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Dr. R. B. Lindsay v. Jennie Woodward : Appellant's Reply Brief

Utah Supreme Court

McConkie & McConkie; Attorneys for Defendant and Appellant;

In the Supreme Court of the State of Utah

DR. R. B. LINDSAY,

Plaintiff and Respondent,

—vs.—

JENNIE WOODWARD,

Defendant and Appellant.

Case No. 8492

APPELLANT'S REPLY BRIEF

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As was indicated in appellant's brief this is an appeal from a judgment allowing plaintiff's Motion for a Summary Judgment against the Amended Counterclaim of the defendant and dismissing the same with prejudice. Appellant contends that the fourth paragraph of plaintiff's Motion for Summary Judgment (R-12), and the subject-matter of point 4 of appellant's brief herein, was not properly before the trial court in said motion because a different division of the trial court had previously ruled on the matter in plaintiff's unsuccessful Motions to Dismiss Defendant's Appeal and to Dismiss Defendant's Counterclaim. Respondent admits "No argument was made upon this point at the time of hearing the motion for Summary Judgment, since, as was explained to the court, the matter had been previously submitted in a former hearing."

None-the-less respondent continues to argue the point in his brief. Without admitting that this point is properly before this court appellant asks leave of the court to briefly reply to respondent's argument.

In this instance it is significant that the authority cited by the respondent as his justification for bringing fully adjudicated matters repeatedly before the trial court is given as *Burt & Carlquist Co.* v. *Marks, et al,* 53 Utah 77, 177 P 224 (1918). In this complex land transaction the original suit for breach of contract was brought in the city court. The seller brought a cross complaint in the district court for more than the jurisdiction of the city court for damages allegedly sustained when an agent for sale of a farm employed another firm

as agent, which sold the farm in excess of the minimum demand, pocketing the difference. The district court was held not to have exceeded its jurisdiction on appeal by permitting of amended counterclaim, trying issues presented by it, and rendering judgment thereon for a sum in excess of amount that the city court had jurisdiction to try and determine. The court said:

> "Here the city court, as stated, had jurisdiction of the subject-matter of the action as the same was commenced and tried in that court. And the district court had original and concurrent jurisdiction with the city court . . . for the subject matter of the action. It also had original jurisdiction of the claim for $660 the subject-matter of the cause of action in the counterclaim."

Manifestly, jurisdiction to enable a valid judgment must be had by the court irrespective of objections or waivers on the part of the litagents.

As Judge Martin Larson announced from the bench, in rejecting respondent's argument herein repeated, *Hardy* v. *Meadows, et al,* 71 Utah 255, 264 P 968 (1928) is clearly distinguishable from the instant fact situation. In the *Hardy Cs.* a counterclaim was filed in the city court beyond the jurisdiction of that court and it was held:

> ". . . when the inferior court is without jurisdiction . . . the district court to which the case is appealed does not acquire jurisdiction . . ."

In the instant case appeal was effected from a default judgment in the city court to the district court where a trial de novo* was thus commenced and original juris-

diction of the court was had. At this stage in the proceedings a counterclaim was allowed. This is quite another thing. To quote the above referred to case:

> "In the one a cause of original, and in the other of a derivative, jurisdiction is invoked."

Within one year after the *Hardy* v. *Meadows* case the same court handed down its decision in *Moss* v. *Taylor,* 73 Utah 227, 273 P 515 (1928). In this case plaintiff secured a judgment against defendant in the district court for (1) personal injuries (2) auto damages. Plaintiff had been assigned the cause of action for auto damages after judgment had been rendered in the city court thereon in an action by other parties by one who had appealed the city court judgment to the district court. In holding that such was assignable the court said:

> "When an appeal is taken to the district court from a judgment rendered in the city court such judgment ceases to be in any sense a final judgment. Unless the appeal is dismissed a trial de novo must be had in the district court. The pleadings in the district court may be amended in all respects in the same manner and upon the same terms as are provided for amendments of pleadings in cases originally commenced in the district court."

**Harris* v. *Barker,* (1932) 80 Utah 21, 12 P2 577, " . . . appealing from the judgment . . . (from city court) to the district court where the case was triable de novo."

‡*Utah Rules of Civil Procedure,* Rule 73(m) "All causes appealed to the district court shall be heard anew . . ."

This rule has been accepted by this court and is incorporated into the *Utah Rules of Civil Procedure*, Rule 73(m).

> "All causes appealed to the district court shall be heard anew. Pleadings may be amended in all respects in the same manner and upon the same terms as pleadings in cases originally commenced therein."

Respondent admits that Rule 13(k) of the above *Rules* invokes original jurisdiction of the district court because the cause is "transferred prior to judgment." We submit that Rule 73(m) invokes that same original jurisdiction. An appealed city court judgment is no more a final judgment than the original cause of action in the city court.

Under the heading of 'Compulsory Counterclaims' this court has instructed in Rule 13(a) as follows:

> "A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against the opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing parties claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction . . ."

Appellant submits that she is under obligation to so counterclaim at the peril of losing her effective cause of action against the plaintiff.