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IN THE

IN THE SUPREME COURT

of the STATE OF UTAH

FILED
NOV 7 - 1958
Clerk, Supreme Court, Utah

CLEO N. SMITH,

Plaintiff,

—vs—

ESTHER MORRIS,

Defendant,

THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

Plaintiff,

—vs—

GEORGE B. HANDY,

Defendant.

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CLEO N. SMITH,

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THE DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

Plaintiff,

—vs—

GEORGE B. HANDY,

Defendant.

PRELIMINARY STATEMENT

George B. Handy, defendant, appeals from a judgment of the court rendered by Stewart M. Hanson, Judge of the District Court of Salt Lake County, State of Utah.

The Record on appeal consists of the pleadings, minute entries, pre-trial order, judgment and similar papers.

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STATEMENT OF FACTS

The defendant, George B. Handy, is an attorney at law, admitted to practice before the Supreme Court of the State of Utah and all state courts.

In November, 1957, he was employed by one Cleo N. Smith, to institute action against one Esther Morris for injuries sustained by plaintiff Smith in an automobile accident with defendant Morris. Pre-trial hearing was had in the matter March 20, 1958 and the matter set for jury trial on April 29, 1958.

On April 29th, 1958, which was the day set for trial, neither plaintiff Cleo Smith, nor her counsel, George B. Handy, appeared and Judge Stewart M. Hanson, on motion of defendant's counsel entered a judgment by default wherein plaintiff Smith's action against defendant Morris was dismissed.

At this point, George B. Handy, who had heretofore merely been counsel for plaintiff Smith, suddenly, without service upon him of Summons or Complaint found himself designated as "Defendant" in an action designated "District Court of Salt Lake County, State of Utah, Plaintiff versus George B. Handy, defendant and judgment entered against him for the costs of impanelling sixteen jurors, in the sum of $128.00.

The Court, in stating a reason for this action, seemed to be quite concerned about the lack of courtesy on the part of plaintiff Smith and her counsel in not appearing for trial, nor in notifying the court of their intention not to appear.

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STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN GRANTING JUDGMENT AGAINST PLAINTIFF'S COUNSEL FOR COSTS OF IMPANELLING THE JURY.

Prior to discussing what defendant Handy considers to be the sole issue raised by the judgment of the court, the appellant herein admits that neither plaintiff Smith nor her counsel informed the court that they did not intend to appear for trial and appellant herein assumes whatever censure there may be for this omission

It should first be noted that defendant Handy was made a defendant and judgment entered aginst him without any compliance being made with Rule 3, Utah Rules of Civil Procedure which required the service of Summons and the filing of the complaint in accordance with the age old custom of giving a defendant the opportunity of having his day in court. The first and only notice Handy received of the courts action was the notice from the clerk that he had 10 days to pay up or have judgment entered against him.

Rule 54 (d) Utah Rules of Civil Procedure is the only statute or rule we have which pertains to the awarding or taxing of costs. This rule, insofar as it is material to this case is as follows:

(d) COSTS

(1) To Whom Awarded. Except when express provision therefore is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs;

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There is no provision in the above rule, either expressly or by implication for costs of any nature to be imposed upon counsel for one of the parties, much less the costs of impanelling the jury. The only significance to be given to the above phrase "unless the court otherwise directs" is that the court has discretion as to whether costs will be awarded to the prevailing party, to neither, and both parties to bear their own costs or to be apportioned between the parties in some other way. This seems to be born out by the practice of the courts and the authorities cited herein.

Rule 54 (d) as cited above superseded sections 104-44-1 to 18 inclusive and 104-44-21, Utah Code Annotated, 1943. There was no provision in the superseded statutes for the awarding of costs of any nature or the taxing of costs of any nature against the counsel of one of the parties. As found in the annotations for rule 54 (d), U.R.C.P. the Rules Committee in the preparation and drafting of these rules had this to say:

> "The above rule leaves the matter of costs somewhat to the discretion of the court and to that extent is inconsistent with our present statutory provisions which set out the various situations where costs are awarded, ****It is intended, however, that the court will follow the former practice, insofar as applicable, in assessing costs."

