

1951

Glen L. Nicewinter v. David H. Nicewinter and Geneva C. Nicewinter and Marie M. Diner : Appellants' Reply Brief

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.

Skeen, Thurman & Worsley; William T. Thurman; Attorneys for Appellants;

Recommended Citation

Reply Brief, *Nicewinter v. Nicewinter*, No. 7669 (Utah Supreme Court, 1951).
https://digitalcommons.law.byu.edu/uofu_sc1/1464

This Reply Brief 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

GLEN L. NICEWINTER,
Plaintiff and Respondent,

vs.

DAVID H. NICEWINTER and
GENEVA C. NICEWINTER,
Defendants and Appellants.

MARIE M. DIENER,
Defendant.

Case No.
7669

APPELLANTS' REPLY BRIEF

FILED

OCT 10 1951

SKEEN, THURMAN & WORSLEY
and WILLIAM T. THURMAN,

Clerk, Supreme Court, Utah

Attorneys for Appellants.

TABLE OF CONTENTS

Page

Points relied upon by Appellants :

Point No. 1. JUDGE VAN COTT'S DEGREE (R. 30, 31) HERE APPEALED FROM IS AN INTERLOCUTORY ORDER OR DECISION WITHIN THE PURVIEW OF 72 (b) OF UTAH RULES OF CIVIL PROCEDURE	1
A. NO MOTION TO DISMISS IS PROPERLY BEFORE THE COURT	2
B. EVEN IF A MOTION TO DISMISS WERE FILED IN PROPER FORM, IT CANNOT BE CONSIDERED BECAUSE NOT PRESENTED WITHIN PROPER TIME	4
C. THE JUDGMENT FROM WHICH THIS APPEAL IS TAKEN IS A FINAL JUDGMENT	7

Argument :

Point No. 1	1
A	2
B	4
C	7

Cases and Authorities :

Attorney General of Utah v. Pomeroy, 93 Utah 426, 73 P. (2d) 1277	3, 12
Benson v. Rozelle et al, 85 Utah 582, 39 P. (2d) 1113	8
Cahow v. Hughes, 173 So. 471 (La. 1937)	7
Childs v. Julian, 2 So. (2d) 453	11
Griffith v. Walesby et al, 91 SW (2d) 232 (Mo. 1936)	7
In re Sheeler's Estate, 284 N.W. 799 (Iowa, 1939)	6
Simmons v. Turner, 283 S.W. 47	11
Staley v. International Agricultural Corp., 194 So. 168.....	11

Statutes and Rules :

Utah Rules of Civil Procedure

Rule 7 (b) (1) and (4)	4
Rule 75 (j)	5
Rule 7 (b) (3)	5

2

IN THE SUPREME COURT of the STATE OF UTAH

GLEN L. NICEWINTER,
Plaintiff and Respondent,

vs.

DAVID H. NICEWINTER and
GENEVA C. NICEWINTER,
Defendants and Appellants.

MARIE M. DIENER,
Defendant.

Case No.
7669

APPELLANTS' REPLY BRIEF

In view of the fact that respondent's brief contains a point not considered in appellants' brief, a reply may prove of possible assistance to the Court. The point, appearing at page 17 of respondent's brief, reads as follows:

Respondent's Point No. 1

"JUDGE VAN COTT'S DECREE (R. 30, 31) HERE APPEALED FROM IS AN INTERLOCUTORY ORDER OR DECISION WITHIN THE PURVIEW OF 72 (b) OF UTAH RULES OF CIVIL PROCEDURE.

Under this point, respondent argues that the judg-

ment with which this appeal is concerned is interlocutory in character, and therefore requires compliance with the Utah Rules of Civil Procedure regarding an appeal from a judgment of this type. Later, and in the conclusion of his brief, respondent states, page 19, "No order having ever been issued authorizing this appeal, respondent moves that it be dismissed." This is, apparently, an attempt to dismiss the appeal, an attempt which is without merit because: A. no motion is properly before the court; B. such a motion may not be made at this late date; and C. the judgment from which the appeal is taken is a final judgment, and full compliance has been made with all appellate procedural requirements. In the interests of clarity, these items will be argued in order.

A. NO MOTION TO DISMISS IS PROPERLY BEFORE THE COURT.

The attempted motion is based upon technical grounds, in that respondent claims there has been a failure to comply with Rule 72 (b) of the Utah Rules of Civil Procedure, which provides that an appeal from an interlocutory order may be made by petition to this Court, which may grant the petition if the order complained of will involve substantial rights and a determination of the correctness of the order will better serve the interests of justice. Whether this rule is involved depends upon whether or not the judgment is interlocutory or final. It should be emphasized that the attempted motion does not involve any question of jurisdiction.

