

1980

Legrande L. Belnap v. Walker Bank & Trust Company In Its Corporate Capacity : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEGRANDE L. BELNAP,

Appellant,

vs.

Case No. 16849

WALKER BANK & TRUST COMPANY,
in its corporate capacity,

Respondent.

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BRIEF OF RESPONDENT

ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

HONORABLE BRYANT H. CROFT
District Judge

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BRIEF OF RESPONDENT

NATURE OF THE CASE

By this action Walker Bank & Trust Company seeks declaratory judgment that its Trust Deed upon Appellant's residence is a good, valid, and subsisting lien.

DISPOSITION IN THE LOWER COURT

The Honorable Bryant H. Croft granted Respondent Summary Judgment on its Counterclaim for declaratory judgment. At the same time, the Honorable Judge Croft denied Appellant's Motion for Summary Judgment and dismissed Appellant's complaint with prejudice.

STATEMENT OF THE FACTS

Respondent disagrees with the characterization of the facts as set forth by Appellant. Respondent submits that

Appellant's statement of many facts is either incomplete, misleading, or both.¹ Therefore, Respondent submits the following more complete statement of background and facts.

A. The Background of Litigation.

On the 28th day of July, 1972, Utahna P. Belnap died. She was survived by her four children and her husband, LeGrande L. Belnap. LeGrande L. Belnap is the plaintiff below and the Appellant in this action.

At the time of Utahna P. Belnap's death the record title to several parcels of real property, including the marital abode, was in her name alone. A will which she had executed on May 21, 1949 and which she had deposited with the Trust Department of Walker Bank & Trust Company for safekeeping named Walker Bank & Trust Company as executor and left her estate to her children. LeGrande L. Belnap was neither a beneficiary of a contingent beneficiary under the will.

The foregoing situation spawned five lawsuits, including this case now on appeal. All but one of the cases were initially permanently assigned together for efficiency and economy of proceedings.

¹The mischaracterization begins with Appellant's first statement, "The plaintiff's father and mother deeded real property to the plaintiff by Warranty Deed dated August 1951. (Supplemental Record p. 1.)" A review of the cited record, however, shows that Utahna P. Belnap was also a grantee under the deed. Appellant's facts totally ignore that point. Additionally, Appellant ignores the fact that the referenced deed was ineffective. (See Point VII, infra.)

The first case arose when Walker Bank's Trust Department filed the 1949 will of Utahna P. Belnap for probate. LeGrande L. Belnap contested that will. He claimed that the 1949 will had been revoked by a later will which named him as executor and sole beneficiary. He alleged the later will had been executed in his business office and had been witnessed by two of his employees, the sales manger of his Ford dealership and his secretary, Doris Bagley, now Mrs. LeGrande L. Belnap. The alleged later will was never produced or found.

The second case was a forgery and fraud case filed against Walker Bank and Utahna's father and siblings, LeGrande L. Belnap v. Walker Bank & Trust Company and Newman Petty, Rachel Lunt, Norma Strasssen, Leila Shipp, Charles B. Petty, personally and d/b/a Petty Investment Company, Civil No. 209266. Count I of the case involved the marital abode² (the "Home"). Appellant claimed Walker Bank had breached a duty to record a prior deed to him and Utahna as joint tenants. He also claimed that Walker Bank and other defendants had conspired to deprive him of his interest in the home by obtaining and causing to be recorded a forged warranty deed which conveyed title to Utahna P. Belnap alone. Four other

²All of Lot 6 Indian Hills Subdivision, Plat B-1 according to the official plat thereof.

counts of the Complaint charged the other defendants, but not Walker Bank with certain frauds, conspiracies and conversions of marital property and of his property.

The third case was this case, LeGrande L. Belnap v. Walker Bank & Trust Company, Civil No. 21151. Via an Amended Complaint he joined his four children as defendants. The Complaint seeks to quiet title in Appellant and to claim damages against Walker Bank for slander of title. The Complaint does not designate the capacity in which Walker Bank was being sued. At the time the Complaint was filed, Walker Bank was holder of a Trust Deed Note, and Trust Deed on the Home securing the Note. The Bank was also the named executor under the will. At about that time Walker Bank had been appointed special administrator of Utahna's estate for the purpose of marshalling her assets (including the Home) and preserving her estate during the pendency of the will contest. Consequently, Walker Bank entered separate appearances; in its corporate capacity and in its capacity as special administrator of the Estate of Utahna P. Belnap.

The Bank, in its corporate capacity, counterclaimed to establish its trust deed as a valid and subsisting first lien on the property as against any claim or interest of LeGrande L. Belnap in the Home.

The fourth and fifth cases involved certain real property located in Monticello, California. In them LeGrande L. Belnap claimed that Utahna, Newman Petty and others had deprived him of his interest in that property, part of which interest was then titled to Utahna P. Belnap. These cases do not now concern us except as part of the backdrop against which this appeal arises.

