

1949

# John B. Swauger v. W. C. Lawler : Brief of Appellant

Utah Supreme Court

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Pugsley, Hayes & Rampton; Attorneys for Appellant and Plaintiff;

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# In the Supreme Court of the State of Utah

JOHN R. SWAUGER,

*Appellant,*

vs.

W. C. LAWLER,

*Respondent.*

Case No. 7316

## BRIEF OF APPELLANT

APPEALED FROM THE THIRD JUDICIAL DISTRICT  
COURT, IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH.

**FILED** HONORABLE CLARENCE E. BAKER  
and LAY VAN COTT, JR., JUDGES

PUGSLEY, HAYES & RAMPTON  
Attorneys for Appellant and Plaintiff

LEONARD K. SURENDRUP, UTAH  
Attorney for Respondent and Defendant

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# In the Supreme Court of the State of Utah

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JOHN R. SWAUGER,

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W. C. LAWLER,

*Respondent.*

Case No. 7316

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## BRIEF OF APPELLANT

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### STATEMENT OF FACTS

This appeal is upon the judgment roll and records of this case in the Third Judicial District Court, in and for Salt Lake County.

The action is one for the sum of \$1000.00 and interest on a loan made December 3, 1945 to the respondent by the appellant. (R. 1). An answer was filed by the respondent, being a general denial and containing no affirmative defense (R. 5).

Pursuant to a proper demand for trial, due and regular notice of the time and place of trial was given to the defendant in conformance with the duly established rules of the Third District Court.

On April 7, 1948 the case came on regularly for trial before the court, Judge Clarence E. Baker presiding over said trial. Both parties appeared at said trial by their counsel. Appellant had travelled many miles from Salmon, Idaho, having left his business there to attend trial, (R. 35) and testified on his own behalf as to the loan and non-payment thereof. Respondent failed to appear or to notify the court of his inability to be present. Judge Baker for good cause thereupon overruled respondent's counsel's motion for a continuance and proceeded with trial. After hearing the evidence and the plaintiff submitting to cross-examination, judgment was granted to John R. Swauger, plaintiff and appellant, April 7, 1948, for the sum prayed. Said order was made in the present of counsel for both parties.

Findings of Fact and Judgment were duly served upon respondent's attorneys on April 8th and signed and filed by Judge Baker on April 9th (R. 13-15). Notice of judgment and demand for payment thereof was served upon respondent's attorneys on April 9th.

Under date of April 12th, 1948 respondent's attorneys served and filed a "Motion for New Trial," (R. 19) setting forth substantially the statutory grounds and stating that affidavits were to be filed. No affidavit in support thereof was filed within the permissive five day period, or at all. After according respondent ample opportunity to file an affidavit in support of the motion for new trial, said motion was duly called up for hearing for May 22, 1948 (R. 20).

On May 22nd said motion for new trial was argued by counsel of record for both parties and Judge Baker in the presence of counsel thereupon entered his Order, May 22, 1948, denying said motion for new trial (R. 21).

Execution was issued to enforce payment of the judgment and on June 17, 1948 respondent's Mercury station wagon was levied upon by the Sheriff of Salt Lake County and impounded. On June 22, 1948, respondent made an affidavit and motion to quash the execution and noticed the matter for argument for June 28th. On said date neither respondent nor his counsel appeared and the motion was stricken from the calendar (R. 26).

On July 8th, 92 days after trial of the case and the Judge's oral order granting judgment and 90 days after entry of written judgment, respondent served and filed a "Motion to Open or Vacate Judgment," (R. 30) and an affidavit to support the motion, the same date calling up his motion for argument on August 5th (R. 31). Said motion was resisted (R. 35-36). On said date the motion was argued by both counsel and taken under advisement. By minute order dated October 15, 1948, (R. 34) Judge Baker vacated and set aside the judgment thereby permitting respondent to have a new trial.