In Attorney General of Utah v. Pomeroy, 93 Utah

426, 73 P. (2d) 1277, the decision discusses a motion to dismiss based upon the ground that judgment was interlocutory, at page 450:

“* * * This excerpt is given from this old work on pleading to show that it was not jurisdictional with the review court, but a policy of the law which was quite uniformly adhered to but not inflexible. If the reasoning of the North Point Case is correct and our jurisdiction depends on the finality of judgments, a decision given by us might be nugatory where it was afterward discovered that by inadvertence the judgment appealed from was not final although no one questioned it. If our right to pass upon assigned error depends upon the finality of the judgment appealed from and such judgment was not final, any decision or opinion we might make would be as if it had not been made.

“In the light of these considerations, we think the North Point Case was not based on the proper grounds and we hold that section 9 of article 8 of the Constitution was a guaranty and not a restriction on the right of the litigant to appeal. Likewise, section 104-41-1, R. S. Utah 1933, was intended not to prevent this court from ever entertaining an appeal from other than what is technically a final judgment, but was meant to assure the right at all events from final judgments.”

In this case, since jurisdiction is not involved, the manner of attempted motion is of importance. The Utah Rules of Civil Procedure provide the manner in which

any motion shall be made, in Rule 7 (b) (1) and (4), which read as follows:

“(1) Motions. An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.”

“(4) Application of Rules to Motions, Orders and Other Papers. The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions, orders, and other papers provided for by these rules.”

It would seem perfectly obvious that where a party merely states in the conclusion of his brief that “he moves it be dismissed”, there has been a complete failure to comply with the rules in any respect, and there is therefore no motion before the Court which can be considered.

B. EVEN IF A MOTION TO DISMISS WERE FILED IN PROPER FORM, IT CANNOT BE CONSIDERED BECAUSE NOT PRESENTED WITHIN PROPER TIME.

The only attempt made to present this motion is found in respondent's brief, which is filed in answer to the brief of appellants. The notice of appeal was filed on March 9, 1951 (R. 38), almost seven months prior to the time of the filing of respondent's brief. On May 23, 1951, a stipulation extending time for filing of briefs

of both parties was signed by them, and an order based thereon entered in this Court on the same date. As late as September 10, 1951, and at the request of the respondent, both parties stipulated for the correction of a minor error in the record. It is of course obvious that appellants' brief had been filed literally months prior to the date set for argument before this Court.

Respondent, if a motion to dismiss upon other than jurisdictional grounds was contemplated, should have filed the same at least prior to the preparation and filing of the appellants' brief. Had this been done, the matter could have been set for hearing in proper manner, and ruling made thereon. While the Utah Rules of Civil Procedure do not seem to contain any provision relating exclusively to the argument on a motion of dismissal on appeal, Rule 75 (j) provides for a motion of the type here involved prior even to the time the complete record is settled and certified. In addition, Rule 7 (b) (3) provides for the manner in which a motion shall be presented to the Court. In any event, the tenor of these rules would indicate the desirability of disposing of such a motion at a time prior to the filing of the appellants' brief.

Certainly, this was clear under the provisions of the Supreme Court Rules as amended, which were published in the May-June 1947 issue of the Utah Bar Bulletin. We refer particularly to Rule V, under which rule we believe it clear that this attempted motion was not made within proper time.

We are not advised as to whether or not this rule

is still in effect. It is true that the Utah Rules of Civil Procedure have incorporated a few of the former Rules of the Supreme Court. At the same time, however, it is noted that the order of the Supreme Court adopting the rules, which appears in the Utah Rules of Civil Procedure at page VI, provides that all *laws* in conflict with those rules shall be of no further force or effect after January 1, 1950. In addition, the Utah Rules of Civil Procedure provide, at pages 186 and 187, that certain portions of Title 20, U.C.A., are superceded, and that all of Title 104 is revoked except the specifically detailed sections. There is no mention of the Rules of the Supreme Court, and so far as we can determine, no order has been entered specifically annulling those previously in force. If this be true, therefore, there would seem to be a distinct possibility that these rules of 1947, as amended, are still in force and effect, except as to any modification made in the Utah Rules of Civil Procedure, and since there is no conflict between Rule V and the Rules of Civil Procedure, this Rule may still be in effect.

