

1957

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

Utah Supreme Court

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In the  
**Supreme Court of the State of Utah**

WALKER BANK & TRUST COM-  
PANY, a corporation, as Adminis-  
trator of the Estate of Nettie Nielson  
Thorup, Deceased,

*Plaintiff and Respondent,*

vs.

EUGENE R. THORUP,  
*Defendant and Appellant,*

IDA VIOLA THORUP LAYTON,  
*Defendant.*

FILED

NOV 27 1957

Supreme Court, Utah

Case No.  
8691

**BRIEF OF RESPONDENT**

ATHOL RAWLINS,  
H. R. WALDO, JR.,  
of RAY, RAWLINS, JONES  
& HENDERSON,

*Attorneys for Respondent.*

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# In the Supreme Court of the State of Utah

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WALKER BANK & TRUST COMPANY, a corporation, as Administrator of the Estate of Nettie Nielson Thorup, Deceased,  
*Plaintiff and Respondent,*

vs.

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

Case No.  
8691

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

Respondent does not agree with the Statement of Facts set forth in appellant's brief and in lieu thereof states the facts as follows:

Respondent as administrator of the estate of Nettie N. Thorup, deceased, filed its complaint against Eugene

R. Thorup and Ida Viola Thorup Layton (R. 1, 2 and 3). The complaint is one to quiet title and alleges plaintiff's appointment as such administrator and that the said deceased, who died on February 23, 1955, was at the time of her death the owner of the two parcels of realty described in the complaint, that defendants are heirs at law of said deceased, have no right, title or interest in said realty except as such heirs, and that plaintiff is entitled to the possession thereof and prays that title be quieted in plaintiff as such representative of the estate of said deceased.

Defendant Eugene R. Thorup answered the complaint admitting the date of death, the appointment of the administrator, that he claims an interest in the property first described in the complaint and alleges that he is the owner in fee thereof (R. 4) and by way of cross complaint, alleged, among other things, that on the 26th day of July, 1950 said deceased duly executed and acknowledged as grantor, a warranty deed by the terms of which said defendant was named and designated as grantee, and conveying and warranting the property first described in plaintiff's complaint and that after such execution and acknowledgment of said deed, the said grantor on said date actually delivered said executed deed to said defendant (R. 5) which allegations plaintiff denied in its reply to such cross complaint, admitting in said reply that said defendant had been in possession of said property since the death of his mother, but only as caretaker for plaintiff (R. 7). The purported deed to the defendant, Eugene R. Thorup, was never recorded and was not in his possession at the time of the trial (Exhibits 1 and 3; R. 5, and 13).

At the opening of the trial, plaintiff's attorney stated that the issues involved were whether the two deeds under which the respective defendants claimed title are forgeries and whether they were delivered (R. 12) and were offered by plaintiff's counsel and received only for the purpose of showing that the purported signatures of the grantor were forgeries, which purported deeds, one marked Exhibit 1 from Nettie N. Thorup to Eugene R. Thorup covering the property first described in plaintiff's complaint and one marked Exhibit 2 from Nettie N. Thorup to Ida Viola Thorup Layton to the property covered by the second description in plaintiff's complaint, and both purported deeds, dated July 26, 1950, were also offered in evidence by counsel for defendants as evidence of title of the respective defendants and were received in evidence by the court for the purposes aforesaid (R. 13-14).

Louis H. Thorup, son of said deceased, then testified that he was familiar with the signature of his mother (R. 18) and that her purported signatures on Exhibits 4, 5 (R. 19) 6, 7, 8 (R. 20) 9, 10 (R. 21) and 11 (R. 22) are her signatures and that her purported signatures on Exhibits 1 and 2 are not her signatures (R. 34-35). (As some of the exhibits are photostatic copies, we refer herein to signatures on exhibits as though they are all originals.)

W. Douglas Beatie, a member of the bar of this court, testified that he performed the legal services in probating the estate of the husband of said deceased (R. 44) during 1947 and 1948 (R. 45), saw Nettie N. Thorup sign documents incident to the probate of said estate, that she had difficulty seeing although some of said instruments were signed with and some without glasses and that her ten-

dency was to get off the line in writing her signature (R. 46). He testified that from observing the signature of Nettie N. Thorup, he was of the opinion that her purported signature on Exhibit 14 is her signature (R. 47) and that he saw her sign Exhibits 13 and 15 (R. 48-49).