From the numerous original claims and defendants, settlements and dismissals leave only this single defendant-respondent. LeGrande's single remaining action on appeal herein seeks to invalidate the Trust Deed Note and the Trust Deed held by Walker. Dismissed from original affirmative claims in excess of \$1,000,000 against the Bank, Appellant tenaciously seeks to avoid attachment of a Trust Deed lien upon the Home in a principal amount of \$11,694.08.³

B. The Documents of Title to the Home.

Ostensibly on August 23, 1951, Henry Belnap and Ida L. Benlap, his wife, executed a warranty deed to the Home conveying it to LeGrande L. Belnap and Utahna P. Belnap as joint tenants. (Supplemental Record at 1.) This deed has been usually referred to as "the first deed". The document,

³Exclusive of interest, costs and attorneys' fees expended in by upholding the Trust Deed's validity.

however, was notarized by an individual who declared on the document that his commission as a Notary Public expired January 6, 1951. The document described the property by a metes and bounds description. This document was never recorded. It is this document upon which LeGrande L. Belnap claimed in case 209266 and in this case.

On August 22, 1952, a plat for Indian Hills B-1 subdivison was recorded in the Salt Lake County Recorder's office. The plat included the property described in the first deed. It was made by Henry and Ida L. Belnap and others as subdividers. It was not, however, joined by LeGrande L. Belnap and Utahna P. Belnap. Rather, LeGrande L. Belnap notarized the signatures of the subdividers on the plat, all of whom together declared themselves to be the owners of the property described thereon. (Supplemental Record at 105).

Additionally, while Lot 6 of that subdivision roughly coincides with the metes and bounds description, its perimeters are different. (See Appendix "A" to this brief.) Thus, on or about August 22, 1952, part of the property claimed by LeGrande L. Belnap pursuant to his claim under the first deed, was dedicated to Salt Lake City for use as a public street.

On June 15, 1954, a deed to the Home from Henry and Ida L. Belnap to "Utahna P. Belnap, a married woman" was recorded. (Supplemental Record at 2.) It was dated November

10, 1952. It bore the subdivision description (Lot 6, Indian Hills Subdivision Plat B-1). This deed has usually been referred to as "the second deed". The signature of Henry Belnap was genuine.⁴ The signature of Ida L. Belnap was ingenuine.⁵

The face of the document indicates that it was recorded at the request of Walker Bank & Trust Company. Wilford Kimball, an officer of Walker Bank employed at its Sugarhouse Branch during 1954, states that November 10, 1952 deed was received by the Bank from Utahna P. Belnap in connection with the negotiation of a mortgage and was recorded in the normal course of the mortgage transaction. This transaction took place on May 27, 1954. Plaintiff joined in that transaction. (Affidavit of Wilford Kimball dated October 15, 1973; Belnap Deposition taken October 12, 1973, page 8, lines 21-23; Record at 80-83.)

Three other deeds are recorded at the Salt Lake County Recorder's office on which Ida L. Belnap's signature is

⁴LeGrande L. Belnap and his handwriting expert admit that Henry Belnap's signature is genuine. (See Ben Garcia Deposition dated 12/18/73 page 24 lines 11-16, Record at 586, and James S. Lowrie Affidavit, dated February 1, 1974, Record at 176, 178.

⁵All parties and handwriting experts concede that Ida L. Belnap's signature on the second deed is ingenuine, but there is controversy as to the effect.

ingenuine. In each instance, the deeds convey real property from Henry and Ida L. Belnap to strangers to this litigation. In each instance the signature of Ida L. Belnap was made by Henry Belnap.⁶

The 1954 mortgage on the property was extended on December 11, 1962. Appellant jointed in that transaction. (LeGrande L. Belnap Deposition dated October 12, 1973, page 10, line 23, page 11, line 8; Record at 585.) On May 3, 1963, the outstanding balance on the mortgage was \$4,702.68. On that date Utahna P. Belnap executed a Trust Deed and a Trust Deed Note in favor of Walker Bank. Walker Bank loaned to Utahna P. Belnap the sum of \$30,000.00. Of this sum, \$4,702.68 was credited to the prior mortgage on which Appellant and Utahna P. Belnap were obligated, paying it in its entirety. The balance of the sum loaned was credited to accounts maintained by Utahna P. Belnap. The unpaid balance of the Trust Deed Note as of January 23, 1974 was \$18,460.42, exclusive of Attorneys' fees and costs of collection. (Stephen Goalen Affidavit dated January 23, 1974; Record at 154-162.)

⁶Henry Belnap wrote the signature of Ida L. Belnap on the second deed as well as on other recorded documents according to Leslie King, handwriting expert. (Leslie King Affidavit, dated 2/1/74; Record at 179-80.)

Appellant has acknowledged having purchased other real property which he placed in Utahna's name alone. He said the purpose was "to give her as much protection as possible." (Deposition of LeGrande L. Belnap, June 24, 1975, p. 8.)⁷

C. The Disposition of the Other Cases.

The will contest was settled by agreement of all the beneficiaries and heirs of Utahna with approval of the court. The parties to the settlement were LeGrande L. Belnap and the children of Utahna P. Belnap. (Record at 661-669.) Walker Bank was not a party to the agreement in any capacity. The value of the property division between LeGrande and the children was roughly equivalent to an intestate treatment of Utahna's estate. As between LeGrande L. Belnap and Utahna P. Belnap's other heirs, the other cases were settled in connection with the will contest settlement. Thus, the children were settled out of this case and the Montebello cases were settled.

