

1949

John B. Swauger v. W. C. Lawler : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Leonard S. Ralph; Attorney for Respondent and Defendant;

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

Recommended Citation

Brief of Respondent, *Swauger v. Lawler*, No. 7316 (Utah Supreme Court, 1949).

https://digitalcommons.law.byu.edu/uofu_sc1/1093

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN R. SWAUGER,

Appellant,

— vs. —

W. C. LAWLER,

Respondent.

Case No.
7316

Respondent's Brief

Appealed From the Third Judicial District Court In and
For Salt Lake County, State of Utah.

HONORABLE CLARENCE R. BAKER and
RAY VAN COTT, JR., *Judges*

FILED

LEONARD S. RALPH,
*Attorney for Respondent
and Defendant.*

PUGSLEY, HAYES &
RAMPTON,
*Attorneys for Appellant
and Defendant.*

SUPREME COURT, UTAH

I N D E X
S U B J E C T S

	Page
PRELIMINARY STATEMENT	1
POINT I	
SINCE NO BILL OF EXCEPTIONS WAS FILED OR SETTLED, THE APPEAL IS ON THE JUDGMENT ROLL ONLY, AND THE ONLY QUESTION FOR REVIEW IS THE QUESTION OF THE SUFFICIENCY OF THE PLEADINGS TO SUSTAIN THE JUDGMENT	2
POINT II	
THE PLEADINGS ARE SUFFICIENT TO SUSTAIN THE JUDGMENT OF NO CAUSE OF ACTION	3
POINT III	
HAVING FAILED TO SERVE, FILE AND SETTLE A BILL OF EXCEPTIONS, RELATING TO THE PROCEEDINGS HAD WHEREBY THE PRIOR JUDGMENT WAS SET ASIDE, THE APPELLANT HAS FAILED TO PRESERVE THIS ISSUE FOR REVIEW BY THE SUPREME COURT.....	3
POINT IV	
THE MOTION TO OPEN OR VACATE JUDGMENT FILED BY THE RESPONDENT WAS FILED UNDER THE PROVISIONS OF SECTION 104-14-4 U.C.A. 1943, TO VACATE OR OPEN A JUDGMENT ON THE GROUNDS OF EXCUSABLE NEGLECT, AS PROVIDED BY THAT SECTION.....	8
POINT V	
THE NATURE OF THE RESPONDENT'S DEFENSE BELOW WAS SUCH THAT IT WAS NECESSARY FOR HIM TO BE PERSONALLY PRESENT	10
POINT VI	
SECTION 104-14-4, U.C.A. 1943, IS DESIGNED TO INSURE INsofar AS POSSIBLE THAT PARTIES LITIGANT WILL BE PROTECTED WHERE MISFORTUNE OF THE TYPE AND NATURE SET FORTH HEREIN HAS OCCURRED....	11
POINT VII	
THERE WAS NO ERROR OR ABUSE OF DISCRETION ON THE PART OF THE COURT IN PERMITTING AMENDMENT OF THE ANSWER	15

I N D E X (Continued)

CASES CITED

	Page
Atkinson v. Pellegrino, 110 Utah 363, 173 P. 2d 543	2, 3
Blythe and Fargo Co. v. Swensen, 15 Utah 345, 49 Pac. 1027.....	11
Bryant v. Kunkel, 32 Utah 377, 90 Pac. 1039	2
Byron v. Utah Copper Co., 53 Utah 151, 178 P. 53.....	2, 3
Campbell v. Union Savings & Investment Company, 63 Utah 336, 226 Pac. 190	12
Coates v. Allen, 88 Utah 545, 56 P. 2d, 612	2, 3
Cornelius v. Mohave Oil Co., 66 Utah 22, 239 P. 475.....	5
Dahlberg v. Dahlberg, 77 Utah 157, 292 Pac. 214	2
Evans v. Jones, 10 Utah 182, 37 Pac. 262.....	5
Gray v. Defa, 103 Utah 342, 135 P. 2d 251	2
Hurd v. Ford, 74 Utah 46, 276 Pac. 908	11
Hutchinson v. Smart, 51 Utah 172, 169 Pac. 166	2
Johnson v. Continental Casualty Co. 78 Utah 18, 300 Pac. 1032....	4, 11
Luke v. Coleman, 38 Utah 383, 113 Pac. 1023	9
Madsen v. Hodsen, et al, 69 Utah 527, 256 Pac. 792	5, 9, 10
McMillan v. Forsythe, 47 Utah 571, 154 Pac. 959	15
Mary Jane Stevens Co. v. First National Building Co., 89 Utah 456, 57 P. 2d 1099	14
McCullough v. McCullough, 37 Utah 148, 106 P. 665	5
Metz v. Jackson, 43 Utah 496, 136 P. 784	2
Naisbitt v. Herrick, 76 Utah 575, 290 Pac. 950.....	5
Peterson v. Crozier, 29 Utah 235, 81 Pac. 860	12
Thomas v. Morris, 8 Utah 284	9, 11

