

1957

Walker Bank & Trust Company v. Eugene R. Thorup and Ida Viola Thorup Layton : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

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Clerk, Supreme Court, Utah

WALKER BANK & TRUST
COMPANY, a, corporation
Plaintiff and Respondent,

vs.

EUGENE R. THORUP,
Defendant and Appellant,
IDA VIOLA THORUP LAYTON,
Defendant.

Case No. 8691

BRIEF OF APPELLANT

ELIAS HANSEN
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IN THE SUPREME COURT
of the
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COMPANY, a, corporation
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EUGENE R. THORUP,
Defendant and Appellant,
IDA VIOLA THORUP LAYTON,
Defendant.

Case No. 8691

BRIEF OF APPELLANT

STATEMENT OF FACTS

Respondent as Administrator of the Estate of Nettie N. Thorup, deceased, filed its complaint against Eugene R. Thorup and Ida Viola Thorup Layton. The complaint is a simple complaint to quiet title in plaintiff. This complaint alleges plaintiff's appointment as Administrator, and that deceased was owner of two parcels of realty described at the time of her death, and that defendants are heirs of said deceased, and that plaintiff is entitled to possession of said realty, and prays that title be quieted in plaintiff as representative of the Estate of Nettie N. Thorup.

Defendants answered that deeds were duly executed by Nettie N. Thorup to defendants on the 26th Day of July, 1950, and duly delivered to defendants during the lifetime of Nettie N. Thorup. She died on February 23, 1955. Plaintiff replied to the answers simply by admitting defendant, Eugene R. Thorup, is in possession of the property, and denying other allegations of defendants' answers.

At the beginning of the trial plaintiff and respondent herein introduced the two Warranty Deeds dated as aforesaid, naming Nettie N. Thorup as grantor (Ex. 1) one to Eugene R. Thorup as grantee, and the other to Mrs. Layton as grantee. (Ex. 2) Attorney for plaintiff announced thereupon that he intended to prove by expert testimony that the two deeds are forgeries. Defendants thereupon objected to such procedure as not within the pleadings. (Tr. 2) The trial judge overruled the objection without an opportunity for defendants' attorney to be heard, or present authorities supporting the objection, and ordered plaintiff to proceed.

Endorsements on Utah Power & Light checks payable to Nettie N. Thorup were introduced, and Percy Goddard, who had picked two checks with endorsements and evidently had enlarged photographs of them made. He testified to the differences in the endorsements and the signatures on the deeds.

These differences were principally in the “T” in Thorup, and the “N” in Nettie, and concluded, therefore, that the signature on the deeds were forgeries. The difference in the “T” consisted, he said, in making the “T” in one stroke in the two endorsements, and in two strokes on the deeds. This testimony, even in the face of testimony of Louis Thorup, who, as plaintiff’s witness, testified that sometimes the deceased wrote the “T” one way and sometimes in two separate strokes (Trans. -6—Rec. 26) The “N”, said Goddard, in the two endorsements has the second loop lower than the first, but on the deeds they were about the same height. It further appeared that plaintiff’s witness, Louis Thorup, had obtained the endorsements at night (Trans. 20) with his help in 90% of the cases (Trans. 23) and cashed all but one at Fisher’s Brewery. He also testified that Mrs. Thorup was nearsighted and sometimes signed the check without using her glasses (Tr. 24)

Defendant Eugene R. Thorup testified that he was personally present on July 26, 1950, and saw Mrs. Thorup sign said deeds in bright daylight with her glasses on. Also that under instruction of James M. Carlson, Mrs. Thorup delivered the deed (Exhibit 1) to him. Also that James M. Carlson was present and saw her sign the deeds, and she acknowledged the execution to and before him.

James M. Carlson testified to preparation of

the deeds after two interviews with Mrs. Nettie N. Thorup, who had called him for interviews. Also he testified she, Eugene R. Thorup and he had together measured the property conveyed to Eugene on the second visit after examination of abstracts delivered to him by Mrs. Thorup. On the date the deeds bear Mrs. Thorup called James M. Carlson and said to bring the deeds in the daytime on a bright day. That afternoon she, in bright daylight with her glasses on, slowly signed the two deeds and handed Eugene's to him after acknowledgment as appears on the deed. (Tr. 84)

On Motion for a New Trial defendant presented twelve other checks payable to Nettie N. Thorup and apparently endorsed by her and cashed by Louis Thorup at Fisher Brewing Company. The twelve checks clearly showed that the "T" was more often than not signed in two separate strokes, and the "N" had the two loops the same height. Clearly witness Goddard had picked out for comparison two endorsements only, which were different from the deed signatures, and not knowing whether Louis Thorup in effect signed or guided Mrs. Thorup's hand or not on his night visits. Goddard sat in a jury seat all the time Louis Thorup testified.

