

1962

Paul Bairas v. Lanard Johnson and Norman Cram : Brief of Appellant

Utah Supreme Court

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**IN THE SUPREME COURT
OF THE STATE OF UTAH**

CITY UT
MAY 2 1962

Paul Bairas,

Plaintiff-Appellant

v.

Lanard Johnson and Norman Cram,
co-administrators of the estate of
Philip G. Fulstow, deceased,

Defendants-Respondents

No. 9599

FILED

MAY 1 1962

APPELLANT'S BRIEF

Appeal from the Judgment of the
Sixth District Court for Kane County
Hon. Ferdinand Erickson, Judge,

Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Philip G. Fulstow, deceased,

Defendants-Respondents

No. 9599

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries by the plaintiff, and personal injuries and property damage by the defendant, arising out of a one car accident.

DISPOSITION IN LOWER COURT

Because of injuries sustained in the accident, plaintiff was unable to attend the jury trial setting of September 20, 1961. The court refused plaintiff's motion for a continuance and, since the plaintiff was unable to proceed, the trial court dismissed plaintiff's complaint with prejudice and defendants' counterclaim without prejudice.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal or vacation of the judgment below and a new trial.

STATEMENT OF FACTS

On or about July 5, 1960, plaintiff, Paul Bairas, a resident of Los Angeles County, California, and Dr. Philip G. Fulstow of Kanab, Utah, were involved in a one car accident in Coconino County, Arizona, in which Dr. Fulstow was killed and plaintiff suffered a broken neck causing him to be paralyzed from about the neck down (R. 7, 8, 18). Plaintiff was removed to California where at the times pertinent hereto he was a ward of the County of Los Angeles, State of California, having no resources of his own (R. 18, 41, 110).

Plaintiff Bairas filed this suit against the defendants, co-administrators of Dr. Fulstow's estate, on March 9, 1961 (R. 3). In his complaint plaintiff alleged that Dr. Fulstow was operating the automobile at the time of the accident and further that the negligence, carelessness, recklessness and intoxication on the part of Fulstow caused the accident (R. 1-2). The defendants' answer and counterclaim was served on March 27, 1961. Defendants denied the essential allegations of the plaintiff's complaint and in their counterclaim alleged that plaintiff was the driver of the automobile and at fault (R. 7, 8).

Fifteen days later the defendants applied to the court to set the case for trial (R. 20). Accordingly the case was set for June 14, 1961, but at the request of

counsel for the plaintiff that date was changed to June 28, 1961, because the prior date conflicted with a planned trip of counsel (R. 20, 21).

A week before the date set for trial, counsel for the plaintiff informed the court that a motion for continuance on the ground that the plaintiff was unable to travel to Utah would be made (R. 24). This motion was supported by an affidavit of counsel for the plaintiff (R. 12) and an affidavit of Dr. C. H. Imes, a member of the medical staff of the Rancho Los Amigos Hospital in Los Angeles County for the treatment of paraplegic patients (R. 18). Defendants filed a four page affidavit in opposition to the motion for continuance, outlining their opposition to the motion (R. 20-23). At the hearing the defendants strongly opposed the granting of the motion for continuance unless it be agreed and ordered that there be no further continuances and that if the plaintiff should be unable to attend the next setting of the trial his deposition would be taken and used and further that the plaintiff would give defendants ten days notice of the taking of the deposition should it appear that plaintiff would be unable to attend (R. 27-29). An order to this effect was signed by the court and served by defendants upon the plaintiff (R. 30). By this order which expressed that "the terms and conditions were stipulated to by counsel for the Plaintiff in consideration for the court granting the instant continuance," the case was set for trial on September 20, 1961.

It appears from the affidavit of the plaintiff that six days before the September trial date he was informed

by the hospital doctors that he would not be able to travel to Utah for trial, although previous to this notification plans and arrangements had been made for his travel to and stay in Utah for the trial (R. 109, 110).

