

1952

Northcrest, Inc. v. Walker Bank & Trust Co. et al : Reply 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 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

Reply Brief of Appellant

FILED

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FEB 1 1952

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

Reply Brief of Appellant

STATEMENT ON REPLY

In reply to the Brief of respondents, Northcrest files this Reply Brief. The points to be argued in reply follow.

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

1. Respondents Failed To Establish By Clear, Convincing, Unequivocal And Conclusive Evidence That The Deed From Lucie R. Thomas (And Husband) To Utah Savings And Trust Company Was Intended As A Mortgage.
2. The Evidence By Utah Savings And Trust Company Attempting To Prove The Deed As 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. The Certificate Of Acknowledgment, By The Law Of Evidence, Equalized the Notary's Testimony Repudiating It. Hugh, Jr.'s Attempt To Corroborate The Notary Was Incompetent. The Evidence Was Thus Left Equipoised And Respondents Failed To Sustain The Burden To Prove The Certificate Was False.
3. Respondents' Claim Of Forgery Not Established.

Northcrest's Title Through H. H. Hempstead.

1. Unfounded Charges Regarding Northcrest's Quiet Title Suit Against Hempsteads.
2. The Deed From Lucie To H. H. Hempstead Was Delivered.

3. Whatever Tax Title Lucie Obtained From Spencer Clawson Inured To Hempstead, Her Grantee, Under Her Prior Warranty Deed To Him.
4. Respondents Failed To Prove A Valid Tax Title In Spencer Clawson.

Northcrest Was Not Estopped To Acquire The Utah Savings And The Hempstead Titles.

Respondents Failed To Establish Adverse Title In Lucie R. Thomas And The Evidence Is Wholly Insufficient To Support The Finding.

Correction As To The Yellow Lots.

ARGUMENT ON REPLY

NORTHCREST'S TITLE THROUGH UTAH SAVINGS AND TRUST COMPANY

- 1. Respondents Failed To Establish By Clear, Convincing, Unequivocal And Conclusive Evidence That The Deed From Lucie R. Thomas (And Husband) To Utah Savings And Trust Company Was Intended As A Mortgage.**

Respondents failed entirely here.

They admit the *onus*, starting this part of their Brief with a heading asserting that they did establish the deed as a mortgage by "clear, convincing and unequivocal" evidence. (Their Brief, Page 16). The decisions by this court required such proof. *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. *Pender vs. Anderson*, (Utah), 235 P. 2d 360.

They admit also "the mutual intention of the parties must be proved". (Their Brief, Page 17). Of course, they must. This is clearly the law.

But the mutual intention was not shown. At most, evidence only of the bank's intention was given. McGee, the bank's officer, was the only witness. His evidence, we submit, was not even proof of the bank's (grantee's) intention. But, assume for argument that it was, still there was a total lack of evidence about the intention of

Lucie and her husband, the *grantors*. Their intention, by this record, is a total blank.

Please turn to Brief of Appellant, Pages 6 to 18. The entire lack of the intention of Lucie and her husband is fully shown there.

But, respondents contend Lucie went on to treat the property as still hers by paying taxes, etc. The character of the conveyance, however, is determined by the agreement *at the time*; not subsequently.

“... The character of the transaction is fixed at its inception; if an instrument is a mortgage at its inception, it remains so with all the incidents thereof, if it is not a mortgage at the time of its inception, it cannot be converted into such by a subsequent act of the parties.” 36 Am. Jur. Mortgages §125.

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

Lucie's subsequent conduct claimed is purely self-serving and amounts to no more than an *implied* declaration that she later claimed an interest in the property; whereas, an *express* declaration of claim would have availed respondents nothing. This court has said just that. Look:

“Should we assume without proof that Ruthrauff himself paid a share of the annual tax on the claim prior to his death, it would *not* affect or

impair his prior deed in 1902 as a conveyance. It would be at most an *implied* declaration that he still had or claimed an interest in the property. But an implied declaration to this effect by Ruthrauff is of no more value than his *express* declaration would be in his own favor or that of his heirs. *An express declaration of a claim by a grantor in a deed, self-serving and in disparagement of his own solemn deed, is a nullity.*” *Ruthrauff vs. Silver King Western Min. & Mill Co.*, 95 Utah 279, 80 P. 2d 338, 343.

The result is:

“It is not evidence in his own favor or of those claiming under him. The principle of this rule is well stated in 22 C.J.S., at pages 234-236, title ‘Evidence’, Secs. 213, 215, 217-219; *Smith v. Hanson*, 34 Utah 171, 96 P. 1087, 18 L.R.A., N.S., 520; *Diaz v. Industrial Comm.*, 80 Utah 77, 13 P. 2d 307; *Baird v. Baird*, 193 Cal. 225, 223 P. 974”.
Id.

Respondents finally say Northcrest “has suggested no other conclusion” than that the deed was intended to be a mortgage. (Their Brief, Page 19). But, it isn’t up to Northcrest to do any suggesting. It has no burden. Respondents are the ones who are trying to prove the mortgage. They have the burden, not Northcrest. (Brief of Appellant, Pages 23, 47). They admit it. (Their Brief, Page 16).