Defendant filed an Affidavit of Bias on objection to Judge Van Cott's hearing the Motion for a New Trial. This the Judge overruled, (Rec. 117),

and Judge Van Cott, Jr., insisted on his hearing the Motion for a New Trial, and denied same after arguments and presentation of the filed Affidavits in support thereof and presentation of twelve different endorsements of Mrs. Thorup. (Rec. 118)

POINTS RELIED UPON

POINT I.

THAT THE PLEADINGS ARE A SIMPLE EQUITY CASE, BUT THE EVIDENCE AND PROCEDURE WAS PERMITTED AND ERRONEOUSLY TAKEN AS IF IT WERE A FRAUD LAW CASE TO CANCEL DEEDS.

POINT II.

THE PROCEDURE AS IF IT WERE A FRAUD CASE TOOK DEFENDANTS BY SURPRISE.

POINT III.

THAT THE CLEAR PREPONDERANCE OF THE EVIDENCE IS IN FAVOR OF THE VALIDITY OF APPELLANT'S DEED, AND PLAINTIFF'S TESTIMONY DOES NOT SUPPORT THE FINDING THAT THE DEEDS WERE FORGERIES.

POINT IV.

THAT THE TRIAL JUDGE ERRED IN NOT REFERRING THE CAUSE ON AFFIDAVIT OF BIAS TO ANOTHER JUDGE.

POINT V.

THAT THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL MADE ON GROUNDS OF SURPRISE, WRONGFUL PROCEDURE AND NEW EVIDENCE.

POINT I.

THAT THE PLEADINGS ARE A SIMPLE EQUITY CASE, BUT THE EVIDENCE AND PROCEDURE WAS PERMITTED AND ERRONEOUSLY TAKEN AS IF IT WERE A FRAUD LAW CASE TO CANCEL DEEDS.

In support of appellant's contention may we cite the following authorities:

Strong v. Strong, 140 Pac. (2d) 386, (Cal.)

This was a suit to quiet title. Defendant's wife attempted to prove fraud under general allegations of ownership. Court held: (at page 389, 9-10)

"Any rights that she might have to the cancellation of the deed or to the declaration of a constructive trust are entirely equitable, (*Rocha v. Rocha*, 197, Cal. 396, 240 P. 1010; *Farrar v. Steenberger*, 159 Pac. 707; *Freligh v. McGraw*, 272 P. 791; Walsh Equity 492), and it is settled that such rights cannot be established in an action to quiet title when the pleadings contain merely general allegations asserting defendant's ownership and denying that of plaintiff."

Ostrom v. Jackson, 127 S.W. (2d) 987. The Court held:

"A deed cannot be set aside on grounds not pleaded."

74 C.J.S., page 75:

"* * * The issues of fact which arise for determination in a suit to quiet title are those, and only those, which are properly presented by the pleadings * * *".

Leland v. Bourne, 41 U. 125; 125 Pac. 652:

A suit to quiet title in an equitable action.

“This is an equity case to quiet the title to real property. In such a case both parties have a right to invoke our judgment upon the whole evidence. If in such a case in our judgment the findings are clearly against the weight of the evidence, it is our duty to vacate them and substitute others. In this case in our judgment the findings are manifestly against the great weight of the evidence, and for that reason cannot be permitted to stand.
* * *”

Fares v. Urban, 46 U. 609, 151 Pac. 57.

Here a simple complaint to quiet title. Plaintiff introduced evidence of adverse possession. Judgment for defendant. Plaintiff on appeal contended the case one in law, in effect an ejectment, and court is bound by findings, if any evidence to support them.

“If the court try the case as an action in equity, the case must be considered as such by us.”

Appellant was and is in possession of the property under claim under the deed.

74 C.J.S., page 53:

“Possession and action at law. As a general rule, a holder of legal title to lands must, in order to maintain an action to quiet title or remove a cloud, be in possession of the land when the action is instituted since, where defendant is in possession, the remedy at law by action of ejectment affords a plain, adequate, and complete remedy.”

POINT II.

THE PROCEDURE AS IF IT WERE A FRAUD CASE TOOK DEFENDANTS BY SURPRISE.

Appellant had no warnings by pleadings that plaintiff under the pleading would present checks, of which he knew not, for comparison, and had no opportunity to present rebuttal testimony by a writing expert or other check endorsement.

See Affidavit in Support of Motion. (p. 115-6)

Rule 9(3)(b) of Rules of Civil Procedure states:

“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”

POINT III.

THAT THE CLEAR PREPONDERANCE OF THE EVIDENCE IS IN FAVOR OF THE VALIDITY OF APPELLANT'S DEED, AND PLAINTIFF'S TESTIMONY DOES NOT SUPPORT THE FINDING THAT THE DEEDS WERE FORGERIES.