J. Percy Goddard qualified as a handwriting expert and testified that he had examined the purported signatures of Nettie N. Thorup on Exhibits 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 15 (R. 54) and assuming that all such purported signatures on all such exhibits except 1 and 2 to be her signature (R. 54), he was of the opinion that her purported signatures on Exhibits 1 and 2 are very crude forgeries (R. 55).

Defendant, Eugene R. Thorup, testified that he was present on July 26, 1950 and saw his mother, Nettie N. Thorup, sign the two deeds (Exhibits 1 and 2) in bright daylight with her glasses on and that under instruction of James M. Carlson, who was also present, she delivered the deed, Exhibit 1, to said defendant (R. 86) and that James M. Carlson notarized the deed and put stamps on it (R. 87). On cross examination he testified that he signed as a witness to the signature of his mother on the fifth line under the heading Witness on Exhibit 14 (R. 87) and that the signature of his mother thereon was one of her signatures (R. 88). He also testified on cross examination that at the time his mother signed said deeds, Mr. Carlson sat next to her (R. 91) and pointed out the line where she was to sign, because his mother could hardly see the lines and did not know where to sign (R. 92). Eugene R. Thorup presumably sat on the other side of the table from his mother and Mr. Carlson (R. 91).



James M. Carlson testified to preparation of the deeds after two interviews with Mrs. Nettie N. Thorup, who had called him for the 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 and on the date the deeds bear, Mrs. Thorup called him and said to bring the deeds in the daytime on a bright day and that on 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 (R. 94-95). He also testified that at that time Nettie N. Thorup also signed the deed, Exhibit 2, and that he instructed her to give the deed to Mrs. Layton who was not present and when asked by Mr. Iverson as to whether Mrs. Thorup did anything with it that he observed that night after he gave it to her, he answered "No, I never heard of that any more until we took a deposition in this case as to what happened \* \* \*" (R. 96).

The trial court thereafter made and entered its findings of fact and conclusions of law (R. 102-105) and its decree (R. 106, 107, 108) finding the purported signatures of Nettie N. Thorup to the two deeds, Exhibits 1 and 2, to be forgeries and awarding judgment as prayed for in the complaint.

Defendant Ida Viola Thorup Layton did not testify at the trial, file a motion for a new trial, or appeal.

Defendant Eugene R. Thorup thereafter filed an affidavit of bias (R. 115) and a motion for new trial (R. 109)

and in support thereof his affidavit (R. 113-114) in which, among other things, he refers to numerous endorsements by deceased on dividend checks near the date of the deeds without describing them. At the hearing of the motion, counsel for defendant, Eugene R. Thorup, presented to the court twelve dividend checks of Utah Power & Light Company, payable to Nettie N. Thorup, which he had marked Exhibit "A", which on request of counsel were filed with the clerk. They were not admitted in evidence for any purpose and there was no proof offered or taken with respect to the genuineness of the endorsements.

## STATEMENT OF POINTS

### POINT I

PLAINTIFF WAS ENTITLED TO INTRODUCE EVIDENCE OF FORGERY.

### POINT II

APPELLANT CANNOT CLAIM SURPRISE FROM THE INTRODUCTION OF CERTAIN EVIDENCE.

### POINT III

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT OF FORGERY.

### POINT IV

THE TRIAL JUDGE DID NOT ERR IN NOT REFERRING APPELLANT'S MOTION FOR NEW TRIAL TO ANOTHER JUDGE.

## POINT V

THE TRIAL JUDGE DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

## ARGUMENT

## POINT I

PLAINTIFF WAS ENTITLED TO INTRODUCE EVIDENCE OF FORGERY.

Whether this case is denominated a "simple equity case" or a "fraud law case to cancel deeds" as claimed by appellant, is in our view immaterial. The complaint is in the ordinary form for a quiet title action which, under Section 78-40-1, U. C. A. 1953, may be brought against any one "who claims an estate or interest in real property \* \* \* adverse to him, for the purpose of determining such adverse claim". Clearly, the complaint states a claim for relief under Rule 8(a), Utah Rules of Civil Procedure, and even under the old procedure contains sufficient allegations as against a general demurrer. *Gibson v. McGurrian*, 37 Utah 158, 106 P. 669. Under such allegations, plaintiff may prove that a deed or other instrument under which defendant claims title or some interest in the property is a forgery. 44 Am. Jur. 19, Quieting Title, Section 20; 74 C. J. S. 30, Quieting Title, Section 14; 78 A. L. R. 182-186. Although we have found no Utah case specifically stating this rule, plaintiff's right under a quiet title complaint to attempt to prove that the deed under which defendant claimed was void, was not questioned in two recent cases:

*Burnham v. Eschler*, 116 Utah 61, 208 P. 2d 96 and *Bertoch v. Gailey*, 116 Utah 101, 208 P. 2d 953. Appellant cannot deny that his claim to the property described in respondent's complaint is adverse to respondent and certainly respondent is entitled to prove that such adverse claim is based on a forged, and therefore void, instrument.