STATUTES CITED

U.C.A. 1943, Section 104-14-4	4
U.C.A. 1943, Section 104-40-4	8
U.C.A. 1943, Section 104-39-14	4

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN R. SWAUGER,

Appellant,

— vs. —

W. C. LAWLER,

Respondent.

Case No.
7316

BRIEF OF RESPONDENT

Appealed From the Third Judicial District Court In and
For Salt Lake County, State of Utah.

HONORABLE CLARENCE E. BAKER and

RAY VAN COTT, JR., *Judges*

PRELIMINARY STATEMENT

This appeal is from a judgment of “No Cause of Action” entered against the plaintiff-appellant, and in favor of the defendant-respondent. The notice of appeal indicates that the appeal is taken from the findings of fact, and judgment, and from the order of the District Court vacating and setting aside the judgment formerly entered April 9, 1948 in favor of the plaintiff-appellant, and against the defendant-respondent. (R. 54.)

The respondent deems the statement of facts as outlined by the appellant to be insufficient, and will hereafter set forth certain additional facts. Before doing so however, respondent raises three points which are believed to be determinative of this appeal, and which preclude a consideration of the matters raised by the Appellant on this appeal.

POINT I.

Since No Bill of Exceptions Was Filed or Settled, the Appeal Is On the Judgment Roll Only, and the Only Question for Review is the Question of the Sufficiency of the Pleadings To Sustain the Judgment.

No bill of exceptions was served, settled or filed in this action, and for that reason, there is nothing before the court to review except the matters presented by the judgment roll. *Byron v. Utah Copper Co.*, 53 Utah 151, 178 Pac. 53; *Dahlberg v. Dahlberg*, 77 Utah 157, 292 Pac. 214.

The cases are numerous holding that when no bill of exceptions is filed, the only question that can be determined is whether the pleadings are sufficient to support the findings and judgment. *Coates v. Allen*, 88 Utah 545, 56 P. 2d 612; *Dahlberg v. Dahlberg*, 77 Utah 157, 292 Pac. 214; *Hutchinson v. Smart*, 51 Utah 172, 169 Pac. 166; *Metz v. Jackson*, 43 Utah 496, 136 Pac. 784; *Bryant v. Kunkel*, 32 Utah 377, 90 Pac. 1039; *Gray v. Defa*, 103 Utah 342, 135 P. 2d 251; *Atkinson v. Pelligrino*, 110 Utah 363, 173 P. 2d 543.

POINT II.

The Pleadings are Sufficient to Sustain the Judgment of No Cause of Action.

While this matter is raised by the appellant's notice of appeal, it is not assigned as error in the statement of issues, nor is it argued by the appellant in his brief. See *Coates v. Allen*, 88 Utah 545, 56 P. 2d 612; where the effect of such failure is fully discussed, and under facts similar to the present case on this point, the Supreme Court held that there was nothing to review.

The pleadings indicate that the plaintiff was proceeding upon the theory of a loan. The amended answer and the second amended answer both affirmatively allege a business enterprise entered into by the plaintiff, the defendant, and others, whereby this money allegedly loaned to the defendant was actually a contribution toward the capital of the business venture. The findings uphold the defendant that this was in fact so, and the court entered its judgment of "No Cause of Action". There is nothing irregular in the judgment roll relative to the pleadings, findings of fact, conclusions of law, or judgment.