The settlements granted the Home to LeGrande L. Belnap so far as the other heirs were concerned. The other heirs,

⁷The original deposition was never returned to the district court. During summary judgment arguments, the absence was noticed. Respondent supplied both the court and the judge with copies of its copy. Appellant was to have read, signed and returned the copy but apparently has not. The court relied on its copy of the deposition in its memorandum opinion. (See Record at 541-542.) For purpose of full review, Respondent has filed its originally notarized copy of the deposition with the clerk of this court.

however, received an assurance from LeGrand L. Belnap that they and Utahna's estate would be held harmless from any claim by Walker Bank on the Trust Deed Note which Utahna gave the Bank on May 3, 1963. (Record at 661-669.)

Walker Bank's duty as Special Administrator of the Estate of Utahna P. Belnap was to secure and preserve the estate for the benefit of the heirs until the will contest was terminated and an executor or administrator could be named. Consequently, when agreement was reached between all the potential heirs, the Special Administrator accepted such resolution.

Case No. 209266, the forgery and fraud case instituted by LeGrande L. Belnap, was not settled. It was involuntarily dismissed with prejudice for failure to comply with prior orders of the court on July 6, 1978, (Supplemental Record at 124). The dismissal was appealed, but LeGrande L. Belnap voluntarily dismissed the appeal. (See Remittiter issued 1-4-79, Docket No. 15985, Supplemental Record at 154.) The dismissal of Case No. 298266 is significant because Walker Bank as Respondent in this case claims res judicata effect from that dismissal. (See Point I, infra. at pp. 11-16).

This case came on for pre-trial on September 10, 1979.⁸ Since both sides had motions for summary judgment on file, the court suggested that the motions be heard prior to beginning the trial. Both sides agreed. After an opportunity for preparation summary judgment motions were heard on September 11, 1979. The court took the matter under advisement. On November 5, 1979 the court granted summary judgment to Walker Bank & Trust Company.

There are other facts which are germane to each of the separate arguments. They will be set out in the arguments which follow.

ARGUMENT

I. BOTH APPELLANT'S COMPLAINT AND HIS DEFENSE TO THE BANK'S COUNTERCLAIM ARE BARRED BY THE OPERATION OF THE DOCTRINE OF RES JUDICATA.

A. The Doctrine Generally.

The doctrine of res judicata bars Appellant's present complaint against the Bank. The dismissal with prejudice in the forgery and fraud case, Belnap v. Walker Bank & Trust Company, et al., Civil No. 209266, operated as an adjudication

⁸Trial was set for September 10, 1979. At pretrial settlement conference it was determined that counsel and the trial judge would utilize the first day set for trial to delineate issues which would shorten and simplify the actual trial - an informal pretrial.

on the merits as to the issue of the validity of the Banks Trust Deed. Such a result is mandated by the Utah Rules of Civil Procedure, Rule 41(b):

Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or comply with these rules or any Order of court, a defendant may move for a dismissal of an action, or of any claim against him . . . Unless the Court in its Order for Dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication on the merits.
(Emphasis Added)

Although the forgery case and this action have substantially identical issues with respect to the Bank in its corporate capacity, this Court's narrow construction of a plaintiff's right after dismissal recognizes even a broader application of res judicata. Thus, in Belliston v. Texaco, Inc., 521 P.2d 379 (Utah 1974), this Court reiterated its previous holdings:

[T]he doctrine of res judicata applie[s] not only to points and issues which were actually raised and decided in a prior action but also as to those that could have been adjudicated, with the qualification that the claim, demand, or cause be the same in both cases. If the parties have had an opportunity to present their case and judgment is rendered thereon, it is binding both as to those issues that were tried and to those that were triable in that proceeding, and they are precluded from further litigating the matter.⁹

⁹Id., at 380. See also Thomas v. Braffet's Heirs, 6 U. 2d. 57, 305 P.2d 507 (1956).

allegations of the fraud and forgery case.¹¹ Finally, appellant's more recent pleadings on file demonstrate the similarity of the two cases. For example, in his January 17, 1976 Stipulation (Record at 393), Appellant stipulated with regard to the then pending cases:

This case [Case Number 211151] involves title to the home located at 1466 Indian Hills Drive, Salt Lake City, Utah. LeGrande L. Belnap claims to be the owner of said home.

"The First Cause of Acton [in Case Number 209266] involves title to the home located at 1466 Indian Hills Drive, Salt Lake City, Utah, a claim for damages and other relief.

And, in his August 1, 1978 Objection to the Request for Trial Setting in this case, Appellant objected to the request for the following reasons:

1. That plaintiff has commenced an appeal in a related case in the District Court under Civil No. 209266, and the issues with respect to that case may affect the outcome, if the defense is available in the instant case.

¹¹In his Reply to Counterclaim, Second Defense, paragraph 2, Appellant alleges: "Denies the allegations of Paragraph 2 and 3 of defendants' counterclaim and further alleges that said trust deed is void as against the claims of plaintiff because of the acts which are fully set forth and the Complaint filed by the plaintiff against the defendant on file with this Court under Civil No. 209266."

2. The issues in the case pending on appeal relate to the validity of a mortgage granted by plaintiff's former wife to the defendant, Walker Bank & Trust Company, in its corporate capacity.

(Supplemental Record at 420-421)

The Complaints, Counterclaim, Reply to Counterclaim and other pleadings in these cases demonstrate the identity of issues. In the forgery and fraud case, Appellant put into issue the validity of both the Bank's Trust Deed and the second deed conveying the home of Utahna P. Belnap alone. These matters are now res judicata against him.

