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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEGRANDE L. BELNAP

Appellant

vs.

Case No. ~~18649~~ 16849

WALKER BANK & TRUST
COMPANY in its corporate
capacity

Respondents

BRIEF OF APPELLANT

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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IN THE SUPREME COURT OF THE STATE OF UTAH

LEGRANDE L. BELNAP)	
)	
Appellant)	
)	
vs.)	Case No. 18649
)	
WALKER BANK & TRUST)	
COMPANY, in its corporate)	
capacity)	
)	
Respondents)	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from an order of the Honorable Bryant H. Croft, denying the plaintiff judgment upon his complaint against the defendant seeking to quiet title to properties situated in Salt Lake County; and from the same Order granting the defendant declaratory relief, pursuant with the prayer of defendant's counterclaim, declaring that the defendant had a good and valid mortgage against the property which is the subject of this action.

DISPOSITION IN THE LOWER COURT

The Honorable Bryant H. Croft, entered his order denying the relief sought by the plaintiff in his case in chief, which action was brought for the purpose of quieting title to the subject property in the plaintiff and declaring that the defendant had no interest in the same. At the

same time, the Honorable Judge Croft granted defendant's motion for Summary Judgment on its counterclaim for declaratory relief, which judgment effectively disposed of the issues raised in plaintiff's complaint.

RELIEF SOUGHT ON APPEAL

Plaintiff contends that the District Court erred in denying him the relief sought and in granting the defendant declaratory relief. The plaintiff seeks an Order of this Court reversing the judgment of the District Court, since the same is based upon a complaint for declaratory relief which does not comply with statute; and for a further order of this Court remanding this case to the District Court with the direction that the District Court enter judgment in favor of the plaintiff and against the defendant for the reason that defendants claim to a lien interest in real property is based upon a written instrument which is void; or failing the aforementioned relief, for an order directing that the judgment be reversed and the case sent back for trial of all issues raised by plaintiff's complaint.

STATEMENT OF FACTS

1. The plaintiff's father and mother deeded real property to the plaintiff by Warranty Deed dated August, 1951, (Supplemental Record pp. 1).
2. Said real property was situated in Salt Lake County and located at 1466 Indian Hills Drive, (Supplemental record pp. 1).

3. Plaintiff and plaintiff's wife erected a home on said property and had resided there continuously until the death of plaintiff's wife in 1972; and plaintiff has continued to reside in said property since her death (Deposition of LeGrande L. Belnap, Record pp.585, (deposition page 20) .

4. The deed conveying said property to the plaintiff was delivered to the defendant and made part of an application by the plaintiff and plaintiff's wife for a mortgage on the subject property. (Affidavit of LeGrande L. Belnap, Record pp.164-165) .

5. Without the knowledge and consent of the plaintiff, the defendant took delivery of a second deed of the same property purportedly conveying said property exclusively to plaintiff's wife. Said deed dated November 10, 1952 was forged as to the signature of plaintiff's mother and the signature of plaintiff's father is still factually in dispute. (Affidavit of LeGrande L. Belnap, Record pp.164-165; Deposition of Ben Garcia, Record p. 586; deposition page 24, lines 1-10 page 25, lines 1-9, page 26 lines 8-9; Affidavit of Wilford W. Kimball, record pp.80-81; Affidavit of Henry Belnap, Record pp.14-15; Record page 768, deposition pp. 6, 9-10; Affidavit of Leslie W. King, transcript pp. 182-183) .

6. The circumstances in the execution and delivery of the deed dated November 10, 1952 is in dispute. (Deposition of Henry Belnap, record page 768 deposition pp. 6, 9-10;

Affidavit of Henry Belnap, Record pp. 14-15).

7. The defendant required the plaintiff to execute a mortgage with warranties of title that he had title to the subject property even though the defendant recorded the forged deed concurrent with the recordation of said mortgage; and even though the defendant retained the original conveyance of August, 1951, conveying said property to the plaintiff and his wife. (Affidavit of Wilford W. Kimball, Record pp. 80-81).

