

In view of the fact that title to the white lots is not in anywise involved in this appeal, they may be eliminated from further consideration, and hereinafter in this brief, any reference to the land in suit will be understood to exclude the white lots.

B. CHRONOLOGY

All parties to this action derive their claims of title from Lucie R. Thomas. (R. 27). It is undisputed that on and before December 16, 1908, Lucie R. Thomas was the owner in fee of all of the lands in suit. (Ex. 11). On that date she executed a Warranty Deed to H. H. Hempstead of San Francisco to the west tract. The deed was subsequently recorded, not at the request of the grantee, Hempstead, but at the request of the grantor, Lucie R. Thomas, (Ex. F.) and Hempstead never thereafter asserted any dominion over the land.

Notwithstanding the deed to Hempstead, Lucie Thomas continued to treat the land as her own. On February 4, 1910, she executed a Warranty Deed to Tracy Loan & Trust Company covering both the East 40 and also the west tract. (Ex. 11, Entry 38). The land was subsequently reconveyed to Lucie Thomas by Tracy Loan & Trust Company on September 17, 1915. (Ex. 11, Entry 44). The west tract was sold for delinquent taxes assessed against Hempstead for the years 1910 and 1911, but was redeemed by Lucie Thomas on Jan-

uary 10, 1915. (Ex. 11, Entries 40 and 42). On January 18, 1912, both the East 40 and the west tract were sold to Spencer Clawson by Auditor's Tax Deed. (Ex. 11, Entry 43). On January 12, 1914, Lucie Thomas and her husband, Hugh (not to be confused with defendant Hugh L. Thomas, Jr., Lucie's son), executed to Utah Savings and Trust Company, hereinafter referred to as Utah Savings, an instrument in the form of a Warranty Deed describing the east 40 and the west tract, but excluding Capitol Heights, Second filing. (Ex. 11, Entry 47; Ex. D). On January 19, 1915, Spencer Clawson, Quit Claimed to Lucie Thomas all of his interest in and to the east 40 acres and the west tract. (Ex. 11, Entry 49). Notwithstanding the deeds to Hempstead, Tracy Loan & Trust Co., and Utah Savings, Lucie Thomas always treated the land as her own. From the years 1918 through 1934 inclusive, Lucie Thomas paid the taxes on all of the lands in suit. The lands were sold for taxes assessed for the years 1935 and 1936 and were later redeemed by Lucie Thomas. From 1938 through 1945 inclusive, Lucie Thomas again paid all of the taxes on the lands in suit. (R. 100, 101). On July 31, 1918, Lucie Thomas obtained a Certificate of Water Appropriation from the State Engineer for use of water on part of the lands in suit. The certificate of water appropriation recites that the date of appropriation was January 13, 1909. (Ex. 11, Entry 52-53).

Willard R. Smith, a stockholder and director of the plaintiff corporation and its treasurer, testified

that in the summer of 1947, the plaintiff corporation became interested in purchasing the lands in suit, having previously purchased adjacent lands. The plaintiff obtained an abstract of title to the lands in suit and determined that Lucie R. Thomas was the owner (R. 68, 69). On August 13, 1947, plaintiff wrote a letter to Lucie Thomas who was then in Southport Connecticut inquiring whether she was interested in selling the lands. (R. 69, 79, 80; Ex. 9). Mrs. Thomas never replied to the letter, but shortly thereafter, Hugh L. Thomas, Jr., called on Mr. Smith and represented that he was Lucie's son. (R. 70). Negotiations for purchase of the property commenced. (R. 70). Northcrest referred the matter to its attorneys for an opinion and they advised that title to the lands in suit was in either Lucie R. Thomas or Hugh L. Thomas, (the witness wasn't certain which), but advised that the title was clouded by the record interests of Utah Savings and Hempstead under the deeds hereinbefore described. (R. 71). As a result of the negotiations between Northcrest and Hugh L. Thomas, Jr., Northcrest agreed to purchase the lands in suit from Hugh L. Thomas, Jr. for the sum of \$2500.00, which was the full value of the property. (R. 73). Hugh L. Thomas Jr. was paid \$1800.00 of the purchase price and the balance of \$700.00 was withheld pending clearance of the title. (R. 74, 76). Pursuant to that agreement, Mr. Smith arranged to obtain a Quit Claim Deed to the lands in suit from Utah Savings. At that time he was advised by the officers of Utah Savings, with whom he negotiated,

that Utah Savings claimed no interest whatsoever in the lands. (R. 72, 73). No consideration was given for the execution of the Quit Claim Deed (R. 75). Smith did not expect to obtain any title by virtue of the Quit Claim Deed, but merely to clear the cloud. Likewise, the interest of Hempstead in the premises was recognized by both Hugh L. Thomas, Jr., and by Smith, as merely a cloud. (R. 75).

Lucie Thomas died on or about July 5, 1948, leaving as her surviving heirs and devisees the defendants John Livingston Thomas, Gertrude Thomas Gardner and Hugh L. Thomas, Jr. (Ex. 6). Prior to this date and on or about September 16, 1947, an instrument was executed purporting to be a Warranty Deed from Lucie R. Thomas to Hugh L. Thomas, Jr., covering all of the lands in suit. (Ex. B; Ex. 11, Entry 67). At the trial the defendants produced evidence so overwhelmingly strong that the signature on this deed was not that of Lucie R. Thomas, that plaintiff now reluctantly, but none the less effectually concedes that this signature was not hers. Appellant does, however, contend that this signature was adopted by Lucie and acknowledged by her, notwithstanding that there is no evidence to support the contention. On June 11, 1948, Hugh L. Thomas, Jr. executed to the plaintiff a Warranty Deed covering all the lands in suit. (Ex. 11, Entry 59; Ex. C.). On December 16, 1947, plaintiff obtained from Utah Savings a Quit Claim Deed to all the lands in suit, except the yellow lots in Capitol Heights Second Filing. (Ex. E; Ex. 11, Entry 64). Plaintiff later obtained a

Quit Claim Deed from Lucie Hempstead, the widow of H. H. Hempstead, deceased, and also obtained a decree quieting its title to the west tract as against the widow and the personal representative of H. H. Hempstead. The details of this transaction are more fully stated hereafter.

Plaintiff's claims to tile to the lands in suit are based upon three separate chains of title. Plaintiff claims first, an undivided fee title to the east 40 acres and to the west tract, and an undivided one-third interest in the yellow lots in Capitol Heights Second Filing, by virtue of its Warranty Deed from Hugh L. Thomas, Jr. Second, plaintiff claims title to the east 40 acres and to the west tract under its Quit Claim Deed from Utah Savings; and third, plaintiff claims title to the west tract under its Quit Claim Deed from Lucie Hempstead and under its decree quieting title to said tract of land as against Lucie S. Hempstead and against the personal representative of the Estate of H. H. Hempstead, deceased. We shall treat these separate claims seriatim.

C. PLAINTIFF'S CLAIM UNDER HUGH L. THOMAS, JR.

The validity of plaintiff's claim under its deed from Hugh L. Thomas, Jr., depends upon the validity of the purported deed from Lucie R. Thomas to Hugh L. Thomas, Jr., dated Sept. 16, 1947, and covering all of the lands in suit. If this purported deed was a valid conveyance to Hugh L. Thomas, Jr., then the claim of

the plaintiff is valid and it is entitled to a decree quieting its title to all of the lands in suit. If, however, the purported deed from Lucie Thomas to Hugh L. Thomas, Jr., was not a valid conveyance, but was a forgery, as claimed by the respondents, then the claim of the plaintiff is without merit and the only interest which plaintiff would have obtained under its deed from Hugh L. Thomas, Jr., would be an undivided one-third interest in the lands in suit, subject to the probate of the estate of Lucie R. Thomas, deceased.