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

2. The Evidence By Utah Savings And Trust Company Attempting To Prove The Deed As A Mortgage Was Incompetent After It Had Conveyed To Northcrest.

Respondents admit again.

They admit the rule:

“... the general rule that a grantor may not, *after parting with his title*, make statements or admissions in disparagement of his title ...” Respondents' Brief, Page 20.

For a discussion of the rule, turn to Brief of Appellant, Page 25.

But, respondents deny the rule applies here. They say the bank's evidence by its officer, McGee, (3 years after it had conveyed to Northcrest) was not what constituted the “statement” or “declaration” in this case. By their admission, if it *did*, then it was clearly incompetent, being made *after* the conveyance.

They say what constituted the “declaration” was the bank's *memo* of a security transaction entered on the loan cards (Exhibit 8) years ago (1914) when the bank had title; *ergo*, they argue, the “declaration” was made before and not after the bank conveyed to Northcrest. This is so ingenious that no one else has ever thought of it before; not even respondents' erudite

counsel at the trial. And, we have now searched in vain for a similar assertion in the texts and cases. But it is a stranger there so far as we can find. The reason must be apparent. To make a declaration is to declare and “declare” means, it is said:

“To make known; tell openly or publicly; proclaim formally; publish; make a solemn affirmation before witnesses” etc. Webster’s Modern Reference Dictionary.

And a “declaration”, it is said, means:

“The act of declaring or proclaiming; that which is declared; an assertion; publication”. Id.

2 Words and Phrases, Page 1904, says:

“The word ‘declare’ signifies to make known, to assert to others; to show forth . . .” etc.

A “declaration” requires (1) a declarant, and, (2) a making known, a “proclaiming”. In other words, a *communicating*. But “to make known” or “communicate”, something else is also required: (3) a *hearer*; someone to whom the declaration is “made known” or “proclaimed” or *communicated*.

This must be so, for in the cases where disparaging statements or declarations of former owners are recorded, they were usually related by a “hearer” of the statement; one to whom the grantor “made known”, “told openly”, “proclaimed”, “asserted” or *communicated* the defect in his title while he owned it.

But test the situation here. Utah Savings made only a private, silent, secret entry on the loan cards (Exhibit 8) years before. This was only the silent entry of a secret thought. That secret was not then “made known”, “told openly”, “proclaimed” or “affirmed before witnesses” or “asserted to others” at all. It was not *communicated*. It lay hidden among the bank’s records, *silent and unproclaimed*, 37 years (1914 to 1951) until over 3 years after the bank conveyed to Northcrest in 1947. Utah Savings made no declaration up to 1951.

But, in 1951 Utah Savings did make a “declaration”. That was when the declaration here was first made. It was at the trial. Utah Savings then “declared” by its officer, McGee, that it had formerly (37 years ago) held a warranty deed—not *this* specified deed, just some deed—as security. But this was *after* it had parted with title and conveyed to Northcrest. That declaration, therefore, was incompetent under the rule. And the rule is confessed by respondents. The trial court erred in admitting this incompetent declaration by Utah Savings after it had conveyed to Northcrest.

Shop Book Rule. Respondents cite the Shop Book Rule as supporting the security entry on the loan cards (Exhibit 8). (Their Brief 23). Shop books are admissible as evidence, *prima facie*. 20 Am. Jur. Evidence §1043. But not if they are incompetent for some other reason; for being, as here, part of the forbidden declarations of a prior owner.

Ancient Document Rule. The 30-year Ancient Document Rule cannot save respondents, either. This rule does not go to the competency of documents but more properly to their manner of proof; dispensing with their first being authenticated by testimony. But, they must be relevant (20 Am. Jur. Evidence §932) and, of course, otherwise *competent* to be admissible.

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

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

Respondents argue the pros and cons of this proposition of law. (Their Brief, Page 24).

We admit the courts are divided. We frankly told the court so in our Brief of Appellant, Page 31. It is a difficult problem. Opposed in every case are the rights of a grantor on the one hand; those of innocent persons dealing on the faith of the recorded acknowledgment, on the other.

The question is not may an acknowledgment be proved false. It is narrower, only: May it be proved false by the *notary* who has already solemnly certified that it is genuine? The answer? There are authorities on each side. The court will have to choose.

Respondents ascribe "great courage" to this deceitful notary. (Their Brief, Page 43). Seeking to provide her with credibility of sorts they ennoble her with traits of great courage and forthrightness in forswearing her constitutional oath as notary and renouncing her certificate on the deed. This sanctifies her testimony, they argue, for thus she invited a damage suit by Northcrest. But, if this notary was noble, then so were all the notaries in the books who testified that their certificates were lies. Of what avail is a damage suit against a notary like this on a \$500.00 bond?

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

2. The Certificate Of Acknowledgment, By The Law Of Evidence, Equalized The Notary's Testimony Repudiating It. Hugh, Jr.'s Attempt To Corroborate The Notary Was Incompetent. The Evidence Was Thus Left Equipoised And Respondents Failed To Sustain The Burden To Prove The Certificate Was False.