8. Both deeds were in the possession and control of the defendant at all times prior to the initiation of this action, at which time they were deposited with the Clerk of the Court. (Deposition of Stephen L. Goalen, Record pp. 769 deposition page 9 lines 8-25, page 10 lines 1-10).

9. In 1964, without the knowledge of the plaintiff, the defendant recorded a trust deed on said property executed by plaintiff's wife. (Affidavit of Wilford W. Kimball Record pp. 80-81).

10. Plaintiff's wife died in 1972 and a probate action was brought to the Third District Court. (Record pp. 653-655).

11. The defendant was appointed the special administrator and the administrator of the estate of plaintiff wife, and the defendant has received a final discharge from its duties as the administrator of the estate of plaintiff's wife. (Record pp. 656-658; Record pp. 712; Record pp 714-715).

12. Subsequent to the death of the plaintiff's wife, the plaintiff brought this action against the defendant, seeking to quiet title to the property, which is the subject of plaintiff's complaint. (Record pp. 2-3).

13. The defendant filed its answer and counterclaim seeking declaratory relief pursuant with the statutes of the State of Utah. (Record pp. 6-9).

14. In its answer and counterclaim, the defendant denied that the plaintiff had any interest in the subject property; but joined no additional parties claiming any interest, and made no allegations of a chain of title. (Record pp. 6-9).

15. In its final order and judgment, the court ordered that the plaintiff had no record interest in the subject property on which to base a judgment quieting title in the name of the plaintiff as against all other parties to the action; and that the defendant was entitled to declaratory relief determining that the defendant's trust deed was a good and valid lien against the subject property. (Record pp. 550 and 551, and 535).

ARGUMENT

POINT I: DID THE DISTRICT COURT ERR IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT BASED UPON A COUNTERCLAIM FOR DECLARATORY RELIEF WHERE THE DEFENDANT FAILED TO SET FORTH IN THE ALLEGATIONS OF ITS COUNTERCLAIM ANY FACTS SUPPORTING ITS CHAIN OF TITLE, AND FURTHER, WHERE THE DEFENDANT FAILED TO JOIN ANY NECESSARY PARTY IN AN ACTION FOR DECLARATORY RELIEF.

On April 16, 1973, the defendant filed its Answer and Counterclaim in this case. In its answer and counterclaim, the defendant merely alleged that it was the owner and holder of a trust deed and note on certain property; and without anything further, prayed for declaratory judgment. (Record pp. 8) This, in spite of the fact that the defendant denied that the plaintiff had any interest in the subject property, and further that the defendant joined no party whom it claimed had an interest.

The judgment of the lower court granted declaratory relief despite these facts. Indeed, the judgment stands for the proposition that the defendant is entitled to a "declaration" that it holds a good and valid lien upon real property even though no person, firm, or corporation, having any claim of interest in the property was ever made a party to the action.

The applicable statute on Declaratory relief provides as follows:

"When declaratory relief is sought all persons shall (emphasis supplied) be made parties who have or claim any interest which would be affected by the declaration..." Utah Code Annotated 78-33-11.

Appellant acknowledges that the declaratory relief statute is to be liberally construed. It is respectfully submitted, however, that to grant declaratory relief respecting title to real property without joining any party who may claim an interest, is not only an abuse of judicial

discretion with respect to liberal construction, it is also a denial of fundamental rights of due process. Declaratory relief is designed to promote judicial economy but to grant such relief without an opponent is a total waste.

Appellant claimed to be the sole owner of the subject property. The Court found that appellant had no interest. Respondant, on the other hand, denied appellant's title yet agreed to allow the court to dismiss out all persons who may have claimed any interest (Record pp. 389, 394-395 para. 2). Later, as will be argued hereafter, respondent in its capacity as administrator of the estate of appellant's deceased wife, disclaimed any interest in the subject property.