From the affidavit of Nathan Goller, plaintiff's Los Angeles attorney, it appears that when he contacted plaintiff on September 11, 1961, it was then intended and planned for plaintiff to travel to Utah for trial and that reservations on the Union Pacific Railroad had been made for that purpose (R. 113). At the time plaintiff was informed that he would not be allowed to travel to Utah he was also informed that a trans-urethra section operation had been scheduled for September 21 in order that he might more comfortably and without attendance relieve his bladder (R. 110). It appears that plaintiff attempted immediately to contact Mr. Goller but that since he was paralyzed from the neck down and could neither write or phone he had to request others to do this for him (R. 113). He was first able to notify Mr. Goller of these unforeseen and unexpected developments Sunday, September 17 (R. 110, 113). Mr. Goller attempted to obtain permission from the hospital for plaintiff's trip but was unsuccessful (R. 113). It was further shown by Mr. Goller's affidavit that he at all times until September 17 believed that the plaintiff would be able to travel to Utah for the trial of his case (R. 114).

Mr. Goller notified the trial judge by wire September 18 (R. 51). Affidavits of Dr. C. H. Imes of the hospital staff and Mr. Goller were executed September 18 and filed with the court September 20 (R. 42, 44, 50).

Plaintiff's local counsel were notified by September 18 and they notified, as quickly as possible, the court and defendants' counsel (R. 100). When the case was called on September 20 plaintiff made an oral motion for a continuance based on the inability of the plaintiff to attend (R. 61).

Plaintiff also made a motion for a change of venue which had been served previously by mail (R. 34, 35) and in support thereof were filed an affidavit and a petition signed by twenty eight local residents (R. 32, 36).

Concerning the motion for continuance, the plaintiff argued *inter alia*, at the hearing on the 20th, that this was the first opportunity to bring the matter before court or defendants' counsel; that plaintiff was a welfare patient in a Los Angeles County hospital for paraplegics and as such was subject to the control of the hospital authorities; that unforeseen circumstances arose very rapidly; that it was believed that the plaintiff would be able to attend trial on the date set until the Monday prior to the Wednesday on which the trial was set; that the agreement and order of the court of June 26 should not operate to deprive the plaintiff of a fair opportunity to try his case; that he is a material witness and that his presence is necessary to the proper conduct of his case; that it was impossible to comply in detail with the provisions of rule 6 (d) of the Utah Rules of Civil Procedure because of the shortness of time and because affidavits from California did not arrive until the evening of the day prior to the trial setting; and that the June 26 understanding and order should not prejudice the right of

the plaintiff to a fair trial in light of the unforeseen and unexpected circumstances which arose (R. 55, 57, 59, 66, 71).

In opposition to the motion defendants argued that it was not timely filed and served and therefore could not be heard; that the order and agreement of June 26 precluded consideration of a continuance and that the trial must go on; that plaintiff should have anticipated that he might not be able to be present for the trial of his case and should have been prepared by desposition; that the affidavits were not sufficiently specific; and defendants also incorporated all objections made at the time of the June 26 hearing (R. 53, 59, 67, 69, 70).

The court denied the motion for continuance on the ground that "it is an oral motion, not having, of course, been served upon defendants as is contemplated and required under the Rules of Civil Procedure and it appearing to the court in this cause that the reasons set out for the continuance are not sufficient to justify a continuance at this time . . ." (R. 73). The motion for a change of venue was also denied (R. 73).

Accordingly, the trial proceeded without the presence of the plaintiff, the jury being empaneled on the afternoon of September 20 (R. 79). Plaintiff's counsel attempted a proffer of proof as to what the plaintiff would testify to were he present (R. 77, 78) and it appears that the court agreed to the preparation and filing of a written proffer of proof (see R. 78) which proffer was prepared and filed (R. 124).

A later renewal of the motion for continuance was also denied by the court (R. 82). Plaintiff then attempted

to introduce into evidence in its entirety a discovery deposition taken by defendants of plaintiff at an earlier date (R. 86) but upon objection to this by defendants, the offer was withdrawn and the deposition was not introduced in evidence in whole or in part (R. 87, 88). Plaintiff's counsel then indicated that they could go no further (R. 91) whereupon the court dismissed plaintiff's complaint with prejudice and the defendants' counterclaim without prejudice (R. 91).