“ . . . The decisions disclose a very decided tendency on the part of the courts to attach weight to certificates of acknowledgment and to view attempts to discredit them with suspicion and distrust.

. . . a high degree of proof is required. It frequently has been stated . . . the evidence must be clear, cogent, and convincing beyond reasonable controversy.

. . . It has been said that such evidence must be almost as strong as that required to correct a mistake in a deed. Thus, it appears that the burden assumed by the assailant of the certificate is, if the language of the rule is to be understood in its literal sense, much *greater* than that usually cast upon a party by a presumption of fact. *Generally, a mere preponderance of evidence is not sufficient to overcome the certificate. . . .* 1 Am. Jur. Acknowledgments §155.

What of the evidence here? The cases say the certificate is entitled to as much weight as the notary's subsequent denial; that it is equivalent to the sworn testimony of one disinterested witness, and the denial should be given but little weight. 1 C.J.S. Acknowledg-

ments §§ 141, 142. *Sparker vs. Sparker*, 274 N.Y.S. 454, 152 Misc. 867. (See Brief of Appellant, 35).

“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.” *Sparker vs. Sparker*, supra.

“(The certificate) is equivalent to the sworn testimony of one apparently disinterested witness.”
1 C.J.S. Acknowledgments §141.

By the foregoing, the certificate itself was (1) equivalent to the testimony of one disinterested witness supporting it, and, (2) entitled to as much weight as the notary's testimony, if not more.

So the evidence that far was at equipoise; the certificate equalized the notary's renunciation. Hence, respondents could not stop there. Remember, theirs was the burden of proving a false certificate; not by a mere preponderance either, but, as the first quotation above states, by evidence which was “clear, cogent and convincing beyond reasonable controversy”. 1 Am. Jur. Acknowledgments §155, supra.

So, they called Hugh, Jr. for corroboration. Respondents say Hugh (their younger brother who got \$3200.00 from Northcrest on the strength of the deed) corroborated the notary's denial of the acknowledgment. Brother Hugh, respondents argue, clinched things for them when he testified his mother was not in Salt Lake to acknowledge the deed. (Their Brief 44). But Hugh's

testimony was given over Northcrest's positive objection. (Tr. 81) It was wholly incompetent. It was an attempt (like McGee's testimony for Utah Savings) to make a declaration against a former title *after* the grantor (Hugh, Jr.) had conveyed to Northcrest; it also violated his covenants of warranty in his deed to Northcrest (Exhibit C) as well. Hugh's deed to Northcrest (Exhibit C) was a warranty deed with full covenants of warranty. Therefore, the statute says, he warranted "that he was fully seised of the premises; that he had a good right to convey the same . . . that he will forever warrant and defend the title thereof in the grantee . . ." etc. §78-1-11 U.C.A. But, far from "defending the title" in his grantee, Hugh sought to *assail* it by saying at the trial his mother could not have acknowledged the prior deed to him (Exhibit B) because she was away. But, grantors may not assail the titles of their grantees. They are *estopped*.

"A grantor is generally estopped from denying the title of his grantee or his own authority to sell". 19 Am. Jur. Estoppel §10.

"A grantor is estopped to assert anything in derogation of his deed." 31 C.J.S. Estoppel §13.

"It is a well settled principal of the common law that no man shall be allowed to dispute his own solemn deed." 5 Thompson on Real Property §2602.

By his statutory warranty (§78-1-11) Hugh, Jr. warranted he was the lawful owner. This estopped him from asserting otherwise. He was barred from testifying as

he did against the validity of his mother's deed to him (Exhibit B).

Northcrest objected and moved to strike Hugh's testimony about Lucie not being in Salt Lake to acknowledge the deed, as incompetent; also as an attempt to dispute and violate his own deed to Northcrest. (Tr. 81-82). It was overruled. (Tr. 82). This was error. In fact, Hugh, on being led closer to the firing line, finally refused to talk any more because of self incrimination and was excused. (Tr. 83).

A situation exactly similar was presented in *Hansen vs. Daniels*, 73 Utah 142, 272 P. 941, where a mortgage contained covenants of warranty and the mortgagor was afterward called to testify that another owned an interest in the mortgaged property (sheep). This court held the testimony incompetent as violating the warranty and written instrument.

On this evidence (1) that of the untrustworthy notary, and, (2) the incompetent testimony of respondents' brother, Hugh, the trial court struck down the certificate of acknowledgment. This was error.

We say this does *not* present a question of credibility or weight at all. It is only a question of applying the rule of evidence. The certificate itself equalized the denial of the notary. It was equal to the testimony of one disinterested witness. And, Hugh's testimony in corroboration was incompetent because (1) it violated

his covenant of warranty in his deed to Northcrest, and, (2) it was an attempted disparagement of his former title after he conveyed to Northcrest.

Respondents are left thus: Hugh's incompetent corroboration must be ruled out. The notary's denial failed to outweigh her certificate. Respondents have not sustained the burden of proof to nullify the acknowledgment.