The second problem with the judgment of the District Court granting declaratory relief in favor of the respondents and against the appellant is that the pleadings of the respondents are fatally defective. To obtain declaratory relief on a Trust Deed declaring that said Trust Deed is a good and valid lien on real property, requires that the parties seeking such declaratory relief allege a chain of title. The respondent, in its answer and counterclaim, and in its amended answer and counterclaim which it subsequently withdrew, never alleged any chain of title whatsoever. Consequently, there is no allegation in pleadings of the respondent whereby the Court could determine that the Trust Deed, which respondent sought to have declared valid

had any root of title whatsoever. In fact, if we are to rely upon the allegations of respondent's answer to plaintiff's complaint, the respondent affirmatively alleges that it claims no title in the subject property. In this respect, appellant quotes from the answer of the respondent as follows:

"In further answer to plaintiff's complaint, this defendant alleges that it has and claims no right, title, interest or estate in the property described in plaintiff's complaint save and except as the owner and holder of a certain trust deed dated May 3, 1963,..." (Record, pp. 7 Paragraph (4)).

The law of the State of Utah has been established in a long line of cases commencing in 1924 and continuing through the present date. In the case of Campbell v. Union Savings and Investment Co., 63 Utah 366, 226 Pacific 190 (1924), the court dealt with a factual situation substantially similar to the case at hand. In that case, the defendant, Union Savings and Investment Company had filed an answer and counterclaim, and in their answer had specifically denied plaintiff's title to the subject property and set up by way of counterclaim, a claim that it had a mortgage interest in the subject property. Defendant's pleadings, however, failed to set forth any claim of ownership or interest in the mortgaged premises, and the court stated as follows:

"In the absence of any claim of ownership or interest by the defendant in the mortgaged premises, we cannot conceive how the mortgage constituted any lien upon the property in question."

Campbell, 226 Pacific 190 at page 193

In the Campbell case, it should be noted, that the defendant, Union Savings and Investment Company had set forth in the allegations of its counterclaim that it had obtained title from a party through whom the plaintiff did not claim title. In the instant case, by way of contrast, Walker Bank and Trust Company, the respondent, has failed even in that respect to allege that it even had a mortgagor or trustor from whom it could obtain a valid lien against the property. (Record pp. 8 Paragraphs 1, 2, and 3 of counterclaim).

The Campbell case was subsequently cited in Pender v. Bird, et al., 224 Pacific 2d 1057 (Utah 1950) and the principals set forth in the Campbell case reaffirmed. The Pender case, however, was distinguished from the Campbell case in that the claim of title in the Pender case was based upon a chain of title which was defective. In the case at hand, as will be shown hereafter, it is clear that the deed upon which the respondent would have the Court base its title is a forgery, and therefore, void. Both the Campbell case and the Pender case have been subsequently affirmed and followed by the case of Pleasant Grove City vs. Crease, et al., Utah, 266 Pacific 2d 1019 (1954). In the Pleasant Grove case, the court stated

as follows:

"In Pender v. Bird, 224 Pacific 2d 1057 a similar situation was presented. The plaintiff claimed title under a deed which we held conveyed nothing. The defendant, Bird, claimed title under a tax title which this court assumed to be defective. We held that the defendant Bird being in possession under color of title was entitled to a decree quieting title against the plaintiff who had no vestage of title. Reliance was placed upon Campbell v. Union Savings & Investment Co., 63 Utah 366 226 Pacific 190, at 193, where this court held that the title of plaintiff who was in possession however defective it may be, 'is nevertheless ample to withstand the assaults of the defendant so long as the defendant shows no right, title, or interest whatever in the property'." Pleasant Grove City vs. Crease, 266 Pacific 2d 1019, at Page 1020.