Plaintiff made a timely motion for a new trial based, *inter alia*, upon the denial of the motion for continuance and the denial of the motion for change of venue (R. 99-103). At the time this motion was heard, the court had before it the affidavit of Paul Bairas, plaintiff, setting forth that he had believed he would have been able to attend the trial September 20 until notified to the contrary a few days prior thereto; that his condition was one of improvement; that transportation and attendance arrangements had previously been made; that a week before trial he was notified that his condition would not allow him to go and that the hospital had scheduled a trans-urethra section for September 21, 1961, which would, if successful, allow him to release his bladder without the use of a catheter; that he had no resources of his own and was dependent for medical care and subsistence on the County of Los Angeles and therefore was under their control and jurisdiction; that he had been advised that he would be released in about four weeks and that the county would provide him with money for a medical attendant to assist him outside of the hospital but that so long as he was a full time

patient of the hospital they would not provide him with a full time assistant for travel away from the hospital (R. 109-111).

In addition, the court also had before it two additional affidavits of Nathan Goller, plaintiff's Los Angeles counsel (R. 113, 117), an affidavit of Dr. Edward Bobo of the Rancho Los Amigos Hospital in Los Angeles County (R. 115), an affidavit of Dr .C. H. Imes, also of the Rancho Los Amigos Hospital in Los Angeles County (R. 119) and the written proffer of what the plaintiff would have testified to had he been able so to do (R. 124).

The motion for a new trial was denied and an amended judgment was entered on October 26, 1961 (R. 122, 128).

A total of seven months and seventeen days had elapsed since the filing of the complaint.

ARGUMENT

POINT 1. THE TRIAL COURT ERRED, BOTH AT THE TIME OF THE TRIAL AND AT THE TIME OF THE MOTION FOR A NEW TRIAL, IN DENYING PLAINTIFF'S MOTION FOR A CONTINUANCE WHICH WAS MADE ON THE GROUND THAT HIS SERIOUS ILLNESS AND PARALYSIS ARISING OUT OF THE ACCIDENT IN ISSUE PREVENTED HIS BEING IN ATTENDANCE AT TRIAL ON THE DATE SET.

In order to fully understand the speed with which the plaintiff was denied his day in court, the material

prejudice arising therefrom and the reasons why the continuance should have been granted, it may be of value to the court to review some of facts as they happened.

This case arose out of a one car accident. There is a dispute as to whether the plaintiff or Dr. Fulstow was the driver. In fact, all material points are in issue. Only the plaintiff and Dr. Fulstow were in the car at the time of the accident. Dr. Fulstow was killed. The plaintiff's neck was broken resulting in paralysis from about the neck down. Being without resources of his own, he was made a ward of the County of Los Angeles in a hospital for paraplegics and he was subject to the control and jurisdiction of the hospital.

This suit was filed on March 9, 1961. Defendants answer and counterclaim was served on March 27, 1961.

Only fifteen days thereafter defendants applied to the court for a trial setting. Trial was first set for June 14 but was reset for June 28 because the first date conflicted with a planned trip of plaintiff's counsel. Plaintiff had not been consulted concerning the first setting.

Prior to June 28, plaintiff moved for a continuance on the ground that he was not then physically able to be present at his trial. Defendants vigorously opposed this continuance although only a few days more than three months had elapsed since the filing of the complaint and no pretrial procedure had been invoked. At this time it was the opinion of plaintiff's doctor that the plaintiff should be able to attend in about three months.

Over the defendants' vigorous objection the court granted a continuance to September 20, but at the insistence of defendants, and apparently as consideration for the continuance, the court required an agreement—embodied in its “Order Continuing Trial Date” (R. 30)—to the effect that this would be the last continuance, that if plaintiff were not able to attend his deposition would be used, and, in addition, that if it were to appear that it would be necessary to use plaintiff's deposition that the defendants be given at least ten days notice of the taking of the deposition.

Plaintiff, however, continued to show steady improvement and he and his Los Angeles counsel, Mr. Nathan Goller, made the necessary arrangements, including train reservations, for his trip to Utah for the trial.