It is interesting to observe that the plaintiff in its brief admits that it obtained only an undivided one-third interest in and to the yellow lots. It would seem to follow as a necessary consequence, that if the plaintiff obtained only an undivided one-third interest in and to the yellow lots, it obtained no greater interest in the rest of the lands in suit. All of the lands in suit are described both in the purported deed from Lucie Thomas to Hugh L. Thomas, Jr., and also in the deed from Hugh L. Thomas, Jr., to the plaintiff. We do not know upon what possible theory it could be contended that the plaintiff derived any greater interest in the east 40 acres and in the west tract, than it obtained in the yellow lots. Having admitted that it acquired only a one-third interest in the yellow lots, plaintiff would seem to have admitted that it obtained no greater interest in the rest of the lands in suit. This alone would be sufficient to defeat plaintiff's claim under Hugh L. Thomas, Jr. However, the evidence received at the trial of the case conclusively shows the purported deed

from Lucie R. Thomas, to Hugh L. Thomas, Jr., to be a forgery and therefore to be wholly nugatory.

It is now admitted that the signature on the deed from Lucie Thomas to Hugh L. Thomas, Jr., was not the signature of Lucie Thomas. The evidence is equally clear that this signature was never acknowledged or adopted by Lucie Thomas as her own. Marguerite B. Clayton, the notary public, who purportedly took the acknowledgment of Lucie R. Thomas on the deed, testified at the trial that Lucie Thomas did not appear before her, either on the date shown on the deed or at any other time, and did not acknowledge the signature to be hers. (R. 59, 60). The defendant Hugh L. Thomas, Jr. (who defaulted), was subpoenaed to testify on behalf of the respondents and he testified that his mother, Lucie Thomas was never in Salt Lake City in 1947, except during the latter part of December of that year, and therefore, could not have acknowledged the signature on the deed. He stood upon his constitutional privilege against self incrimination and refused to answer any further questions. (R. 81).

D. PLAINTIFF'S CLAIM UNDER UTAH SAVINGS & TRUST COMPANY

Mr. McGee, an officer of Utah Savings was called and testified on behalf of the respondents. The testimony of McGee is produced in full in appellant's brief and need not be repeated here. The purpose of calling McGee was to identify the defendants' Exhibit 8, which is a series of three loan cards, part of the records

of Utah Savings. The cards, together with Mr. McGee's explanation thereof, show conclusively that on January 12, 1914, Lucie Thomas and her husband borrowed from Utah Savings the sum of \$1400.00. The cards also show that the loan, together with interest thereon was fully repaid on November 3, 1915. Exhibit 8 also shows that the borrowers, Lucie Thomas and her husband, Hugh, executed a Warranty Deed as security for the loan. On the loan card the deed is merely described as W.D. [Warranty Deed] to part of Section 29, Township 1 North, Range 1 East, Salt Lake Meridian. The Warranty Deed from Lucie Thomas and her husband Hugh to Utah Savings and Trust Co., under which plaintiff claims title to the east 40 acres, and the west tract, is dated January 12, 1914, which is the same date as the loan. The consideration recited in the deed is \$1400.00, which is the exact amount of the loan.

As above pointed out, the property was never thereafter claimed by Utah Savings, but was always claimed by Lucie R. Thomas and treated as her own. No other deed from Lucie Thomas to Utah Savings covering any other lands in Section 29, was ever recorded. (R. 101). In light of these facts and circumstances, the conclusion is irresistible that this purported Warranty Deed was not a deed at all, but was intended by both of the parties thereto to be a mortgage and security for the loan, and was treated by both as such.

E. PLAINTIFF'S CLAIM UNDER
H. H. HEMPSTEAD

Plaintiff also claims title to the west tract by virtue of a Quit Claim Deed from Lucie S. Hempstead, the widow of H. H. Hempstead, deceased, (Ex. G) and by virtue of a decree quieting its title in and to the west tract, as against Lucie S. Hempstead and as against Arthur P. Lakin, administrator with the will annexed of the Estate of H. H. Hempstead, deceased. (Ex. H). The quiet title suit against the Hempsteads was originally commenced on November 7, 1950, (after commencement of the case at bar) and Lucie Hempstead was the sole defendant. The complaint alleged that title to the premises was in the plaintiff, that the defendant claimed some interest in and to the lands adverse to the plaintiff and that such claim was null and void. The complaint was signed by Frank Armstrong one of the attorneys for the plaintiff, and by signing the complaint he certified that in his opinion there were good grounds to support the allegations therein contained. Rule 11, U.R.C.P. Subsequently on about November 29, 1950, the plaintiff obtained a Quit Claim Deed from Lucie Hempstead to the west tract for which it paid a consideration of \$25.00. Thereafter, the attorneys for the plaintiff procured the appointment of Arthur P. Lakin as administrator with the will annexed of H. H. Hempstead, deceased, and they amended their complaint in the quiet title suit by joining the personal representative of H. H. Hempstead as a party defend-

ant. (Ex. 10). Thus the attorneys for Northcrest represented both the plaintiff, Northcrest and the defendant representative of the Estate of H. H. Hempstead, and assumedly on their advice the personal representative of the Hempstead estate defaulted.

It should be observed here, that if plaintiff is in good faith when it states that it would be willing to rely on its title derived from Utah Savings (as it does state at page 6 of its brief), it can hardly be in good faith in asserting that it obtained a good title from the Hempsteads. The claim under Utah Savings as to the west tract, could not have any validity, if there is any merit to the Hempstead claim, since the Hempstead deed antedates the deed to Utah Savings.

Both Hempstead and Lucie Thomas being dead at the time of the trial it was impossible to show the exact nature of the transaction between Lucie Thomas and H. H. Hempstead. However, from the fact that the deed was recorded by Lucie Thomas, the grantor, rather than by Hempstead, the grantee, (who was a resident of San Francisco), and from the fact that Hempstead never thereafter asserted any interest in the land and from the fact that Lucie Thomas continued to treat the land as her own, it is almost necessary to infer that the deed from Lucie R. Thomas to Hempstead was never intended to convey any beneficial interest in the land. In any event, if Hempstead ever obtained any title to the west tract, such title was subsequently extinguished by virtue of the Auditor's Tax Deed of the west tract to Spencer Clawson.

F. SUMMARY

In summary, it may be said that Lucie Thomas was the owner of all of the lands in suit prior to 1908 and at that time she executed a Warranty Deed to H. H. Hempstead to a portion of the lands in suit, that such deed probably never conveyed any title to Hempstead but if it did so, such title was later extinguished by an Auditor's Tax Deed to Spencer Clawson, covering the same lands; that on January 12, 1914, Lucie Thomas executed an instrument in the form of a Warranty Deed to Utah Savings, covering the East 40 acres and the West tract, but said instrument was never intended as a conveyance, but merely as a mortgage; that the loan secured thereby was later fully paid and satisfied and that on the payment of such loan, Utah Savings never had any further interest in the land and never claimed any; that thereafter Lucie Thomas was the sole owner of said lands and continued as such to the date of her death, paying all of the taxes thereon; that the purported deed from Lucie Thomas to Hugh L. Thomas, Jr., was a forgery and was of no force or effect whatsoever; that the plaintiff, Northcrest, dealt with Hugh Thomas Jr., in good faith, believing that Hugh Thomas, Jr. had the title to the land; that the plaintiff, Northcrest knew that the interests of both Hempstead and Utah Savings were merely clouds and treated them as such; that the Quit Claim Deed obtained by the plaintiff from Utah Savings was not in derogation of the Thomas title, but in affirmation thereof;

that the plaintiff having discovered that it had been defrauded and that it obtained no title whatsoever to the lands in suit, except whatever interest Hugh might have had by right of inheritance from his mother, has sought by various devices to throw its loss upon the defendants, John Livingston Thomas and Gertrude Thomas Gardner, both of whom are entirely innocent of any wrongdoing in the matter and who in equity and good conscience should not be deprived of their rights of inheritance by reason of the wrongdoing of a third person with whom they never dealt.

POINTS TO BE ARGUED

1. The respondents established by evidence which was clear, convincing and unequivocal that the deed from Lucie R. Thomas to Utah Savings & Trust Company was intended as a mortgage.

2. The evidence by Utah Savings & Trust Company that the deed from Lucie R. Thomas to Utah Savings & Trust Company was intended as a mortgage was competent and relevant and was properly received by the Court.