POINT II: IS THE RESPONDENT, WALKER BANK & TRUST COMPANY BARRED BY DOCTRINES OF RES JUDICATA, ESTOPPLE BY JUDGMENT OR THE "ONE ACTION RULE" FROM ASSERTING AN INTEREST IN THE PROPERTY WHICH THEY HAVE PREVIOUSLY DISCLAIMED ANY INTEREST IN, AND WHERE THE COUNTERCLAIM OF WALKER BANK & TRUST COMPANY IN ITS CAPACITY AS THE SPECIAL ADMINISTRATOR OF THE ESTATE OF UTAHNA P. BELNAP IN THIS ACTION HAS BEEN DISMISSED WITH PREJUDICE

In considering the questions of res judicata, estoppel by judgment, and the "One Action Rule", appellant feels that it would be helpful to set forth a recitation of the facts upon which it claims the respondent is barred from obtaining a judgment for declaratory relief in this action.

1. Walker Bank & Trust Company was appointed the special administrator of the estate of Utahna Petty Belnap on March 19, 1973, (Record pp.565-657).

2. Walker Bank & Trust Company was appointed the administrator of the estate of Utahna Petty Belnap on August 24, 1976. (Record, pp. 712).

3. As the special administrator:

A. Walker Bank & Trust Company petitioned the court for authority to pay themselves all past due payments due on the Trust Deed note which is the subject of the counterclaim of the respondent, Walker Bank & Trust Company in its action for declaratory relief. (Record pp. 676-678).

B. In their petition, Walker Bank & Trust Company as the special administrator set forth the fact that LeGrande L. Belnap, appellant in this case, disputed the claim of the estate that the estate had an interest in the property which was given as security for the subject trust deed and note.

C. On May 15, 1975, the court approved payments from the estate of Utahna Petty Belnap on the note of Walker Bank & Trust Company and directed that all current payments be continued to be made by the estate to Walker Bank & Trust Company until further order of the court. (Record pp. 674-75, 707).

D. No order was ever entered by the Third District Court in either of the probate actions, which are part of this appeal terminating the authorization to pay the payments on the note from the assets of the estate of Utahna Petty Belnap.

E. On January 31, 1976, Walker Bank & Trust Company as the special administrator filed its "SECOND AND FINAL ACCOUNT OF WALKER BANK & TRUST COMPANY AS SPECIAL ADMINISTRATOR OF THE ESTATE OF UTAHNA PETTY BELNAP, DECEASED, OCTOBER 1, 1974 THROUGH JANUARY 31, 1976. (Record pp. 693).

F. On January 31, 1976, Walker Bank & Trust Company deleted the trust property from the estate with the statement "Court determined above property to be that of LeGrande L. Belnap and not that of decedent. Per Court order dtd 01/19/76." (Record pp. 700).

G. Thereafter, Walker Bank & Trust as the administrator of the estate of Utahna P. Belnap continued to act as such until it was appointed as the administrator in August, 1976. (Record pp. 712).

H. Walker Bank & Trust Company as the special administrator filed a counterclaim in this case on April 16, 1973. (Record pp. 10-12). Said counterclaim alleged that the estate of Utahna P. Belnap owned the fee simple interest in the property which was given as security for the trust deed note which is the subject of respondent's petition for declaratory relief, and further alleged in said counterclaim that LeGrande L. Belnap had no interest in the property and sought the aid of the court quieting title in the estate as against the interest of LeGrande Belnap. Said counterclaim of the special administrator in this action, was dismissed with prejudice

(Order, Judgment and Decree dated 1-19-76, Record pp. 390-91).

The respondent, Walker Bank & Trust Company claims a lien against the subject property by virtue of a Trust Deed and a Trust Deed Note signed by Utahna Petty Belnap. The estate of Utahna Belnap, with Walker Bank & Trust as the special administrator disclaimed any interest in the property, and consented that its counterclaim in this action be dismissed with prejudice (Record pp. 390-391). The respondent was present at the hearing when the estate and others were dismissed, and when the counterclaim of the estate was dismissed with prejudice. The respondent as a corporation never filed a claim against the estate of Utahna Petty Belnap even though notice to creditors was duly given pursuant with statute. (Record pp. 716-718).