Demand for trial was at once made and on December 6, 1948 an "Amended Answer" was filed asserting a new and different defense alleging a purported corporate investment,

an entirely new theory, which was abandoned at trial and excluded from the Findings of Fact and from the Second Amended Answer filed after trial of the case (R. 48).

Upon re-trial of the case, over objections of appellant, before a different Judge, the issues were found against appellant and judgment of "no cause of action" entered January 10, 1949 (R. 53).

### STATEMENT OF ISSUES

1. The District Court was without jurisdiction to hear the motion to vacate and grant the new trial.

2. The Order denying the Motion for New Trial was res adjudicata as to the issues involved in vacating the judgment and granting thereby a new trial.

3. The defendant is guilty of laches in failing to file his affidavit in support of the motion for new trial and hence barred from later asserting such.

4. The Court erred and abused its discretion in granting the Motion to Vacate the Judgment.

5. The Court erred and abused its discretion in permitting the amendment of the Answer in said case.

### ARGUMENT I.

*The District Court was without jurisdiction to hear the motion to vacate the judgment and grant thereby a new trial.*



On May 22, 1948 the defendant's motion for new trial was argued before the court by counsel on both sides and thereupon denied (R. 21). Full and ample opportunity was presented to the defendant to assert any grounds which he considered sufficient to warrant a new trial.

By the Motion to Vacate Judgment filed July 8, 1948 the defendant in essence was seeking a rehearing on the motion for a new trial. It is the function of the Supreme Court to review on appeal, by proper procedure, the granting or denying of that motion for new trial. The District Court was without jurisdiction thereon.

In the case of *Luke vs. Coleman*, 113 Pac. 1023; 38 Utah 383, a very similar situation developed. Judgment was entered in favor of the defendant. A motion for new trial was filed, heard and submitted October 17, 1908. On October 28th the motion was overruled. December 19th the plaintiff filed a petition and motion to grant a rehearing and reargument of the motion for new trial. Said motion was not acted upon until June 3, 1909 when it was denied.

Before the Supreme Court it was urged that the appeal filed November 4, 1909 was not taken within time. The plaintiff urged that the finality of the judgment was suspended by the pendency of the motion for rehearing. Your Supreme Court held:

"We think the District Court had not the power to entertain such a motion. It is unknown to our practice. In California, where the practice relating to



new trials is similar to ours, it is firmly established that the Court has no power to reopen the question of granting or denying a motion for a new trial after disposing of it."

"In the next place, the power of the district court to rehear and re-examine the cause was once invoked by plaintiff's first application for a retrial. After the application was denied, to then also permit a petition to rehear and re-examine the order denying the motion is in effect to allow the limited time within a motion for a new trial may be made to be enlarged and to render the proceedings after judgment interminable. There must be some point where the losing party turned over to the appellate court for redress. *Coombs v. Hibberd*, supra. We think the district court was without jurisdiction to entertain the application for rehearing; that the judgment became final when the court, on the 28th day of October, 1908, denied the motion for a new trial; and that the appeal taken on the 4th day of November, 1909, was therefore too late."

This decision has not been modified or reversed. Then as now, there existed what is our Section 104-14-4, Utah Code Annotated, 1943, in substantially identical language. To permit the proceeding followed by Judge Baker in this present case, leads to chaos. No certainty of status can be assured to a client. The orderly procedure of appeal to your Court is thwarted.

It is pertinent to observe that no steps have been taken to change or recall the motion denying a new trial. Thus two diametrically opposed orders of the court still stand.

## ARGUMENT II - III

*The Order denying the Motion for New Trial (R. 21) is res adjudicata as to the issues raised by the motion.* Among the grounds stated for the said Motion are these:

(a) Irregularity in the proceedings of the Court, and of the adverse party, and in the orders of the Court, and abuse of discretion by which the defendant was prevented from having a fair trial.

(b) Accident and surprise which ordinary prudence could not have guarded against.