Unexpectedly, on September 14, six days before the trial date, plaintiff was for the first time informed by the hospital that he could not attend the trial and further that his then condition required a trans-urethra section on September 21 for the purpose of enabling him to release his bladder without the use of a catheter and without the constant surveillance of attendants, and that this operation would, if successful, greatly facilitate his ability to travel. Because of his paralysis from the neck down, plaintiff was required to rely upon others to notify his counsel of this unexpected development. He was first able to notify Mr. Goller on September 17, and he, Mr. Goller, immediately attempted to get the hospital authorities to reverse their position and to allow the plaintiff to travel to Utah, but in this he was un-

successful. Mr. Goller immediately notified the court of this development. Counsel were notified as rapidly as possible. Affidavits stating the facts were prepared, forwarded to Utah, and an oral motion for a continuance was made in court on the morning of the 20th.

Defendants again vigorously opposed the granting of the motion, on the ground, *inter alia*, that it had not been timely filed. Defendants also insisted that the court's order of June 26 precluded any further continuance and that the plaintiff should have been prepared for this type of unforeseen development. Defendants insisted that the trial proceed. This was six months and eleven days after the initial commencement of this suit.

The trial court denied plaintiff's motion even though the affidavit of Dr. Imes of the Rancho Los Amigos Hospital showed that a trip at that time would seriously endanger plaintiff's life, but that the contemplated operation would greatly facilitate plaintiff's traveling to Utah, and that the plaintiff should be able to accomplish this travel in about five weeks with the hospital furnishing him needed assistance for this purpose (R. 41).

Though the case had been at issue for less than six months, the requested short continuance was denied.

Rule 40(b) of the Utah Rules of Civil Procedure provides that "Upon motion of a party, the court may in its discretion, and upon such terms as may be just . . . postpone a trial or proceeding upon good cause shown." Plaintiff recognizes the wholesome rule that the granting of a continuance is within the sound

discretion of the trial court and that the court's action will be reviewed only where there is an abuse of this sound discretion.

Plaintiff submits that this is a case meriting such review. Plaintiff recognizes that there are many cases which on their facts have held that failure to grant a continuance was not error. Plaintiff also recognizes that where, in fairness and in the furtherance of the ends of justice, a continuance should have been granted in a given case, the appellate courts have not hesitated to grant relief in order that a party may have his day in court.

Plaintiff submits that this is a case meriting such review in order that the mandate contained in the Utah Constitution, Article I, Section 11, that "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without *denial* or unnecessary delay . . ." and the further mandate contained in Rule 1(a) of the Utah Rules of Civil Procedure promulgated by this court, that "They shall be liberally construed to secure the *just*, speedy, and inexpensive determination of every action" shall not be mere hollow utterances honored more in the breach than in the observance. (*Italics added*)

Surely the right to a just trial on the merits must take precedence over the right to a speedy disposition of a case not on the merits which precludes a plaintiff paralyzed from the neck down from ever having heard in a court of justice his cause which had then been but a few days over six months on the docket.

It has been recognized in many cases that a party has a strong and substantial right to attend the trial of his own case in order to assist his counsel in its conduct (as well as be a material witness). He should not be denied this fundamental right for light and transient reasons or merely as a matter of convenience to court or counsel or as a matter of technicality, when to do so deprives him forever of the right to have his case heard on the merits.

In *Jaffe v. Lilienthal*, 101 Cal. 175, 35 P. 636, 637 (1894) the court said

It seldom happens that a trial can be properly had in the absence of the plaintiff, even where he is disqualified as a witness, especially where it is to be tried upon oral testimony. With all the care that can reasonably be taken by both attorney and client, some matter of vital importance is liable to be overlooked by them until the trial calls it to the recollection of the plaintiff, and this is especially true in relation to matters purely in rebuttal. It is the right of parties to be present at the trial of their causes.

The recent case of *Giorgetti v. Peccole*, 69 Nev. 76, 241 P. 2d 199 (1952), quoting the above with approval, held it an abuse of discretion to deny a continuance where illness precluded a party's attendance.