3. The testimony of the notary public denying that Lucie R. Thomas acknowledged the purported deed from Lucie R. Thomas to Hugh L. Thomas, Jr., was competent and relevant and was properly received by the Court.

4. Respondents proved by a clear preponderance of the evidence that the purported deed from Lucie R.

Thomas to Hugh L. Thomas, Jr., was a forgery and said instrument was nutagory and void and of no force and effect.

5. Plaintiff's claim to title under H. H. Hempstead is wholly without merit.

6. Plaintiff's claims to title under H. H. Hempstead and Utah Savings & Trust Company were obtained in affirmation and not in derogation of the Thomas title and the plaintiff is estopped to claim title under either.

7. Lucie Thomas established a title by adverse possession, good as against the claims of either H. H. Hempstead or Utah Savings & Trust Co.

ARGUMENT

POINT I.

THE RESPONDENTS ESTABLISHED BY EVIDENCE WHICH WAS CLEAR, CONVINCING AND UNEQUIVOCAL THAT THE DEED FROM LUCIE R. THOMAS TO UTAH SAVINGS & TRUST COMPANY WAS INTENDED AS A MORTGAGE.

Appellant commences its argument with the assertion that it would be willing to stand on its title obtained under its Quit Claim Deed from Utah Savings. This bold assertion fails to ring true in view of the fact that appellant devotes a considerable portion of its brief in attempting to uphold its position under two other chains of title. While we can well understand why appellant would not place much faith in its claims under Hugh L. Thomas, Jr., and H. H. Hempstead, its

claim under Utah Savings is equally frail and must fall when confronted with cold facts and clear reasoning.

Appellant concedes, as well it must, that a deed absolute on its face may be shown to be intended only as a mortgage, and we assume that appellant also concedes that when such a showing is made, courts of equity will give effect to the intent of the parties and treat the instrument as a mortgage. The cases cited in appellant's brief are ample authority for this proposition.

We agree with the appellant's statement that the question in every case is the intention of the parties, and we have no quarrel with the proposition that the mutual intention of the parties must be proved. The evidence outlined in our Statement of Facts clearly shows the intention of both parties, that is of Lucie R. Thomas and her husband, Hugh Thomas on the one hand, and Utah Savings on the other, that the instrument executed by the Thomases to Utah Savings in the form of a Warranty Deed was intended by both of the parties thereto as a security transaction only, and that it was treated by both parties as such. It is apparently the position of the appellant that this intent of the parties can be shown only by conversations of the parties at the time of the execution of the instrument. However, the law of evidence is not so poverty stricken. In determining the intent of the parties, and whether or not a mortgage was intended, the Court may and should consider the existence of a continuing obligation to pay a debt; relative values;

contemporaneous and subsequent acts and declarations of the parties to the instrument; the form of written evidence of the transactions; the relationship of the parties, and the purposes to be accomplished. *Corey vs. Roberts*, 82 Utah 445, 25 Pac. (2d) 940; *Thornley Land and Livestock Co. vs. Gailey*, (Utah), 143 Pac. (2d) 283.

The record quite conclusively establishes that there was an existing and continuing obligation on the part of the Thomases to pay a debt to Utah Savings which was evidenced by the loan cards of the bank. It fully appears from the testimony of E. R. McGee set forth in full in appellant's brief, and from Exhibit 8, part of the records of Utah Savings, that prior to January 12, 1914, the Thomases borrowed money from Utah Savings, that a portion of this loan was repaid, and that on January 12, 1914, an additional amount was borrowed, making the total amount of the obligation \$1400.00. The date of this transaction is identical to the date of the Warranty Deed from the Thomases to Utah Savings, and the consideration recited in the deed is \$1400.00, the exact amount of the loan. Further, the records of the bank show that a Warranty Deed covering part of the lands in Section 29, was executed by the Thomases, as security for the loan. While the bank records do not specifically identify the land covered in the security deed, as being the same identical lands as those described in the deed under which appellant claims, there would seem to be little doubt that the lands referred to were the same. The identity of date

and consideration can hardly be charged to coincidence. Moreover, it appears from the abstract of title received in evidence, that Lucie R. Thomas thereafter continued to treat the land as her own, mortgaging it, conveying it, paying the taxes thereon and securing a certificate of water appropriation.

After the amount of the indebtedness was paid, Utah Savings never asserted any further interest in the land. At the time of its Quit Claim Deed to the appellant, Utah Savings admitted that it claimed no interest in the land.

In view of all these facts and circumstances, the conclusion is irresistible that it was the intent of both parties that the deed should be treated as a mortgage, and both parties did in fact treat the deed as a mortgage. Counsel for the appellant has suggested no other conclusion which would be consistent with all of the above mentioned facts and circumstances and we are unable to conceive of any. Counsel has suggested that the Thomases might have executed another Warranty Deed conveying other lands in Section 29, as security for the loan transaction, and counsel specifically suggests that Lucie Thomas owned the yellow lots in Section 29 as well as the lands described in Exhibit D. The record does not show when Lucie Thomas acquired title to the yellow lots and it would be mere speculation to assume that she was the owner of those lots or any other lands in Section 29 at the time of this conveyance. It would be even more speculative to assume that Lucie Thomas executed two deeds to Utah Savings. The record is

clear that only one deed was ever recorded, and there is no evidence whatsoever, that even suggests that another deed was executed by Lucie Thomas to Utah Savings. The finding of the Court must be based on evidence, not upon speculation and conjecture. There is no evidence to support appellant's thesis. The trial Court arrived at the only conclusion possible under the evidence adduced.

POINT II.

THE EVIDENCE BY UTAH SAVINGS & TRUST COMPANY THAT THE DEED FROM LUCIE R. THOMAS TO UTAH SAVINGS & TRUST COMPANY WAS INTENDED AS A MORTGAGE WAS COMPETENT AND RELEVANT AND WAS PROPERLY RECEIVED BY THE COURT.

Plaintiff contends that it was incompetent for Mr. McGee to testify with respect to the records of Utah Savings. This contention seems to be based upon a false premise. Appellant cites the general rule that a grantor may not, *after parting with his title*, make statements or admissions in disparagement of his title to the prejudice of his grantee. No such problem is here involved. It was not contended by respondents that McGee knew of his own personal knowledge the facts with respect to the deed from the Thomases to Utah Savings. Mr. McGee, as an officer of Utah Savings, having access to its records, was called merely to identify the records and to explain the notations thereon. The records speak from the date they bear and not from the date of trial, and were properly received as statements in disparagement of its title by a grantor made

at a time when it was vested with whatever interest it ever held, and long prior to the time it parted with its title. The rule with respect to such declarations is well stated in the annotation in 1 A.L.R. at page 1240 where it is said:

“The well-settled rule of law is that *the declarations against his own title of a former owner of property, either real or personal, made while in the possession thereof, are admissible not only against himself, but also against those claiming under him*, but that a derogatory statement of a grantor made after parting with title, being hearsay, and not having the required guaranty of truth, is not competent evidence against the transferee, or those claiming under him, at least, in the absence of fraud or collusion.” (Italics ours.)

See also the statement of the rule in 20 Am. Jur. pages 502, 503 and 516, Evidence, Secs. 593, 593.1 and 604:

Page 502, Sec. 593:

“The declarations of a third person are admissible against a party whenever privity of estate exists between the declarant and the party, the term ‘privity of estate’ generally denoting in this respect a succession in rights. The declarations of the privity in estate are deemed in law to be the declarations of the party himself. Thus, whenever a party claims under, or in the interest or right of, another, the declarations of such other person pertaining to the subject of the claim are admissible against him.”

Page 503, Sec. 593.1:

“It should be observed that the statements of parties to an instrument at and after the execution thereof are admissable where the issue is whether the instrument was an absolute deed or mortgage.”

Page 516, Sec. 604:

“On the other hand, it is held that whenever a party claims under or in the interest or right of another, the declarations of such other person pertaining to the subject of the claim are admissible against him. Accordingly, a declaration of a former owner in the nature of an admission against interest, is, as to real estate at least, admissible against his successors in title to show the real character of the possession of the declarant or the title under which he held, provided the matter is one which may be proved by parol evidence and the declarant possessed a proprietary interest at the time he made the statement. It is not necessary to call the former owner as a witness to prove the statement; and any person may testify thereto.”

