

1949

La Vora Spendlove v. Paul Shewchuck, Matilda Shewchuck and Mary Shewchuck, dba American Window Cleaning Co. : Brief of Respondent

Utah Supreme Court

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CLERK, SUPREME COURT, UTAH

IN THE

FEB 14 1949

SUPREME COURT

OF THE

State of Utah

LA VORA SPENDLOVE,

Plaintiff and Respondent,

-vs-

PAUL SHECHUCK, doing business as
AMERICAN WINDOW CLEANING COM-
PANY,

Defendant and Appellant.

No. 7185

RESPONDENT'S BRIEF

Appeal from Second District Court,

Weber County, Utah

Honorable John A. Hendricks, Judge

FILED

FEB 14 1949

WILSON & WILSON

Attorneys for Plaintiff and Respondent

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IN THE
SUPREME COURT
OF THE
State of Utah

LA VORA SPENDLOVE,

Plaintiff and Respondent,

-vs-

No. 7185

PAUL SHECHUCK, doing business as
AMERICAN WINDOW CLEANING COM-
PANY,

Defendant and Appellant.

RESPONDENT'S BRIEF

**STATEMENT OF THE CASE RELATING TO BILL OF
EXCEPTIONS**

In this case the appeal on its merits will be without real substance if the Bill of Exceptions is stricken. The facts are such that the Supreme Court can not do otherwise than strike the Bill of Exceptions from the record in accordance with motion filed herein by the respondent on the 18th day of May,

1948. If the Bill of Exceptions is stricken, there will be nothing before the court for consideration because the appellant did not raise any questions of law during the trial, and after the jury returned its verdict and judgment was entered thereon, he never at any time moved for a new trial. In any event without the evidence as contained in the Bill of Exceptions before the appellate court, appellant is really dangling in the air. It is essential, therefore, that the motion to strike appellant's Bill of Exceptions be first considered.

The following facts are definitely a matter of record in the proceedings of the case:

1. The verdict of the jury was returned and filed on the 23rd day of January, 1948.

2. When the respondent rested her case, no motion for nonsuit was made.

3. A motion for new trial was never made.

4. A Bill of Exceptions was not prepared, served, settled, or filed within a thirty day period after the return of the verdict of the jury, and the entry of judgment thereon.

5. No application was made to the trial court within thirty days after the entry of judgment on the verdict for an extension of time within which to prepare, serve, settle, and file the Bill of Exceptions, and no extension of time was granted within said thirty day period, or at all.

6. The purported Bill of Exceptions was served upon the attorneys for the respondent on the 24th day of April, 1948, more than ninety days after the entry of the judgment on the verdict. Up to that time no application for an extension of time within which to have the Bill of Exceptions prepared, served, settled,

or filed was applied for or granted, and no such extension has yet been applied for or granted.

7. When the purported Bill of Exceptions was served upon the attorneys for the respondent they were asked to stipulate that it was a true Bill of Exceptions, and that it might be settled and signed by the court. The respondent through her attorneys refused to sign said stipulation as presented, but added thereto the following words, "subject, however, to all rights of the plaintiff to move to strike said Bill or to take such steps as provided by law because of failure of the defendant to prepare, settle, and file said Bill in the time and manner provided by law."

8. Without any application being made to the court by the defendant and appellant to be relieved of his default, the trial judge on April 24, 1948, signed a certificate purporting to settle the Bill of Exceptions served upon the attorneys for the respondent, and the purported Bill of Exceptions was filed in the Supreme Court on the 5th day of May, 1948.

10. In due course the respondent filed a motion in the Supreme Court in which she moved to strike from the records the purported Bill of Exceptions on the following grounds:

(1) That said Bill of Exceptions was not prepared, served, and filed within the time required by law; (2) That no extension for the service and filing of said Bill of Exceptions was ever requested or granted during the time required by law; (3) That no motion was made by the appellant during the time required by law for new trial in the above entitled case after the entry of judgment on the verdict of the jury in said case; (4) That the said Bill of Exceptions was served, settled, and filed after the expiration for the time for appeal herein and over

the protest of the plaintiff through her counsel.

11. That on the 10th day of May, 1948, after the filing of the purported Bill of Exceptions in the Supreme Court, the attorney for the appellant served upon the attorneys for the respondent a certain paper designated Application for Relief in which the attorney for the appellant moved to be relieved of his default for failure to serve and file his Bill of Exceptions within the time required by law upon the grounds of inadvertence, mistake, and excusable neglect, said motion specifically stating "this motion is made and will be supported upon the affidavit of Ira A. Huggins, attorney for said defendant." With the Application for Relief was served an affidavit by Ira A. Huggins in which he stated that a verdict was entered in favor of the respondent and against the appellant on January 23, 1948; that about two weeks thereafter, the affiant ordered preparation of a transcript and Bill of Exceptions from a court reporter; the transcript and Bill of Exceptions were completed and delivered about the 16th day of April, 1948; that said Bill of Exceptions was served upon the plaintiff's attorneys on April 24, 1948; that said Bill of Exceptions was signed by the trial Judge on April 24, 1948 and filed with the trial court April 29, 1948; that the affiant failed to apply for an extension of time within which to prepare and file his Bill of Exceptions because he misread Section 104-39-4, Utah Code Annotated, 1943, and thought that he had thirty days from the service of notice of appeal in which to prepare and file his Bill of Exceptions.