When an appeal is taken on the judgment roll alone, the Supreme Court is bound to assume that the findings of the trial court were true and supported by the evidence. *Byron v. Utah Copper Co.*, 53 Utah 151, 178 Pac. 53; *Atkinson v. Pellegrino*, 110 Utah 358, 173 P. 2d 543.

POINT III.

Having Failed to Serve, File and Settle a Bill of Exceptions, Relating to the Proceedings Had Whereby the Prior Judgment Was Set Aside, the Appellant Has Failed to Preserve This Issue for Review by the Supreme Court.

The motion to open or vacate a judgment under Section 104-14-4 U.C.A. 1943, affidavits and other proceedings had in support thereof, and the rulings and orders of court in regard thereto are no part of the judgment roll. Section 104-39-4, U.C.A. 1943. In order for the appellant to preserve this matter for review upon appeal he must have presented a bill of exceptions in the proper manner in order that this court might pass upon the questions, and in the absence of such a bill of exceptions, there is nothing before this court to be reviewed.

In the case of *Johnson v. Continental Casualty Co.*, 78 Utah 18, 300 Pac. 1032, at page 22, this rule is announced in the following language:

“* * * The application for relief under section 6619 (present section 104-14-4, U.C.A. 1943) presents an issue which must be tried by the court as any other issue, and before any party is entitled to have a decision on such an issue reviewed on appeal it is necessary that the proceedings had thereunder be incorporated in a bill of exceptions duly authenticated by the certificate of the judge. *Comp. Laws Utah 1917, Sec. 6971; Somers v. Somers*, 81 Cal. 608, 22 P. 967. The matter of granting relief under section 6619 (104-14-4) rests largely within the sound discretion of the court to which the application is made, and his rulings with respect thereto will not ordinarily be disturbed unless it is made apparent that the court has abused such discretion. Clearly, the party who seeks a reversal of such an order has the duty of bringing to this court a properly authenticated record by a bill of exceptions of the proceeding had before the court on that particular issue. This was not done, and for

that reason the motion of respondent must prevail.

Since no ruling is presented for review, except as is required to be exhibited by a bill of exceptions, and since there is no bill, it follows that the judgment of the district court must be, and the same is affirmed.

Other cases to like effect are Madsen, et al, v. Hodson, et al., 69 Utah 527, 256 Pac. 792; Cornelius v. Mohave Oil Co., 66 Utah 22, 239 Pac. 475; and see generally on this question Evans v. Jones, 10 Utah 182, 37 Pac. 262, and McCullough v. McCullough, 37 Utah 148, 106 Pac. 665.

In the case of Madsen v. Hodson, supra, a bill of exceptions had been filed; however, the bill of exceptions contained only a minute entry which purported to record the action of the court in overruling a motion to vacate the judgment. The record did disclose the motions made, and the supporting affidavits apparently, but these matters were not to be found in the settled bill of exceptions. This Supreme Court held that the matter was not before it for review, in the following language:

“* * * The very purpose of asking this court to review a ruling of the trial court on a motion of this nature is to determine whether the court abused its discretion. The motion, if there was one, to vacate the judgment, and the evidence in support of that motion, not being properly certified to this court, cannot be reviewed by us. Every presumption is that the trial court did not abuse its discretion.”

See also the case of Naisbitt v. Herrick, 76 Utah

575, 290 Pac. 950, wherein the necessity for a bill of exceptions covering proceedings had under Section 104-14-4, U.C.A. 1943, is further recognized, and for a case wherein such a bill of exceptions was properly brought, and the matter reviewed.

“An examination of Section 104-30-14, U.C.A. 1943, indicates that the motion to set aside or vacate judgment, affidavits in support thereof, and order and proceedings had thereon are not a part of the judgment roll, unless a bill of exceptions is preserved on these points and included in the appeal.”

ADDITIONAL STATEMENT OF FACTS

While respondent takes the position that there is nothing before the court to be reviewed relative to the order of the District Court opening and vacating the former judgment, and that therefore the appeal must be determined in favor of the respondent, he nonetheless, without waiving said position desires to answer the arguments of the appellant, and meet the issues raised by appellant in his brief, and in order to do so, it is felt that an additional statement of facts might be helpful to the court.