This court is no doubt aware of the broad use (or misuse) of the Doctrines of Estoppel. One form of estoppel which seems to be applicable in the case at hand is commonly referred to as judicial estoppel. It is a general rule that a party is bound by his judicial declarations and may not contradict them in a subsequent action or proceeding. Tracy Loan and Trust Company vs. Openshaw Investment Company, 102 Utah 509, 132 Pacific 2d 388. In light of the Tracy case (op. cit.) it would seem that Walker Bank & Trust Company

as the administrator of the estate of Utahna Petty Belnap has in fact made judicial declarations by virtue of the filing of its second and final account in that estate, disclaiming any interest in the subject property, and further by reason of the fact that it has voluntarily consented to the dismissal of any claim which it may have in the estate, which dismissal was granted by this court in this case with prejudice.

Generally speaking, it has been said that estoppel is a bar which would preclude a person or entity from denying anything to the contrary of that which has been established as a fact by the acts of a judicial body, or which has been established by his own acts or conduct or lack thereof. Kessinger v. Anderson, 31 Washington 2d, 157, 196 Pacific 2d 289.

The respondent would have this court believe that while it is acting in its corporate capacity (it has no other capacity) that it cannot be bound for acts which it participated in in a judicial forum in some other capacity. Appellant respectfully submits that such a distinction is clearly without form. It is axiomatic that a corporation is given its form by virtue of the law. Since Walker Bank & Trust Company does not exist except in a corporate form, obviously it cannot function except in its corporate

form. Whether it is acting on its own account, or whether it is acting on the account of others, it is the same capacity and the same "corpus". Since Walker Bank & Trust Company can have only one personality, it is therefore submitted to this court under the policy of Tracy Loan & Trust Company (op. cit.) that the respondent is bound by its own acts in another capacity in the same District Court respecting the subject property.

It is often said, however, that in order to enforce the principals of estoppel against one party in favor of another party, that it must be shown that the party seeking to enforce the principal of estoppel must show that he has been harmed. Since it is clear that the estate of Utahna Petty Belnap has now been finally settled under the hand of Walker Bank & Trust Company as the administrator, and since it is further clear that the statutory time for the plaintiff to file any claim against the estate of Utahna Petty Belnap which he may have by virtue of the claimed lien of Walker Bank & Trust Company in this action has run, that the plaintiff has clearly been prejudiced and has no other claim or claimant against which he could assert a claim in damages as a result of the judgment of the District Court in this case. Since Walker Bank & Trust Company was party to the

judicial action declaring that the estate of Utahna Petty Belnap had no interest in the subject property, and since the appellant in this matter is clearly prejudiced in that he is not now able to bring any claim for damages against the estate of Utahna Petty Belnap as a result of the claimed lien of the respondent, the Doctrines of Estopple should clearly apply against the defendant and in favor of the plaintiff in this case. In the case of Weyant vs. Utah Savings & Trust Co., 54 Utah, 181, 182 Pacific 189, 9 ALR, 1119, the Supreme Court held that where the statutory notice to creditors had been given pursuant with the statutes applicable to probate proceedings, all persons who were interested in the estate are bound by all orders and decrees duly entered in that particular case. Such is the case here, and the doctrines of the Weyant case would not only apply to the appellant in this case, but should also be made to apply to the respondent.