Apart from these considerations, applicable law would seem to indicate that this appeal is not made within time. The decision in *In Re Sheeler's Estate*, 284 N.W. 799 (Iowa, 1939), states as follows at page 806:

“VII. Foft, as executor, and the Fidelity & Deposit Company, in their brief and argument, served November 17, 1938, in answer to the brief and argument of Champeny, for the first time raised the question that the Champeny appeal

should be dismissed. The causes for the 21st judicial district were set for hearing for November 23, 1938. If it be conceded to be a motion to dismiss the appeal, it was not timely served."

Again, in *Griffith v. Walesby et al.*, 91 S.W. (2d) 232 (Mo., 1936), the Court states at page 234:

"Aside from this, we do not think that the point was timely raised. The cause was set for hearing in this court on December 4, 1935. The abstracts and briefs were required to be served on the respondent 20 days prior to that time. The motion to dismiss the appeal was filed on November 23, 1935, which was after the abstract and brief of appellants were printed and filed in this court. The respondent could not have been prejudiced by the failure of the affidavit to follow exactly the words of the statute and he waited until after appellants had gone to the expense of printing their brief and abstract before raising the point. The motion to dismiss was filed too late (*Causey v. Wittig*, 321 Mo. 358, 11 S.W. (2d) 11; *State ex rel. v. Broadbus*, 210 Mo. 1, 108 S.W. 544) and it is overruled."

See also *Cahow v. Hughes*, 173 So. 471 (La., 1937).

C. THE JUDGMENT FROM WHICH THIS APPEAL IS TAKEN IS A FINAL JUDGMENT.

It will be noted that this judgment (R. 30) is based upon detailed findings of fact and conclusions of law (R. 21), that it provides for the sale of all interest of the parties in and to the real and personal property, allows a liquidated amount to be available to respondent

as cash in bidding, provides manner of notice, vacation and delivery of the premises to the successful bidder, and for deposit of proceeds with Clerk of the Court for a later accounting.

It is submitted that this is a final judgment, in the sense that the same is used from the standpoint of an appeal.

A Utah case which is closely related from a factual standpoint is *Benson v. Rozzelle et al.*, 85 Utah 582, 39 P. (2d) 1113. There, this Court held that a judgment as to certain defendants, or particular issues, or affecting special property, while all other equities as to other defendants and claims were reserved for further consideration, may be a final determination for purposes of appeal. The Court considered a number of previous Utah decisions, and in holding that the case involved a final order, summarized applicable law as follows, at page 590:

“This is a case in equity, and whether the case be considered upon the appeal or upon the application for a writ of review, this court is called upon to examine the record. To attempt to frame a general definition of what is or is not a “final judgment” applicable to all cases possible to arise in practice would present an undertaking not easily accomplished. Many definitions have been attempted to define a “final judgment.” Most of them are criticized as being either too specific or too broad in their terms. An interesting discussion of some of such attempts or definitions is found in the case of *Tucker v. Yell*, 25 Ark. 420, at pages 429-432. This court in the

case of *Ketchum Coal Co. v. Pleasant Valley Coal Co. et al.*, 50 Utah 395, 168 P. 86, 89, approved what was said in the *Tucker v. Yell Case*, supra, and quoted and approved the statement: 'A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question,' found in *Sharon v. Sharon*, 67 Cal. 196, 7 P. 456, 463, 635, 8 P. 709, and referred to the cases of *Bristol v. Brent*, 35 Utah 213, 99 P. 1000, and other cases as illustrative of the principle.

"Many cases present dual or multiple situations wherein it is necessary to enter judgment on one or more matters that are final and appealable, whether or not other matters are treated as interlocutory and are reserved for further determination. An action for divorce, wherein alimony, property adjustments, and counsel fees are involved, presents such a situation. A mortgage foreclosure involving sale of property, or the appointment of a receiver, and a possible deficiency judgment, may involve similar principles.

"The instant case, fundamentally by allegation but wanting in proof, charged the existence of a partnership and sufficient, if such existed, as to violation of partnership rights to warrant dissolution, and as ancillary relief prayed for the dissolution of the partnership, the appointment of a receiver, an accounting, and general relief.

"While no money judgment has in the instant case yet been entered, and while the appointment of a receiver was denied, the procedure required by an accounting certainly contemplates the examination and valuation of defendants', especially Rozzelle's, property, and if the judgment of dis-

solution of the alleged partnership is valid, the court has the undoubted authority to enforce the judgment of dissolution by attachment or other process to take into custody property, allegedly partnership assets, and punish as for contempt for a failure or refusal to so submit property, records, or information to the court.