12. The respondent filed objections to the granting of the application upon the grounds that the court was without jurisdiction to grant any relief; that the affidavit filed in support of the motion does not set forth facts sufficient to constitute

grounds for relief; that no motion for new trial was made and that no Bill of Exceptions could have been filed; and that no extension of time was requested or granted for the filing of a Bill of Exceptions until after more than ninety days had expired after the entry of judgment on the verdict.

12. The court heard the application of the appellant to be relieved of default on the 18th day of May, 1948 and made purported findings, conclusions of law and an order. From the courts findings these things appear:

(1) No motion for new trial was ever made; (2) Approximately two weeks after the entry of judgment on the verdict, the appellant's attorney was directed by the appellant to effect an appeal; that immediately upon being directed to take the appeal the attorney for appellant ordered a transcript and Bill of Exceptions from the court reporter; that appellant's attorney misread the law and thought he had thirty days from the day that he served his notice of appeal in which to prepare and settle his Bill of Exceptions.

13. Based upon the said findings the trial Judge signed an order purporting to relieve the appellant of his default, but did not enter an order extending the time of appellant to serve, settle, and file a Bill of Exceptions, and that after the entry of the purported order relieving defendant of his default no Bill of Exceptions was served or filed.

Now before attempting to argue this case on its merits, or to make any statement concerning what is shown by the evidence contained in the Bill of Exceptions, we present the following argument in support of our motion to strike the Bill of Exceptions:

I.

THE TRIAL COURT WAS WITHOUT POWER TO SETTLE THE PURPORTED BILL OF EXCEPTIONS ON APRIL 24, 1948.

The law is definitely settled in the State of Utah "in an unbroken line of decisions that in case the party who desires an extension of time fails to apply for such extension at some time before the statutory time, or any extension thereof, has expired, the district court or judge is without power thereafter to allow, settle and sign a bill of exceptions." *Moyle v. McKean et al*, 49 Utah 93, 162 Pac. 63.

The beginning point in the consideration of this question, of course, is the statute (Section 104-39-4, Utah Code Annotated, 1943) which reads in part as follows:

"When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within thirty days after the entry of judgment, if the action was tried with a jury, or after the service of notice of the entry of judgment, if the action was tried without a jury, or after service of notice of the determination of motion for a new trial, prepare a draft of the bill and serve the same, or a copy thereof, upon the adverse party."

This was formerly Section 6969, Compiled Laws of Utah, 1917, and prior to that time was Section 3005, Compiled Laws of Utah, 1907. It is Sec. 104-39-4 in Revised Statutes of Utah, 1933.

In the case of *Tooele Improvement Company vs. Hoffman*, 44 Utah 532, 141 Pac. 744, the Utah Supreme Court in construing the 1907 statute said:

"This court has repeatedly held that while the District

Court may, before the statutory period for serving the bill of exceptions has elapsed, extend the time 'upon good cause shown,' as provided in Section 3329, it is without authority to grant such extension if, at the time the application is made, the statutory time for service of the bill has fully expired. *Butter vs. Lampson*, 29 Utah 439, 82 Pac. 473; *Bryant vs. Kunkel*, 32 Utah 377, 90 Pac. 1079; *War-nock Ins. Agency vs. Peterson Inv. Co.*, 35 Utah 542, 101 Pac. 699; *Metz vs. Jackson*, 43 Utah 496, 136 Pac. 784. On authority of these cases, which we think were correctly decided, the motion to strike the bill of objections is sustained."

In the case of *Independent Gas & Oil Co. vs. Beneficial Oil Co. et al*, 71 Utah 348, 266 Pac. 267, the question of serving a bill of exceptions within the prescribed period under the provisions of Section 6969, Compiled Laws of Utah, 1917, with other applicable Sections from the same code, was before the court. Speaking through Mr. Justice Hansen, the court said:

"The following provisions of Comp. Laws Utah 1917 fix the time within which a bill of exceptions shall be prepared and served. We quote only such part of the laws as are deemed material to the question here involved:

'Sec. 6969. When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within thirty days after the entry of judgment if the action were tried with a jury, or after service of notice of the entry of judgment if the action were tried without a jury, or after service of notice of the determination of a motion for a new trial, prepare a draft of a bill and serve the same, or a copy thereof, upon the adverse party. * * *'

'Sec. 7023. When an act to be done as provided in this Code relates to * * * the preparation, service, filing, or presentment of bills of exception, or of amendments thereto, * * * the time allowed by this Code may be extended,

upon good cause shown, by the court in which the action is pending, or by a judge thereof.'

'Sec. 6619. The court may, in furtherance of justice, * * * upon such terms as may be just, relieve a party or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect.'

"After the time fixed by Comp. Laws Utah 1917, No. 6969, had expired, without any further extension of time as provided by Comp. Laws 1917, No. 7023, the district court was without jurisdiction or power to grant further time until the defendants had first been relieved from their default in failing to keep alive the time in which to prepare and serve their bill of exceptions. Such has been the repeated and uniform holdings of this court. *Butter v. Lamson*, 29 Utah 439, 82 P. 473; *Bryant v. Kunkel*, 32 Utah 377, 90 P. 1079; *Warnock Ins. Agency v. Peterson Inv. Co.*, 35 Utah 542, 101 P. 699; *Metz v. Jackson*, 43 Utah 496, 136 P. 784; *Tooele Imp. Co. v. Hoffman*, 44 Utah 532, 141 P. 744; *Allen v. Garner*, 45 Utah 39, 143 P. 228; *McEwan v. Anderson*, 50 Utah 317, 167 P. 685; *State v. Martin*, 149 Utah 136, 164 P. 500.

