

1957

William C. Moore & Co. v. Delfino Sanchez et al : Petition for Rehearing and Brief in Support Thereof

Utah Supreme Court

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of the
STATE OF UTAH

WILLIAM C. MOORE & COMPANY,
a corporation,
Plaintiff and Respondent,

vs.

DELFINO SANCHEZ,
Defendant and Appellant.

and

WILLIAM C. MOORE & COMPANY,
a corporation,
Plaintiff and Respondent,

vs.

ILIFF GARDNER,
Defendant and Appellant.

FILED

JUL 3 1 1957

8607

Clerk, Supreme Court, Utah

8608

PETITION FOR REHEARING AND
BRIEF IN SUPPORT THEREOF

WM. H. BOWMAN

*Attorney for Appellants and
Defendants*

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IN THE SUPREME COURT of the STATE OF UTAH

WILLIAM C. MOORE & COMPANY,
a corporation,
Plaintiff and Respondent,

vs.

8607

DELFINO SANCHEZ,
Defendant and Appellant.

and

WILLIAM C. MOORE & COMPANY,
a corporation,
Plaintiff and Respondent,

vs.

8608

ILIFF GARDNER,
Defendant and Appellant.

Defendants and Appellants respectfully petition the Supreme Court of Utah for rehearing in the above entitled causes, and in support thereof point out that the Supreme Court failed to consider in its decision as rendered the 27th day of June, 1957 in the above entitled causes the two following particulars:

STATEMENT OF POINTS

1. That the record on appeal consisted solely of the judgment role and that the Supreme Court should have struck what was designated as supplemental record on appeal.

2. That there was nothing before the Supreme Court save and except the sufficiency of the pleadings to raise an issue of fact and whether or not the plaintiffs motion to strike defendants second defense was properly granted or not, on the basis of the record.

ARGUMENT

These points will be argued in the manner presented rather than in the sequence of the Supreme Court Ruling.

Under rule 75a of the Utah rules of Civil Procedure of Utah, the following is set forth:

(a) DESIGNATION OF CONTENTS OF RECORD ON APPEAL. Within 10 days after the filing of the notice of appeal, the appellant shall serve upon the respondent and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal unless the respondent has already served and filed a resignation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the respondent files the original designation, the parties shall proceed under subdivision (b) of this rule as if the respondent were the appellant.

the attempt of the respondents to bring up before this Court *after appellants* briefs were filed, additional portions which they called supplemental record amounted to an attempt to file a transcript or bill of exceptions. Under the old code the method and procedure followed by respondents, as far as attorney for appellants is able to determine, has never before, been condoned by any Court. Anything except the pleadings which have been taken before any appellate Court has under all other jurisdictions been held to be part of the bill of exceptions and must be submitted to the opposing party for settlement and if not settled in that manner then submitted to the trial Court for settlement.

It is admitted by attorney for appellants that our present rules do not cover this step in arriving at the proper transcript of testimony or argument. Rule 75b attempts to cover this but there is no provision in that rule for submission to the opposing party for corrections, amendments, or alterations, and if the decision of the Supreme Court stands as rendered on June 27, 1957 in the two causes involved there will be no appellate procedure in the State of Utah, in that any party who is a party respondent in an appeal may sit back and wait until such time as appellants briefs are filed, then apply for additional matters which were not matters of the record from the District Court, claiming surprise, error or accident, and without notice to the other party, file their briefs and in effect entrap the opposing party or the appellant whose only recourse would be to apply for addi-

tional time before the Supreme Court to prepare a reply brief or apply to the Supreme Court for correction of a transcript.

In this instance respondents obtained a transcript without notice, without settlement, obtained an extension of time in which to file their briefs and the matter was set down for hearing on such short notice as to leave appellant with no time with^{IN} which to prepare a reply brief. In the motion of respondents for supplemental record, there was no allegation of error or accident or that there was any mistatements in the record as filed in the Supreme Court and in fact respondents knew or should have known what was in the record a long time prior to the filing of appellants briefs as they had argued a motion to dismiss for failure to file the record on time and appellants time was shortened within which to file his briefs, because of this motion; there was no showing of any sort of surprise, error, or accident in their motion. It is appellants earnest contention that rule 75 subdivision (a) as hereinabove cited, is controlling upon this.

In American Jurisprudence volume 3, page 266, section 666, the following general rule is set forth:

At some point in the preparation of the bill of exceptions, the attorney for the opposite party must, under the modern practice, have the opportunity of examining it and approving or disapproving it. Failure to furnish this opportunity defeats the bill.

If the procedure as approved by the Supreme Court in this case is followed, then no appellant or respondent

would be entitled to any notice or submission of a bill of exceptions for correction or amendments, such bill would and could be submitted to the District Court for approval and lodged with the Supreme Court without any opportunity on the part of respondent or appellant to have hearing upon the validity of such bill. The entire appellate procedure could become a mockery. See the following citations:

Scott vs. Hansen, 279 Pac. 2nd 654, Oklahoma case; Case-made settled and signed without notice to opposing parties of time and place of settling and signing the case-made, and without appearance of such party or parties, and without their waiver of such notice, is a nullity and confers no jurisdiction on Supreme Court to decide questions thereunder. . . .