“It would not be seriously argued that there was no right of appeal in a mortgage foreclosure until after final sale of the property, the making of the sheriff’s return under an order of sale, and the entry of a deficiency judgment. A single illustration will suffice. A brings a suit upon a promissory note for \$1,000 secured by a real estate mortgage. B defends and pleads payment in full. The court finds payment of \$500 and enters judgment for \$500, interest, costs, and attorney’s fees, and orders foreclosure and sale as provided by law. Must B wait until his property is sold before he may appeal, or if a receiver has been appointed has he no relief from either situation if either alone creates a situation from which irreparable damage may result from the application of one remedy only?

“A final order dismissing an action which puts one of a number of defendants out of court, or directing the sale of certain property, or declaring certain property subject to liens or other burdens, or directing a final disposition of funds in court or in the hands of a receiver, may destroy some of the fundamental rights, some of the most vital and important interests, yet there may be other parties, other equities, and other remedies to be considered, and the trial court may have exercised its judgment on only one of them.”

So far as can be determined, there are few Utah cases involving similar facts to those presented in this case. There are some from other jurisdictions, however, factually similar and following the same general rules as the Utah decisions. *Childs v. Julian*, 2 So. (2d) 453, was a suit seeking the sale of realty for division among joint owners, and for an accounting of the proceeds. The decree settled the equities of the parties and referred certain matters of fact touching various interests and liabilities of the joint owners to the register for further report to the Court. This decree was held final for purposes of appeal.

In *Staley v. International Agricultural Corp.*, 194 So. 168, a decree which held that moneys collected by an executor belonged to plaintiff, and that plaintiff had a mortgage on the crops of decedent's tenants, was deemed final for appeal purposes, even though the decree ordered a subsequent account.

In *Simmons v. Turner*, 283 S.W. 47, the decree was held a final decree in a suit involving title to land, cancellation of instruments of title, and establishing the ownership, even though the Court provided for a further report of commissioners, who were appointed to partition land, as to rents, improvements, and taxes.

In this case, there was clearly a final order as it decreed a sale of the property in question, wiped out the equities of the parties in the same, and as to this phase of the action nothing more remained to be done. Since a previous decree had established the existence of a joint venture, there remained only an account, a

matter which could easily be referred to a master, as the rights of the parties had been fixed by judicial action.

Certainly, respondent can show no prejudice. Under presently existing rules appellant had the right to appeal in any event, whether interlocutory or final, and the distinction, in a case of this kind, is essentially one of mechanics.

On the other hand, if the judgment of the lower court is allowed to stand, appellant will be prejudicially affected by a court action which could not later be corrected. The order of sale as drawn, and as previously pointed out, permitted substantial interests of appellants in the property to be destroyed. Once the sale was consummated, respondent was free to resell the premises. The account in all likelihood could not have been completed prior to the expiration of the appeal period following the judgment of sale. If, as we firmly believe, the judgment was final, the appeal period could expire before the account could be rendered, with the result that a judgment without foundation in fact or law, and highly prejudicial to the appellants, would remain in force and effect.

In any event, the Utah cases clearly indicate that the rule of definition between interlocutory and final judgments is one which should not be permitted to impose injustice or hardship. Thus, in *Attorney General of Utah v. Pomeroy*, supra, the Court stated at page 471:

“The principle that only final judgments are appealable rests upon a salutary policy of the

law of ancient origin. Cases cannot be brought up in parcels. But it being a policy of the law, it is not inflexible and should not be invoked where injustice or hardship would result. The very struggle to get away from the inexorability of the rule has led to various exceptions. Illinois, which has adhered to the general rule, created an exception where to deny the appeal would amount to great hardship or a denial of justice. See note, 80 A.L.R. 1192. Likewise, some of the attempted distinctions between severable and identical interests of defendants comes from a desire to escape the inexorability of the rule."

CONCLUSION

In conclusion, it is submitted that the respondent, belatedly and in improper form, seeks to dismiss the appeal upon grounds which are without foundation, the judgment being final, and that to permit the dismissal of the appeal would not only work a hardship on the appellant but would be a matter of injustice which could not thereafter be adequately remedied.

Respectfully submitted,

SKEEN, THURMAN & WORSLEY
and WILLIAM T. THURMAN,
Attorneys for Appellants.