"In order to invoke the jurisdiction or power of the district court to revive and grant further time in which defendants may prepare and serve their bill of exceptions under the provisions of Comp. Laws of Utah 1917, Sec. 6619, it was necessary for them to make a proper application and showing. *Morgan v. O. S. L. R. Co.*, 29 Utah 92, 74 P. 523; *Felt v. Cook*, 31 Utah 299, 87 P. 1092; *Tooele Imp. Co. v. Hoffman*, and *Allen v. Garner*, *supra*."

In the case of *Findlay v. National Union Indemnity Co.*, 85 Utah 110, 38 P. 2d 760, this court went rather extensively into the question relating to the time for the service of a bill of exceptions. Speaking through Justice Moffat, the court said:

"In the instant case the cause was tried, judgment entered, and a motion for a new trial filed and heard. The motion was denied on the 15th day of March, 1932. Notice thereof was served by the plaintiff on the 16th of March and filed with the clerk of the court the day following. Thus under the statute the time within which the bill of exceptions must be prepared and served started to run by the service of the notice of determination of the motion for a new trial. Comp. Laws of Utah 1917, Sec. 6969, as amended by Laws Utah 1925, c. 51. That statute, by which this case is controlled, now amended and superseded by R. S. Utah 1933, 104-39-4, reads:

'When a party desires to have exceptions taken at a trial settled in a bill of exceptions, he may, within thirty days after the entry of judgment if the action were tried with a jury, or after service of a notice of the entry of judgment if the action were tried without a jury, or after service of notice of the determination of a motion for a new trial or in case an appeal is taken before the bill of exceptions is settled service of the notice aforesaid shall not be necessary and the appellant shall, within thirty days after service of his notice of appeal, prepare a draft of a bill and serve the same, or a copy thereof, upon the adverse party. * * *

"When a judgment is entered, the losing party has a right of appeal. This is a transient right, and, if not perfected within the six-month period, the right of appeal is lost and ceases to exist. R. S. 1933, 104-41-2. As a part of the record on appeal; the bill of exceptions may or may not be incorporated therein, depending upon the nature of the question sought to be reviewed therein. The right to have the bill of exceptions included in the record on appeal is given not without limitations, but is contingent upon the doing of the prescribed acts and within the time fixed. When a party desires to have the exceptions he has taken at the trial settled in a bill of exceptions, he may within

thirty days after the entry of judgment, if the action were tried to a jury and no motion for a new trial has been interposed, have his bill of exceptions settled, or, if the action were tried to the court, he may have the bill of exceptions settled within thirty days after the service of notice of the entry of judgment, or, if the cause were tried to the court or to the court sitting with a jury and a motion for a new trial interposed, he may have his bill of exceptions settled and signed within thirty days after the service of notice of the determination of the motion for a new trial.

“Before the amendment of 1925, the foregoing were the only limitations, except the ninety-day limitation hereinbefore referred to, relating to the preparing, serving, settling, and signing of the bill of exceptions. Under the provisions of the statute, the time limitations began running automatically upon the entry of a judgment on the verdict, when the cause was tried to a jury, if no motion for a new trial had been filed within time. By the other provisions of the statute prior to the amendment, service of a notice of the entry of judgment or service of notice of determination of the motion for a new trial was necessary to start the running of the time limitation relating to the settlement of the bill of exceptions. The 1925 amendment added to the section (Comp. Laws 1917, Sec. 6969, as amended by Laws 1925, c. 51) the words:

‘Or in case an appeal is taken before the bill of exceptions is settled service of the notice aforesaid shall not be necessary (to start the time to run) and the appellant shall, within thirty days after service of his notice of appeal, prepare a draft of a bill and serve the same, or a copy thereof, upon the adverse party.’ (Parenthetical phrase added.)

“Counsel for appellant insists that the amendment last above quoted gives a fourth and alternative way by which the parties to an appeal may start the time to run within which the preparation and settlement of the bill must be made, regardless of whether the notices referred to have

been served. We think counsel is in error in this convention.

"In passing, it might be of value especially as to cases arising in the future and for the purpose of indicating the court's position upon this question to advert to the further amendment of the same part of the section involved herein as now contained in R. S. 1933, 104-39-4. In the 1933 revision the section is now divided into six subparagraphs. The ninety-day limitation heretofore referred to has been omitted and repealed; some other omissions have been made. Except for the omissions we think the meaning and purpose of the statute have not been changed. Subparagraph (2) of the amended section now 104-39-4, reads:

'In case an appeal is taken before the bill of exceptions is settled, service of the notices aforesaid shall not be necessary and time shall run from service of his notice of appeal.'