The appellant and the respondent, together with J. E. Rafferty (R. 29) and one Weston Daines (Def. Ex. 1, R. 56) proposed the purchase of an airplane for their joint use and benefit (R. 48). The parties purchased the airplane in September, 1946, in the name of Air Service Inc., a corporation to be formed. The appellant gave to the respondent his check for \$1,000.00 (Pl. Ex. A) to ward the purchase price of said airplane which sum was

utilized, together with sums of money similarly contributed by Raferty (R. 29) and respondent.

The parties consulted counsel for the purpose of incorporating this joint venture. The articles of incorporation were signed but they were never filed, and a charter never issued by the State of Utah. The said corporation was never completed due to sudden financial reverses requiring full attention of the parties to other matters. The airplane was purchased in the summer of 1946 and used intermittently until the spring of 1947, at which time the parties were unable to maintain installment payments required under the contract of purchase, and the lienholder repossessed said airplane. The net result of this venture was a loss of all the funds which had been invested in said airplane, and which funds included the \$1,000.00 which appellant later alleges was a loan. (R. 1.)

A complaint was filed in the Third Judicial District Court on January 16, 1947 (R. 1) by Barclay and Barclay, appellant's counsel who later withdrew. (R. 6.)

The case was set for April 7, 1948. The day before the trial the respondent was driving from Ashton, Idaho to Salt Lake City, to appear at the trial (R. 28) the following day, April 7th. While enroute, he became ill due to a severe attack of hemorrhoids and was unable to drive his automobile, so he parked on the highway and attended to himself. Respondent was unable to reach Salt Lake City in time for the trial. He sent a telegram to his counsel the morning of April 7th, requesting a continuance. The telegram did not reach the counsel in

time. The counsel representing respondent at this the first trial was an associate sent over to court by the respondent's retained counsel of record, McKay, Burton and White. Reed Richards (R. 11) who appeared at the first trial was not known and is still not known to the respondent, nor was he his attorney. Richards asked for a continuance which was denied. After hearing the evidence of the plaintiff only, judgment was granted as prayed.

Judgment was entered on April 9, 1948, by the clerk of the court. A motion for a new trial made on April 12, 1948, was denied on May 22, 1948 (R. 21). Thereafter, on July 8th, within 90 days as provided for in Section 104-14-4, U.C.A. 1943, respondent, through his present counsel filed a motion to open or vacate the judgment on grounds provided in section 104-14-4, together with his affidavit (R. 48) in support thereof. This motion and affidavit interposing his defense for the first time was heard by the same Judge who heard the original motion for a new trial. This motion was granted.

POINT IV.

The Motion to Open or Vacate Judgment Filed By the Respondent Was Filed Under the Provisions of Section 104-14-4, U.C.A. 1943, to Vacate or Open a Judgment on the Grounds of Excusable Neglect, as Provided By That Section.

This was not a motion to allow the defendant (Respondent) to file a motion for a new trial, as where he has failed within the requisite time under section 104-40-4, U.C.A. 1943, to file such motion, and he thereafter

seeks permission to do so. Such a proceeding is provided for under Section 104-14-4, U.C.A. 1943, as is also the proceeding which the respondent in fact instituted. The distinction between the two is clearly set forth in the case of *Thomas v. Morris*, 8 Utah 284; and in *Madsen v. Hodson*, 69 Utah 527, 256 Pac. 792.

The case of *Luke v. Coleman*, 38 Utah 383, 113 Pac. 1023, relied upon by the appellant, has no application to such a motion as was here filed. The *Luke v. Coleman* case was one wherein the losing party filed a motion for new trial which motion was argued and decided adversely to him. He thereafter filed a motion for a rehearing and reargument of the motion for new trial. The Supreme Court held that the District Court had no power to entertain such a motion, that it was not a recognized pleading.

The grounds for setting aside a judgment for excusable neglect whereby the respondent was precluded by his unavoidable absence from setting up what later proved to be a valid defense, differs vastly from the review upon the ordinary motion for a new trial under Section 104-40-4. Judge Baker of the District Court heard both motions.—New Trial (R. 21) Motion to open or vacate judgment (R. 33, 34). Obviously he considered the grounds in the second instance to be sufficiently different and that the defendant had been precluded from setting up his defense under circumstances which would justify a vacation of the original judgment, and for this reason he vacated the judgment, in order to promote substantial justice between the parties as was his discretionary power under Section 104-14-4, U.C.A.