Likewise, Appellant's only affirmative defense to the Bank's counterclaim herein is conclusively established against him by res judicata. This follows not only under the generally broad application of res judicata with regard to Rule 41(b), but also because the specific issues in dispute here were also addressed in Case Number 209266. Each issue presently at bar was, in fact, raised and adjudicated by the forgery and fraud case dismissal.

The dismissal with prejudice in Case Number 209266 operates as an absolute bar to any assertion by Appellant in this case that the Bank's Trust Deed is not valid or that the second deed was not valid because of alleged forgery. To the extent that Appellant's case herein seeks to establish his title in derogation of the Bank's Trust Deed, he is barred by

the dismissal with prejudice of the earlier case.

The proper application of res judicata fully resolves this appeal against Appellant and renders consideration of the following arguments unnecessary.

II. APPELLANT'S PLEADINGS PRECLUDE HIS ARGUMENTS ON APPEAL.

Appellant's arguments in brief, in light of his pleadings, compel affirmation of the lower court's summary judgment. In his brief, Appellant now raises various defenses to the Bank's Trust Deed based on:

- 1) Bank's failure to comply with declaratory relief statute (Point I);
- 2) Actions of the personal representative, estoppel and the "one action" rule (Point II); and
- 3) he forgery of the second deed and the bank's notice of Appellant's interest under the first deed (Point III).

The first two arguments are in the nature of affirmative defenses, alleging matters which are not implicit in Appellant's general denials to the Bank's counterclaim. But, Appellant neither pleaded such matters, nor sought to amend or supplement his pleadings to allege such matters. Because these defenses were not raised in his pleadings, Appellant may not

now argue them.¹²

On the other hand, the third argument addresses and sets forth his only pleaded affirmative defense - the matters covered in the forgery and fraud case. Thus the familiar litany on page 24 of his brief: The Bank had notice of Appellant's interest when Appellant delivered the first deed to the Bank. The Bank should have known the second deed was a forgery and failed to protect itself. (Compare Complaint 209266, Supplemental Record at 2-8.)

Even if this Court does not reaffirm its broad application of res judicata as set forth in Point I supra, at the very least, the affirmative defense which is based on the pleadings of the forgery and fraud case must be determined against Appellant.

Thus, because of his failure to plead the belated defenses, and because of the unavailability of the only defense pleaded, Appellant may not properly argue any of his proposed defenses on the appeal. Walker Bank is properly entitled to summary judgment as a matter of law.

¹²See Utah Rules of Civil Procedure, Rule 12(h); see Tygesen v. Magna Water Company, 13 U.2d 397, 375 P.2d 456 (1962).

III. EVEN IF ALL APPELLANT'S ARGUMENTS WERE ADMITTED,
AT THE VERY LEAST, WALKER BANK HOLDS A VALID LIEN
ON AN UNDIVIDED ONE-HALF OF THE PROPERTY.

Even if Appellant can somehow prevail in his claim under the defective deed of August 23, 1951, he cannot have the property free and clear. This question is settled by the Utah Supreme Court in the case of Tracy Collins Trust Co. v. Goeltz, 5 U.2d 350, 301 P.2d 1086 (1956). In that case a husband and wife owned property in joint tenancy and jointly executed a mortgage on the property. Thereafter, the husband sought a second mortgage from another lending institution, Tracy Collins Trust Company. As a condition to the loan, the prospective lender required that the original mortgage be paid and that the wife join in the new mortgage to it. The husband, without the knowledge of the lender, signed his wife's name. In the lender's action to foreclose the mortgage after default, the wife resisted because the mortgage had been executed by the husband alone.

In Tracy Collins Trust Co. v. Goeltz, the Utah Supreme Court held that the husband's signature was ineffective to mortgage the wife's interest. The Court held, however, that the mortgage by the husband alone severed the joint tenancy and created a tenancy in common. The Court further held that the wife was liable for, and the entire tenancy in common was

subject to a portion of the second mortgage. The court found such liability existed to the extent by which the proceeds of the second mortgage relieved her and her one-half of the property of the prior obligation. Finally the Court held that the husband's undivided one-half interest of the tenancy in common was subject to the whole amount of the unpaid balance of the mortgage.

If somehow Appellant prevails on his claim under the August 23, 1951 deed, Tracy Collins controls this case. At the time of the trust deed transaction on May 3, 1963, Utahna Belnap had an undivided interest in joint tenancy in the property in question. Her trust deed transaction severed the joint tenancy and created a tenancy in common with Appellant, with each tenant having an undivided one-half interest. Her transaction also caused Appellant to be relieved of an obligation of \$4,708.68 as a joint obligor on the mortgage of the property. Consequently, if any property passes to Appellant by virtue of the August 23, 1951 deed, he can only take an undivided one-half interest as a tenant in common and that he takes subject to the lien of Walker Bank & Trust Company in the sum of \$4,708.68.¹³ Furthermore, the remaining undivided one-half interest in common is subject to the

¹³plus statutory interest from May 3, 1963. Utah Code Annotated, §15-1-1.

trust deed and the whole unpaid amount of the trust deed note.

Nonetheless, Appellant says that Walker Bank's trust deed is void because a forged deed was used as security for a loan to Utahna P. Belnap. This is not the case. The Bank took Utahna P. Belnap's interest in the property as security for a loan to Utahna P. Belnap. If Walker Bank was misled or mistaken as to the extent of her estate, it is still entitled to take that which she held at the time. Utah Code Annotated, Section 57-1-4. Moreover, the contrary authority which counsel for Appellant cites deals with situations where the deeds are entire foregeries. Such cases are distinguishable from the circumstance here. In this case one grantor's signature is genuine, and that grantor survived the other signator. Moreover, the party obligating the property had a claim to it independently of the so called forgery.

