

1955

George N. Cannon v. B. K. Tuft : Brief of Appellant

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.

Olsen and Chamberlain; Attorneys for Appellant;

Recommended Citation

Brief of Appellant, *Cannon v. Tuft*, No. 8292 (Utah Supreme Court, 1955).
https://digitalcommons.law.byu.edu/uofu_sc1/2325

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.

2297

In the Supreme Court of the State of Utah

GEORGE N. CANNON, doing
business as INTERMOUNTAIN
SUPPLY COMPANY,

Plaintiff and
Appellant

vs.

B. K. TUFT

Defendant and
Appellant

Case No. 8292

BRIEF OF APPELLANT

OLSEN and CHAMBERLAIN
Richfield, Utah
Attorneys for Appellant

I N D E X

TABLE ON CONTENTS

	Page
STATEMENT OF FACTS	1, 2, 3
STATEMENT OF POINTS	4
ARGUMENT	4
POINT I: THE TRIAL COURT ERRED IN DENYING DEFENDANT - APPELLANT'S MOTION TO DISMISS FOR IMPROPER VENUE, IN REFUSING TO RE-HEAR THE QUESTION OF VENUE, AND IN ORDERING DEFENDANT - APPELLANT TO FILE HIS ANSWER IN SALT LAKE COUNTY AS A CONDITION TO VACATING THE JUDGMENT.....	4, 5, 6, 7

CASES CITED

Buckle v. Ogden Furniture and Carpet Co., 61 Utah 559, 216 P. 684	4
Timmons v. Coonley, 197 P. 429, 39 Cal. App. 35	7

I N D E X

STATUTORY REFERENCES

Utah Code Annotated 1953

	Pages
78-13-4 U. C. A. 1953	5
78-13-7 U. C. A. 1953	5

Comp. Laws Utah 1917

Sec. 6528 C. U. 1917	5
Sec. 6531 C. U. 1917	5

RULES OF CIVIL PROCEDURE

Utah Supreme Court

Rule	Pages
6 (e)	7
12 (a)	7
41 (b)	6
60 (b)	6

TEXTS CITED

Barron & Holtzoff, Federal Practice & Procedure, Vol. 1, P. 635, Section 354	6
Id. Vol. 5, P. 252, Section 3521	6
Moore's Federal Practice, 2nd Ed., Vol. 2, P. 595, Sec. 2238	7

In the Supreme Court of the State of Utah

GEORGE N. CANNON, doing
business as INTERMOUNTAIN
SUPPLY COMPANY,

Plaintiff and
Appellant

vs.

B. K. TUFT,

Defendant and
Appellant

Case No. 8292

BRIEF OF APPELLANT

STATEMENT OF FACTS

This is an Interlocutory Appeal from the Third District Court's action in denying a Motion to Dismiss the plaintiff's complaint for Improper Venue, in denying a Motion to rehear the question of venue, and in Ordering that a default judgment subsequently entered be vacated upon the condition that the defendant, (Appellant here) file an answer to

the complaint in the District Court of Salt Lake County. which county, it is alleged by the Defendant and Appellant, is not the county of proper venue.

Since the judgment heretofore entered has been vacated ¹ the only issue presented by this appeal is whether or not the trial court erred in refusing to grant the Defendant's several Motions to Dismiss for Improper Venue.

For convenience the parties will be referred to the same as in the lower court.

This action was commenced in the District Court of **Salt Lake County** by a complaint showing upon its face that the defendant was a resident of Salina, **Sevier County**, Utah and had defaulted upon a contract not in writing. (R. p. 1).

The defendant filed a timely Motion to Dismiss for Improper Venue (R. p. 2) which was denied. The defendant, at Richfield, Utah, received notice of the denial by plaintiff's notice mailed on September 9th, 1954. (R. p. 3). In the notice the plaintiff advised defendant he would have until September 20th to answer, (R. p. 3) and on September 21st, 1954 the defendant was defaulted and a "Decree" giving plaintiff judgment upon his complaint was entered. (R. pp. 4, 5). The judgment thus was entered 12 days after the plaintiff mailed notice of denial of defendant's motion to dismiss.

The defendant thereafter moved to vacate the judgment upon two grounds:

1. That the judgment was void, Rules 6 (e) and 12 (a)

1. But for a different reason than that asserted both here and in the court below.

U.R.C.P. allowing the defendant 13 days after mailed notice of denial of the defendant's motion within which to answer.

2. Under Rule 60 (b) (7) granting relief from judgments upon a showing of such "other reasons" as justify **such relief**, the reasons in this case being the void character of the judgment entered (because of 1) and the commission of error in the trial court's refusal to dismiss the action for improper venue. (R. p. 6).

At the same time defendant filed a motion to re-hear venue and grant to defendant some relief from the improper fixing of venue in Salt Lake County. (R. p. 7).

The latter motion was denied. (R. p. 8).

The motion to vacate the judgment was granted but on the condition that the defendant serve and file an answer to the complaint within 10 days in Salt Lake County. (R.p.9)

The defendant answered within the time required establishing as his first defense improper venue and as his second defense a general traverse and denial of the allegations of the complaint. (R. p. 10).

The defendant thereupon filed a petition for an interlocutory appeal asking that the question of venue be determined by this court. (R. pp. 11-17). The petition was granted February 7th, 1955. (R. p. 18).