Respondent's testimony in this regard rests solely on the so-called expert that signatures as endorsements on two checks are different in some respects from the signature on deeds. As against such is the testimony of two witnesses present on July 26, 1950, and saw the actual signing, acknowledgment and delivery of the deed to appellant. Also, in refutation of the Goddard testimony is the testi-

mony of Louis Thorup, who hurriedly obtained the so-called endorsements at night, sometimes without Mrs. Thorup's use of glasses, (Tr. 20), and that sometimes she signed one way sometimes another way (Trans. 16) the letters on which Goddard based his opinion of difference.

Also, Appellant was and is in possession of the property.

Leland v. Bourne, 41 U. 425, 125 Pac. 652, at 657:

“This is an equity case to quiet the title to real property. In such a case both parties have a right to invoke our judgment upon the whole evidence. If in such a case in our judgment the findings are clearly against the weight of the evidence, it is our duty to vacate them and substitute others. In this case in our judgment the findings are manifestly against the great weight of the evidence, and for that reason cannot be permitted to stand. * * *”

In Re Helin's Estate, 55 U. 572, 188 Pac. 633:

Possession under a deed regular upon its face carries with it presumption of regularity notwithstanding it was not recorded until after death of grantor.

Ogg v. Gunderson, 168 Pac. (2d) 793:

“The primary test of the validity of a deed was whether grantor intended to make a present transfer, and if such was his intention, the title of the property thereby passed irrevocably to the grantee.”

POINT IV.

THAT THE TRIAL JUDGE ERRED IN NOT REFERRING THE CAUSE ON AFFIDAVIT OF BIAS TO ANOTHER JUDGE.

See Affidavit. (p. 115)

Rule 63 (b) of Rules of Civil Procedure.

Judge Van Cott, Jr., just denied the sufficiency of the Affidavit and denied the request that the cause be referred to another Judge. He, therefore, violated the said Rule 63, which provides:

“* * * If the judge against who the affidavit is directed questions the sufficiency of the affidavit, he shall enter an order directing that a copy thereof be forthwith certified to another judge (naming him) of the same court or of a court of like jurisdiction, which judge shall then pass upon the legal sufficiency of the affidavit. If the judge against whom the affidavit is directed does not question the legal sufficiency of the affidavit, or if the judge to whom the affidavit is certified finds that it is legally sufficient another judge must be called in to try the case or determine the matter in question.

Coll v. Lowes, Inc. 76 F. Supp. 872.

POINT V.

THAT THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL MADE ON GROUNDS OF SURPRISE, WRONGFUL PROCEDURE AND NEW EVIDENCE.

This point involves the discussions under Points I, II, and III.

Affidavits were presented of two witnesses, namely: Helen Heins, a close neighbor of Nettie N. Thorup, and Bertha H. Morris, a friend of the whole Thorup family. Helen Heins swears that Nellie N. Thorup before she became ill stated to her that she had given or left the home to "Gene", so he should have a home.

Bertha H. Morris swears that Nettie N. Thorup told her that: (p. 112)

"she had a lawyer make out papers giving the home property to 'Gene', as she called him. She said this home is his."

Also, appellant's attorney presented, as indicated in an Affidavit in support of Appellant's Motion, twelve endorsements of Nettie N. Thorup, which showed that Nettie N. Thorup signed them with a "T" and an "N" as in the questioned deed in refutation of Goddard's testimony and conclusions based on differences between her writing on two singled out checks and appellant's deed. If Goddard had picked the twelve check endorsements, his testimony and conclusion would have to have been different.

There is no evidence in the record to justify a finding that the signature on the deed in question is forged.

See: *People v. Mitchell*, 92 Cal. 590, 28 Pac. 597 at 8.

Here only evidence is (as in the case at bar)

of an expert who by comparison was of the opinion a certain check was signed by defendant. Held this evidence does not prove forgery.

State v. Swan, 411 Pac. 750, (Kans.)

To prove forgery plaintiff must prove document signed without authority.

State v. Jones, 20 Pac. (2d) 614, (Utah)

To prove forgery it must be shown that name of another was signed without authority, and expert evidence by comparison not enough.

Redington v. Woods, 45 Cal. App. 45, 200 Pac. 1054.

Held: There is no presumption from a difference in handwriting.

26 C.J.S., Section 34, page 663:

“It is not essential to the validity of a deed that the grantor should actually affix his signature thereto with his own hand, and the source or nature of its execution is immaterial if he adopts such signature or acknowledges as his own.”

And, of course, there is no pleading to authorize a finding of forgery.

We submit that the Findings and Judgment should be set aside and a decree entered in favor of Appellant.

Respectfully submitted

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J. GRANT IVERSON

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