It is of great importance to note the type of costs taxed against defendant, costs of impanelling a jury. Even where it is proper to impose payment of costs, there is no precedent for ordering a proper party to pay such costs.

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The Utah case of *Fowler vs. Gillman* 76 U. 414, 430; 290 P. 358 held:

> "costs are mere incident to judgment to which they attach and are allowances to reimburse the successful party for expenses incurred in presenting or defending an action or special proceeding."

If this is so, and we must assume that it is the law, or a correct interpretation of it, the taxing of the costs of impanelling a jury against plaintiff's counsel is without a basis in law because such costs could not possibly be construed as "allowances to reimburse the successful party for expenses incurred".

In the Utah case of *Houghton vs. Barton,* 49 U. 611; 165 P. 471, it was held:

> "as costs were unknown at common law, the right, therefore to tax and recover costs in an action or proceeding is purely statutory and statutes authorizing them are strictly construed.

See also *Openshaw vs. Openshaw,* 80 U. 9, 12; 12 P 2 364.

Therefore, according to Utah law, where the statute does not permit the assessing of cost of impanelling the jury as an item of costs and the statute does not allow the assessing of such costs against the counsel for one of the parties, the court was without authority to enter judgment against counsel as was done and the judgment rendered in the matter is void.

The following are holdings under the Federal rule which is identical to the Utah rule.

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In the case of *Strong vs. Broward Country Kennel Club,* 77 F. Supp. 262, a derivative action was brought by a stockholder by the name of McRitchie against the corporation. McRitchie was not a party to the action, because he was not a resident of Florida, the state in which the action was brought, but he was prosecuting the action in the names of two other stockholders who never appeared and testified. The action was dismissed and in taxing costs, the court held against the recommendation of the special master in taxing costs and stated:

> "Although McRitchie was the sole stockholder actively prosecuting the ligitagion, because he was not a party to the litigation, the court was without authority to tax costs against him."

The case of *In Re Childs Co.,* 52 Fed. Supp., 89, 91 in part concerned itself with the awarding and taxing of costs in a bankruptcy action and it concerned itself with the interpretation of Section 2 (18), 11 U.S.C.A. because of the request of one of the answering creditors to tax costs against one of the petitioning creditors. It held:

> "Section 2(18) speaks of 'parties' and the general rule is that no judgment for costs can be rendered against a person not a party to the suit." 20 C.J.S. Costs, Section 120, page 360.

Corpus Juris Secundum, Vol. 20, page 360, Section 120

> "The general rule is well settled that no judgment for costs can be rendered against a person not a party to the suit. There must be express statutory provision to permit the awarding of costs against one not a party to the record." Citing

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Tulare County vs. City of Dinuba, 220 P. 201 (Cal); *Lindsley vs. City & County of Denver,* 196 P. 859, (Colo.)

American Jurisprudence, Vol. 14, Section 29, page 19

"As a general rule, costs are not recoverable by or taxable against a person who is not a party to the suit."

American Jurisprudence, Vol. 14, Section 32, page 21

"Usually an attorney is not liable for costs of an action in connection with which he is employed."

If the court in the instant case acted properly in taxing costs of impanelling the jury, against Counsel Handy, next it would appear that any attorney who brings action that seems non-meritorious to the court could be taxed with the costs of impanelling the jury and for such costs of retaining them, regardless of the number of days the jury sat. I admit that this does not seem to be a logical extension of the courts powers, and certainly not a power we would care to see the court exercise, but I consider it a logical extension of power if the action in the instant case is condoned.

CONCLUSION

From the foregoing authorities and from the facts as stated I submit to the court that the District Court of Salt Lake County, erred in entering judgment against defendant Handy for costs of impanelling the jury in the matter of Smith vs Morris.

Respectfully submitted,
GEORGE B. HANDY

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