See also *Abbott v. Walker*, 204 Mass. 71, 90 N.E. 406.

Not only were these records of Utah Savings properly received as admissions against interest of a former owner, binding upon his privity, (appellant), but they were also admissible as records made in the regular course of business of Utah Savings. The rule with respect to this is well stated in 20 Am. Jur. 881, Evidence Sec. 1403, follows:

“Independent of, and in addition to, the shop-book rule of the common law and statute, which admits only the account books of a party to a cause or proceeding, is another rule which is not confined to books of account or to records made by a party to an action, under which entries or memoranda made by third parties in the regular course of business, under circumstances calculated to insure accuracy and precluding any motive of misrepresentation, are admissible as prima facie evidence of the facts stated. The truth-telling habits of such business records make them admissible, irrespective of the unavailability of the witness. Modern statutes of recent development have provided for admissibility of certain business books and memoranda.”

The documents were also admissible under still another rule that is, the ancient document rule, these records having been in existence for more than 30 years.

Only by keeping the true facts from the Court can appellant hope to prevail. To its credit, it must be said, that it has exercised real ingenuity in attempting to devise arguments and to raise obstructions to the presentation of the full facts to the Court. However, trials of law suits being essentially factual investigations, it is the policy of the law to receive in proof all evidence which reasonably tends to prove or disprove the ultimate facts in issue, except as such evidence is declared to be inadmissible under one of the well established exclusionary rules. Appellant has pointed to no exclusionary rule which would make the testimony of McGee or Exhibit 8 inadmissible. The false issue of

disparaging declarations being made after the grantor has parted with interest is patently without merit and the evidence of McGee is entitled to be weighed and considered the same as that of any other disinterested witness.

POINT III.

THE TESTIMONY OF THE NOTARY PUBLIC DENYING THAT LUCIE R. THOMAS ACKNOWLEDGED THE PURPORTED DEED FROM LUCIE R. THOMAS TO HUGH L. THOMAS, JR., WAS COMPETENT AND RELEVANT AND WAS PROPERLY RECEIVED BY THE COURT.

In seeking to establish its title under Hugh L. Thomas, Jr., the plaintiff is again confronted with the necessity of supressing the facts, and only by so doing can it hope to prevail upon this theory. It has always been the contention of the respondents, that the deed from Lucie R. Thomas to Hugh L. Thomas, Jr., was a forgery. It is elementary of course, that a forged deed is utterly void and conveys nothing to the grantee although he may be an innocent purchaser for value and without notice of the forgery. Long Co. v. Kenwood 85 Ut. 524, 39 Pac. (2d) 1088, and cases there cited; also 16 Am. Jur. 452.

At the trial of this cause, respondents produced such overwhelming evidence that the signature upon the deed was not that of Lucie R. Thomas, that appellant now belatedly and reluctantly concedes that the signature on the deed is not hers. However, appellant has the temerity to assert that the notary's certificate of acknowledgment stands as strong evidence that Lucie

Thomas acknowledged the deed as her own act, and that it was incompetent for the notary public to impeach her certificate of acknowledgment. In making this contention, appellant seeks to give to the certificate of acknowledgment a degree of sanctity far above that to which it is entitled.

While asserting that the weight of authority is to the effect that a notary may not impeach his certificate of acknowledgment, appellant cites only two cases in support of its position and both of those cases are readily distinguishable from the facts in the case at bar, as will be more fully pointed out, hereafter.

Appellant has failed to recognize that there are two types of fact situations which may occur and which are controlled by different legal principles. In the first situation the person purporting to execute the deed or other instrument, may actually be in the physical presence of the Notary Public, but may not make a valid acknowledgment, due to physical infirmity, mental incapacity, ignorance, or failure of the notary to follow the forms prescribed by the law. In situations of this sort, many of the Courts hold not only that the notary may not impeach his certificate, but that the certificate is absolutely conclusive of the facts therein stated. However, in the second class of cases, where the person purporting to execute the deed or instrument never appears before the notary public at all, the authorities are virtually unanimous in holding that the purported certificate of acknowledgment is a nullity and has no force or effect whatsoever and may be impeached by

parol evidence. It has been held in a great number of cases that the officer taking the acknowledgment may testify in impeachment of his own certificate, and the trend of authority and the better reasoning is in support of this view.

For an excellent discussion of the foregoing views see *Grider vs. American Freehold Land Mortgage Co.* 99 Ala. 281, 12 So. 775, where it is said:

“It must be regarded as settled by the great weight of authority that when the grantor or mortgagor appears before the officer and makes an acknowledgment of the execution of the instrument, which is duly certified by the officer to have been made in conformity to law, the certificate is conclusive of the truth of all the facts therein certified, and which the officer was by law authorized to certify, until successfully assailed for duress or fraud in which the grantee or mortgagee participated, or of which he had notice at the time of parting with the consideration. The taking and certifying of the acknowledgment are held in many of the cases to be of a judicial nature; and when the officer has jurisdiction so to speak, by having the party acknowledging, and the instrument to be acknowledged before him, and enters upon and exercises this jurisdiction, the parties will not be allowed to impeach the truth of the facts which he is required by law to certify, and does certify, in the absence of fraud or duress, as above stated.

* * *

“... we must realize that the question we are called upon to decide is by no means free from difficulty. We know the absolute and implicit

faith and trust which, in practice, purchasers of real estate repose, and must necessarily repose, in the formal and regular certificates of authorized officers, authenticating the regular and legal execution of conveyances, and the disastrous consequences which may flow from a rule which would allow those certificates to be questioned, and set aside against purchasers who have parted with valuable interests in reliance upon them; yet on the other hand we perceive the manifest injustice of a rule which would deprive one of his property, without his knowledge or consent, upon the mere baseless fabrication of another . . . Upon due consideration, we are of the opinion that the better rule, and the one sustained by the weight of authority is that *when there has been no appearance before the officer, and no acknowledgment at all made, it may be shown in disproof of the officer's certificate, even against bona fide mortgagees and purchasers.* We approve the rule as it is stated in 1 American & English Enc. Law. P 160 ¶6: *'When there is no appearance before the officer, his false certificate of acknowledgment is void; but when there is an appearance and acknowledgment of it in some manner, then the official certificate is conclusive of every fact appearing on its face, and evidence of what passed at the time of the acknowledgment is inadmissible to impeach the certificate, except in case of fraud or imposition, and where knowledge or notice of the fraud or imposition is brought home to the grantee.'* (Italics ours).

Another excellent discussion is set forth in the case of *Pickens vs. Knisely*, 29 W. Va. 1, 11 S. E. 932. The Court there said:

“In all the cases the struggle has been to protect the married woman in her right of property on the one hand, and the innocent purchaser, who parted with his money for her land, on the other, and to uphold the rights of land owners, who must necessarily rely on the correctness of the records of land-titles for their protection . . . it has been uniformly held that, as regards an innocent purchaser of the land of a married woman, the certificate of her acknowledgment of the deed by an authorized officer is conclusive of the facts which are therein stated. The principle, it is contended, applies to every case where the acknowledgment has been certified by an officer authorized to take it, whether the married woman ever acknowledged it or not. But I have found no case where it has been held that if it clearly appeared, by proper parol evidence, that the married woman never, in fact, appeared before the officer to acknowledge the deed, and the certificate contains all the requirements of the law, just as though she had in fact appeared before the officer, the deed would operate to divest [sic] her estate, even in favor of an innocent purchaser; but we have cited two cases where it has been held that under such circumstances her estate could not be divested [sic]. It does seem to me that strong as may be the claims of innocent purchasers, who have been thus imposed upon by the gross fraud and collusion of a wicked husband and a justice, who had no regard for the rights of property, yet the claim of an innocent wife, who, without the least fault of hers, has thus been the victim of such an attempted spoliation of her land, makes a much stronger appeal to the Court.

* * *

“It seems to us that it is admissible to hear the evidence of a justice who took the acknowledgment of a married woman to prove that she never did in fact appear before him to acknowledge a deed, although he has certified that she did.”