IV. WALKER BANK & TRUST COMPANY IS A PURCHASER IN GOOD FAITH AND FOR A VALUABLE CONSIDERATION.

Section 57-3-3 of the Utah Code Annotated states:

Every conveyance of real estate hereafter made, which shall not be recorded as provided in this title, shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded.

In the case of Federal Land Bank of Berkeley v. Pace, 87 Utah 156, 48 P.2d 480 (1935) this Court held that the term conveyance in the predecessor statute to the above quoted statute

included mortgage liens. There would seem little doubt that it also includes trust deeds.

In the case now before the Court, Walker Bank took the Trust Deed of Utahna P. Belnap as security for a trust deed note and loaned the sum of \$30,000.00 to Utahna P. Belnap on May 3, 1963. At this time, Utahna P. Belnap had been the record owner of the property for approximately nine years and the Bank had no knowledge of any defect in the title. The Bank's trust deed was recorded on May 8, 1963.

The deed under which Appellant claims was never recorded. In his forgery suit, Appellant claimed that Walker Bank did have notice because Appellant allegedly entrusted the August 23, 1951, deed to it for recording. Because of the dismissal with prejudice the allegation has been conclusively determined against him, even were it not belied by the record of Appellant's subsequent involvement in the Plat of the Indian Hills B-1 subdivision. And, in any event, at the time the Bank had the second deed recorded and lent money pursuant to a mortgage transaction the first deed was unrecordable to demonstrate any interest in Appellant. It was unrecordable both because of the defective acknowledgement and also because it predated the plat which was signed by the grantors. That plat indicated to the world that the grantors, and not Appellant, still claimed ownership to the property. In fact, even if the deed had been recorded, standing alone, it would

not have been notice of Appellant's alleged interest. See Norton v. Fuller, 68 Utah 524, 251 P. 29 (1926). Appellant has not met his burden of raising genuine issues respecting the Bank's notice of the 1951 deed, nor with the dismissal of the forgery case can he. The Bank is a subsequent purchaser in good faith and for a valuable consideration.

V. APPELLANT MAY NOT USE THE ACTIONS OF WALKER BANK IN ITS CAPACITY AS SPECIAL ADMINISTRATOR OR ADMINISTRATOR OF THE ESTATE OF UTAHNA P. BELNAP AS ADMISSIONS BY RESPONDENT IN ITS CORPORATE CAPACITY IN THIS CASE.

In the Appellant's various actions against it, the Bank has participated in two capacities. The Bank has appeared both in its fiduciary capacity as proponent and named executor under a Will, and its corporate capacity as a creditor of Utahna Belnap and a lien holder on potential estate assets.

In the initial stages of the probate proceedings, the Bank participated as the named executor under the 1949 will seeking formal appointment as such. Later, as Special Administrator and ultimately as Administrator of the estate, the Bank acted in a fiduciary capacity as representative of the estate. In this case, the Bank was sued in both capacities.

Different law firms represented the Bank's independent interests. Initially, the firm of Romney, Nelson and Cassity appeared for the Bank in its capacity as representative of the

estate. (Later, the law firm of Strong & Hanni appeared for the Bank in its capacity as representative of the estate.) The Bank's present counsel represented and continues to represent the Bank in its corporate capacity. The distinction and independence of the two separate Bank persona is one of both form and substance. The distinction is apparent not only under the law, but in the handling of these cases as well.

Under the law, the acts of the Bank in the faithful performance of its duties as representative of the estate are chargeable to the estate. A claim against the Bank who has faithfully performed its duty¹⁴ is a claim against the estate which must indemnify it. On the other hand, a claim against the Bank in its corporate capacity is a claim against the Bank's own assets.

The statutes and courts of Utah recognize this distinction. For example, the relevant Utah statutes provide that all assets held in any fiduciary capacity must be kept separate from the general assets from the Bank.¹⁵ Former Utah Code Annotated Section 75-9-15 respecting judgments against the

¹⁴Plaintiff stipulated to the dismissal of all of his claims against the Bank as Special Administrator and, therefore, must concede its faithful performance of its fiduciary duties.

¹⁵Utah Code Annotated §7-5-12.

personal representative has been interpreted by this Court to mean that any judgment so given must be a judgment against the estate assets only and that entry of said judgment against the personal representative personally is improper. Clayton v. Dinwoodey, 33 U 251, 93 P. 723, 782 (1908).

Because of the separate and distinct nature of the Bank's two persona, the acts of the Bank as the representative of the estate are not admissions against the Bank in its corporate capacity. Such a conclusion is compelled not only by the general rule which requires the bank as fiduciary to represent the estate's interests independently of the bank's interests which might arise from its corporate transactions, but also by the record of these cases.

In the 1976 Stipulation between Appellant and the heirs of the estate, the distinction was recognized. All claims against the Bank as representative of the estate were dismissed with prejudice. The claims against the Bank in its corporate capacity were reserved for further proceedings. The claim of the Bank in its corporate capacity was recognized and reserved. And, according to the Stipulation, Appellant agreed to indemnify and to hold the heirs, the estate and Walker Bank in its capacity as estate representative harmless from any such claims.