Palin vs. General Construction Company, 277 Pac. 2nd 703, 45 Washington 2nd 721. . . . Party, upon whom proposed statement of facts has been served, fails to proposed amendments at his peril for, if it be determined that the proposed statement was filed in good faith and with the intent that it be a full and complete record of the material facts, matters, and proceedings theretofore occurring in the cause, such party is deemed to have agreed to it and does not have any right thereafter to propose or suggest amendments, corrections, or supplementations.

As to point two, it appears to the appellants that the Supreme Court has taken as a matter of fact the statements of counsel for plaintiffs and respondents that the transactions involved in these causes were transactions in inter-state commerce rather than intra-state

commerce. If the oral statements of counsel can be used as a basis of a motion to strike when no evidence has been introduced by the defendants in support of their contentions, then indeed will we have chaos on our practice. Assuming that the Supreme Court had a right to see the contract, a copy of which was attached to one of the depositions of defendants and appellants here, would it be that this Court is going to reverse all of the modern decisions in regard to foreign corporations and hold that a single item of evidence on one side is sufficient to grant a motion of law to strike a pleading? This Court and all other jurisdictions have repeatedly held that there is no rule of thumb by which to judge to whether a foreign corporation is doing business in inter-state commerce or intra-state commerce, but that each case must turn upon its own facts. Nowhere and at no stage of the proceeding did appellants and defendants admit that these contracts were New York contracts, in fact it was definitely stated that appellants contention was that these were Utah contracts regardless of the wording therein contained. This could only be shown by testimony relating to the intention and conduct of the parties.

It is strange that only certain portions of the statute which is controlling is referred to in the decision, to-wit: Utah Code Annotated, 1953, Section 16-8-3 is quoted as followed by the Supreme Court:

“Any foreign corporation doing business within this state and failing to comply with the provisions of sections 16-8-1 and 16-8-2 shall not

be entitled to the benefit of the laws of this state relating to corporations, and shall not sue, . . . in any of the courts of this state. . . .”

however, in reading the whole of the statute as it applies to this case, there is a vastly different and broader meaning. The portions omitted from the above quotations are as follows:

. . . . and shall not sue, prosecute or maintain any action, suit, counterclaim, cross complaint or proceeding in any of the courts of this state on any claim, interest or demand arising or growing out of or founded on any tort occurring, or of any contract, agreement or transaction made or entered into, in this state by such corporation or by its assignors and every contract, agreement and transaction whatsoever made or entered into by or on behalf of any such corporation within this state or to be executed or performed within this state shall be wholly void on behalf of such corporation and its assignees and every person deriving any interest or title therefrom, but shall be valid and enforceable against such corporation, assignee and person. . . .

In this instance the Wm. C. Moore Company, by their agreement, and through the conduct of their agents who solicited the orders, set out definite landscaping plans for the various proposed customers, and agreed to replace items which were found to be faulty and render various other services which appear on the contract, either on the face or the back thereof, which in effect renders it a Utah contract, regardless of the wording that said contract shall be only construed as a New York contract. The question of whether or not this corporation can be shown

to be doing business within the state of Utah is a question of fact and will have to be determined through the evidence submitted at the trial of this cause. This rule is substantially set forth in the case of *Modern Housing Manufacturing Company vs. Cartier et al*, 149 Federal 2nd, page 980 where on page 985 the Court used the following language:

“From this line of reasoning has stemmed the rule laid down and continuously followed by the Supreme Court for many years, that when a corporation is engaged in interstate commerce in a state other than that of its residence, and as a related part of such engagement there performs acts which are merely incidental to the carrying on of such commerce, such acts will not constitute doing business in that state within the meaning of such a state statute as that of Wisconsin. The converse of this is true. If such acts performed in another state are not merely incidental to the interstate commerce, but are substantial with respect thereto, then it is carrying on business in that state, and is subject to reasonable requirement of the state statute. In the cases where the corporation has been relieved from the effect of such a statute, it was not merely because it was engaged in interstate commerce, but also because the unreasonable requirements of the statute amounted to regulation of interstate commerce, or because the acts complained of were merely incidental to interstate commerce and did not amount to doing business in these state within the meaning of such statute. So far as we know all states have such a statute. They were enacted for the benefit and convenience of the citizenship generally, and the Wisconsin statute bears the distinction of having the approval of the Supreme Court as to its reasonableness.”

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It would be a strange interpretation of law indeed if the Courts of this land would interpret a statute such as ours to run only to the benefit of the state governments for taxation purposes and not to the benefit of the citizens as a whole, especially where the statute provides definitely that all contracts entered into in violation of Section 16-8-3 shall be void, and does not limit such contracts to those involving state or municipal governments and their taxation authority. It is defendant's contention that in view of the statute as enacted under the Title 16, Chapter 8, Sub-section 3 by the Utah Legislature it was the intent and is fully set forth under said statute that the citizens of the state were the ones to be protected from the acts of corporations such as plaintiff.

Appellants therefore respectfully submit that petition for rehearing be granted and that the judgment of this Court be reversed and that the cause be submitted back to the District Court for trial of the issues and the ascertainment of the facts, and that the supplemental record as attempted to be filed herein be stricken and found null and void in these proceedings.

Respectfully submitted,

WM. H. BOWMAN

*Attorney for Appellants and
Defendants*