(c) Newly discovered evidence, material for the defendant, which he could not with reasonable diligence have discovered and produced at the trial.

These same issues were again raised by the Motion to Vacate the Judgment and the accompanying affidavit: By hearing and granting said last motion, the court failed to abide by its earlier decision on the same issues. The defendant was given two clear chances to raise and argue the same legal principles involved.

All of the facts stated in the belated affidavit were known to the defendant and his legal counsel prior to the time of filing the motion for new trial on April 12, 1948. This is established by the affidavit (R. 28) wherein it states that the defendant on his return to Salt Lake City on April 7th "immediately contacted his attorney."

Still it was not until July 8, 1948, after defendant had failed in his effort under purported bankruptcy proceedings (R. 22) to regain the Mercury Station Wagon impounded by the Sheriff pursuant to the execution, that any affidavit was made or filed on the facts. By dilatory conduct the defendant and his counsel stalled and delayed the proceedings. Absolutely no excuse is shown in the record for not filing the affidavit in time for the Court to have the same before it when considering the Motion for New Trial. Obviously the purported grounds must not have been stated to his counsel by the defendant.

This is a clear case where the defendant should be estopped, because of his laches, from asserting the plea for equitable relief 92 days after the judgment ordered in April. The basic maxim of "clean hands" applies. He who seeks equity should do equity, and should avail himself of the relief within a reasonable time. The delay of months incurred herein was wholly unreasonable. (See *McMillan vs. Forsythe*, 47 *Ut.* 571; 154 *P.* 959).

This appellant has suffered grievously. In accord with the established rules of trial, he left his business in Salmon, Idaho, and attended at Salt Lake City, Utah on the date set. By the rehearing and reversal on the motion for new trial, Judge Baker erroneously forced him to again travel, in the dead of winter, the long distance and to again appear at trial and meet, not the pleadings filed originally, but a defense of which he was not previously apprised by any existing pleadings.

The original answer (R. 5) in January was only a general denial. The Amended Answer (R. 41) filed after the judgment had been vacated, set forth a purported affirmative defense rejected by the court. Finally, after judgment, a Second Amended Answer was filed (R. 48) setting forth an entirely different theory. Here again, we urge that the defendant was guilty of laches in complying with the fundamental rule of a motion to vacate judgment, that a valid defense be promptly asserted. Apparently the defendant had not honestly advised his counsel of the facts of the case at any stage of the proceedings until the final, second trial. By this measure may the worth of his Affidavit be judged.

#### ARGUMENT IV.

*The court erred in granting the Motion to Vacate Judgment.* Practically 99% of the cases wherein a judgment has been vacated under section 104-14-4 are *default* judgments. This case is not such. The defendant's counsel duly appeared at the trial and cross-examined the plaintiff. No irregularities on the part of the court at the first trial have been asserted, as none existed.

It is our position further that notice of the time of trial having been duly given in conformance with the rules of the court, and it being acknowledged by the defendant in his affidavit through his third counsel of record, that he knew of the time of trial some seven days prior to the date thereof, that he was not entitled to have the relief prayed for. His counsel was diligent in advising him of the time and place of trial.

Your Supreme Court in the case of *Campbell vs. Union Savings & Investment Company*, 63 *Ut.* 366; 226 *Pac.* 190, held that even in a default judgment matter the court would not set aside the judgment so entered inasmuch as the rules of the court had been complied with as to the giving of notice to the parties litigant of the time of trial. It is obvious that such must be followed, otherwise the district court would be constantly imposed upon by applications of this nature whereby after setting aside other cases and attending at the time of trial, together with the one party litigant, the court would be requested to give to the defendant additional time and additional consideration in the trial of a lawsuit.

Particularly in this case we feel that the defendant is bound because competent legal counsel of the firm engaged by the defendant appeared and cross-examined the plaintiff and investigated the issues which they subsequently raised. No allegation of neglect, omission or mistake by his attorneys has been raised.