"Adverting now to the construction of that part of the section of the statute in question: It is to be observed that fundamentally the statute is procedural in nature and limitational in purpose and effect. It requires a notice to set the time running in all cases tried to the court with or without a motion for a new trial and in cases tried to a jury when a motion for a new trial has been filed and determined. Time begins to run automatically upon entry of judgment on the verdict if no motion for a new trial has been filed, and in any case by the service of notice of appeal. When the time limitation fixed by the statute has been started running by any one of the methods provided by the statute, except by notice of appeal, may such time as has elapsed be cut off and the time started to run anew and from the date of the services of notice of appeal? We think it was neither the purpose of the statute nor the intention of the Legislature in making the amendment to thus permit an extension of time when once started as provided by the statute: 'In case an appeal is taken before the bill of exceptions is settled service of the notices aforesaid

shall not be necessary' to start the time running within which to prepare and serve the bill of exceptions. When the time has once been started by the service of the required notice, it may no more be cut off by serving and filing a subsequent notice of appeal than the time could be similarly cut off in case of entry of judgment on a verdict where no notice is necessary in the absence of a motion for a new trial. The appeal method of starting the time to run is applicable only when time has not already been started to run either by notice or by the provision of the statute without notice.

"It is conceded by counsel that the order of April 29, 1932, extending the time for sixty days after May 1, 1932, in which to prepare, serve, have settled, and file the bill of exceptions, was entered without any proceedings under Comp. Laws Utah 1917, Sec. 6619, to relieve appellant from its default. The notice of determination of the motion for a new trial was served on March 16, 1932. This notice started the time running within which the settlement of the bill must be made, unless the time was extended by proper proceedings as by the statute provided. The order of April 29, 1932, was more than thirty days after the service of the notice. No application was made to the district court, and no showing suggested to that court for relief. In the absence of an application to be relieved and showing justifying such relief, the district court lost jurisdiction to make the order of April 29, 1932, extending the time within which the bill of exceptions could be settled by that court.

"It being clear under the statute that the time within which to prepare and serve the bill of exceptions began running on March 16, 1932, the date of service of the notice of determination of the motion for a new trial, the doctrine heretofore laid down by this court in the case of Independent Gas & Oil Co. v. Beneficial Oil Co., 71 Utah 348, 266 P. 267, 269, and cases therein cited, it determinative of the matter.

See following additional cases: Keller vs. Chournos, 95 Ut. 25, 76 P. 2nd 625; Foxley v. Gallagher, 55 Ut. 298, 185 Pac. 775; In re Peterson, 87 Ut. 144, 48 Pac. 2nd 468; Prunty v. Equitable Life Assur., 86 Ut. 236, 42 P. 2nd 219; Metz v. Jackson, 43 Ut. 496.

It appears conclusively, therefore, that the purported bill of exceptions served on April 24, 1948, and signed by the trial judge on the same date was a nullity.

Unless, therefore, appellant's right to serve and file a bill of exceptions was revived in some manner, the alleged bill of exceptions must be stricken. See Warnock Ins. Agency v. Peterson, 35 Ut. 542.

II.

THERE HAVE BEEN NO VALID PROCEEDINGS BY WHICH APPELLANT'S RIGHT TO PREPARE, SERVE AND FILE A BILL OF EXCEPTIONS HAS BEEN RESTORED.

If it be conceded for the purpose of this argument that there are cases in which relief may be granted under the provisions of Section 104-14-4, U. C. A. 1943, the instant case surely cannot be brought within that category. The Utah State Supreme Court has repeatedly held that while ex parte extensions for the preparation, serving and filing of bills of exception are granted readily, and the reason for the extensions is seldom, if ever, questioned, where the application for the extension is made within the thirty-day period, or some timely extension thereof, yet there is a difference where application for extension is first made after more than thirty days have lapsed. Keller vs. Chournos, 95 Ut. 25, 76 P. 2nd 626; Prunty vs. Equitable Life etc. 86 Ut. 236, 42 P. 2nd 219.

In the Prunty case, *supra*, the court citing with approval the holding in *Tooele Improvement Co. vs. Hoffman*, 44 Ut. 532, held that:

Where an applicant seeks relief under the provisions of 104-14-4, "the court is without jurisdiction to grant relief, unless an application and showing is made to the court upon which it can base findings for or against the application. * * * The findings and order, when properly served and made a part of the record on appeal, may then be reviewed by this court upon the application of either party the same as any other ruling in the case. For these reasons, therefore, it is necessary that the application and showing be sufficient in form and substance to authorize the court to act." *Tooele Improvement Co. v. Hoffman*, *supra*.

The court is not empowered to use an imaginary or insufficient reason to set aside an applicant's default, but must require substantial grounds. Any order setting aside a default must be based upon adequate findings. See *Chournos case*, *supra*; *Findlay vs. National Ind. Co.*, 85 Ut. 110.

If it be assumed that a proper application was made for reinstatement of the appellant's rights in this case (which is contrary to the facts as will be pointed out) yet no showing was made entitling appellant to relief.

Moyle vs. McKean, 49 Utah 93, is controlling in the instant case, even if we indulge the presumption that a proper application for relief was made. In the *McKean* case the court pointed out that if application is made to be relieved from a default such as we are considering, certain procedure must be followed, and an adequate showing made. The court stated the law as follows:

"The applicant must, however, make a proper showing of facts from which the court is authorized to find that

the delay and failure to act timely on his part is excusable, and the court, or judge, must make findings of that fact which, at the instance of the opposing party, may be reviewed by this court. The district court, or judge, under Section 3005, may not assume arbitrary power and allow and sign a bill of exceptions out of time, but can do so only when good and sufficient cause is made to appear. In this case, as in *Tooele Improvement Co. v. Hoffman*, supra, the facts upon which appellants' counsel rely are wholly insufficient to authorize any court or judge to grant relief under Section 3005. While one of appellants' counsel has filed a voluminous affidavit in support of his application, yet practically the only facts upon which counsel relies, and upon which the district judge apparently acted in allowing and signing the proposed bill are as follows:

"That it has been some years since affiant in person has been charged with the taking and perfection of an appeal, such matters having been committed to other members of the firm of which affiant is a member.