1943. What the substance of the argument was in the court below on the motion for new trial does not appear from the record before the Supreme Court. Present counsel for the respondent, did not represent respondent in the proceedings had to that point. If, as argued by the appellant, the same matters were gone into in both instances, seemingly the burden should be upon appellant to sustain his position. Respondent's position in this regard is sustained by the ruling of Judge Baker, by his order vacating the former judgment upon the showing made before him on that matter. "Every presumption is that the trial court did not abuse its discretion". *Madsen v. Hodson*, 69 Utah 527, 256 Pac. 792. Respondent takes the position that the fact that Judge Baker made both rulings, (Denial of motion for new trial, and order opening and vacating judgment) is strongly indicative that different matters were encompassed in the two motions. Certainly the court cannot say from anything which appears before it, that the grounds were the same.

POINT V.

The Nature of the Respondent's Defense Below Was Such That It Was Necessary For Him To Be Personally Present.

If the motion, affidavits and order on the motion to vacate or open the judgment are before the court, and this latter part of respondent's brief is predicated upon that supposition, then the nature of the respondent's defense in this matter is set forth, and it was apparent that his presence was absolutely necessary in order to properly and adequately present that defense. The trial court, on the showing before it, exercised his discretion

in the matter, and upon a trial of the issue on its merits before yet another judge the defense was interposed and sustained. It is submitted that this honorable court should not under such facts and circumstances overrule the lower court. The matter of granting relief under this section rests largely within the sound discretion of the court to which application is made. *Johnson v. Cont. Casualty Co.*, 78 Utah 18, 300 Pac. 1032; *Hurd v. Ford*, 74 Utah 46, 276 Pac. 908; *Blythe and Fargo Co. v. Swensen*, 15 Utah 345, 49 Pac. 1027; *Thomas v. Morris*, 8 Utah 284.

POINT VI.

Section 104-14-4, U.C.A. 1943, is Designed to Insure Insofar As Possible That Parties Litigant Will Be Protected Where Misfortune of the Type and Nature Set Forth Herein Has Occurred.

While it is true that many of the cases wherein the court's have vacated judgments, have been cases wherein default judgments have been entered, the statute in no way limits its use to those cases, nor has the Supreme Court so construed it. Appellant concedes that not all cases where relief has been granted are default cases. Where the facts bring the case within the section of the statute, and the court in the exercise of its wise discretion has determined that the facts are sufficient upon which to grant the relief authorized in the statute, and a trial on the merits in which the respondent's defense is fully sustained, the respondent takes the position that this court should not seek to restrict the use of this remedy, particularly in view of the fact that the merits

of respondent's defense have been upheld, and the appellant has not sought to review those merits.

Appellant relies upon the case of *Campbell v. Union Savings & Investment Company*, 63 Utah 336, 226 Pac. 190, in support of his contention that the lower court erred in granting the motion to vacate judgment. The facts of that case reveal that it was a suit to quiet title. The question was whether the court abused its discretion in failing or refusing to vacate the judgment. The court tried the case in the absence of the defendant and its attorney and this was relied upon by the defendant in that case. Defendant's attorney contended that he did not have proper notice of the trial date, therefore judgment should be set aside. The Supreme Court sustained the trial court and denied the defendant's motion to vacate.

In the present case, there was no default, nor any contention of lack of notice. What the defendant (respondent) did by his motion was to ask for his day in court in order to interpose his defense, and the basis of his motion was that of excusable neglect and illness. This differs vastly from the failure of the defendant's attorney in the *Campbell* case to diligently discover that the case was to be tried, where court rules relative to such notice had been complied with.

