1955

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

Utah Supreme Court

In the Supreme Court of the State of Utah

GEORGE N. CANNON, doing business as INTERMOUNTAIN SUPPLY COMPANY,
Plaintiff and Respondent,

vs.

B. K. TUFT,
Defendant and Appellant.

Case No. 8292

BRIEF OF RESPONDENT

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STATEMENT OF FACTS

With the consent of the Plaintiff the Trial Court granted the Defendant's motion to vacate the judgment mentioned in Defendant's brief so as to eliminate any question involving judgment which had been entered and in order to give the Defendant the opportunity to answer and to present his evidence at a trial on the merits of the case.

Counsel for Defendant, on pages 2 and 4 of his brief, states that the only issue presented by this appeal is

whether or not the Trial Court erred in refusing the Defendant's several motions to dismiss for improper venue.

We take it, therefore, that this Court will not wish to bother itself with the other questions which counsel for the Defendant spends so much time on in his brief which do not pertain to the question of venue.

As counsel for the Defendant has done for convenience we also will refer to the parties as Plaintiff and Defendant, the same as they are referred to in the lower Court.

This action was commenced in the District Court in and For Salt Lake County by a complaint showing upon its face that the Defendant was a resident of Salina, Utah, and had defaulted on a contract. (R. p. 1).

The Defendant filed a timely Motion to Dismiss on the ground that the Defendant is a resident of Sevier County, Utah, *but did not ask for a change of venue.* On August 30, 1954, Plaintiff mailed a notice to the Defendant that on September 9, 1954, the Plaintiff would call up for final disposition Defendant's Motion to Dismiss. The Defendant failed to appear at the hearing of the motion and the District Court, on September 9, 1954, denied Defendant's motion to dismiss and designated no time within which the Defendant would have to answer.

On September 9, 1954, (R. p. 3) Plaintiff mailed notice to Defendant of said denial of Motion to Dismiss.

The questions counsel talks about as to enry of judgment are immaterial because the judgment was set aside and the Defendant was given an opportunity to answer.

Later, within the time required, Defendant filed his Answer in which as a First Defense he raises the question of improper venue, and as his Second Defense, a general traverse and denial of the allegations of Plaintiff's complaint. (R. p. 10)

As stated by the Defendant in his brief he 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 7, 1955. (R. p. 18).

The Court will notice as above stated from Defendant's Motion to Dismiss THAT DEFENDANT MERELY ASKED FOR DISMISSAL OF THE CASE AND DID NOT ASK FOR CHANGE OF VENUE.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO DISMISS FOR IMPROPER VENUE, NOR IN REFUSING TO RE-HEAR THE QUESTION OF VENUE, NOR IN ORDERING THE DEFENDANT-APPELLANT TO FILE HIS ANSWER IN SALT LAKE COUNTY IF HE WISHED TO PROCEED WITH THE CASE.

ARGUMENT

POINT I.

THE COURT DID NOT ERR IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO DISMISS FOR IMPROPER VENUE, NOR IN REFUSING TO RE-HEAR THE QUESTION OF VENUE, NOR IN ORDERING THE DEFENDANT-APPELLANT TO FILE HIS ANSWER IN SALT LAKE COUNTY IF HE WISHED TO PROCEED WITH THE CASE.

In his argument the defendant states that he "has exhausted every effort to avail himself of the substantial right of trial in the county of his residence" but the defendant did not make a timely application in compliance with the statutes of the State of Utah for a change of venue. In fact, he never did make an application for a change of venue but merely filed a motion to dismiss the case which would have put the plaintiff to the expense of re-filing the case in the county of defendant's residence which is not contemplated by the Utah statutes.

This Utah statute is Sec. 78-13-8, Utah Code Anno. 1953, which is entitled:

> "Change of venue—*Conditions precedent.* If the county in which the action is commenced is not the proper county for the trial thereof, the action may nevertheless be tried therein, *unless the defendant at the time he answers or otherwise appears files a motion, in writing,* that the trial be had in the proper county." (Underscoring added).

We call the attention of the Court to the words in the heading of this statute—"Conditions precedent." These conditions precedent are (1) the defendant must make the request at the time he answers or otherwise appears; (2) he must file a motion in writing that the trial be had in the proper county. The Court will notice that the wording of the statute does not allow a dismissal of the case but merely a change of place of trial. This is done apparently for the purpose of saving the plaintiff the expense of the court costs in re-filing the case if it were dismissed. There are many reasons why, if the place of

trial is going to be changed, all parties should know about it when the defendant appears. Apparently the legislature did not want to allow the case to proceed and give the defendant the right at any time he chose to disturb the situation and all parties concerned by asking for a change of place of trial after answer or otherwise appearing. Such a rule would cause great confusion and uncertainty for the courts as well as the parties in litigation.

Counsel for defendant tries to make a lot of the case of Buckle v. Ogden Furniture and Carpet Co., 61 Utah 559, 216 P. 684, but in this case while the court held that the defendant was entitled to a change of venue because of defendant's residence being in Weber County while the case was filed in Salt Lake County, the defendant filed a motion for change of venue at the time he answered which motion was erroneously denied. The Court held:

> "It is, therefore, the conclusion of the Court that actions upon contracts not in writing upon *proper and timely demand* being made must be tried in the county where one of the defendants reside.
>
> "In construing the statute the legislative intent is to be determined from a general view of the whole act with reference to the subject matter to which it applies and it is a *cardinal* rule that effect is to be given if possible to *every word, clause and sentence* and so far as practicable reconcile the different provisions so as to make them consistent and harmoneous and to give a sensible and intelligent effect to each." (Underscoring added).

This rule is laid down by Judge Frick in Board of Education, vs. Bryner, 57 U. 78, 192 P. 627 in which he said:

> "It is * * * necessary * * * that every word and every phrase must be given some force and effect * * * notwithstanding * * * the statutes may thereby be enlarged or restricted."

Counsel makes the mistake of comparing the practice of the Federal Court with our practice. In the Federal practice the courts do not have a statute worded as our Sec. 78-13-8, above referred to, and, consequently, any rule the Federal Courts may have would not logically be applicable to our practice in which we are bound by the wording of our Utah statute.

See Barron & Holtzoff, Federal Practice and Procedure, Volume 1, Section 71, 86, 87 and 354. In said Section 71, at page 135, the following language is used:

> "Venue is governed by acts of congress * * * venue is not affected by the Federal Rules of Civil Procedure."

Said Section 86, at page 164, uses the following language:

> "Congress in 1948 Revision of the Judicial Code, has provided for a change of venue in the District Courts '*for the convenience of parties and witnesses in the interest of justice.*' ".

In said Section 354, page 636, the following language is used:

> "A motion to dismiss was formerly the only method by which to raise the objection to forum non conveniens, but by statute the District Courts now have authority to transfer any case to a

forum more convenient to the parties and witnesses if transfer is in the interest of justice."

"Therefore, the cases formerly decided on motion to dismiss though no longer authority for dismissal may, still serve some useful purpose on motions for change of venue under the statute to indicate the scope of the doctrine and the Court's discretion * * *"

Even in the Federal practice the rule now is to file a motion for change of venue rather than ask for dismissal of the case as the foregoing language indicates. It seems to us very clearly that counsel is without authority either in our State or in the Federal courts to show that he had the right to a dismissal of the case. He should have filed a motion for change of venue in a timely manner and he would, without question, have had the right to a change of venue but we take the position that he lost that opportunity by failing to request it in writing in a timely manner which is a condition precedent to the Court granting him a change of venue.

Respectfully submitted,

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