'That affiant, knowing that the law permitted him six months after judgment within which to take the initial step to appeal, namely, the filing of a notice, and, for the time, overlooking the requirement that the trouble and expense (in this case \$240) of procuring and serving a bill of exceptions must be undertaken months before it is necessary to serve a notice of appeal, or, in the alternative, that the discretion of the trial judge should be invoked in order to secure such extensions of time as might be necessary to permit a party to determine whether or not to appeal or to procure his record, inadvertently mistook and overlooked the time within which the service of the bill should be made, affiant believing that such service and filing would be timely if made so as to permit the transcript to be filed in the Supreme Court within thirty days after the perfection of the bill as provided in rule II of the Supreme Court rules.

'Affiant further states that he was induced to believe he was moving within the proper time because of the physical impossibility in this case, and in all other cases where the transcript is voluminous and the appeal is on the entire record, of procuring and serving a draft of the bill of exceptions within thirty days after notice of judgment.'

"The district judge made no findings, and, apart from the foregoing statements, the record is destitute of anything from which we can determine what induced him to act. The facts presented by counsel as an excuse for a delay of more than six months in preparing and serving their proposed bill of exceptions were, therefore, as pointed out in *Felt v. Cook*, 31 Utah 299, 87 Pac. 1092, and in *Tooele Improvement Co. v. Hoffman*, supra, wholly insufficient to set in motion the jurisdiction or power of the district judge, or to authorize him to act. Appellant's counsel, however, invoke the rule that we must presume that the district court acted regularly and for sufficient cause. That rule has no application here, since the record affirmatively shows upon what grounds the court based its action. Where the record speaks, presumptions may not be indulged."

In the case of *Keller v. Chournos*, 95 Utah 25, 76 P. 2nd 626, proceedings were instituted by the appellant to be relieved of his default for failure to serve and file his bill of exceptions within the time required by law.

In that case a motion for a new trial was denied by the court on August 10, 1936. Notice of the ruling denying the motion for new trial was served on August 12, 1936.

"Thereafter, counsel for plaintiff secured an extension of time, in which to prepare and settle the bill of exceptions on the appeal until November 1, 1936."

The Supreme Court took the following position:

"Summarizing what was stated before the trial court

as a basis for the relief sought, it appears that judgment was entered July 13, 1936; motion for a new trial overruled August 10, 1936; and notice served of the overruling of the motion for a new trial August 12, 1936. On July 13, 1936, after the decree had been entered, counsel for appellant directed the court reporter to prepare a transcript, and requested him to take care of obtaining necessary extensions of time, which was agreed to by the reporter. Accordingly on August 29, 1936, he obtained an order giving appellant until November 1, 1936, to prepare and serve the bill. On July 14, 1936, the reporter, by letter, asked counsel for a deposit of \$100 in part payment for preparing the transcript and on July 15, 1936, counsel for plaintiff replied:

'As soon as the situation seems to warrant it, I shall have Mr. Keller advance \$100.00 to apply upon the record.'

"Whether right or wrong, the reporter seems to have assumed that this letter amounted to a cancellation of the order for the transcript and therefore took no further action in the matter. Early in November, 1936, counsel for defendant called the attention of counsel for plaintiff to the fact that his time for preparing and filing his bill of exceptions had expired and suggested a payment of the judgment. Notwithstanding this information and request, it was not until sometime in January, 1937, that counsel for plaintiff directed the reporter to proceed with the preparation of the transcript. It appears that the transcript was completed and delivered on February 27, 1937. It was not until June 10, 1937, that counsel for plaintiff took any action seeking to obtain relief from his default. The court has jurisdiction under provisions of section 104-14-4, R. S. Utah 1933, to grant relief sought in this case upon a proper showing. This section provides that the court may, 'upon such terms as may be just, relieve a party or his legal representative from a judgment, order or other proceeding taken against him through his mistake, inadvertence, sur-

prise, or excusable neglect.'

"It has been held that the preparation and settlement of a bill of exceptions is a proceeding in a pending action, and that in case a party has failed to prepare, serve, and file his bill of exceptions within the statutory time he may apply to the court for relief; and, if he can show that he failed to do so through mistake, inadvertence, surprise, or excusable neglect, under the section above quoted, the court could relieve him and make an order settling the bill of exceptions to be served and filed although the statutory time had fully elapsed.

"There is a difference, however, between being relieved before the time for settlement has elapsed and after. In the first instance, it is a matter of discretion of the court and is usually upon request ex parte granted; in the latter, the court's jurisdiction must be properly invoked and proof submitted and findings made showing cause for relief. In the case of *Tooele Improvement Co. v. Hoffman*, 44 Utah 532, 141 P. 744, 745, in construing the above-quoted section, Comp. Laws Utah, 1907, section 3005, carried into Comp. Laws, 1917, Sec. 6619, then as section 104-14-4, R. S. Utah 1933, this court said:

'The court is without jurisdiction to grant relief, unless an application and showing is made to the court upon which it can base findings for or against the application. If the court finds the showing sufficient to authorize the relief sought, it should make an order allowing the proposed bill of exceptions to be served, and, if it finds the showing insufficient, make an order to the contrary. The findings and order, when properly served and made a part of the record on appeal, may then be reviewed by this court upon the application of either party the same as any other ruling in the case.'

