

1952

Leo Adler v. Dean Clark and Alma Clark dba Clark Pharmacy : Brief of Appellants

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.

George S. Ballif; Attorney for Appellants and Defendants;

Recommended Citation

Brief of Appellant, *Adler v. Clark*, No. 7846 (Utah Supreme Court, 1952).
https://digitalcommons.law.byu.edu/uofu_sc1/1744

This Brief of Appellant 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**

LEO ADLER,
Plaintiff and Respondent,

vs.

DEAN CLARK, and his wife, ALMA
CLARK, d.b.a. CLARK PHARMACY,
Defendants and Appellants.

**CASE
NO. 7846**

APPELLANTS' BRIEF

FILED

SEP 8 - 1952

GEORGE S. BALLIF,
Attorney for Appellants
and Defendants

Clerk, Supreme Court, Utah

INDEX

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	3
THE ARGUMENT	4
I. THE COURT ERRED IN FAILING TO MAKE FINDINGS UPON THE MATERIAL ISSUES DRAWN BY THE PLEADINGS...	4
II. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS OF FACT AC- TUALY MADE BY THE COURT.....	6
CONCLUSION	11

TABLE OF CASES

Duncan v. Hemmelwright, (1947) 186 P. 2. 965, 112 Utah 262:269	4
Kahn v. Central Smelting Co., 2 Utah 371 as follows at p. 374	4
Greenhalgh v. United Tintic Mines Co., 42 U. 524, 132 P. 390	7
Hathaway v. United Tintic Mines Co., 42 U. 520, 132 P. 388	7

TEXTS AND STATUTES

Section 104-26-3, Utah Code Annotated, 1943.....	4
Section 104-26-3, U. C. A., 1943.....	4
64 C. J. Sec. 1105 p. 1257.....	7

In the Supreme Court of the State of Utah

LEO ADLER,
Plaintiff and Respondent,

vs.

DEAN CLARK, and his wife, ALMA
CLARK, d.b.a. CLARK PHARMACY,
Defendants and Appellants.

**CASE
NO. 7846**

APPELLANTS' BRIEF

STATEMENT OF FACTS

This is an appeal from a judgment in favor of plaintiff and respondent made and entered by the Honorable Will L. Hoyt on March 13, 1952, in the Fifth District Court of Washington County, State of Utah (Rec. 16). Appellants assail the judgment (1) because the findings and conclusions (Rec. 16) are insufficient to support it, and (2) the findings made are not supported by the evidence. For convenience, we shall refer herein to appellants as defendants and the respondent as plaintiff.

The plaintiff, a non-resident, brought suit against defendants for a claimed balance owing on an open account for goods sold and delivered to defendants. The complaint (Rec. 1) alleges:

(1) That he is a resident of Baker, Oregon, and a magazine and newspaper wholesale distributor "authorized to do business in the state of Utah."

(2) That defendant does business at Hurricane, Utah, under the trade name of Clark Pharmacy.

(3) "That the defendant owes the plaintiff \$238.51 for goods, wares and merchandise sold and delivered to the defendant between April 11, 1949, and October 31, 1950."

The defendants' answer (Rec. 3) denies the plaintiff's residence, business and that he is "authorized to do business in the state of Utah" because "without knowledge or information sufficient to form a belief." The answer admits that defendant is Dean Clark and Alma Clark, his wife, d.b.a. the Clark Pharmacy at Hurricane, Utah; but it denies that defendant owes plaintiff the claimed sum for goods, wares and merchandise sold and delivered to defendant between the dates mentioned.

Upon the issues drawn by the foregoing pleadings a trial was had before the court at St. George, Utah, on January 30, 1952 (Rec. 14). The trial opened by the publication of the deposition (Rec. 11) about which plaintiff's counsel stated (Tr. 1) "That is our case". The deposition proved to be an abortive attempt on the part of plaintiff to prove the account and the claimed balance due thereon (Tr. 1-16). Finally because the deposition opened with the name of the witness being given as "Angela A. Evaldson," and ended by being signed by "Leo Adler," the court rejected the entire deposition (Tr. 16). The plaintiff's counsel then called

the defendant, Dean Clark, and from him adduced the only evidence in the record in support of plaintiff's claim (Tr. 17-27).

At the conclusion of the trial the court took the case under advisement, and on March 6, 1952, entered a "Memorandum Decision" (Rec. 18) setting forth an account and deciding "that plaintiff is entitled to judgment for the sum of \$150.24 and costs."

Thereafter and on March 13, 1952, the court made and entered "Findings of Fact and Conclusions of Law" (Rec. 16). Paragraphs 1, and 2 of the Findings are identical with paragraphs 1, and 2 of the court's "Memorandum Decision."