In the leading case of *Borman v. Geib*, 94 Okla. 270, 221 P. 1006, 1007 (1924) the Oklahoma court held

A party to the litigation is entitled to be present to assist in the conduct of the cause. Counsel is entitled to have his client present for many considerations which need not be detailed here, but

which are familiar to all courts and legal practitioners.

Other significant cases in support of this fair and fundamental rule are *Westfall v. Motors Ins. Corp.*, 348 P. 2d 784 (Mont. 1960); *Anderson v. Chapman*, 356 P. 2d 1072 (Okla. 1960); *Rausch v. Cozian*, 86 Colo. 389, 282 P. 251 (1929); *Bernard's Fur Shop v. De Witt, Inc.*, 102 A2d 462 (Mun.Ct.App., Dist. Col. 1954); *Norman v. McGraw*, 299 P.2d 521 (Okla. 1956).

The older Utah case of *McGrath v. Tallent*, 7 Utah 256, 26 P. 574 (1891) cannot be considered as diminishing that rule for the comments there concerning continuance are not essential to the disposition of the case for it was disposed of on other grounds.

In any event, plaintiff was a material witness and thus would come within the rule stated, through dicta, in *McGrath*. Not only was a proper showing of the materiality of plaintiff's testimony made—we do not believe this point to be seriously questioned—but it should have been, and undoubtedly was, apparent to the court from the very nature of the case. *Morehouse, v. Morehouse*, 136 Cal. 332, 68 P. 976 (1902).

We recognize that where there is no chance for improvement the court may properly deny a continuance, in a proper case, rather than merely postpone the inevitable. But where there is a reasonable chance for improvement and attendance, as there was in this case, it has been almost universally held error to deny on this ground a motion for continuance. A recent case in point is *Thanos v. Mitchell*, 220 Md. 389, 152 A.2d 833 (1959). Despite dilatory delays for over two years the

court held it error to deny a continuance, pointing out, at page 834, that

It appeared that Mrs. Thanos would be available within a reasonable time (a different situation would be presented if her illness were permanent or the prognosis was for a lengthy disability). As Judge Henderson said in *Plank v. Summers* [205 Md. 598, 109 A.2d 914, 917] to have required the case to go to trial without her presence, would have been “like the play of Hamlet with Hamlet left out.”

Plaintiff finds no error in the many cases which hold that a continuance need not be granted, on the basis of illness, where there is no possibility of recovery sufficient to allow attendance within a reasonable time. But that is not the instant case. The affidavits of the plaintiff and his doctors show continual improvement, interrupted once temporarily, but eventually hastening recovery, by the situation which prevented his appearance at the September trial date. It would be indeed most unjust and restrictive to the point of being a denial of due process if the procedural rules were to deprive the plaintiff of an opportunity to show this court, or a trial court, as the case might be, that in fact the belief of himself and others that his rate of recovery would have allowed attendance in about five weeks was not only bona fide but also accurate. The plaintiff would welcome an opportunity to show the truth of the above statement and that he is, and for some time has been—as was presented to the trial court would be the case—able, ready and willing to travel to Utah for the trial of his case.

There had been no undue delay in the prosecution of this case; on the other hand, there was a most concerted effort on the part of defendants to avoid a trial on the merits, an effort which, it might be said, went to the extreme of taking an unfair advantage of plaintiff's helpless condition at a time when about five more weeks would have allowed a fair trial on the merits. At the risk of being repetitive, plaintiff would again point out to the court that this case was filed on March 9, 1961 and ended by the denial of plaintiff's motion on September 21, a period of only six months and twelve days. Had the reasonable continuance requested been granted, the matter could have been heard on its merits in about eight months or less from the date the complaint was first filed. It may be noted that except for the factors arising in a wrongful death action or a claim against an estate, the plaintiff would have had, in a normal situation, until the middle of 1964 in which to have filed his suit—and the defendants would not have been heard to complain.

No case has been found, similar to the present case on its facts, wherein speed has been held so much more important than a just trial on the merits that a denial of a continuance has been affirmed. This fundamental principal of Anglo-American due process and fair play is quite well summed up in a few words in *Borman v. Geib*, 94 Okla. 270, 221 P. 1006, 1007 (1924) where the court said

The showing made disclosed that the plaintiff could be present within a reasonable time. Justice does not demand that a trial should be so hurried

that a plaintiff who is absent on account of illness is deprived of the right to be present.