In the Second Point of his brief Appellant claims great prejudice, in that he cannot now reach the estate for payment of the Trust Deed indebtedness. Additionally Appellant seeks to impose acts which the Bank undertook as estate representative as admissions against the Bank in its corporate capacity. Appellant ignores the law, the facts and the record. Both Appellant's liability here and the Bank's acts which are complained of are in accordance with the Stipulation Appellant executed. That Stipulation provides in relevant part:

(2) LeGrande L. Belnap shall receive and be entitled to the home located at 1466 Indian Hill Drive, Salt Lake City, Utah, and shall take said home subject to the existing mortgage thereon, which said mortgage LeGrande L. Belnap hereby assumes and agrees to discharge and does hereby indemnify and agree to save the estate of Utahna P. Belnap and defendants harmless from any loss, damage, claims, or liability on account thereof. The action described in Paragraph V B shall be dismissed as against Walker Bank & Trust Company as special administrator of the estate of Utahna P. Belnap, deceased, and as against her children with prejudice, provided that the claims against said bank in its corporate capacity shall be reserved.

(4) All property, real, personal and mixed, other than the home referred to in paragraph V B above and the Montebello property referred to in Paragraph V C above including, but without limitation, all other property shown on the inventory and appraisal filed by the Special Administrator in Case No. 59387 pending in the above-entitled court, and all other properties of every kind or nature owned by Utahna P. Belnap at the time of her death, known or unknown, or hereafter discovered or that may be hereafter acquired, shall belong to the estate of Utahna P.

Belnap, deceased, and as to which LeGrande L. Belnap and Belnap Freight Lines hereby disclaim and waive any interest therein. All of said property, real, personal and mixed, belonging to the estate of Utahna P. Belnap shall be distributed to the defendants, Barbara Sine, LeGrande P. Belnap, Arlene Waldron and Jaynie Belnap, in equal shares free and clear of any interest or claim of LeGrande L. Belnap or Belnap Freight Lines.

(5) All taxes of every kind or nature that are due or that may hereafter become due on said Home. . .B. . .all state inheritance taxes or federal estate taxes that may be claimed or that may become payable by reason of any claim that said Home. . .were assets of Utahna P. Belnap shall be paid by LeGrande L. Belnap and Belnap Freight Lines, and LeGrande L. Belnap and Belnap Freight Lines do indemnify and agree to save the estate of Utahna P. Belnap and defendants harmless from any and all loss, damages, claims or liability on account thereof.

(Record at 393)(Emphasis added)

In accepting the judicial order made pursuant to the compromise or Stipulation of the heirs regarding the treatment of the home, the Bank as estate fiduciary was compelled to act in the best interests of the estate and of the rightful heirs of the estate. But such actions taken in "the best interests of the estate" do not bind third parties whose claims may be contrary to such a settlement or determination. This is especially true where such claims were specifically recognized and the Appellant expressly indemnified the representative and held it harmless from any liability on account thereof. The Bank's acts as representative of the estate are not admissions

against Respondent herein who appears as creditor. Appellant may not now claim that the acts taken in reliance on and in pursuance of such a Stipulation are acts which bind the Bank in its corporate capacity.

VI. THE ONE-ACTION RULE DOES NOT BAR THE BANK'S CLAIM FOR DECLARATORY RELIEF.

In exquisite convolution, Appellant appears to assert variously that (1) the Bank failed to make a timely claim against the estate; and/or (2) that when Walker Bank as a special administrator petitioned the court to make payments on the promissory note, it did make a claim which violated the "one-action" rule, and thereby waived its right to the security;¹⁶ and/or (3) that since the estate disclaimed the property, the Bank may not have the protection of Utah Code Ann. §75-3-803(3).¹⁷ In short, Appellant argues that the Bank should have claimed against the estate, but it did not;

¹⁶The one-action rule, as set forth in Utah Code Ann. §78-37-1 provides as follows: "There can be but one action for the recovery of any debt or the enforcement of any rights secured solely by mortgage upon real estate which action must be in accordance with the provisions of this chapter."

¹⁷Utah Code Ann. §75-3-803(3) provides:

"nothing in this section effects or prevents
(a) any proceedings to enforce any mortgage,
pledge or other lien upon property of the estate."

The section generally exempts persons claiming lien interest in estate property from the necessity of making a formal claim with the estate.

or, that the Bank should not have claimed against the estate, but it did.

The single action rule does not bar the bank's claim for declaratory relief herein. The estate representative's request for authority to pay a bona fide debt is not an action under Utah Code Annotated §78-37-1. This is obvious from the record that reflects that no one opposed the petition. (See Order, Record at 674.) Indeed, had there been opposition to the matter, it would have been set for trial and then the Bank would have been obliged to formulate a foreclosure action to collect or enforce the debt. Under the circumstances that existed, however, such action was unnecessary, inasmuch as neither Appellant nor anyone else made objections to the payment.

Appellant's failure to have earlier objected is fatal to his argument now. This is especially so since the estate's payment of the delinquent amounts in fact reduced the lien upon the home and, thus, increased the value of the property which Appellant claimed. Having taken the benefit, Appellant too belatedly contests the propriety or effect of the payment.