The judgment based upon the foregoing Findings (Rec. 17) was signed by the court and entered March 13, 1952, and it reads as follows:

"Ordered, Adjudged and Decreed":

1. That the plaintiff recover judgment for the sum of \$150.24 and the costs of this action in the amount of \$16.60 making a total judgment of \$166.84."

It is from this judgment that defendants have taken this appeal.

STATEMENT OF POINTS

I

THE COURT ERRED IN FAILING TO MAKE FINDINGS UPON THE MATERIAL ISSUES DRAWN BY THE PLEADINGS.

II

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS OF FACT ACTUALLY MADE BY THE COURT.

ARGUMENT**POINT I**

THE COURT ERRED IN FAILING TO MAKE FINDINGS UPON THE MATERIAL ISSUES DRAWN BY THE PLEADINGS.

In the instant case the facts were tried by the court. It is the law of Utah that in such cases the courts' decision "must be given in writing." (Section 104-26-3, Utah Code Annotated, 1943). Our law then provides (Section 104-26-3, U. C. A. 1943) as follows:

"In giving the decision the facts found and the conclusions of law must be separately stated, and the judgment must thereupon be entered accordingly."

The predecessor of this section was interpreted by this Court in *Kahn v. Central Smelting Co.*, 2 Utah 371, as follows at p. 374:

"The decision consists of the findings of fact and conclusions of law. The judgment is entered upon that decision. It is apparent, therefore, that whatever of findings there are in a case must, under the provisions of our act, precede and are the foundation of the judgment."

It follows that the court must make findings on material issues as a basis for entry of a valid judgment. This Court has stated in the case of *Duncan v. Hemmelwright* (1947) 186 P. 2 965, 112 Utah 262, at page 269:

"It is well settled in this jurisdiction that failure to make findings of fact on material issues is error, and is ordinarily prejudicial." (Citing most of the Utah cases which have so held.)

It is this law defendants rely upon in their attack upon the judgment in the case at bar..

Our position is that the trial court failed to make findings on material issues drawn by the pleadings and that this failure constitutes prejudicial error. The material issues before the court at the trial were threefold:

(1) Was the non-resident plaintiff, Leo Adler, authorized to do business within the state of Utah?

(2) Did the said plaintiff sell and deliver the merchandise to defendants during the times mentioned?

(3) If so, what were the terms of the sale, including the agreed price to be paid?

(4) If the merchandise was sold and delivered, did the defendants still owe the claimed balance for same?

These were the material issues defendants were entitled to have findings made upon at the conclusion of the trial. The court actually made only the following findings: (Rec. 16).

"1. That the defendant should be charged for magazines and books received and credited for payments made and for magazines and books returned as follows

(Then follows the account from July, 1949, thru February, 1950 with two columns of figures to the right of the items above each of which appears "Dr" at the bottom of one of these columns are the words and figures: "To balance 150.24.")

"2. That the plaintiff is entitled to recover judgment for the sum of \$150.24 and costs."

Obviously No. 2 is a conclusion of law, and there is no finding of fact upon which it can be based. Finding No. 1 finds in part upon the material issue of whether or not pay-

ment has been made for magazines and books. It is so vague and indefinite that it becomes meaningless in determining whether or not defendant has any liability to plaintiff. It is impossible to tell from it whether the books and magazines came from plaintiff or whether there was agreement for their delivery, or whether or not they were ever delivered to defendants. There is no other finding that would tend to give meaning to this one. The conclusions of law that follow in this same document are a reiteration of the said purported findings of fact.

Except as above indicated, the court failed to find upon any of the material issues. There is no finding that the plaintiff, Leo Adler, was qualified to do business in the state of Utah, or as to the nature of his business. There is no finding that the plaintiff ever sold and delivered any books, magazines or other merchandise to the defendants. There is no finding as to the existence of any agreement, express or implied, between plaintiff and defendant for the sale of merchandise of any kind, or the price to be paid therefor. There is no finding that any books and magazines were ever received by defendants pursuant to any agreement. Such failure herein to make findings on these material issues raised by the pleadings constitutes prejudicial error. The judgment being thus unsupported, the same should be declared invalid and reversed.

POINT II

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FINDINGS OF FACT ACTUALLY MADE BY THE COURT.

We rely on Point I that the court's failure to make findings on the material issues drawn by the pleadings con-

stitutes fatal error. Perhaps it is superfluous to discuss Point II, but it should be pointed out that the findings actually made by the court are not supported by the evidence.

It is elemental that the court's findings must be supported by the evidence adduced at the trial. We quote a general statement of the law in this regard from 64 C. J. Sec. 1105, p. 1257:

"It is essential to the sufficiency of the findings of fact that they be sustained by the evidence . . . and where a finding is not sustained by sufficient evidence, it will not support the judgment."

And this Court has held that "The trial court should not make findings of fact when there is no evidence to support them. If it does so, judgment thereon will be reversed."