There are many cases which have held, despite great delays, prior continuances, dilatory tactics and other misconduct that a denial of a continuance where a party was ill was error. Despite many apparently prior delays on flimsy excuses, the court held in *Anderson v. Chapman*, 356 P.2d 1072 (Okla. 1960) that a refusal of a continuance requested because of party's illness was reversible error. In that case the period of total delay was sixteen months. Where a fair trial on the merits will be facilitated thereby, a continuance should be granted on the basis of a party's illness, despite prior continuances and delays. *Morehouse v. Morehouse*, 136 Cal. 332, 68 P. 976 (1902) several prior continuances; *Pierce v. Merchants Heat & Light Co.*, 189 Ind. 571, 127 N.E. 765, 128 N.E. 598 (1920) much procrastination and delay; *Overstreet v. Citizens' Union Nat. Bank*, 256 Ky. 653, 76 S.W.2d 641 (1934) attorney-party guilty of dilatory tactics prior to illness; *Ex parte Driver*, 258 Ala. 233, 62 So.2d 241 (1952) two prior continuances.

Some cases have turned on the question of whether the alleged illness did in fact prevent attendance or was merely advanced as an excuse. Defendants have not seen fit to question the fact of illness, or incapacity, in this case, nor is that point seriously in issue. Defendants have asserted, however, that the agreement and order of June 26 precluded a further continuance regardless of the question of good faith or when the plaintiff first learned that the hospital would not allow him to attend the trial. Plaintiff submits, however, that the agreement and order

must be read as a whole and that the third portion—which would be superfluous if it did not have this effect—shows that the order was not an absolute do or die matter, but that it was reasonably and in good faith interpreted by plaintiff and his counsel not to preclude a request for a further continuance if the plaintiff, unexpectedly, were unable to attend the trial from matters arising to late to give the required ten days notice for the taking of his deposition.

This provision which was inserted at the insistence of defendants and apparently prepared in its final form by defendants should not be held to make a game of Russian Roulette out of our trial procedure and to deprive a plaintiff of his day in court because of the sudden arising of an unexpected impediment to his attendance and participation at trial. If however this court should feel that such was the intention of the court's order of June 26, it is submitted that this court, in the exercise of its equitable supervisory powers over the administration of justice in this state can and should act to relieve plaintiff from the harshness of the bargain exacted as the *quid pro quo* for the first continuance requested because of his illness. Such action by this court would serve to make the order of June 26, authorized by U. R. C. P. 40(b) just rather than an unjust order. Such action would also be consistent with the letter and the spirit of Article I, Section 11 of the Utah Constitution.

Defendants also asserted at trial that the plaintiff should not have his continuance because he should have been prepared for such an eventuality as did occur and

have available plaintiff's deposition. Under other circumstances this might be a wholesome rule. Such circumstances would be where there was little chance for ultimate recovery, where there had been several prior delays, where there had been long prior delays or where the plaintiff had not been acting in good faith. While there are many cases which could be indiscriminately cited for the proposition that a party will not be granted a continuance where he could have taken his deposition, such cases do not bear scrutiny on this point. Approximately forty of these cases are collected at 68 A.L.R.2d 470, 482. As is always the case when using secondary sources, the cases cited must be examined with caution. Almost all of them have been examined and in those instances where a denial of a continuance based on illness of a party has been upheld there have been, almost invariably, other substantial and good reasons, completely independent of the deposition question, to merit the denial. In some there were very lengthy prior delays; in some the assertion of illness was clearly a fabrication; in some the ill party had no prospect of recovery; some suggested that there was no showing of materiality to the party's testimony; in others the party's testimony was available from a prior trial of the same case; in some there is obvious bad faith; and in some the opinion is so truncated and devoid of essential facts as to be meaningless as a judicial pronouncement.