In addition to the Doctrines of Estopple, the provisions of Utah Code Annotated, Section 78-37-1 are also applicable against the respondent in this case. That statute is widely recognized as the "One Action Rule" of the State of Utah, and provides that there shall be one action for the foreclosure of any mortgage or Trust Deed secured solely by mortgage or trust deed on real property. As set forth above, the special administrator

of the estate of Walker Bank & Trust Company specifically petitioned the court for authority to pay all past due current and future payments on the trust deed note which is the subject of respondents counterclaim. In said petition, the special administrator admitted that the appellant in this case claimed to be the fee title owner of the subject property. In the same hearing where the court approved the payment of all past due, present, and future payments due on the trust deed note, from the assets of the estate of Utahna Petty Belnap, the special administrator concurrently disclaimed any interest in the property. At that point, it is clear that the special administrator knew on behalf of itself and as the administrator of the estate that its security had been impaired, and with the authority of the court to continue making the payments on the note from the assets of the estate until further order of the court, should indeed have filed its claims against the estate as provided by law, and receive the payments from the estate until its trust deed note was satisfied in full. In the case of Baker National Bank v. Henderson (Montana) 445 Pacific 2d 574, the Montana court held pursuant with applicable Montana statutes that the failure of the bank to file its creditors claim against the estate of a decedent within a statutory period had the effect of barring the claim, and not only was the remedy itself

destroyed, but the right was wiped out, and the claim . thereupon ceased to exist.

It may be asserted. on the other hand that Walker Bank & Trust Company in its petition for approval to make payments on the Trust Deed note did in fact make a claim against the estate. In that respect, since the court granted their petition, and directed that payments be continued to be made on the trust deed note until further order of the court, and further since no order of the court was ever entered denying them the right to make the payments, that Walker Bank & Trust Company cannot now assert a lien against this property where they had the authority to satisfy their note from the assets of the estate. If they did in fact file such a claim by virtue of the filing of the petition for approval to make payments, then they have commenced an action against the estate of Utahna Petty Belnap and they are precluded from bringing any other action on the trust deed.

The provisions of Utah Code Annotated Section 78-37-1 et seq., clearly provide that a secured creditor, upon determining that his security has been impaired can in fact waive his security and proceed against the general assets of the debtor. Since the estate of Utahna Petty Belnap has disclaimed any interest in the subject

property, and since such disclaimer would obviously result in the impairment of the security, the petition of Walker Bank & Trust Company as the special administrator for payment on the note from the general assets of the estate is clearly the action contemplated by Utah Code Annotated Section 78-37-1.

It may be argued that the provisions of Utah Code Annotated Section 75-3-803 (3) exempts respondent from necessarily filing a claim as a creditor of the estate of Utahna Petty Belnap since it claims a mortgage or other lien upon "property of the estate." Since it is now a matter of a judicial order and decree that the subject property is not the property of Utahna Petty Belnap, such a claimed exemption would fail.

In addition to the foregoing principals of estoppel, and the provision of the mortgage foreclosure statutes of the State of Utah, it should also be clear that the determination of the Third District Court in the matter of the probate of the estate of Utahna Petty Belnap as well as the dismissal with prejudice of the counterclaim of Walker Bank & Trust Company, in the instant case constitutes a total bar to any further action by Walker Bank & Trust Company on the principals of res judicata; see Con v. Whitmore, 9 Utah 2d 250, 342 Pacific 2d page 71. Such a doctrine applies to all

persons who may be affected by judgments rendered in the probate matter and in this case. Since these matters were consolidated by the Honorable Judge Hall, it is clear that Walker Bank & Trust Company in its corporate capacity, as well as any other capacity was a party both to this action and to the estate action.

In the final analysis, it seems that the District Court has rendered a judgment in favor of Walker Bank & Trust Company declaring that it has a good and valid lien against real property situated in Salt Lake County, but the judgments of the Third District Court in this case, as well as the probate case would lead us but to one conclusion, to wit: That appellant in this case has no interest in the subject property, and decedent in the probate case has no interest in the subject property. In deed, if no one has any interest in the subject property how is the respondent able to assert a claim based upon a trust deed note executed by one of the parties who claims no interest in the property.

POINT III. CAN THE RESPONDENT, WALKER BANK & TRUST COMPANY, BASE A CLAIM TO A SECURITY INTEREST IN REAL PROPERTY UPON AN INSTRUMENT WHICH IS ADMITTEDLY AND FACTUALLY FORGED.