But even disregarding this rule, respondent was entitled to introduce evidence of forgery under the issues joined to appellant's cross-complaint, wherein he specifically alleged title under a warranty deed allegedly executed and delivered to him (R. 5), in reply to which respondent denied the allegations of execution and delivery (R. 7).

If this case involved the avoidance of a deed because of fraudulent misrepresentations by defendant or others, appellant's citation to *Strong v. Strong*, 22 Cal. 2d 540, 140 P. 2d 386 might be apt and it is conceivable that in such a case, this court might require a plaintiff to specifically allege the fraud pursuant to Rule 9(b), Utah Rules of Civil Procedure. But this is not such a case. Forgery, not fraud, is the issue. Although both forgery and fraud are equally opprobrious, the legal effect in the first case is that the instrument is wholly void, whereas in the latter case the instrument is usually only voidable. Compare 26 C. J. S., Deeds, Section 54(g) with Section 56 and 16 Am. Jur., Deeds, Sec. 27 with Sec. 30. In the first case, the question is whether the grantor in fact executed the instrument as required by both the common law and statutes (Sec. 25-5-1 and 57-1-12, U. C. A. 1953); in the latter case the actual signing by the grantor is assumed and the question is whether the grantor would have signed had he known the

truth and had not relied on the fraudulent misrepresentation. See *Cox v. Watkins*, 149 Kan. 209, 87 P. 2d 243.

The suggestion that a quiet title action cannot be maintained when the plaintiff is not in possession is not the rule in our state. *Gibson v. McGurrian*, *supra*; *Worley v. Peterson*, 80 Utah 27, 12 P. 2d 579.

## POINT II

### APPELLANT CANNOT CLAIM SURPRISE FROM THE INTRODUCTION OF CERTAIN EVIDENCE.

Appellant claims in his Point II that he was taken by surprise by the introduction of certain checks in evidence, presumably Exhibits 9, 10 and 11, and complains he had no opportunity to present rebuttal testimony. Such a claim is frivolous. No pleading may or should allege that a certain type of evidence will be relied on. Any attorney can be surprised by a given piece of evidence if he does not properly prepare his case and does not use or even attempt to use the available methods of discovery and pretrial. Respondent's denial of appellant's allegations of execution and delivery of the questioned deed was before counsel, and certainly by the time the deposition was taken "as to what happened", as Mr. Carlson describes it in his testimony (R. 96), appellant was or should have been fully aware that the signatures on the deeds were questioned and that exemplars of decedent's signatures would be introduced at the trial on the issue of forgery. Furthermore, appellant made no objection to the introduction in evidence of Exhibits 9 and 10 (R. 21) and objected to Exhibit 11 only on

the ground that the signatures on the checks were not properly identified, which objection was properly overruled (R. 23).

### POINT III

#### THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT OF FORGERY.

The evidence is clear and convincing that the signature on the questioned deed (Exhibit 1) was not the signature of Nettie N. Thorup. No less than 18 exemplars of Mrs. Thorup's handwriting were offered and received in evidence, for the most part without objection. That these were her true signatures was not questioned at the trial by appellant and is not questioned now except as to the signatures on the two Utah Power & Light Company checks (Exhibits 9 and 10). Indeed, the appellant identified his mother's signature and his own signature as witness on Exhibit 14 (R. 87-88).

A comparison of these exemplars with the signature on Exhibit 1 demonstrates marked dissimilarities even to non-experts in handwriting. As the trial judge pointed out in his oral opinion at the conclusion of the trial (R. 98-99), the questioned signature on Exhibit 1 is entirely dissimilar to Mrs. Thorup's signature on Defendant's Exhibit 12 which was made in 1927 and yet this 1927 signature has marked similarities to the later examples of Mrs. Thorup's handwriting.