Moreover, in light of Appellant's warrants to the estate, a claim against the estate would have triggered a claim by the estate against Appellant to defend and indemnify. The case then would have come full circle.

VII. APPELLANT CAN RAISE NO GENUINE ISSUE OF DISPUTE TO OVERCOME THE ADMITTED EVIDENCE AND LEGAL PRESUMPTIONS THAT VALIDATE THE SECOND DEED.

A. The Standard for Summary Judgment.

Rule 56(c) of the Utah Rules of Civil Procedure provides that summary judgment shall be rendered

if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.

Under the standards for statutory construction the precise wording, and each and every word, of the rule must be given significance. The terms "genuine" and "material" are significant. The terms "genuine" and "material" prevent a litigant from defeating summary judgment by raising facts or issues which are irrelevant or otherwise inadmissible at trial. The term "genuine" logically encompasses the evidentiary standards or burdens which the resisting party must meet under the law of the particular case.

The second deed dated November 10, 1952, which describes the property as Lot 6, Indian Hills sub-division B-1 was recorded on June 15, 1954.

Because the deed was recorded, Appellant must prove its invalidity by clear and convincing evidence. Controlled Receivables, Inc. v. Harmon, 17 U.2d 420, 413 P.2d 807 (1976).

Although Respondent admits the signature of Ida Belnap is not genuine, it submits that such fact, standing alone, does not invalidate the whole conveyance. And, the evidence which Appellant adduces to prove the entire forgery is either inadmissible or self-serving. In similar cases this court has affirmed summary judgment against the person attacking recorded deeds. See Controlled Receivables, Inc., supra. Summary judgment is proper here because Appellant has failed to adduce his own clear and convincing evidence that the second deed is invalid and has failed to address the abundant evidence which supports the deed's validity.

B. The Defects of the First Deed.

The property description under the first deed does not exactly coincide with the dedicated Lot 6. (See Appendix A to this brief). It has not been determined how much difference these variances between the deed under which Appellant claims and the Plat make in terms of actual acreage. It is demonstrated, however, that the shape of the property described on the deed is not the same as the shape on the Plat. The effect of the differences is that some property under one of the descriptions will appear as a dedicated street under the other.

Examination of the first deed under which Appellant claims discloses that the purported notary public who

supposedly notarized the signature of Henry and Ida Belnap on August 23, 1951 stated on the deed that his commission expired January 6, 1951. There was then no proper acknowledgement of the alleged signatures on that deed because the document on its face indicates it was not taken before a commissioned notary. The deed was, therefore, unrecordable. Utah Code Annotated, 57-3-1. C.f. Norton v. Fuller, 68 Utah 524, 251 P. 29 (1926).

The Plat for Indian Hills B-1 subdivision was filed for record on August 22, 1952 with the Salt Lake County Recorder by Henry and Ida L. Belnap and others. Although the property claimed by Appellant was included among the property dedicated by the Plat, he was not one of the signatories or dedicators on the Plat who warranted their ownership of the dedicated property. However, Appellant notarized that the signatures of the dedicators, such an act serves as an admission to the world that Appellant made no claim to the property one full year following the alleged conveyance.

The existence of the August 23, 1951 deed signed by Ida and Henry Belnap before an expired notary, the existence of the Plat which was notarized by Appellant and which contains variances from the deed under which he claims, the recorded 1952 deed and the record of Appellant's own depositions demonstrate certain factual matters and when the logical inferences are followed, lead to the following conclusions:

1. That on August 23, 1951, Henry and Ida Belnap purported to convey the property described in that dede to LeGrande and Utahna Belnap.

2. That by August 22, 1952, Henry, Ida and LeGrande Belnap realized that certain problems were presented by the purported conveyance:

(a) It was not recordable because of the defect in the acknowledgement.

(b) The property description thereon was not compatible with the survey which was taken for the purpose of platting and subdividing the property.

3. That by August 22, 1952, Henry, Ida and LeGrande Belnap had reached the following decision:

(a) To treat the August 23, 1951 deed as null and void, and to file the Plat in order to get the development of the subdivision under way.

(b) To execute a new deed after the approval of the plat.

(c) To place the property in Utahna's name alone.

C. The Validity of the Second Deed.

The deed dated November 10, 1952 carries the property description which comports to the plat that was by that time in effect. It was purportedly executed by Henry Belnap and Ida Belnap and purportedly conveys the property to Utahna P.

Belnap. Leslie King, a qualified handwriting expert states the signature of Henry Belnap is an authentic signature (Leslie King Affidavit dated October 16, 1973, Record at 66-75), but that the signature of Ida Belnap is a forgery. (Leslie King Affidavit dated February 1, 1974, Record at 179-188.) Ben Garcia, a handwriting expert retained by Appellant, agreed in his disposition to both of these opinions. (Ben Garcia Deposition dated December 18, 1973, page 24, lines 11-16, Record at 586.) During the deposition of Mr. Garcia, Appellant stated that he does not contest the authenticity of the signature of Henry Belnap.¹⁸ (James S. Lowrie Affidavit dated February 1, 1974 Record at 176,178) Leslie King further states that Henry Belnap signed Ida L. Belnap's signature on that Deed and on three other conveyances of property in the same locale. (Leslie King Affidavit dated February 1, 1974, Record at 179-180.)