The better reasoned cases however which are similar in background to the instant case hold it error to require a party-witness to submit to a trial by deposition where a showing is made that a reasonable further delay would

allow him to attend and to testify in person. For example, in *Sampley v. Sampley*, 166 S.W.2d 208 (Tex.Civ.App. 1942) the court said, at page 209,

The appellee's sole answer to the application for continuance, on the merits, was that he, through his counsel following the first continuance, offered to aid appellant's counsel in procuring her deposition by waiving time, commission, etc., so that she might in that way get her testimony into the cause before another trial; but it is this court's conclusion that she was not compelled—at her peril—to content herself with a deposition in advance of and in anticipation of being unable to appear at some future date. . .

Of similar import are *Stoneberger v. Bishkin*, 236 S.W. 782 (Tex.Civ.App. 1922); *Low, Hudson & Gray Water Co. v. Hickson*, 32 Tex. Civ. App. 457, 74 S.W. 781 (1903). See also *Plank v. Summers*, 205 Md. 598, 109 A.2d 914, 917 (1954).

In some cases prejudice to the opposing side has been a factor considered. The record in this case is devoid of any evidence to suggest that the defendants would be prejudiced or even materially inconvenienced by the granting of the requested postponement. At the June 26 hearing reference by affidavit was made to the desire to close the estate to avoid tax penalties and that the heirs were suffering anxiety, solicitude and concern over the litigation and that the settlement of the claims of general creditors was being delayed. However no facts in support of these broad, general, sweeping conclusions were adduced at that time, nor has this ground been seriously interposed since or substantiated. It is unfortunate that litigation cannot be conducted without

some inconvenience—but such seems to be the nature of the thing and it is respectfully submitted that in order to justify depriving a party of a chance to prove the merits of his claim the inconvenience that would deprive a man forever of his day in court must be indeed more than mere conjecture. Any inconvenience caused by the short requested delay would have been microscopically infinitesimal compared to the enormity and gravity of the loss to the plaintiff.

The facts and showings concerning the reason for plaintiff's requested continuance were all before the trial court at the time the motion was denied on September 20. They were still before the court, and amplified and buttressed by additional affidavits at the time of the hearing on the motion for a new trial. At either point the trial court could have, and should have, granted the continuance. The arguments made herein are applicable to either point of time.

It is respectfully submitted that under the circumstances of this case it was material prejudicial error—an abuse of the trial court's sound discretion—to deny plaintiff's requested continuance and that accordingly the judgment below should be reversed or vacated and a new trial granted.

POINT 2 THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR A CHANGE OF VENUE.

Utah Code Anno. 1953, 78-13-9 provides:

The court may, on motion, change the place of trial in the following cases:

. . .
(2) When there is reason to believe that an impartial trial cannot be had in the county, city, or precinct designated in the complaint.

Plaintiff moved the court for a change of venue on the ground that local prejudice would preclude his obtaining a fair trial in the county where set. In support thereof plaintiff provided the court with an affidavit of Larry Reeves and a petition signed by twenty-eight persons all to the effect that there was such bias and prejudice in Kane County as to make it impossible for plaintiff to have a fair jury trial there. Despite this showing of bias and prejudice the motion was denied.

Through the case of *Anderson v. Johnson*, 1 Utah 2d 400, 268 P.2d 427 (1954) affirmed a change of venue, it sets forth the rule that "all laws that have to do with the removal of action from one local jurisdiction to another for trial have one definite purpose, that is to promote justice by avoiding local matters of a prejudicial nature that might be detrimental to the rights of one of the parties."

The plaintiff in this case is entitled to his day in court and also to a day in court where an unbiased jury may be had.

Though the case did not get to the jury, it was nonetheless error not to grant the motion for a change of venue. In a subsequent trial the plaintiff should be afforded a trial in a county where an unbiased jury may be assured.

CONCLUSION

The plaintiff submits that the record before this court shows that the trial court abused its sound discretion in failing to grant plaintiff's motion for a continuance and in failing to grant plaintiff's motion for a change of venue.

Plaintiff prays that this court reverse or vacate the judgment of the lower court and remand this case for a trial on the merits in a county free from bias and prejudice, and in any event that it be reversed for a trial on the merits.

Respectfully submitted,

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