A comparison of the enlarged signature on Exhibit 1 (Exhibit 1a) with the enlarged signatures on Exhibits 7, 8, 9 and 10 (Exhibits 7a, 8a, 9a and 10a) shows even more

graphically the differences in handwriting. In addition to the differences in the N's, T's, r's and p's referred to at some length in the examination and cross-examination of Mr. Goddard, the court will note that the letters in the signature on Exhibit 1 appear to be quite firmly written, whereas the letters in the signatures on Exhibits 4, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 15 are shaky. There is, of course, the very obvious difference that the questioned signature is directly on the base line, while the signatures on all of the exemplars, except Exhibit 12, wander either up or down from a straight line. Note also the gaps between several of the letters on Exhibit 1 which do not appear on the exemplars.

Supplementing this evidence is the testimony of Louis, one of Mrs. Thorup's sons, and the testimony of Percy Goddard, a qualified handwriting expert, that the signature on Exhibit 1 is not the signature of Mrs. Thorup or to use Mr. Goddard's words, that the signatures on the questioned deeds are "very crude forgeries" (R. 55).

Appellant's argument that respondent's sole proof of forgery is the testimony of the expert, Mr. Goddard, ignores the evidence of Louis Thorup and the very convincing evidence of the documents themselves. Furthermore, the statement that Mr. Goddard's opinion was based solely on the two Utah Power & Light Company checks is incorrect. His opinion was based on a comparison of all the exemplars, except Exhibit 12, with the questioned signatures (R. 54), and on cross-examination, he compared this 1927 Exhibit 12 with the questioned signatures and found several differences (R. 71).



Admittedly the above evidence is in sharp conflict with the evidence of the appellant and his counsel and the question becomes who and what to believe. In this respect, this court must give great weight to the opinion of the trial judge who heard the testimony and saw the witnesses. *Sprague v. Boyles Bros. Drilling Co.*, 4 U. 2d 344, 294 P. 2d 689; *Malstrom v. Consol. Theatres*, 4 U. 2d 181, 290 P. 2d 689; *Hatch v. W. S. Hatch Co.*, 3 U. 2d 295, 283 P. 2d 217; *Cutler Assoc. v. DeJay Stores, Inc.*, 3 U. 2d 107, 279 P. 2d 700.

In considering the testimony of appellant and his counsel, the court should note the great detail testified to by these witnesses more than six years after the event. The sun was shining and they sat next to the window where it was light (R. 88, 95). Mrs. Thorup signed the deed in their presence without assistance (R. 77, 86, 90, 91, 95), except that Mr. Carlson pointed out the line (R. 95) and told her to sign on the line (R. 90). She probably made the letters of her signature separately as she was a little nervous (R. 90). No explanation was offered as to why this nervousness did not make the letters at least as shaky as the letters in the exemplars. Mrs. Thorup "couldn't hardly see the lines" (R. 92), yet once Mr. Carlson pointed out the line with his finger (R. 95), she was able to see the line and follow the line exactly without going up or down from the line (see Exhibits 1 and 1a). Mr. Carlson thought she signed letter by letter (R. 95) and Eugene Thorup thought she probably stopped writing between some of the letters (R. 90). It took her quite a while to sign the deeds although she was "feeling good that day and the light was shining on the table" (R. 89-90). Immediately after it was signed,



Mr. Carlson signed as witness and notary public and affixed his notarial seal and documentary stamps (R. 77, 95). He then handed the deeds back to Mrs. Thorup, prompting her with respect to the delivery requirement. She then handed Exhibit 1 to Eugene (R. 77, 95). All of this took place around the dining room table (R. 88, 95) or kitchen table (R. 91) “where it was nice and light and the sun was shining through the window” (R. 88).

The suggestion in appellant’s brief at page 9 that there is a presumption that the deed was regular because of appellant’s possession of the property has no application to the facts here, although it might be pertinent in a case where only a question of delivery is involved. Appellant and his mother lived together on the property in question both before and after the date of the purported deed (R. 76). In any event, such a presumption, if it exists at all, has been overcome by the evidence that the deed was not regular.