See also the language of the Supreme Court of Arkansas in the case of Hall vs. Mitchell, 175 Ark. 641, 1 S.W. (2d) 59 where the court said:

“A proper acknowledgment is an essential part of the execution of a conveyance of land, and it is competent for the grantor to show the falsity of a certificate of acknowledgment. Where the grantor does not acknowledge the deed and the officer makes a certificate that the grantor did appear, the act of the officer is without authority of law and void. No one can claim that an estate in land can be divested by forgery, and every one must be subject to the risk of forgery by officers authorized to take acknowledgments. Miles v. Jerry holds in accord with above and further holds that forgery need only be proved by a preponderance of the evidence. Miles v. Jerry, 158 Ark. 314, 250 S.W. 34 and Wilson v. Biles, 171 Ark. 912, 287 S.W. 373.”

The rule is summarized in 41 L.R.A. (N.S.) at pages 1170 and 1171 as follows:

“Even in those states where the certificate is held to be conclusive of every fact appearing on the face of the certificate which the officer is by law authorized to certify, and where it is held that evidence of what passed at the time of the

acknowledgment is inadmissible to impeach the certificate except in case of fraud or imposition, the certificate may always be impeached by proof that the party did not in fact appear before the officer certifying to the acknowledgment, nor otherwise acknowledge the instrument. *Michener v. Cavender*, 38 Pa. 334, 80 Am. Dec. 486; *Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054; *Grider v. American Freehold Land Mortg. Co.* 99 Ala. 281, 42 Am. St. Rep. 58, 12 So. 775; *Meyer v. Gossett* 38 Ark. 377; *Wheelock v. Cavitt*, 91 Tex. 579, 66 Am. St. Rep. 920, 45 S.W. 796; *Johnston v. Wallace*, 53 Miss. 321, 24 Am. Rep. 699.”

And at page 1173 of the same annotation it is said:

“But it is always admissible to show that grantors in alleged deeds or mortgages never actually appeared before the officer purporting to have taken their acknowledgments, and that they made no acknowledgment at all, even as against a bona fide purchaser or mortgagee without notice, and relying on the acknowledgment. This situation is analogous to a judgment void for want of jurisdiction. There is a wide distinction between this and the admission of an appearance before the officer, but a denial of the occurrence of certain material incidents recited in the certificate.”

For other authorities to the same effect see *Donahue vs. Mills*, 41 Ark. 421; *Peoples Gas Co. vs. Fletcher*, 81 Kan. 76, 105 Pac. 34, *Robertson vs. Burnham*, (Tex.) 12 S.W. (2d) 991; and *Moore vs. Bragg* 212 Ala. 481,

103 So. 452; See also 1 Am. Jur. 378, where the rule is declared as follows:

“On the other hand, it shocks the conscience to suppose that property owners may be defrauded merely by false personation or by procuring the collusion of an unscrupulous officer. *A balancing of the conveniences leads to the conclusion that where there was no appearance before the officer and no acknowledgment at all made, this may be shown in disproof of the certificate, even against innocent persons who have relied upon the recitals thereof.* There is a wide distinction between this and the admission of an appearance before the officer, but a denial of the occurrence of the material incidents recited in the certificate. In the latter class of cases it is generally held that the recitals in the certificate can only be impeached for fraud or imposition, and then only if the knowledge or notice of the fraud can be brought home to the grantee. The rights of property are too sacred to allow them to be swept away without the knowledge of the owner. Furthermore, caveat emptor.” (Italics ours.)

Utah is committed to the above rule. In the case of Tarpey vs. Desert Salt Co., (Utah) 14 Pac. 338, this court said:

“A deed may be acknowledged and admitted to record. One object of the acknowledgment is to entitle the deed to be recorded. *But the record is only prima facie evidence of the facts therein stated.* Law Utah 1884 p. 363, secs. 1177, 1178. *The certificate of acknowledgment is itself only*

prima facie evidence of the facts therein stated. It is not conclusive, and may be rebutted. Comp. Law Utah, p. 255, sec. 9, (625). Further proof may become necessary in support of the certificate, or to show its falsity." (Italics ours).

Though appellant asserts that the weight of authority does not permit a notary or certifying officer to impeach his certificate, most of the cases which we have been able to discover on this question have permitted the certifying officer to impeach his certificate. The trend of authority is definitely in this direction. See 1 Am. Jur. 380 where it is said:

"The trend of authority, however, is in favor of admitting any evidence that may have a tendency to prove the truth, and a more liberal rule permits the officer to be called as a witness and compelled under oath to state the true facts of the transaction so far as he can remember them, whether he acted under mistake, misapprehension, or in collusion with the party to be benefited by taking the acknowledgment."

The only two cases cited by appellant, (First National Bank v. Glenn. 10 Ida. 224, 77 P. 623 and Woodridge v. Woodridge (W. Va.) 72 S.E. 654), do not support the rule for which appellant contends. In both of those cases it was clear *that the party purporting to have executed the acknowledgment did in fact appear before the officer*, whereas in the case at bar, the testimony is that Lucie R. Thomas never did appear before Mrs. Clayton to acknowledge the deed. The courts held,

in those two cases, that it was not competent for the notary to impeach his certificate. In the case of the First Natl. Bank of Hailey v. Glenn, *supra*, (quoted in appellant's brief at page 34) the language which purports to support the appellant's position is merely dicta. In that case the notary actually testified in support of his certificate. The language was unnecessary to the holding of the court and should not be persuasive on this court. We quote the following language from that case:

"In this case, however, the evidence of the notary was as much in support of the certificate as in contradiction thereof. He testified to explaining to the witness the contents of the instrument, and its purpose and effect, and that, while she did not appear to understand it very well, she told him it was all right with her if it was with her husband, and that whatever he did or said was all right with her. He also testified that after going over the matter, making a full explanation as he could, and conversing with her about it, he considered she had made a sufficient acknowledgment of the execution of the instrument and that she was satisfied therewith, and that he felt justified in attaching the certificate of acknowledgment thereto."

We quote below from a few of the many decisions which have authorized the courts to receive the testimony of the officer in impeachment of his certificate of acknowledgment.

Qualls vs. Qualls, 196 Ala. 524, 72 So. 76:

“Neither public policy nor other rule of our court would prevent the witness Searcy [notary] in a controversy between the parties to the purported deed to deny its execution, to explain the presence of his affixed seal of office, and certificate of acknowledgment, and to state the true facts, in a court of justice, when such a reputed conveyance is collaterally attacked.”

Garth v. Fort, 15 Lea (83 Tenn.) 683:

“... any evidence going to show a want of the invalidity of the privy examination is competent, and we know of no rule excusing an officer from stating such facts as will go to show a failure on his part to do his duty.”

Louden v. Blythe, 16 Pa. 532:

“The justice who takes and certifies the acknowledgment of the wife to a deed is acting judicially . . . We cannot cast into oblivion our knowledge that this duty is often, by justices of the peace, and sometimes by other judicial officers, as has been said, ‘hurried over almost in the presence of the husband.’

“Can it be that such acknowledgments are of so high and sacred a character as to import absolute verity, and cannot be assailed by parol evidence?”

Camp v. Carpenter, 52 Mich. 375, 18 N.W. 113:

“In the present case, when the notary swore he did not know the person whom he certified he knew, *he deprived his certificate of all the*

foundation on which the law allows the presumption to be raised, and the subscribing witness who testified to his own ignorance destroyed also the presumption that in some cases attend the action of such witness in the absence of suspicion. It would be very absurd to allow a certificate such weight as is claimed for it here when the notary himself contradicts his own statements and shows its want of truth. It is not a very satisfactory state of things when a forgery can gain even presumptive credit from the examination of an officer who has certified, without foundation for his action." (Italics ours).