Hathaway v. United Tintic Mines Co., 42 U. 520, 132 P. 388.

Greenhalgh v. United Tintic Mines Co., 42 U. 524, 132 P. 390.

We here assail the only finding of fact made by the trial court as being unsupported by the evidence. That is Finding No. 1 (Rec. 16) and it is:

"That the defendant should be charged for magazines and books received and credited for payments made and for magazines and book sreturned as follows:

	Dr.	Dr.
July, 1949:		
Balance owing	79.48	
Books and magazines received.	54.78	
By cash		79.48
August:		
Books and magazines received.	46.33	
Books and magazines returned.		28.56

September:		
Books and magazines received.....	52.89	
October:		
Books and magazines received.....	76.49	
Books and magazines returned.....		21.09
November:		
Books and magazines received.....	87.22	
Books and magazines returned.....		42.88
December:		
Books and magazines received.....	98.15	
January, 1950:		
Books and magazines received.....	57.19	
January:		
Books and magazines returned.....		112.32
February:		
Books and magazines returned.....		17.96
By cash		100.00
	<hr/>	<hr/>
	552.53	402.29
To Balance		150.24"

What evidence is in the record upon which this finding can be based? The plaintiff was not present at the trial and his deposition was excluded (Tr. 16). The only evidence plaintiff adduced in the case was from defendant Dean Clark, who was called as plaintiff's witness (Tr. 17-27). Defendants had denied in their answer (Rec. 4) that they owed plaintiff the claimed \$238.51 (Rec. 1) for the merchandise.

Plaintiff's counsel elicited that Dean Clark had done business with plaintiff Leo Adler by purchasing magazines through his agency (Tr. 17). It does not appear when or under what arrangement the dealings took place. At the

instance of plaintiff's counsel, defendant Clark then produced ten statement sheets which were tied together and marked Plaintiff's Exhibit 1 (Rec. 10(3)). At the top left of the first of these sheets the following words appear in bold type: "March Statement 1950." In the bundle there is a similar sheet for each month, July, 1949, thru December, 1949, and for January, 1950 thru April, 1950.

Counsel interrogates defendant about each of these statement sheets separately beginning with March, 1950, and brings out that Clark had made marks and writings of his own on each of them (Tr. 18-27). Then counsel asked defendant: (Tr. 18)

Q. In all other respects that is a copy of the bill that was sent to you, invoices, is that right?"

A. "That is right."

Similar questions were put to defendant by counsel with respect to each statement sheet and an affirmative response was made in each case (See Tr. 19, Lines 4 and 14; lines 7 and 21; 21, lines 12, 20 and 24; 22, lines 13 and 22). It does not appear who made up the statement sheets or what they purport to show. There is no testimony that the sheets represent the complete and accurate account between these parties. Indeed plaintiff's complaint declares upon an account extending from April, 1949, to October, 1950, while these statements cover only from July 1949, to April, 1950. Despite their fragmentary character and their vagueness and uncertainties, these statement sheets (Rec. 10(3)) were received and made the basis of the finding under attack.

The defendant, Clark, testified in support of his own case as follows: (Tr. 39)

Q. "What occasioned your letter of March 28, plaintiff's Exhibit 3? I understand you say you had ordered the magazines all stopped in December?"

A. "In December, yes."

Q. "What occasioned your writing to Adler at that time?"

A. "Well, he was continuing to send those magazines after I had ordered them stopped."

Q. "In response to that you received plaintiff's Exhibit 2 from Mr. Adler, is that right?"

A. "Yes sir."

Q. "In which he states 'We advised all publishers to cancel your orders on December 16th', is that right?"

A. "Yes."

Plaintiff's Exhibits 2 and 3 were produced by defendant Clark at the instance of plaintiff's counsel (Tr. 23) and were offered and received in evidence (Rec. 10(1) and 10(2)). In his letter (Rec. 10(2)) of March 31, 1950, the plaintiff, Adler, admits that defendant had terminated all dealings in December, 1949. Despite the foregoing uncontradicted evidence, the court included in the said assailed finding "Books and Magazines received" for December, 1949, in the amount of \$98.15 and January, 1950, in the amount of \$57.19. The sum total of these items charged in said account against defendant, and there is no evidence to the contrary, is \$155.34, which is more than the judgment rendered against the defendant.

We reiterate that the entire record fails to reflect evidence that will support the disputed finding. Obviously the only finding of fact made being unsustained by the evidence, the judgment entered thereon cannot stand.

CONCLUSION

We respectfully submit that because (1) the court failed to make findings on the material issues, and (2) the only finding made by the court is unsupported by the evidence, the judgment under attack must fall. In rendering the judgment under the circumstances, the court committed prejudicial error, and the judgment should be reversed.

Respectfully submitted,

GEORGE S. BALLIF,

Attorney for Appellants