Appellant’s contention at page 12 of his brief that in order to prove forgery plaintiff must prove that the deed was signed without the authority of the grantor is not the law. No suggestion was made in the pleadings or at the trial that Mrs. Thorup authorized appellant or anyone else to sign her name to Exhibit 1. If respondent had to show that the signature was not signed by authority of Mrs. Thorup, it would be required not only to prove a negative, but would have the impossible task of proving that the deceased grantor, whose testimony is no longer available, at no time during her life and particularly on July 26, 1950, did not authorize either orally or in writing any person,

whether a relative, friend, stranger or one of the defendants, to sign her name to Exhibit 1. In addition to these absurdities, such a rule would reduce the Statute of Frauds to an empty shell. It is significant that of the cases cited by appellant for this proposition (insofar as the same can be checked from the citations given), all were criminal cases where the defendant's liberty was at stake and the prosecution was required to prove forgery beyond a reasonable doubt and all involved a factual situation where the evidence indicated an authorization for the asserted forgery might have been given.

The rules cited by appellant at page 12 of his brief that a grantor need not sign a deed if he adopts the signature or acknowledges the signature as his own has no application to the facts of this case. There was no suggestion in the pleadings or at the trial that Mrs. Thorup at any time adopted someone else's signature and appellant's own evidence was that Mrs. Thorup signed the deed herself and at the same time acknowledged it before a notary public. The execution by Mrs. Thorup and the acknowledgment were contemporaneous events according to appellant's evidence and if the judge disbelieved that Mrs. Thorup executed Exhibit 1, the judge was also entitled to disbelieve the testimony that she acknowledged the signature on Exhibit 1 before a notary public. In a case somewhat similar to the case at bar in that the trial judge did not believe the testimony of witnesses who stated they were present when a grantor purportedly executed and acknowledged a deed, the Kentucky Supreme Court stated:

“In the case at bar, the evidence as to both the execution and acknowledgment of the alleged deed

is so interwoven, it cannot be separated or considered independently. It may not be, for, under the peculiar circumstances here, we may well conclude that falsus in uno, falsus in omnibus.”

*Slusher v. Locke*, (Ky.) 243 S. W. 2d 649. See also *Conly v. Coburn*, 297 Ky. 292, 179 S. W. 2d 668.

#### POINT IV

#### THE TRIAL JUDGE DID NOT ERR IN NOT REFERRING APPELLANT’S MOTION FOR NEW TRIAL TO ANOTHER JUDGE.

Rule 63 (b), Utah Rules of Civil Procedure, under which appellant filed his affidavit claiming that the Honorable Ray Van Cott, Jr., District Judge, was biased and prejudiced toward appellant and his counsel, does not, we contend, apply to motions for new trial. The rule in terms relates only to actions or proceedings “to be tried or heard”. Here the case had already been tried and heard when the affidavit was filed and the judge had made his oral decision and signed the findings of fact, conclusions of law and judgment.

We point out that the filing of this affidavit smacks somewhat of the maneuver referred to by this court in *Meagher v. Equity Oil Company*, 5 U. 2d 196 at 201, 299 P. 2d 827.

Without going into the sufficiency of the affidavit which, the court will note, is based only on information and belief (R. 115), the refusal of the trial judge to certify the motion for new trial to another judge was not prejudi-

cial. If another judge had heard the motion, he would have decided whether to grant or deny the motion on the basis of the written record. This court is in the same position as such a judge for it too must decide whether a new trial should be granted on the basis of the same written record.

## POINT V

### THE TRIAL JUDGE DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL.

Of the grounds relied on by appellant in his Motion for New Trial (R. 109) we have discussed grounds 1, 3 and 4 in our Points II, III and I, respectively. The second ground for new trial was newly discovered evidence consisting of the testimony of two witnesses who would relate certain statements made by Mrs. Thorup prior to her death (R. 111, 112) and twelve Utah Power & Light Co. checks (Defendant's Exhibit A) the endorsements on which were assertedly made by Mrs. Thorup and resemble the signature on Exhibit 1.

There is no showing why the two witnesses were not produced at the trial but in any event their testimony was merely cumulative to that given by Merle Hinds (R. 40-43). The testimony of such witnesses that Mrs. Thorup wanted to give or had given the property to the appellant and that she wanted him to have the house is of little value. None of these statements indicate that Mrs. Thorup signed the deed in question. For all we know, she may have believed the mere intention to pass title was sufficient without the execution of a deed or will.

The twelve checks were never offered or received in evidence and thus the endorsements have never been properly identified as the signature of Mrs. Thorup. But assuming Mrs. Thorup did sign all or some of the checks, a comparison of such signatures with the signature on Exhibit 1 shows many different characteristics.

### CONCLUSION

While we acknowledge the severe burden of proof on plaintiff, we respectfully submit that the burden has been sustained and that the judgment of the trial court should be affirmed.

Respectfully submitted,

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