Campbell vs. Campbell, (Wash.) 263 Pac. 957:

"As we indicated in Ehlers v. United States Fid. & Guar. Co., supra, the act of the officer in certifying to the acknowledgment may result in taking the property of one person and vesting it in another, and that such an officer, no matter how prudent he is, may be deceived. *It would seem necessarily to follow, therefore, that the person wronged by such an act should not be deprived of any testimony which would tend to correct the wrong, and it can be that the testimony of the officer taking the acknowledgment would be the most persuasive testimony that could be produced upon the fact.* The weight that is to be given to his testimony will of course depend upon the circumstances, but the triers of the fact in such an instance, as in all other instances of controverted fact, must be relied upon to give the testimony its due weight. The reason usually given for excluding the testimony of the officer, is that it is contrary to public policy. But to us this is a mistaken view. If the question rests upon this ground, it must be because the

certificate is conclusive, and none of the cases, even those that adhere most tenaciously to the rule of disqualification, goes to this extent.” (Italics ours).

Mays vs. Pryce, et al, 95 Mo. 603, 8 S. W. 731:

“The notary who was most conversant with the facts recited in his certificate, was of all persons the most competent to testify on that subject, whether in support or in impeachment of the verity of its statements. The only rule that could possibly close his mouth as a witness would be one making this certificate absolutely conclusive, one that would preclude him or anybody else from calling in question the verity of that certificate. In the argument of the learned counsel for the plaintiff, much is said in support of the proposition that such ought to be the rule, but it having been long settled the other way, it must follow from the rule as now established that the notary is as competent as any other witness to testify touching his knowledge of the facts recited in the certificate, the verity of which under that rule is a legitimate subject of inquiry; a corollary recognized in the cases cited, *supra*, in nearly all of which the notary testified, sometimes in support of, and sometimes in impeachment of, his certificate and his competency was never questioned. There was no error in admitting the testimony of the notary.”

For other cases to the same effect see Fisher vs. Bollman, 258 Ill., App. 461; McDowell vs. Stewart, 83 Ill. 538; McCurley v. Pitner, 65 Ill. App. 17; Comings vs. Leedy, 114 Mo. 454, 21 S.W. 804; Truman vs. Lore, 14 Ohio State, 144; Jackson vs. Humphry 1 Johns,

(N.Y.) 498; Kranichfelt vs. Slattery, 12 Misc. 96, 33 N.Y.S. 27; Winn vs. Itzel, 125 Wis. 19, 103 N.W. 220; Davis vs. Monroe, 187 Pa. St. 334; Roach vs. Francisco, 138 Tenn. 357, 197 S.W. 1099; Tatum vs. Goforth, 9 Ia. 247, Pereau vs. Frederick, 17 Neb. 117, 22 N.W. 235; In re Hylbert, 26 Fed. (2d) 672; Wolverine Oil Co. vs. Parks, 79 Okl. 318, 193 Pac. 624; Effenberger vs. Durant, 57 Okla. 445, 156 Pac. 212.

Appellant has failed to cite to the court so much as a single case which supports its view that a notary public or other officer is not competent to impeach his certificate where the person purporting to have acknowledged the instrument never in fact appeared before him at all. There may be a few cases which support this position but such cases are in the minority and are not supported by sound reasoning or by any principle of public policy.

At pages 33 and 34 of its brief, appellant advances three reasons in support of the rule for which it contends. These reasons are as follows:

1. That it is against public policy to permit a notary public to testify in impeachment of his certificate of acknowledgment.

2. That the certificate of acknowledgment being the solemn declaration of an officer in his public and official capacity and under his hand and seal, is more likely to be true than the memory and testimony of the witness years afterwards.

3. Persons who have dealt and paid in reliance on the truth of the certificate should be protected

against the contradictory statements made afterwards.

With respect to the first reason advanced, appellant has not pointed out wherein it would be against public policy to permit the notary to testify in impeachment of his certificate, except as it may be against public policy under the third reason. We are not unmindful, that persons dealing in and with property and parting with valuable consideration in reliance upon the public records should be protected to the fullest possible extent. However, an even higher consideration of public policy, universally recognized by the courts, dictates that no person shall be deprived of his property rights by the connivance of forgers, thieves and dishonest or careless public officers. Rights in property may not thus be lightly swept away, even though bona fide purchasers for value, may be caused to suffer thereby. This is a case where one of two innocent parties must suffer for the wrong doing of a third party. It is universally held that under such circumstances the one who dealt with the wrongdoer, (in this case the appellant,) must bear the loss. It is a fundamental principle of property law, too well recognized to require citation of authority and subject only to a few exceptions not applicable here, that a person can convey no better title than he holds. He who purchases a defective title must bear the loss.

Contrary to appellant's contention, there are strong considerations of public policy in favor of permitting the notary to testify in impeachment of his certificate. The notary will in many cases be the person most con-

versant with the facts, and therefore the one best able to testify with respect thereto. In many cases, as in the case at bar, the notary may be the only witness able to testify as to all of the facts surrounding the transaction, and to deprive the parties of his testimony would require the courts to perpetuate rather than to correct a grievous wrong, and would result in depriving innocent owners of their property. It is settled law in this state that the certificate of acknowledgment is only prima facie evidence of the truth of the facts therein stated, and the courts should not close their eyes and ears to any evidence which may serve to show the true facts and to rectify a wrong.

The second argument advanced by the appellant in support of its contention that the notary should not be permitted to testify in impeachment of his certificate, is one addressed to the weight rather than the competency of the evidence. Whether or not the officer's testimony at the trial is more reliable than his certificate must depend upon the facts of each case. The factors to be considered should include the time elapsed from the date of the certificate to the date of trial; the interest, if any, of the notary public in the outcome of the litigation; whether or not the officer was a party to the wrongdoing; whether or not the officer was acquainted with the person purporting to have made the acknowledgment; the manner and demeanor of the officer upon the witness stand and all of the other circumstances surrounding the transaction,

which might tend to affect the reliability or credibility of the testimony.

POINT IV.

RESPONDENTS PROVED BY A CLEAR PREPONDERANCE OF THE EVIDENCE THAT THE PURPORTED DEED FROM LUCIE R. THOMAS TO HUGH L. THOMAS, JR., WAS A FORGERY AND SAID INSTRUMENT WAS NUGATORY AND VOID AND OF NO FORCE OR EFFECT.

As pointed out heretofore, a certificate of acknowledgment executed by a notary public, or officer, where no person actually appeared before him, is a nullity and of no force and effect. When this fact is established the certificate is deprived of all credibility and of all weight in evidence. See 1 Am Jur. 376, where it is said:

“A grantor in an instrument of conveyance who never at any time appeared for the purpose of acknowledging the instrument is not bound in any wise by the recitals in the certificate of acknowledgment attached by a notary public. The notary is without authority or jurisdiction to attach any certificate whatever. In such a case, the jurisdiction of the officer not having been invoked, *his utterance is a nullity and his certificate has no evidentiary force whatever*, in favor of or against anyone.” (Italics ours.)

We again invite the Court's attention to the quotations set forth under Point III in the cases of Loudon v. Blythe, McCurley vs. Pitner, Camp vs. Carpenter and Campbell vs. Campbell, particularly as they deal with the weight to be accorded a certificate of acknowledgment, under such circumstances. We also

invite the Court's attention to the following additional cases:

Roach vs. Francisco, 138 Tenn. 357, 197 S. W. 1099 where the court said:

"It is unwise to lay down a fixed rule to determine the weight of evidence required to overturn the officer's certificate. *The ascertainment of truth is the purpose of all judicial inquiry, and whenever the court is satisfied that the truth has been reached, it would be folly to refuse to accept it because of some arbitrary rule respecting the weight of evidence . . .* Cases may often arise, and if an inflexible rule as to the weight of testimony required should be adopted they doubtless would rise, in which no one but the defendant landowner could testify to impeach the certificate of the notary, as in the case of a forged certificate. It could not be said, if the court were satisfied of the truth of the complainant's story, that he must lose his land because some official was willing to forge a certificate to a deed showing that he had conveyed it." (Italics ours.)

The case of People vs. Geibel (Cal.) 208 Pac. (2d) 743, was a criminal prosecution for forgery. In that case the evidence showed that the signature on the deed had not been signed by the person purporting to sign the same. The notary public was called as a witness and she was unable to testify as to the identity of the individual whose acknowledgment she took. (Note that she did not testify positively that the person who purported to have signed the instrument did not personally appear before her and acknowledge the same.)