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

3. Respondents' Claim Of Forgery Not Established.

Respondents argue needlessly that the signature on the deed (Exhibit B) from Lucie to son, Hugh, Jr. was not signed by her. (Their Brief 40). They need not argue that. Northcrest admits it. But the argument says the deed was proved a forgery. Not so. All respondents proved (and all Northcrest admits) is that the deed was not in Lucie's hand. There is quite a difference.

A forged deed, to be sure, passes no title. It is spurious and null. But simple proof (or admission) that a signature is not in the hand of a named signer does *not* establish forgery. The proof must show that the signature was *not authorized*. *State vs. Jones*, 81 Utah 503, 20 P. 2d 614. See Brief of Appellant, 39-40.

Respondents' argument of forgery assumes too much. It assumes exactly what is up for inquiry here—the validity or invalidity of Lucie's signature to the deed.

NORTHCREST'S TITLE THROUGH H. H. HEMPSTEAD

1. Unfounded Charges Regarding Northcrest's Quiet Title Suit Against Hempsteads.

“... if none of the relatives ... will accept, ... a person having a claim in or adverse to the estate shall be entitled to letters (of administration) ...” §102-4-3 U.C.A.

“Administration may be granted to one or more competent persons ... at the request of the person entitled filed in court.” §102-4-1 U.C.A.

H. H. Hempstead's estate was first probated in California. His wife, Lucy S. Hempstead, survived. She was sole devisee under his will and his only heir. This was stated and proved by respondents' counsel himself. (Tr. 87). Hempstead lived in San Francisco. (Respondents' Brief 47).

After Hempstead died, Northcrest secured a deed from his wife (sole devisee and heir) to the West 40 acre tract (less the 20 x 30 rods. See Sketch, Brief of Appellant, 42). Northcrest thereby got the full Hempstead title which had devolved on Hempstead's widow on his death. Northcrest thus became “a person having a claim in or adverse to the estate” of Hempstead. As such, and as authorized by the quoted statute, it was then entitled to letters of administration in its own name or to nominate another “competent person or persons”. It did. It petitioned the District Court, Salt Lake County, and nominated A. P. Lakin and secured his ap-

pointment as administrator with Hempstead's will annexed in Utah. This the statutes specifically authorized and provided for. Northcrest then also sued and got a decree quieting title against (1) Mrs. Hempstead, the sole heir and devisee, and (2) Hempstead's administrator.

But respondents criticize this procedure. They charge that this might amount to fraud upon the court and Hempstead's creditors. (Their Brief 47). Hempstead's widow (sole heir and devisee) got the property from Hempstead by his death. It was hers. She was then the sole owner. And upon this record there were no creditors of Hempstead. His creditors, if any, must have been provided for by the California probate of his estate where he lived. And the court in the Utah quiet title proceedings must have been advised in the premises and well able to look out for its judicial self. Upon this record there were no creditors. There are none. But, if there were, it will be time enough to hear from them, if and when they complain. Respondents and their counsel cannot appoint themselves to look after Hempstead's creditors. Respondents and their counsel have no part of the Hempstead estate. They are neither creditors, heirs or devisees. Hempstead's widow was the sole heir and devisee. Not respondents. Not their counsel. What concern of respondents or their counsel is it as to what happened to Hempstead's estate? It passed to his widow. And, are respondents or their counsel the court's keeper in the quiet title action?

Respondents and their eager counsel are not appointed to protect Hempstead's creditors nor the court. **Just whom then are they looking after?** Those proceedings do not concern them. They are total strangers thereto. Let the creditors (if any) and the court in the quiet title action (if it deems itself imposed upon) come forward, if they will. It will be time enough to hear them if and when they do. Northcrest and we, its counsel, will respond willingly and confidently. The statute sets the authority for what was done. Smoke screens labeled fraud ill become their makers. They oftentimes smoke out those who set them—even lawyers. Respondents' charges are a complete departure from their counsel's statement at the trial: "Now I don't mean to imply there was any impropriety in so doing". (Tr. 92).

**NORTHCREST'S TITLE THROUGH
H. H. HEMPSTEAD (Cont'd.)**

**2. The Deed From Lucie To H. H. Hempstead Was
Delivered.**

Respondents say the deed from Lucie to Hempstead (Exhibit F) was recorded by Lucie herself and, therefore, they argue, no delivery was established and Hempstead got no title thereby.

But, recording creates a *presumption* (rebuttable though it may be) of delivery.

“As a general rule the filing and recording of a deed is *prima facie* evidence of delivery, but this presumption is rebuttable. The record of a deed *by the grantor* is presumptive evidence of a most cogent character tending to show delivery, for it is tantamount to a public proclamation by the grantor at a public place, intended for the world to act upon, that the grantor had in apt and due form transferred his title (and thereby his land) to another.” 7 Thompson on Real Property §4185. “The recording of a deed ordinarily creates a rebuttable presumption of its delivery to, and its acceptance by, the grantee.” 26 C.J.S. Deeds §187.

The recording of the deed to Hempstead established, *prima facie*, its delivery. Respondents had the right to offer evidence to overcome that presumption. They offered none. They proved nothing. The presumption that the deed was delivered stands unrefuted.