The only reason why the defendant was not in attendance was that he carelessly and recklessly conducted himself so as to be absent. He is presumed to have intended the result which followed his conduct. Only his self-serving affidavit tends to excuse his absence from trial.

In the case of *Peterson vs. Crosier*, 29 *Utah* 235; 81 *Pac.* 860, a defendant, against whom judgment had been taken, sought to have the judgment vacated upon the basis that had he attended the trial he would have lost his employment. That

ground was denied by your court. The defendant Lawler in this particular case finds himself practically in the same situation, except that he was personally represented by legal counsel at the trial. Mr. Lawler preferred to attend to other business by reason of a bad check issued to him, knowing of the time of trial, the areas involved and, if his alleged physical condition does exist, such was also known to him. The plaintiff, Mr. Swauger, and his father came from Salmon, Idaho to attend at the time of trial, set aside their other business and paid their expenses of transportation, lodging and necessary costs in attending the trial at the time set by this court. Legal counsel and the court set aside other matters to attend the trial.

It would be manifestly unjust, on the merits of this matter, to ratify the granting of the new trial for the reason that the defendant had the benefit of cross examination of the plaintiff and then amended his answer so as to present to the court the purported defense referred to in the affidavit. The only issue before the court at the time of the first trial was the execution of the loan for \$1000.00, as all the defendant filed was a general denial of the plaintiff's complaint. See: *Peterson vs. Crosier* (supra).

No place in the pleadings does the defendant offer to do equity in this matter. The records in this case will show that nothing was done by way of this motion to vacate until the nintieth day after written judgment and then not until the Sheriff of Salt Lake County had impounded the defendant's station wagon pursuant to an execution duly issued by the court. Now he has imposed upon the court the burden of a



rehearing on the motion denying a new trial and without seeking to do equity himself. Even if such second trial were legally available to him, he has wrongfully imposed upon the plaintiff the cost and expense of additional travel to Salt Lake to attend at the trial and re-litigation of the matters already adjudicated.

Additional cases may be cited to affirm the general rule that a judgment once entered by a court of competent jurisdiction, in the presence of counsel for both parties, after introduction of evidence at a time duly set and noticed, pursuant to the court's rules, will not be set aside or vacated. As to *default* judgments, the matter is one of discretion. Here, however, we submit that after denying the motion for new trial the court had no jurisdiction to vacate the judgment and further, if by any strained construction it is felt that jurisdiction and power still remained to vacate the judgment, the court grossly abused its discretion in granting the motion to vacate.

At this time by the judgment roll, your court has before it all of the facts, records and affidavits before the District Court on these issues. You may review the same as to facts and law and determine the issues. You are not bound by the Order of the District Court. You should by your decision, reinstate the first judgment entered herein in favor of the plaintiff and appellant.



## ARGUMENT V.

*We urge that the District Court further erred and abused its discretion in allowing the defendant to amend his answer, after trial, after denial of his Motion for New Trial and after the vacating of the judgment.* As heretofore indicated, the defendant's attorney participated in the first trial of the case upon the issues created by the pleadings. He cross-examined the plaintiff and then months later the defendant completely altered the theory of his defense. Even this was again altered after final judgment by a Second Amended Answer.

No equitable basis for amendment was asserted. No new evidence or other grounds were alleged. No surprise is even intimated as a supporting reason for the multiple shifting of theory. It is our firm contention that the court erred to the prejudice of the plaintiff (appellant) in tolerating such vacillating conduct.

WHEREFORE, appellant respectfully and emphatically urges that your Honorable Court review this matter fully and thereupon enter an order cancelling and annulling the second judgment entered in this case, (on January 10, 1949) and that the October 15th, 1948 Order Vacating Judgment be annulled and the original judgment signed and filed April 9, 1948 be fully reinstated.

Respectfully submitted,

PUGSLEY, HAYES & RAMPTON,  
*Attorneys for Appellant*