"It will thus be seen that we may then review both the findings and order.

"In the instant case no findings were made upon which to base the order, and an examination of the evidence indicates that there was no proper showing justifying a finding of mistake, inadvertence, surprise, or excusable neglect. State v. Bartholomew, 85 Utah 94, 38 P. 2nd 753, and cases cited, are in point."

The case of Prunty v. Equitable Life, supra (86 Utah 236) is also in point. In that case application to be relieved from default was also filed. In the words of the Supreme Court,

"The affidavit states that a stenographer was instructed to file the bill of exceptions, that affiant went on a vacation, and by inadvertence and mistake the bill was not filed in time. No findings were made upon the so-called application or motion to be relieved. Indeed, it would seem difficult without more to frame anything worthy of the name of a finding. The court's order recited that for good cause shown, the applicant was relieved from default if any existed. This brings nothing in the nature of a finding here for review and in any view of the matter is insufficient. Tooele Improvement Co. v. Hoffman, supra; Independent Gas & Oil Co. v. Beneficial Oil Co., supra; Morgan v. Oregon S. L. R. Co., 27 Utah 92, 74 P. 523; Felt v. Cook, 31 Utah 299, 87 P. 1092; and Allen v. Garner, supra."

It will thus be seen that our Supreme Court has definitely decided that while the power resides in the court to relieve a party of his default for failure to prepare and serve a bill of exceptions within the time prescribed by statute, yet proceedings must be instituted in a proper way to obtain relief. There must be substantial evidence of inadvertence and excusable neglect. It doesn't lie within the discretion of the court to find excusable neglect unless there is real evidence to support such a finding.

Let us now examine what happened in the instant case.

The district court had no jurisdiction to grant an extension of time to the appellant after the 23rd day of February, 1948, since the judgment was entered on the verdict on January 23, 1948, as shown in the judgment roll, page 040. However, no proposed bill of exceptions was served until April 24, 1948. In the meantime no application for an extension had been made or granted, and no motion for new trial had been made. Obviously, therefore, under the holdings of the Utah Supreme Court hereinbefore cited, the purported service and settlement of the bill of exceptions on April 24, 1948, were null and void.

It was not until the 10th day of May, 1948, that the attorney for the appellant served upon the attorney for the respondent a paper which was designated "APPLICATION FOR RELIEF" (See page 3, Supplemental Bill of Exceptions).

That application for relief moved "for relief, as provided in Section 104-14-4, U. C. A., 1943, because of the failure of the defendant to serve and file his bill of exceptions in the above entitled case within the time provided for by Section 104-39-4, U C. A., 1943, upon the grounds of inadvertence, mistake and excusable neglect. This motion is made and will be supported upon the affidavit of Ira A. Huggins, attorney for said defendant." There was nothing in the application to indicate that the appellant intended to do anything except support his motion by the affidavit which was served with the motion.

In the affidavit (See Pages 1 and 2 of Supplemental Bill of Exceptions) the attorney for the appellant sets forth that the verdict of the jury was returned on January 23, 1948; "that approximately two weeks thereafter, affiant ordered the preparation of a transcript and bill of exceptions in the case from Simon Barlow, the court reporter in said court in said cause." That the affiant received the transcript about April 16, 1948;

that he submitted it to plaintiff's attorney about April 24, 1948. At this point the affiant overlooks an obvious and important part of the record. He says that a stipulation was signed to the effect that the transcript as served upon the attorney for respondent was true and correct and might be settled by the judge as such. However, the stipulation now in the record contains the following words in the handwriting of one of the attorneys for the respondent:

"Subject, however, to all rights of plaintiff to move to strike said bill or to take such steps as provided by law because of the failure of defendant to prepare, settle and file said bill in the time and manner provided by law."

Obviously, up to that point in the affidavit there is nothing warranting any relief from default. Affiant then proceeds in his affidavit to state in substance that the reason he didn't apply to the court for an extension of time within the thirty-day period was because he misunderstood the provisions of subdivision 2 of Section 104-39-4, U. C. A., 1943, and thought he had thirty days after service of his notice of appeal in which to serve and file his bill of exceptions, and that he didn't become aware of his mistake until he rechecked the statute on April 21, 1948. He doesn't state, however, what caused him to put a different meaning into the statute on April 21, than he got out of it about the 10th of February.

The last paragraph of the affidavit merely contains a statement to the effect that the affiant believes he has grounds for appeal and that the case can't properly be reviewed without a bill of exceptions.

In substance, therefore, all that the attorney for the appellant says in his affidavit is that he misunderstood the obvious provisions of the law as contained in Section 104-39-4, U. C. A.

1943, relating to the preparation, serving and filing of bills of exception.