Respondents cite *Chamberlain vs. Larsen*, 83 Utah 420, 29 P. 2d 355. But they are wrong. That case says: “. . . the recording of a deed is likewise evidence of delivery”. 29 P. 2d 361.

**NORTHCREST'S TITLE THROUGH
H. H. HEMPSTEAD (Cont'd.)**

3. Whatever Tax Title Lucie Obtained From Spencer Clawson Inured To Hempstead, Her Grantee, Under Her Prior Warranty Deed To Him.

Respondents contend the Hempstead title was extinguished by tax sale. (Their Brief 48). This is based entirely on the abstract of title in evidence. (Exhibit 11). But, the abstract (Page 35 thereof) shows that when Lucie R. Thomas deeded to Hempstead (1908) by warranty deed, the taxes were already delinquent for the prior year (1907). (Abstract, Page 32). Lucie's deed to Hempstead is shown in full as *Exhibit F*. It was a warranty deed. And it contained no exceptions. It was a full warranty. Consequently, she thereby warranted as against the *already* delinquent tax of 1907. And that warranty *estopped* her from asserting anything, including this delinquent tax, against Hempstead and his grantees. (See Page 14, *supra*).

Furthermore, Spencer Clawson, to whom the auditor's tax deed (1912) ran, (Abstract, Page 43) afterward quit-claimed his interest to Lucie R. Thomas in 1915. (Abstract, Page 49). That *after-acquired* title (so-called) which Lucie got from Clawson then immediately inured to the benefit of Hempstead, to whom she had previously conveyed by warranty deed. The statute said so.

“After acquired title inures to prior grantee. If any person shall hereafter convey any real estate by conveyance purporting to convey the same in fee simple absolute, and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, his heirs, successors, or assigns, and such conveyance shall be as valid as if such legal estate had been in the grantor at the time of the conveyance.” §1979 Compiled Laws of Utah 1907. §4879 Compiled Laws of Utah 1919. §78-1-9 Revised Statutes of Utah 1933. §78-1-9 U.C.A. 1943.

But respondents admit the rule. For they say it applies to a 1/3 interest — which they say Hugh, Jr. inherited from his mother, Lucie, after his deed to Northcrest (Exhibit C). Look:

“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 (Northcrest) acquired an undivided one-third interest in lands by virtue of its deed from Hugh L. Thomas, Jr. . . .” etc. (Parentheses and emphasis ours). (Their Brief, 53.)

In fact, the award in respondent’s *findings* to Northcrest of an undivided third is predicated on respondents’ proposition that after Hugh conveyed to Northcrest, he inherited 1/3 from his mother, Lucie, and that after-acquired inheritance passed to Northcrest by his prior deed.

**NORTHCREST'S TITLE THROUGH
H. H. HEMPSTEAD (Cont'd.)**

**4. Respondents Failed To Prove A Valid Tax Title In
Spencer Clawson.**

We have just seen that whatever tax title Lucie got from Clawson inured to her grantee, H. H. Hempstead, under her earlier warranty deed to him. But, we shall now see that no valid tax title was proved by respondents.

“It has long been held in this jurisdiction that one who relies on a tax title must show that all of the requirements of the law were complied with in the issuance of that tax title. *Asper v. Moon*, 24 Utah 241, 67 P. 409; *Bean v. Fairbanks*, 46 Utah 513, 151 P. 338; *Bolognese v. Anderson*, 87 Utah 450, 44 P. 2d 706.” *Anson vs. Ellison*, 104 Utah 576, 140 P. 2d 653.

This is the same as the common law rule which:

“... was strict in its requirement that the holder of the tax title should by his evidence exhibit the proceedings, *from step to step*.” (Italics added). 51 Am. Jur. Taxation §1091.

The alleged tax sale and deed were in 1908 and 1912 respectively. (Abstract, Pages 32, 43). So they were governed by Compiled Laws of Utah 1907. To aid a tax title holder in his proof “from step to step”, the law at that time helped—part way—but only in regard to the auditor’s tax deed. It said, the tax deed, —“... shall be prima facie evidence of the facts recited therein”. §2629 Compiled Laws of Utah 1907, Cf. §6030 Com-

piled Laws of Utah 1917. §80-10-66 Revised Statutes of Utah 1933. §80-10-68 (7) U.C.A. 1943.

But no such efficacy was applied to the certificate of sale. Its form was specifically prescribed and set out in full detail by the statute. §2624 Compiled Laws of Utah 1907. The 1917 Compilation varied the form, but still the Legislature provided no evidentiary value to the certificate. §6021 Compiled Laws of Utah 1917. It was 1921 before the certificate of sale was made *prima facie* evidence, the Legislature saying:

“(The certificate of sale) herein provided for . . . shall be *prima facie* evidence of the regularity of all proceedings connected with the assessment notice, equalization, levies, advertisement and sale of the property . . .” §6021 Laws of Utah 1921.

But, the 1921 law did not make 1908 certificates evidence. Statutes operate prospectively, not retroactively. Furthermore, the 1921 statutory certificate (set forth in the law) varied in form from the 1907 one. And the 1921 law was addressed to 1921 (and subsequent) certificates, for it said: “the certificate of sale *herein* provided for” should be evidence; *not* a 1907 certificate.