It is undisputed that the signature of appellant's mother on the deed dated November 10, 1952, is in fact forged (Record Memorandum Decision page 540), and that the signature of appellant's father on said deed is factually in dispute (Record pp. 14 and 15).

The law in the State of Utah with respect to a forged instrument is clearly set forth in the case of Rasmussen vs. Olson, 583 Pacific 2d 50, (Utah 1978). The Rasmussen case clearly held that the recording of a forged deed gives no notice to the world or to anybody within in it of the contents thereof that such a deed is void and even a bona fide purchaser from the person who offered it takes nothing by it.

In the case of Mosley vs. Magnolia Petroleum Company, 45 New Mexico 230, 114 Pacific 2d 740, (1941) the law with respect to forged instruments is exhaustively treated and the Rasmussen case cites Mosley with approval. In the Mosley case, it was factually shown that one of the parties had fraudulently and surreptitiously obtained a deed from an escrow agent without the knowledge or consent of the grantor of the deed, and after obtaining the same, altered the instrument with respect to the name of the grantee and delivered it to the newly named grantee. The Mosley court held that where the instrument had been altered in that singular respect and further because of the fact that there had been no delivery by the original grantor to the grantee named in the altered instrument, that the deed was void and that no bona fide purchaser could rely upon the same in a claim for title.

Here, the deed of November 10, 1952, a deed upon which the respondent apparently relied is not only void

because of the signature of Ida Belnap, but also because

the same was never delivered by the purported grantor, Henry Belnap to the purported grantee, Utahna P. Belnap. (Record pp. 14-15).

In the case of Salazar v. Manderfield 134 Pacific 2d, 544 (New Mexico 1943), it was held that a deed which is void in part because of a fraud with respect to any single material aspect thereof will be void as to the whole. Appellants respectfully submits that the Salazar case taken in connection with the Rasmussen opinion (583 Pacific 2d 50) and the Magnolia opinion (114 Pacific 2d 740) is the better law and the fact that the instrument dated November 10, 1952 is an admitted forgery, that the same is void, conveys no title, and puts no one on notice of any interest contained therein.

Appellent cites the case of Walker Bank & Trust Company v. Thorup, 7 Utah 2d 33, 317 Pacific 2d 952 (1957) in support of the assertion that Walker Bank & Trust Company having both instruments in its possession at the time of the recording of the instrument which is admittedly forged, is charged with the responsibility to know and determine the validity of all aspects of the instrument upon which it intends to rely. In the Walker Bank v. Thorup case the attorney who claimed to have witnessed the signing of the questioned deeds, and to have taken the decedent's acknowledgement testified in great detail. There was also testimony to the effect that the

deceased had often stated after the date of the deed that the deceased had given the respective tracts of land to the respective defendants in the case. The court ruled however that there was nothing in the testimony that would support a finding that the signature, although written by another was ever authorized by the decedent or that the decedent ever adopted it as her own. Thus, in spite of the fact that the decedent may have acted in such a way as to give credence to the validity of the deed, since the same were forged they had no force or effect, Walker Bank v. Thorup (supra at page 954).

This law is particularly applicable to appellants case. Since there is no testimony whatsoever suggesting that the deceased mother of appellant ever adopted or ratified the forged signature, but on the contrary, there is testimony of Henry Belnap that he never signed his wifes name to the instrument in question, and that he never appeared before the purported notary of his signature and the forged signature of Ida Belnap, thus making it impossible under the statutes of this State for said instrument to be recorded or recordable. (Record pp. 14 and 15).