As stated hereinabove, the trial court granted the defendant his motion to vacate the judgment presumably to permit the cause to go to trial upon its merits, since he denied defendant's motion to dismiss for improper venue. The defendant - appellant here - contends that the judgment was void. Notwithstanding, the judgment was vacated and

therefore the only issue to be determined upon this appeal is the question of venue.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO DISMISS FOR IMPROPER VENUE, IN REFUSING TO RE-HEAR THE QUESTION OF VENUE, AND IN ORDERING DEFENDANT-APPELLANT TO FILE HIS ANSWER IN SALT LAKE COUNTY AS A CONDITION TO VACATING THE JUDGMENT.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING DEFENDANT-APPELLANT'S MOTION TO DISMISS FOR IMPROPER VENUE, IN REFUSING TO RE-HEAR THE QUESTION OF VENUE, AND IN ORDERING DEFENDANT-APPELLANT TO FILE HIS ANSWER IN SALT LAKE COUNTY AS A CONDITION TO VACATING THE JUDGMENT.

In the case of Buckle vs. Ogden Furniture and Carpet Company, 61 Utah 559, 216 Pac. 684, it was held that the right of a defendant in an action upon a contract not in writing to be sued in the county of his residence is a substantial right and when properly demanded it is reversible error to deny it.

That case is in all respects identical to the one here.

The facts are the same: The Plaintiff sued the defen-

dant, a Weber County resident, in Salt Lake County in an action to recover the purchase price of goods on an unwritten contract. A timely demand for change of venue was made but denied.

This Court held under venue provisions identical to those existing today, that an action on an unwritten contract must be brought in the county of defendant's residence. The court expressly held that section 78-13-4 UCA 1953 (then Sec. 6528 C. L. 1917) governed all contract actions, written and unwritten, the former expressly, the latter impliedly, and that the residuum statute, 78-13-7, (then Sec. 6531 C. L. 1917) fixing venue in "all other cases" in the "county in which the cause of action arises, or in the county in which the defendant resides" has no application to any contract action, whether written or unwritten (See 219 Pac. at page 686 (4)).

In that case the defendant was forced to a trial on the merits in Salt Lake County after judgment had been found against him, he appealed. Without a showing of prejudicial or assignable error other than that the trial was conducted against the objection of the defendant in an improper county, the judgment was reversed by this Court with instructions to try the same in the proper county, that of the defendant's residence.

In this action the defendant has exhausted every effort to avail himself of the substantial right of trial in the county of his residence. He filed a timely motion to dismiss for improper venue responsive to the complaint commencing the action. (R. p. 2). It was indicated below that this should have been a "Motion for a Change of Venue."

The defense of improper venue may be interposed by

Motion to Dismiss. (Barron and Holtzoff, **Federal Practice and Procedure**, Vol. 1, p. 635, Sec. 354). In Rule 41(b), Utah Rules of Civil Procedure, the last sentence provides:

***Unless the court in its order for dismissal otherwise specifies, a dismissal under this sub-division and any dismissal not provided for in this rule **other than a dismissal for lack of jurisdiction or for improper venue**, operates as an adjudication upon the merits. (emphasis added).

It is there clearly implied that venue is properly to be tested by a Motion to Dismiss.

As an official form adopted by the United States Supreme Court in its appendix to the Federal Rules of Civil Procedure, Official Form 19 includes, as one of the grounds the basis of a motion to dismiss, improper venue. (See Barron and Holtzoff, **Federal Practice and Procedure**, Vol. 5, Table LVII, and also Sec. 3521, p. 252 of the same volume).

There has been no waiver or laches on the part of the defendant concluding him from asserting venue because a judgment had been entered against him. Under Rule 60 (b), U.R.C.P. the Court, upon Motion, may relieve a party from a final judgment, order or proceeding for any of the following reasons:

*** (5) the judgment is void; *** (7) any other reason justifying relief from the operation of the judgment.

In this instance the defendant timely raised the contention (R. p. 6) that the judgment entered on September 21st, pursuant only to 12 days notice inclusive of mailing time, was void exactly as would be a default judgment taken on the 19th day after service upon the defendant of an original

summons commencing an action. (Timmons v. Coonley, 197 Pac. 429, 39 Cal. App. 35).

Rule 12(a) provides in part:

The service of a motion under this rule alters these periods of time as follows. ***(1) If the court denies the motionthe responsive pleading shall be served within 10 days after notice of the Court's action;***

Rule 6(e) provides:

Whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, three days shall be added to the prescribed period.

From those two rules it is apparent that when a defendant files a motion and the motion is denied and notice of the denial is served upon him by mail, he is granted 13 days after such notice within which to file a responsive pleading. (Moore's **Federal Practice**, Vol. 2, 2nd Ed., Sec. 2238, p. 595).

If the judgment were not void, it is still a judgment such as one relief from which ought to have been granted under sub-paragraph (7) of Rule 60(b), the lack of notice to the defendant being a "reason justifying relief from the operation of the judgment."

Therefore it is not tenable to assert that upon entry of the thusly defective judgment below the defendant lost or gave up any of his fundamental rights or that the vacation of that judgment was **quid pro quo** for his loss or alienation of such right.

CONCLUSION

The appellant in conclusion urgently contends that the trial court has been in error in the several proceedings affecting venue, and that this cause ought to be remanded, reversing those erroneous orders, with instructions to dismiss the action subject to its being transferred, re-filed, or re-commenced in the county of proper venue.

Respectfully submitted,

OLSEN and CHAMBERLAIN
Business and Professional Building
Richfield, Utah
ATTORNEYS FOR APPELLANT