But, assume for argument that the tax certificate here (1907) had been made evidence by the 1921 (or even the 1943) law. In that case, the certificate and the auditor’s tax deed both would be *prima facie* evidence of the acts and things recited *only when put in evidence*. But respondents did not put them in evidence. All that

was introduced was the abstract of title. It does not even purport to exhibit the contents of either the certificate or tax deed. All the abstract contains is a brief *memo* of each. (Abstract, Pages 32, 43). The form of the *certificate* is not set forth to be tested for its compliance with the law. Nor is the form of the *tax deed* set out so as to show "the facts recited therein" to be tested for their compliance. Respondents had access to these recorded documents but rested upon their mere notation in the abstract. But, that notation is not enough. It is no more than proof that a certificate and a tax deed were issued *without* disclosing their contents. It is exactly the same as if it had been merely *stipulated* that these documents were issued. This court has already passed upon that situation and found it wanting. The decision is well reflected in the following headnote:

"Stipulation that certificate of sale had been issued on realty sold for delinquent taxes and county's quitclaim deed of such realty to plaintiff which deed recited that it was issued pursuant to statute relating to sale of land for delinquent taxes did not make a 'prima facie case' of title in plaintiff." *Anson vs. Ellison*, 104 Utah 576, 140 P. 2d 653.

NORTHCREST WAS NOT ESTOPPED TO ACQUIRE THE UTAH SAVINGS AND THE HEMPSTEAD TITLES

Respondents misconceive the rule. They argue that Northcrest, having taken one title, (through Hugh, Jr.) was estopped to later acquire and assert these other titles (from Hempstead and Utah Savings) against Lucie's estate and devisees. (Their Brief, 48).

As to Hugh, Jr., exactly the reverse would be the rule. Having conveyed and warranted to Northcrest, Hugh would be the one estopped. He could not afterward acquire and assert an adverse title against Northcrest. The estoppel bars him, not Northcrest. But he defaulted. He claims no estoppel in his favor. Respondents cannot claim it for him.

As to respondents, if they mean to argue that Northcrest became estopped as to Lucie or her estate or devisees (John and Gertrude) the argument is a curious one. They furiously contend that Lucie's deed to Hugh (Exhibit B) was null; in other words, that this title Northcrest claims under and which created the estoppel was no title at all! If that is so, no estoppel resulted; none will by a void deed.

Respondents confuse the rule. Their citations disclose the misconception. Those offered (Their Brief, 49, 50) all deal with situations where a *vendee* is purchasing but has not paid out, and meanwhile acquires an adverse title and asserts it against his vendor. But, in that

executory relation, the law refuses to permit him to do so. He is estopped. It is as if Northcrest had been purchasing on contract from Hugh but bought up the Utah Savings and Hempstead titles *before* paying him in full and sought to assert them against Hugh to avoid paying him out. Northcrest, in that situation, would surely be estopped and could not avoid payment. But the estoppel would only run in Hugh's favor, not Lucie's or her devisees. They were not parties to Hugh's and Northcrest's supposed contract.

The estoppel described extends to many relations:

Mortgagor and Mortgagee,

36 Am. Jur. Mortgages §241.

Columbia Trust Co. vs. Nielsen, 76 Utah 129,
287 P. 926.

Landlord and Tenant,

32 Am. Jur. Landlord and Tenant, §113, §118.

Vendor and Vendee,

55 Am. Jur. Vendor and Purchaser, §381.

Tenants in Common,

Columbia Trust Co. vs. Nielsen, *supra*.

But, in very case where the estoppel arises, it is out of an obligation, legal or moral, to another which renders it unfair to acquire antagonistic rights against such other. 55 Am. Jur. Vendor and Purchaser §381. Northcrest owed no obligation to Lucie, John or Gertrude. It had no dealings with them at all. And, after it paid Hugh in full, it owed him none. So, it was free to acquire, as it did, the Utah Savings and Hempstead titles. It was not estopped.

Northcrest quieted title against Hempstead's widow. (Exhibit 10, Files in action by Northcrest vs. Hempstead.) Respondents say Northcrest is estopped to claim the Hempstead title because it alleged therein and got a judgment holding it was of no force. The estoppel claimed is an estoppel "by record". 31 C.J.S. Estoppel §5. But allegations in a pleading of a prior action "do not as a rule operate in a subsequent case, proceeding or transaction as a technical estoppel by record against the party making them". 31 C.J.S. Estoppel §7. But, respondents were not parties to the Northcrest-Hempstead quiet title action. Nor do they claim through it or thereunder. Consequently, they cannot claim the alleged estoppel because,—

"Estoppels *by record* exist only as between the same parties or those in legal privity with them, and cannot be insisted on by one who is not himself bound thereby." 31 C.J.S. Estoppel §8.

**RESPONDENTS FAILED TO ESTABLISH ADVERSE
TITLE IN LUCIE R. THOMAS AND THE EVIDENCE IS
WHOLLY INSUFFICIENT TO SUPPORT THE FINDING.**

Respondents say that they proved Lucie established title by adverse possession and that it extinguished the outstanding titles of Utah Savings and Hempstead. The court made a finding of adverse possession. (Their Brief, 51, 52).