It should also be noted that appellant's mother had been deceased for more than one year when the forged deed dated November 10, 1952 was delivered to Walker

Bank as a "new deed" (Record pp. 531), when the deed of

August of 1951 was already in the possession of Walker Bank & Trust Company, (Record pp. 80-83). Thus Walker Bank had actual notice of the ownership interest of the appellant at all times prior to recording the forged deed in derogation of appellant's ownership, and this notice continued until after the filing of this action when both original documents were discovered in the files of Walker Bank & Trust Company. (Deposition of Stephen L. Goalen Record pp. 769 (Deposition pp. 9 and 10). Since the initial deed which appellant had delivered to Walker Bank was in their file and constituted actual notice to them of the claimed interest which appellant had in the property, the bank was charged with the duty and responsibility to inquire into the validity of the second deed.

In the case of Ogilvie vs. Idaho Bank & Trust Company, 582 Pacific 2d 215 (Idaho 1978) the court held under the facts of that case that though the bank could have protected itself from a forgery, it did not take the care to do so; and that the bank cannot assert the rights of a bona fide purchaser.

All of these facts taken together with the fact that Walker Bank & Trust Company as a special administrator of the estate of Utahna Petty Belnap disclaimed any interest in the subject property should clearly establish that the opinion and judgment of the Third District Court does not comport with the law of this state or of the

majority opinion with respect to forged instruments.

In further support of appellant's contention with respect to this matter, appellant cites the case of Coast Mutual Building & Loan Association v. Security Title Insurance and Guarantee Company, 14 Cal. App. 2d 225, 57 Pacific 2d 1392 (1936). In that case, the California Court found itself facing a situation very similar to the facts in this case. There the Court held that where a party forged the owner's signature to a deed and then obtained a loan which was secured by a Trust Deed on the property, the actual owner should prevail in a subsequent action to quiet title to such property. The District Court of Appeal affirmed the lower court decision that the insurer of a title policy, which policy had been issued to the lenders simultaneously with the recordation of the forged deed and the Trust Deed, could not defeat the lender's action on the policy on the ground that the owner's rights were not "shown by public records" as provided in the policy. In that lower court decision, the California court held that the owner of the property should prevail against the encumberancer of the property who took such encumbrance as a result of a forged deed even though such forged deed was properly recorded.

Finally, since the first deed dated August 23, 1951, was duly executed and delivered (Record, pp. 14-15), the second deed conveyed nothing, the fee having already been delivered to appellant and accepted by him. Delivery and acceptance of a deed irrevocably passes title out of the grantor, and he cannot by any act subsequent to the delivery invalidate, alter, or affect the first conveyance, Valley State Bank v. Dean, 97 Colo. 151, 47 P. 2d 924. (1934)

CONCLUSION

The Third District Court, through the Declaratory Judgment of Judge Bryant Croft has ignored the basic rules of pleadings and the statute respecting declaratory judgments. Indeed it seems to have created a paradox. The Honorable Judge Gordon Hall has entered two consistent orders to the effect that appellant is the owner of the property and the estate of appellant's deceased wife had no interest (Record, pp 390-91; Record, pp 713-715). The judgment of Judge Bryant Croft, on the contrary says that appellant's deceased wife has a good and valid first lien against the property (Record pp 550-555) This is in spite of the fact that the counterclaim of Walker Bank & Trust as Special Administrator, which alleged a chain of title, was dismissed with prejudice; and the counterclaim of Walker Bank & Trust in its corporate capacity, which has not set up a chain of title or joined any necessary party, was allowed.

Since the judgment of Judge Croft is inconsistent with earlier rulings of the same court; since Respondent has alleged no chain of title; since Respondant has joined no party claiming an interest (the judgment ruled that appellant had no interest and Respondant denied appellants had an interest); and last of all, since the only recorded deed is forged and conveys nothing, it is mandatory that the Judgment be reversed and judgment entered in favor of Appellant quieting title as against the Respondent; or at least that the matter be remanded for trial to determine the proper root of title.

Respectfully submitted

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CERTIFICATE OF SERVICE

I do hereby certify that on this ____ day of April, 1980, I served a true and correct copy of the foregoing Brief on James S. Lowrie, Robyn O. Heibrun, Attorneys for Respondant, 800 Walker Bank Bldg. Salt Lake City, Utah 84111