As early as 1934, the Utah Supreme Court passed upon this very question in the case of Findlay v. National Union Indemnity Co., 85 Ut. 110, cited at length in the previous pages of this brief. The provisions of the statute now under consideration which were then contained in R. S. of Utah, 1933, were discussed and definitely construed. In that case it was specifically urged that the statute gave thirty days from the date of the service of the notice of appeal in which to serve and file the bill of exceptions. The court held that the contention was erroneous, and that all the statute meant was that if the time had not already started to run that the filing of a notice of appeal started the time to pass for the filing of the bill of exceptions. If to ignore a law which is so well established comprises inadvertence and excusable neglect then to ignore or misinterpret any and all other provisions of law could at any time be urged as grounds for relief.

But, let us look a bit further into this case. There is nothing in the application of the appellant requesting an order permitting the serving and filing of the bill of exceptions within a specified time. Nor does the order of the court grant the appellant any additional time, or fix any time in which to file a bill of exceptions or authorize the filing of a bill of exceptions. The order of the court found on Page 10 of the Supplemental Bill of Exceptions reads as follows:

“IT IS THEREFORE ORDERED that the defendant Paul Schewchuck should be in the furtherance of justice, and he is hereby relieved of any default or apparent default in failing to prepare, serve and file his bill of exceptions in said case within the time fixed by statute pursuant to the

Section 104-14-4, U. C. A., 1943.

"IT IS FURTHER ORDERED that plaintiff's objections to the granting of relief as prayed in defendant's petition for relief should be and the same hereby are overruled and denied. Dated and signed this 21st day of May, 1948, John A. Hendricks, Judge."

Now if the court was without jurisdiction to settle the bill of exceptions on April 24, 1948, and the bill served upon the respondent on that date was a nullity, there was, therefore, in effect no bill of exceptions served or filed when the court entered its order on May 21, 1948.

The records fail to disclose any attempt whatever to serve or file a bill of exceptions after the court purportedly relieved the appellant of his default. There was no attempt even to make a nunc pro tunc order validating the purported bill of exceptions. In substance, therefore, no bill of exceptions has yet been served or filed.

The plaintiff and respondent objected to the purported proceedings contained in the Supplemental Bill of Exceptions.

We, therefore, submit that the bill of exceptions must be stricken because it was not served and filed within the time required by law, and there has never been any valid proceedings upon which to ground a claim that the rights of the appellant to prepare, serve and file his bill of exceptions have been revived.

III.

THERE ARE NO GROUNDS FOR REVERSAL BASED SOLELY UPON THE JUDGMENT ROLL.

If the bill of exceptions is stricken, as it must be, then the

only think left before the court really is the appellant's general demurrer to the respondent's amended and supplemental complaint. On this question the only point argued in appellant's brief is that the amended and supplemental complaint is defective in that it does not contain allegations asserting affirmatively that the plaintiff was not guilty of contributory negligence.

That is a strange contention in the face of the allegation "that as the plaintiff approached the point where the agent of the defendant was cleaning said windows said employee had the window cleaner with the long handle extended vertically into the air parallel with the window, but as the plaintiff reached a point even with the said employee the said agent carelessly, recklessly and negligently, without looking and without any regard for the safety of pedestrians using the sidewalk and particularly for the safety of the plaintiff, **suddenly** pulled said long handled window cleaner down without turning around and negligently, recklessly, carelessly and suddenly thrust the handle of said window cleaner across the sidewalk so as to suddenly project the said handle between the legs of the plaintiff and trip her so that she fell to the paved sidewalk with great force."

Certainly it is the law according to the overwhelming weight of authority that the plaintiff is not required by affirmative allegations in the complaint to negative the possibility of contributory negligence. That is entirely a matter of affirmative defense.

As stated in 38 Am. Jur. 959,

"According to the practice prevailing in most states, the plaintiff in an action for injuries claimed to have been

due to the defendant's negligence need not, unless the statement of his case indicates probability of contributory negligence on his part, allege specifically that he was free from negligence at the time of the acts of which complaint is made. As it sometimes is expressed, the plaintiff need not negative contributory negligence; or need the plaintiff allege a want of knowledge of the danger from which his injury resulted, for such an allegation is no more than a denial of contributory negligence. A motion by the defendant to require the complaint in an action for injuries to be made more specific as regards facts which, if incorporated in the complaint would have related to the question of contributory negligence, is properly denied, for contributory negligence is a matter of defense."

And on page 960 the text continues,

"The jury, by finding the defendant guilty of negligence, impliedly finds that the plaintiff had no knowledge thereof. Thus, it would seem to be sufficient to allege that the plaintiff's injury was caused solely by the negligence of the defendant.

"Contributory negligence is a matter of defense, and the burden of proving such a defense is on the defendant in a personal injury case or in an action to recover for wrongful death, and plaintiff's complaint need not show freedom from contributory negligence." *Michigan C. R. Co. v. Spindler*, 5 N. E. 2 (d) 632.

STATEMENT OF CASE ON ASSUMPTION BILL OF EXCEPTIONS IS NOT STRICKEN

Now, let us turn to the consideration of the case on the theory that the Bill of Exceptions is before the court.

The appellant devotes the bulk of his brief to an argument on contributory negligence. He takes the position not only that freedom from contributory negligence must be alleged in the

complaint but that the facts in this case clearly indicate contributory negligence.

However, the defendant in his answer failed to make proper allegations of contributory negligence. (See paragraph 5 of Answer, page 015 judgment roll).