The Court held in that case that the evidence was sufficient to support a criminal conviction of forgery. Thus evidence weaker than that in the case at bar (where the notary testified positively that the person purporting to acknowledge the deed did not appear before her,) was held sufficient to support (i. e. to prove beyond a reasonable doubt) a criminal conviction of forgery.

The court said:

“It is true, as stated by appellant, with reference to the genuineness of the signature of the contract, that proof of acknowledgment by a notary public is *prima facie* evidence of the execution of the writing, but such a showing is rebuttable and not conclusive. In the case at bar, Mrs. Berg, the notary, could not testify to the identity of the individual whose acknowledgment she took except that she had been introduced to him as Clarence Clark by appellant. While she testified as to the general appearance of the individual, his approximate age and dress, there was expert testimony by handwriting experts that decedent Clark did not sign the contract, and there was positive testimony that it was typed on a typewriter which was not in existence on the date of said contract. A certificate of acknowledgment being only *prima facie* evidence, such certificate may be contradicted by other evidence direct or indirect. Code Civ. Proc. sec. 1833; *Moore v. Hopkins*, 83 Cal. 270, 271, 272, 23 P. 318, 17 Am. St. Rep. 248; *Le Mesnager v. Hamilton*, 101 Cal. 532, 533, 538, 35 P. 1054, 40 Am. St. Rep. 81. *Courtney v. Daniel et al.*, 124 Okl. 46, 253 P. 990, 995, 996. The evidence was sufficient to justify the jury

in concluding that notwithstanding the notarial acknowledgment thereon, the contract was not signed by Clarence Clark.”

In this case the trial court having heard the testimony of Mrs. Clayton and having observed her demeanor on the witness stand, found that Mrs. Thomas never in fact appeared before the notary. The judge was well justified in so finding. In fact the evidence would not admit of any other finding. Mrs. Clayton was well acquainted with Mrs. Thomas, having known her for more than 15 years; hence there would be no question as to her recollection or to the identity of the person purporting to make the acknowledgment. Secondly, Mrs. Clayton had nothing personally to gain by impeaching her certificate; on the contrary it must have taken great courage on her part to admit in open court to her wrong-doing in the matter. Further, by testifying as she did Mrs. Clayton made damaging admissions against herself, and practically invited a civil action on her bond for damages by the wronged party. See Sec. 63-1-4 U.C.A. 1943. There is nothing in the record to indicate that Mrs. Clayton had anything to gain by testifying as she did; rather, she testified contrary to her own best interest. The trial judge observed her demeanor on the stand and had an opportunity to determine whether she was a credible witness. There is nothing in the record which in any way reflects discredit on her testimony except the fact that without authority she did affix the certificate of acknowledgment to the deed; and this appears to have been done

without any mala fides on her part. While it was wrong on her part so to do, it was not a wrong involving such moral turpitude on her part as to rob her testimony of all credibility. Her wrong was one of laxity, and not of fraud, deceit or malice.

Besides the testimony of Mrs. Clayton, there is the uncontradicted testimony of the defendant, Hugh L. Thomas, Jr. (who is not a party to this appeal) that his mother was not in Salt Lake City on the date that the deed purported to have been acknowledged, nor was she in Salt Lake City at any other time during 1947, except at around Christmas time near the end of the year. This testimony, coupled with the now undisputed fact that the signature upon the deed was not that of Mrs. Thomas, compels a holding that the deed was a forgery and was never acknowledged by Mrs. Thomas as her own act. Indeed there is no evidence in the record whatsoever that would warrant any different finding, and the forgery being established, it necessarily follows that Northerest obtained nothing under its deed from Hugh L. Thomas, Jr., except his after-acquired undivided one-third interest in the lands in suit.

POINT V.

PLAINTIFF'S CLAIM TO TITLE UNDER H. H. HEMPSTEAD IS WHOLLY WITHOUT MERIT.

In a last desperate effort to salvage something from this litigation, plaintiff claims title to the west tract under chain of title derived from H. H. Hempstead. It appears that in December, 1908, Lucie Thomas, who

was then the undisputed owner, executed a Warranty Deed to the west tract to H. H. Hempstead of San Francisco, California. The deed was recorded, not at the request of the grantee, but at the request of the grantor. Thereafter, the grantee never exercised any act of dominion over the property and never in anywise treated it as his own. Lucie R. Thomas continued to treat the land as her own, mortgaging it, selling it, and repurchasing it, paying the taxes thereon and securing a certificate of water appropriation. In 1912, the land was sold by Auditor's Tax Deed to Spencer Clawson, who thereafter executed a Quit Claim Deed to the same lands to Lucie Thomas. From that date forward, Lucie Thomas was treated by the County as the owner of the land. Taxes on it were assessed in her name and were paid by her. When Northcrest became interested in purchasing the land in 1947, it procured a title opinion from its attorneys wherein it appeared that there was a cloud on the title by reason of the deed to Hempstead. Both Hugh L. Thomas, Jr., and Northcrest recognized that it was only a cloud and it was agreed that the cloud would be cleared as part of the agreement between Hugh L. Thomas, Jr., and the plaintiff.

The present action was commenced in August of 1950. For reasons known only to itself, Northcrest did not join Lucie Hempstead, the widow of H. H. Hempstead, nor the personal representative of H. H. Hempstead as defendants in this action. Later it commenced a separate quiet title action against Lucie Hempstead on November 7, 1950. At that time the only title which

Northcrest had was whatever it obtained by virtue of its deeds from Hugh L. Thomas, Jr., and Utah Savings. It was only by virtue of these deeds that it had any standing whatsoever to commence or maintain the action. On November 29, 1950, Northcrest obtained a Quit Claim Deed from Lucie Hempstead for which it paid the nominal consideration of \$25.00. We do not know what representations were made to Mrs. Hempstead in order to obtain the Quit Claim Deed, but at that time the lands covered by the Quit Claim Deed had a fair market value of somewhere around \$1250.00.

After obtaining the Quit Claim Deed the attorneys for the appellant procured the appointment of Arthur P. Lakin as administrator with the will annexed of H. H. Hempstead, deceased, and then filed an amended complaint, adding Lakin as personal representative of the estate of Hempstead as an additional defendant. Both of the defendants defaulted and Northcrest obtained a Decree quieting its title to the west tract as against the Hempstead interest.

We assume that the administrator of the Hempstead Estate defaulted on advice of counsel, who also represented Northcrest. If, at the time the quiet title suit against the Hempstead interests was commenced, there was in fact no merit to the Hempstead claim, plaintiff gained nothing by virtue of the Quit Claim Deed from Lucie Hempstead or by virtue of its decree quieting title as against the Hempstead interests, and patently there would be no merit to its present claim to title under H. H. Hempstead. On the other hand, if there

was any merit to the Hempstead claim, it would appear that the personal representative of Hempstead was guilty of a gross breach of duty in failing to defend the quiet title suit. The net effect of this would be to perpetrate a fraud upon both the court and upon the creditors of the Estate of H. H. Hempstead. We cannot believe that the conduct of the appellant in this matter will appeal very strongly to a court of equity. Plaintiff either obtained nothing by virtue of its dealings with the Hempsteads, as above outlined, or else whatever it obtained was obtained by conduct which was at best open to severe criticism.

(a) The Evidence Shows that Hempstead Never Acquired any Title by Virtue of his Deed from Lucie R. Thomas.

As above indicated, Hempstead never asserted any claim to the west tract, nor did he ever exercise any act of dominion over it. This, coupled with the fact that Lucie Thomas continued to treat the land as her own, and that she paid the taxes thereon, and had always dealt with the property as her own, and the further fact that the deed was recorded at her request and not at the request of Hempstead, who was a resident of San Francisco, as appears from the deed, all point very strongly to the fact that the deed was never delivered to Hempstead and there was never any intent to convey title to him. *Chamberlain vs. Larson*, 83 Ut. 420, 29 Pac. (2d) 335; *Woolley vs. Taylor*, (Ut.) 144 Pac. 1094.