There was no testimony by any witness on this point. Absolutely none. The only evidence relating to this at all is a stipulation that Lucie paid taxes. It was stipulated that she paid the taxes of 1918 to 1935, and from 1938 through 1945. (The lands were sold for taxes in 1935 and 1936). (Tr. 100).

But Lucie's deed to Hempstead (Exhibit F) was in 1908. It was outstanding against her ever after. Northcrest secured that title from Hempstead's widow (1950) and quieted title against Hempstead's estate (1951). This title covered the West 40 acre tract (less 20 x 30 rods). And Lucie's deed to Utah Savings was 1914. (Exhibit D). It was also outstanding against her ever after and Northcrest acquired that title from Utah Savings in 1947 (Exhibit E). This covered all of the property, both 40 acre tracts (less the 20 x 30 rods).

So, during all of the years in question (1918-1945) and long before, these two deeds were outstanding. Those deeds established, of course, a "legal title" in

Hempstead and Utah Savings. (One or the other on the West 40 and Utah Savings on the East 40 acre tract). Hempstead and Utah Savings respectively were, therefore, deemed to have been in possession all the while, and it was up to respondents to prove otherwise. The statute says so.

“104-2-7. Adverse Possession—Possession Presumed in Owner. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time required by law; and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that the property has been held and possessed adversely to such legal title for seven years before the commencement of the action.”

This court has said:

“According to this the presumption is that the legal title is in the owner, unless it appears that the property was held and possessed adversely to him for seven years.” *Funk vs. Anderson*, 22 Utah 238, 61 P. 1006.

Respondents didn't prove anything about Lucie's occupancy. The record is silent as to that; wholly barren. No one testified about possession at all. Respondents offered no evidence on that point. There was none. They stood upon payment of the taxes *alone*. Obviously, that was valueless. And yet the trial court made the astonishing finding that Lucie was at all times in exclu-

sive possession! (Finding 20, Tr. 110). There is no evidence that Lucie occupied these lands, absolutely none.

But, if Lucie had actually occupied the lands (which she did not) still, by the statute and decisions, she would be deemed to have done so "under and in subordination" to the "legal title" established in Hempstead and Utah Savings by their respective deeds, which were outstanding at all times claimed. The burden thus rested on respondents to prove she "possessed and occupied" the lands adversely. To prove that kind of possession and occupancy, they were bound by statute to establish (and they didn't even try) not only actual occupancy by Lucie but also that she had (1) cultivated or improved, or, (2) fenced the lands, or, (3) used them for supply of fuel, fencing timber or pasturage, etc. §104-2-9, §104-2-11 U.C.A. This is the only way land can be possessed *adversely*. The statutory methods are exclusive. *Jenkins vs. Morgan*, 113 Utah 534, 196 P. 2d 871. *H.O.L.C. vs. Dudley*, 105 Utah 208, 141 P. 2d 160. *Central P. Ry. Co. vs. Tarpey*, 51 Utah 107, 168 P. 554.

There was no evidence of Lucie's occupancy at all. On such a record there can be no adverse possession. It was so held in *Jenkins vs. Morgan*, *supra*, this court saying:

"We find no evidence in the record that the defendants have complied with the requirements therein set forth . . . It would thus appear that defendants have failed to establish occupation or possession within the limits of the statutory requirements." *Jenkins vs. Morgan*, *supra*.

Since there was no evidence whatever that Lucie (1) occupied these lands, and, (2) that she also cultivated, improved, fenced or otherwise did with them as the statute requires, respondents failed to establish any adverse possession and the court's finding that she did is not sustained and must be set aside.

CORRECTION AS TO THE YELLOW LOTS

Respondents have pointed out (Their Brief, 9) that in our first Brief of Appellant (Pages 46, 50) Northcrest conceded $2/3$ of the 32 "yellow lots" was properly awarded them, leaving $1/3$ properly awarded to Northcrest.

We confess a contingent correction, in part, must be made.

The yellow lots are within the 20 x 30 rod strip in the West 40 acre tract. (See Map, Exhibit A). This strip is platted and is Capitol Heights second filing. (Respondents' Brief, 3).

Lucie's deeds (1) to Utah Savings, and, (2) to Hempstead (Exhibits E and F) both excluded this 20 x 30 rod strip. Lucie's deed to Hugh, Jr. skirted out around the 20 x 30 rod strip also. (Exhibit B). But, it actually *included* the yellow lots therein in a separate paragraph by referring to them (Paragraph 2 therein) by specific reference to the lot number of each lot. Hugh's deed to Northcrest, which followed, conveyed all of Capitol Heights second filing (which, of course, included the yellow lots. (Exhibit C).

Therefore, if Lucie's deed to Hugh is sustained, then Northcrest must be awarded the entire property and cannot be limited to a $1/3$ interest in the yellow lots. In that case, those lots passed from Lucie-to-Hugh-to-

Northcrest. We acknowledge our error in the Brief of Appellant in this respect accordingly.