D. Appellant's Evidence.

Henry Belnap, has disavowed the transaction. Thinking, we believe, to help his son, he has disavowed his own signature which is verified by two handwriting experts and

¹⁸ Additionally, at pretrial proceedings Appellant's counsel represented and argued that Appellant did not contest the genuineness of Henry Belnap's signature, but rather whether Henry Belnap intended to convey to the named grantee.

which is admitted by his son, the Appellant. (Henry Belnap Affidavit dated June 5, 1973.). However, the Affidavit of Henry Belnap is hearsay, and will be subject to exclusion as evidence of the issue. Likewise, the deposition of Henry Belnap is hearsay - having been taken in the early stages of the probate case, before the Bank became party to these actions in its creditor corporate capacity. Thus, Appellant has no admissible evidence of the alleged forgery even if, despite the doctrine of res judicata such issues could again be litigated.

And, in any event, the record demonstrates that Appellant himself and through his expert has admitted the authenticity of Henry Belnap's signature. Thus, Henry's signature should be taken as authentic, and no genuine question of fact exists to the contrary. Furthermore, the expert evidence demonstrates that Henry also signed Ida Belnap's signature on the 1952 deed, as well as on other conveyances apparently in a normal course of dealing.

Further facts which support the conclusion that the November 10, 1952 deed is a correct and valid deed and which Appellant has failed in his burden to overcome, are as follows: The November 10, 1952 deed instructs that tax notices be mailed to Utahna P. Belnap at 1466 Indian Hills Drive, Salt Lake City, Utah. It is presumed as a matter of law that tax notices on the property arrived at Appellant's residence for eighteen years, without his ever noticing that the Salt Lake

County Treasurer listed the property in Utahna P. Belnap's name alone. In the same vein, Appellant signed at least one tax return wherein the property was listed as Utahna P. Belnap's property. (Edward G. Richards Affidavit dated October 16, 1973, Supplemental Record at 84-104) Similarly, that until 1972 Appellant had not discovered the payment of the original mortgage from the funds secured by the Trust Deed transaction between Utahna P. Belnap and Walker Bank & Trust Company (LeGrande Belnap Deposition dated October 12, 1973, page 12, lines 18-22), is inferential of a disregard of the details of property ownership which even when viewed favorably to Appellant, is, inconsistent with a belief in ownership of the property.

When the issues already considered in this brief are considered together, the logical conclusion is that the November 10, 1952 deed was a correction deed, designed to remedy the defect in the acknowledgment in the August 23, 1951 deed, designed to correct the variances between the August 23, 1951 deed and the August 22, 1952 plat; and designed to place the property in Utahna P. Belnap's name alone, for tax purposes, for credit purposes or for some other undisclosed reason.

The conclusion that the 1952 deed is valid follows as a matter of logic, and it follows as a matter of legal presumption because the 1952 deed was recorded. Even were a

trier of fact to consider the forgery issue through the affidavit and deposition of Henry Belnap, Appellant cannot, as a matter of law, meet his burden of proof.

CONCLUSION

Summary judgment was proper. Appellant's arguments to reverse the summary judgment avoid, overlook and contort the dispositive facts and law. For the past eight years, Appellant has resisted the validity of the trust deed held by Walker Bank & Trust Company. During that time he has brought numerous actions and allegations. Now he must accept the effect of his own litigious spirit. The factual basis of Appellant's claims have been conclusively determined against him by the dismissal with prejudice of his related complaint in Civil No. 209266. He has failed to properly reserve or bring his other defenses. In any event, Walker Bank & Trust Company's trust deed is valid under this court's holding in Tracy Collins Trust Co. v. Goeltz. The record unequivocally demonstrates that Walker Bank and Trust Company is a good faith purchaser for value. Finally, as a matter of law, Appellant has not and cannot meet his burden of proof even were the matter to go to trial. Summary judgment must be affirmed.

RESPECTFULLY SUBMITTED, this 20th day of June, 1980.

JONES, WALDO, HOLBROOK & McDONOUGH

James S. Lowrie
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Attorneys for Respondent,
Walker Bank & Trust Company

APPENDIX A

(Outline of Disparities Between the First Deed and the Plat)

By locating on the Plat the approximate point of beginning as stated in the August 23, 1951 deed the following disparities are found:

1. There is a disparity in the first distance to be covered--the 1951 deed stating 50.95 feet and the plat stating 50.96 feet.
2. The 1951 deed describes an angle of $66^{\circ}34'45''$ while the Plat describes an angle of $66^{\circ}31'4''$. The distance on this line according to the deed is 134.10 feet, but according to the Plat it is 134.08 feet.
3. The next deed description is for an angle of $35^{\circ}30'E$, a distance of 12.96 feet. The corresponding Plat description does not state the angle, but states the distance to be 12.97 feet.
4. The deed then describes a curve to the right on a defined radius for 159.0 feet, followed by another curve to the right on another radius for 50.34 feet, followed by another curve to the right a distance of 89.53 feet to the point of beginning. The Plat, however, shows a curve on a set radius for 128.07 feet, a curve to the right on a changed radius for 90.04 feet and a curve to the right on another changed radius, a distance of 58.49 feet to the point of beginning.

CERTIFICATE OF MAILING

I hereby certify that on this the 20th day of June 1980, I caused to be mailed, postage prepaid, two true and accurate copies of the foregoing Brief of Respondent upon:

Kenneth L. Rothey
2275 South West Temple
Salt Lake City, Utah 84115

Raymond C. Hillman