(b) Any Interest Which Hempstead May Have Acquired Under his Deed from Lucie R. Thomas was Extinguished by the Subsequent Sale of the property for Delinquent Taxes and Conveyance by Auditor's Tax Deed to Spencer Clawson.

The abstract of title received in evidence shows that the west tract was sold for taxes and was conveyed to Spencer Clawson by Auditor's Tax Deed in the year 1912. The period of redemption expired and Hempstead made no effort to redeem the lands and Clawson thereafter Quit Claimed to Lucie R. Thomas. If Hempstead ever acquired any interest in the lands, that interest was completely extinguished by the subsequent tax deed, and it follows as a necessary consequence that plaintiff obtained nothing by virtue of its dealing with the Hempstead interests.

POINT VI.

PLAINTIFF'S CLAIMS TO TITLE UNDER H. H. HEMPSTEAD AND UTAH SAVINGS & TRUST COMPANY WERE OBTAINED IN AFFIRMATION AND NOT IN DEROGATION OF THE THOMAS TITLE AND THE PLAINTIFF IS ESTOPPED TO CLAIM TITLE UNDER EITHER.

The evidence is clear and undisputed that at the time that the plaintiff entered into its agreement with Hugh L. Thomas, Jr., to purchase the lands in suit, both of the parties to that contract recognized that there were outstanding clouds on the title in the form of record interests held by H. H. Hempstead and Utah Savings. Both of the parties likewise recognized that these were only clouds and that they should be cleared in order to

give the purchaser good marketable title, and it was understood between the parties that such clouds would be cleared. Appellant entered into possession of the lands with this understanding. Thereafter, appellant obtained a Quit Claim Deed from Utah Savings in affirmation of and in accordance with its contract with Hugh L. Thomas, Jr. Long after this action was commenced, appellant further obtained a Quit Claim Deed from Lucie Hempstead, widow of H. H. Hempstead and a decree quieting its title as against Hempstead's administrator and his widow.

Plaintiff, having recognized the Thomas title, and having gone into possession under the Thomas deed is now estopped to assert an after acquired title as against the Thomas title.

A case somewhat similar to the case at bar is Frink vs. Thomas, (Ore.) 25 Pac. 717, where the court said:

"But defendant, having entered into the possession of this land under a contract of purchase, will not be permitted to obtain an outstanding title and assert it against the plaintiff. It was expressly understood at the time the contract for the sale of this land was made that the title was unsettled, and that plaintiff would take such steps as might be necessary, in order to perfect the same, so as to comply with his agreement with defendant. With this understanding, defendant was allowed to go into possession of the land, and having done so, neither equity nor good conscience will permit him, by taking advantage of such possession, to obtain the title from the general government in his own name for his

own use and benefit. So that, if it should finally be determined by the land department that the land is not within the grant to the Oregon & California Railroad Company, and a patent issued to defendant, the title will inure to the benefit of plaintiff, and the defendant would only be entitled to deduct from the purchase money the actual cost of obtaining such title from the government. It is an established rule of equity 'that if a vendee buys up a better title than that of the vendor, and the vendor was guilty of no fraud, he can only be compelled to refund to the vendee the amount of money paid for the better title. Equity treats the purchaser as a trustee for his vendor, because he holds under him, and acts done to perfect the title of the former when in possession of the land inure to the benefit of him under whom the possession of the land was obtained, and through whom a knowledge of a defect of title was obtained. The vendor and vendee stand in the relation of landlord and tenant. The vendee cannot disavow the vendor's title.' *Bush v. Marshall*, 6 How. 284; *Galloway v. Finley*, 12 Pet. 294.'" (Italics ours).

For other cases supporting the same rule see, *Stephens vs. Kesselburg*, (Wash) 143 P. (2d) 289, *Garvey vs. LaShells* (Cal.) 91 Pac. 498, *Finch vs. Noble*, 49 Wash. 578, 96 Pac. 3, *Flint v. Conner*, 53 Cal. App. 279, 200 Pac. 37, *Patreski v. Minzgoehr*, 144 Mich. 356, 108 N.W. 77, *Misamore v. Berglin*, 197 Ala. 111, 72 So. 347.

With respect to the *Hempstead* claim, plaintiff is also estopped under another principle. Plaintiff through

its attorneys commenced an action against the Hempsteads alleging that the Hempsteads claimed an interest in the land; that the land was owned by Northcrest and that the claims of the Hempsteads were null and void and of no force and effect. On the basis of these allegations, and evidence in support thereof, (assumedly adduced), plaintiff obtained a decree quieting its title as against the Hempsteads. Plaintiffs having come into open court and having claimed and represented to the court, that it was the true owner of the land, and that the Hempstead claim was null and void, cannot come into the same court and represent to the court that it obtained a good title from the Hempsteads. If the Hempsteads had no title to the lands when the quiet title suit was commenced against them, then plaintiff could not have obtained any title from them. On the other hand, if the Hempsteads did have any title at the time of the commencement of the quiet title suit, plaintiff has been guilty of fraud upon the court in obtaining a decree quieting its title as against the Hempsteads.

POINT VII.

LUCIE THOMAS ESTABLISHED A TITLE BY ADVERSE POSSESSION, GOOD AS AGAINST THE CLAIMS OF EITHER H. H. HEMPSTEAD OR UTAH SAVINGS & TRUST COMPANY.

The trial court's Finding of Fact number 20 was as follows:

“That Lucie R. Thomas became the owner of all of the said property on the 2nd day of Sep-

tember, 1905, and from that date to the date of her death on or about the 5th day of July, 1948, she was in the exclusive possession of all of the same under claim of right and as the owner thereof and paid all taxes levied and assessed against said property.”

Plaintiff has made no attack upon this finding and there is indeed no basis for any attack. The finding is amply supported by the record. Particularly from the year 1915 it is clear that Lucie Thomas was the owner of all the lands in suit and as such was possessed thereof and that she paid all the taxes thereon until the date of her death. Any interests which either Hempstead or Utah Savings might have had by virtue of their respective deeds from Lucie Thomas, were extinguished by this period of adverse possession. Consequently neither Utah Savings nor Hempstead had anything to convey to Northcrest, and Northcrest obtained nothing under its Quit Claim Deeds from either Lucie Hempstead or from Utah Savings.

CONCLUSION

Appellant seeks to establish a title by suppressing the facts. If the evidence adduced at the trial was properly received there can be no question but what plaintiff has no title except as to an undivided one-third interest in the lands in suit. The evidence clearly establishes and the court found, that the deed from Lucie Thomas and her husband, Hugh, to Utah Savings was intended by the parties thereto as a mortgage and

was so treated; that the debt thereby secured was fully paid and satisfied, and that thereafter Utah Savings had no interest in the land and claimed none, and so advised the plaintiff and having no interest in the land could convey none; hence plaintiff acquired nothing under its Quit Claim Deed from Utah Savings.

The evidence is equally clear that the purported deed from Lucie R. Thomas to Hugh L. Thomas, Jr., covering the lands in suit was a forgery, and that Hugh L. Thomas, Jr., obtained nothing thereunder. Having nothing, he could convey nothing to Northcrest. After the date of that deed Lucie R. Thomas died and Hugh L. Thomas, Jr. as one of her heirs and devisees, succeeded to an undivided one-third interest in the lands in suit, subject however to the probate of his mother's estate. Under the doctrine of after acquired title, appellant acquired an undivided one-third interest in lands by virtue of its deed from Hugh L. Thomas, Jr., such interest, however, being subject to the probate of the estate of Lucie R. Thomas. This undivided one-third interest we freely admit.

The evidence shows that the deed from Lucie R. Thomas to Hempstead was never delivered to Hempstead and that he never acquired any interest thereunder. If any interest was acquired, it was extinguished by subsequent tax deed to Spencer R. Clawson who in turn Quit Claimed to Lucie R. Thomas. Lucie Thomas also established a title by adverse possession against both Utah Savings and H. H. Hempstead. Further

appellant is estopped to assert any title to said lands under either Utah Savings or H. H. Hempstead.

The Judgment of the trial court was correct and should be affirmed.

Respectfully submitted,

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