If, however, Lucie's deed to Hugh is not sustained, then Northcrest's title comes through Hempstead or Utah Savings. But Lucie's deeds to them did *not* include the tract containing the yellow lots. Therefore, in such case, Northcrest must have only a $1/3$ interest in the yellow lots which went to Hugh by inheritance from his mother and passed and inured to Northcrest by his prior deed to it.

To this extent we willingly stand corrected.

CONCLUSION

All contentions of respondents have been fully met and answered by this Reply Brief. Northcrest now submits:

1. Respondents failed to prove by clear, convincing, unequivocal and conclusive evidence that Lucie's deed to Utah Savings was a mortgage. Mutual intention must be shown. Lucie's intention is a complete blank upon this record. Mutual intention at the date of the deed governs. Her action afterward proves nothing, is only self-serving and not evidence against Northcrest. *Ruthrauff vs. Silver King Western Min. & Mill. Co.*, supra.

2. Respondents admit the rule: A grantor may not make disparaging declarations after parting with title. The private *memo* on Utah Savings' loan cards was not a declaration. It was merely a silent and private entry not communicated or made known to anyone. The declaration was attempted at the *trial* by McGee, Utah Savings' officer. It was incompetent. Utah Savings had already conveyed to Northcrest three years before.

3. The notary's testimony repudiating the certificate of acknowledgment was incompetent. But, if not, it was insufficient by law to overcome the certificate itself. The law of evidence treats the certificate as equaling (if not outweighing) the notary's testimony against it. Hugh's attempted corroboration was incom-

petent because (1) it violated his warranty in his deed to Northcrest, and, (2) it was derogatory of his title after he had conveyed. The evidence then was only *equipoised* and respondents failed in their burden of proof.

4. Respondents proved no forgery of Lucie's deed to Hugh. It was only shown (and admitted) to have not been signed by her hand. There was no evidence that the signature was not authorized and the notary's certificate, if it stands, establishes Lucie's *adoption* of the signature.

5. The recording of Lucie's deed to Hempstead established a *presumptive* delivery. Respondents offered no evidence to refute that *prima facie* fact. The delivery thus stands.

6. Whatever tax title, if any, Lucie got from Spencer Clawson inured to Hempstead under Lucie's prior deed to him. The statute says so. §78-1-9. The 1907 tax was already delinquent when she warranted to Hempstead in 1908. And, she warranted against that tax. She and respondents (her successors) are thus estopped to assert it against Hempstead or his successor, Northcrest.

7. Respondents proved no valid tax title in Clawson. They had the burden to do so *step by step*. They introduced only the abstract. The certificate of sale and tax deed are not set out therein; only a brief *memo* thereof. Therefore, the certificate cannot be tested for

its required statutory form nor the deed for "the facts recited therein". Not being before us, they provide no *prima facie* evidence of the sale or facts recited therein. It is only as if it were stipulated these documents had been issued without stating their contents. *Anson vs. Ellison*, *supra*.

8. Northcrest was not estopped to acquire the Utah Savings and Hempstead titles. Hugh is the one estopped. Not Northcrest. He warranted to it. Respondents are confused. The situations they cite are not like this. Those were *executory* situations where a vendee still owing the unpaid purchase price acquired and asserted an adverse title against his unpaid vendor. That is not allowed. The vendee's obligation cannot be wiped out in that fashion.

9. Respondents failed to establish adverse title in Lucie. The finding must be set aside. There was no evidence at all about *possession*; none whatever. It was stipulated Lucie paid taxes. But the record is silent on possession. Hempstead's deed and Utah Savings' deed were both outstanding throughout all the years in question. They "established a legal title" in them (one or the other on the West 40 and Utah Savings on the East 40 acre tract). They, therefore, one or the other, were deemed to be in possession and it was up to respondents to prove otherwise. They did not even try. It was not shown that Lucie even occupied the lands, much less that she used them in the exclusive adverse manner required by the statute.

10. We stand corrected on the yellow lots, *provided* Lucie's deed to Hugh is sustained. For, in that case, since that deed specifically included those lots and Hugh also afterward conveyed them to Northcrest, they passed in full, not just 1/3, to Northcrest. But, if the deed from Lucie to Hugh is not sustained, then, of course, the lots remained with Lucie and only passed 1/3 to Hugh by her devise upon her death and his after-acquired title to the 1/3 inured to Northcrest by his prior deed.

11. The court properly adjudged to Northcrest the stipulated 33 "white lots" in the 20 x 30 rod strip (Capitol Heights Second Filing). It also adjudged to Northcrest only 1/3 of the 32 "yellow lots" and of the rest of the property, too. But, if Lucie's deed to Hugh (Exhibit B) was good, the judgment must be reversed outright and judgment entered to the whole for Northcrest; otherwise, (under the Hempstead and Utah Savings titles) reversed and judgment entered for Northcrest for the whole of the property except the yellow lots and for 1/3 in them.

12. We assert the judgment of only 1/3 to Northcrest is wrong and must be reversed, with judgment for Northcrest to the whole of the property.

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