The test of whether or not a plaintiff is guilty of contributory negligence is set forth in 38 Am. Jur. at 858 where it is stated "Negligence is essentially a matter of faulty conduct in the manner of acting or in failure to act. A plaintiff is guilty of contributory negligence only in so far as he, or some person for whose conduct he is responsible, is at fault. A plaintiff's right to recover is not affected by his having contributed to his injury unless he was in fault in so doing. Fault can be predicated upon the plaintiff's conduct only where such conduct was in violation of a duty on his part to exercise care. Otherwise stated, there is no negligence without the violation of some duty, and there can be no contributory negligence when no duty is placed on the plaintiff to exercise care. Contributory negligence, it has been said by the courts, is the neglect of the duty imposed upon all men to observe ordinary care for their own safety. It is the doing of something that a person of ordinary prudence would not do, under the circumstances. Before one can be held to have been guilty of contributory negligence, the court must find that some specific act or omission did not meet the standards exacted by law. Therefore, essentially, contributory negligence is tortious conduct. As hereinbefore stated, however, the chain of causation between the defendant's negligence and the plaintiff's injury may be broken, so that the defendant will be relieved of liability, by an independent act of the plaintiff, not within the reasonable contem-

plation of the defendant, which intervenes as an efficient and responsible cause of the injury, irrespective of whether or not the plaintiff was at fault."

What act of negligence on the part of the plaintiff can the defendant possible point out? She was walking down a public sidewalk. She had a right to assume that other persons using the sidewalk would exercise due care. How could she possibly anticipate that the agent of the defendant would suddenly thrust the long handle of the mop he was using across the sidewalk between her legs so as to trip her. Surely there was nothing in the conduct of the defendant's agent when he had his long handled mop straight in the air parallel with the window to indicate that he would do anything but pull the mop down to the sidewalk parallel to the window as proper care required.

The defendant has labored hard in his brief to establish a showing of contributory negligence but there is not an iota of evidence anywhere in the record to indicate contributory negligence. As a matter of fact, Archie Hood, who it is stipulated was an employee of the defendant and who was handling the mop testified that he was using a window cleaner into which was fastened a handle 6 feet and 3 $\frac{1}{4}$ inches in length. (Tr. 206) That he pulled it down in such a way that it tripped Mrs. Spendlove so that she fell on the sidewalk. He said Mrs. Spendlove wasn't close enough to brush his body and that he first knew of the accident when he felt something strike the end of his mop handle and then turned around and saw Mrs. Spendlove falling to the sidewalk. (Tr. 209-210).

The issue of contributory negligence was submitted to the jury under special interrogatory No. 2 in the following

language, "Was the plaintiff Levora Spendlove guilty of contributory negligence that proximately caused the injuries which she received on the 3rd day of January, 1947." The answer to this was "No."

The defendant has spent much time in his brief arguing the abstract principle of contributory negligence. He cites several Montana cases which do not support his position.

Evidently counsel for the defendant was so convinced himself that there was no contributory negligence in the case that he didn't make a motion for nonsuit, and never made a motion for a new trial, yet now he argues that there is a legal presumption of contributory negligence in the case.

There was nothing presented in the evidence which would indicate that the plaintiff should have been aware that she was under any degree of danger.

In conclusion let it be said that the evidence introduced at the trial and the cases cited by the defendant in no way substantiate the position he has taken that the plaintiff was guilty of contributory negligence. This matter was properly referred to the jury on the pleadings and evidence in the case and the jury has correctly found that there was no contributory negligence on the part of the plaintiff.

The appellant spends the rest of his brief discussing questions relating to the earnings of Leland Spendlove, husband of the plaintiff, and the question of the evidence of the plaintiff concerning her losses resulting from her inability to care for her chickens.

The court did not submit to the jury any issue on the earnings of the plaintiff's husband. The evidence relating to

the plaintiff's losses in connection with the operation of her chicken business and special damages of other types was sufficient to sustain the findings for the jury. (See Tr. pp. 68 to 71).

CONCLUSION

Looking now at the case as a whole, we respectfully submit that under the statutes and decided cases of the State of Utah there is no theory upon which the appellant's purported bill of exceptions can be considered as part of the record. Obviously the court had no jurisdiction to settle the bill on April 24, and the filing of the bill in the Supreme Court on May 5, was an empty act. There have never been any proper proceedings to revive the rights of the appellant to file a bill of exceptions; no showing has been made of excusable neglect or inadvertence and no order has yet been entered fixing any time for the filing of a bill of exceptions or authorizing the filing of it.

Without the bill of exceptions in the record there is really nothing before the court for decision. Quite clearly the general demurrer of the defendant to the plaintiff's amended and supplemental complaint was without merit.

We have not argued at length concerning the appeal on its merits because we are so definitely convinced that the court must grant our motion to strike the bill of exceptions. However, even if the court considers the appeal on its merits, practically the only ground for reversal urged by the appellant in his brief is that the record shows contributory negligence on the part of the respondent. The record shows this contention to be without merit.

We, therefore, respectfully submit that the bill of ex-

ceptions should be stricken and the appeal dismissed. If for any reason does not grant the motion to strike the bill of exceptions, we submit that the court should affirm the verdict of the jury.

Respectfully submitted,

WILSON & WILSON,
Attorneys for Respondent

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

STATE OF UTAH,
Plaintiff and Respondent,

vs.

GRANT COOPER,
Defendant and Appellant.

Case

No. _____

BRIEF OF APPELLANT

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