Appellant also relies upon the case of *Peterson v. Crozier*, 29 Utah 235, 81 Pac. 860. This was a seduction case. The defendant did not appear at the trial although he had ample notice of the time and place where it was to be held. His excuse was that he could not leave his job for he would lose it. The Supreme Court on review

sustained the lower court in holding that this was not excusable neglect, stating that the affidavit rather than showing excusable neglect, tended to show a deliberate intention on his part to abandon his defense and permit the plaintiff to take a judgment against him. In the present case the defendant was sick and ill enroute to the trial, and although represented by an attorney, it was other than counsel actually retained by him, and one who did not know the facts of the case, nor have the file of the case.

It should further be borne in mind that in the present case the lower court upheld the contention that excusable neglect existed, and he vacated the judgment. The review is only as to abuse of discretion, and where he is supported as in the present case, there is no abuse of discretion shown. The two cases relied upon by appellant are distinguishable, but they do have one feature in common—the court in each instance held that there was no abuse of discretion. Respondent contends that such should be the ruling in the present case.

The court having exercised its discretion in this matter, there is no merit in the contention that laches, even if available to appellant in this action, should act as a bar to the respondent. There is nothing to indicate in any event that appellant should prevail under a theory of laches since all that is shown is the bare passage of 90 days' time from the entry of judgment, and only a matter of 46 days from the overruling of his motion for a new trial. Something more than the mere passage of time is contemplated in order that a party may prevail under the doctrine of laches. Mary Jane

Stevens Co. v. First National Building Co., 89 Utah 456, 57 P. 2d 1099. There is nothing indicating any change of position, nor does the appellant so argue. He argues that there has been hardship on the plaintiff in having to return to again fight the case. This argument loses sight of the equities as between the parties. The court in the second instance held that the plaintiff did not have a cause of action at all. He cannot be heard to complain that having recovered a judgment on a claimed cause of action that had no validity, that he has been injured when the gain in the form of the judgment has been taken away from him where the court has ruled that he is not entitled to that gain. What the court did in vacating the first judgment was clearly "in furtherance of justice" (Section 104-14-4, U.C.A. 1943).

The time for filing an appeal from the original judgment had not run when respondent entered his motion before the court to vacate or open the judgment. It is difficult to see how laches could bar the respondent from one type of relief authorized by the statute during the time when that relief is available to him in the discretion of the court, when no other of his rights under other statutes have expired.

The appellant's statement of the issue relative to laches is that respondent is barred from asserting an affidavit to support a motion for new trial, because such affidavit was not filed at the time the motion for new trial was filed. Since the matter in issue is a motion to vacate or open a judgment on the grounds of excusable neglect, this assertion is without merit.

POINT VII.

There Was No Error or Abuse of Discretion on the Part of the Court in Permitting Amendment of the Answer.

The second amended answer was filed to comply with the order of court to enable the pleadings to conform to the proofs. There was an immaterial variance which the second amended answer corrected. An examination of the amended answer and the second amended answer, together with the findings of fact, will disclose that the variance was not a material one. The respondent's theory was that the appellant had engaged in a business enterprise with the respondent and others. The exact nature of that enterprise is immaterial. The important thing is the determination that he did in fact enter into such an enterprise. The amended answer alleged this to be a corporation, the proofs established a joint venture.

The amended answer was interposed in order that defendant might properly take advantage of the defense available to him. The judgment had previously been vacated, and an affidavit filed setting forth the substance and nature of the proposed defense, and therefore the appellant had notice of the proposed defense. It was a matter of discretion with the court whether he would allow such amendment. There was no abuse of that discretion.

The case of *McMillan v. Forsythe*, 47 Utah 571, 154 Pac. 959, has no application to this case.

CONCLUSION

It is respectfully submitted that there is nothing before this honorable court whereby a review can be had of the proceedings relating to the motion to vacate or open the judgment and proceedings had thereon, and that the lower court should be affirmed on the judgment roll, since no other contention is made in this appeal, save those matters referring to the motion and proceedings had subsequent thereto. The pleadings amply sustain the judgment on the merits.

If the motion and proceedings subsequent thereto are properly before this honorable court, then it is respectfully submitted that the proceedings sustain the district court in its vacation of the judgment, and there is nothing indicating an abuse of that discretion, and the appellants position on appeal is without merit. Judgment of the lower court should be affirmed.

Respectfully submitted,

LEONARD S. RALPH,
*Attorney for Respondent
and Defendant.*