1967

Redwood Land Company v. Farrell W. Kimball And Mrs. Farrell W. Kimball : Appellant's Brief

In the Supreme Court of the State of Utah

REDWOOD LAND COMPANY,
a partnership,

Plaintiff and Respondent,

vs.

FARRELL W. KIMBALL and
MRS. FARRELL W. KIMBALL

Defendants,

MRS. FARRELL W. KIMBALL,

Appellant.

Case No.
10911

APPELLANT'S BRIEF

Intermediate Appeal from the Order of the
Third District Court of Salt Lake County, State of Utah,
Hon. Marcellus K. Snow, Judge

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STATEMENT OF THE KIND OF CASE

Action to quiet title, and for title disparagement damages, in which sheriff's return on summons served on defendant-appellant was made out of time.

DISPOSITION IN LOWER COURT

District Court entered its order denying defendant-appellant's motion to quash summons filed with an out of time return.

RELIEF SOUGHT ON APPEAL

Defendant-appellant, Mrs. Farrell W. Kimball, seeks (a) reversal of said order denying the quashing of said purported service of summons, or (b) entry of an order affirming her motion to quash.

STATEMENT OF FACTS

Plaintiff-respondent's summons (R. 6) was purportedly served (R. 7) on defendant-appellant on February 7, 1967, at Sacramento County, California (in lieu of publication of summons). Contrary to requirements of Rule 4(g), Utah Rules of Civil Procedure, proof of service was made on February 15, 1967, (R. 7, R. 11) more than five days after its purported service. Defendant-Appellant, appearing specially, filed her motion (among other things) to quash said service and summons (R. 1) because of said defect in the return. Denial of said motion to quash was entered (R. 2, 3) by District Court. Thereafter, and within time limited for taking appeals, defendant-appellant's petition for an intermediate appeal (R. 8-11) was filed, and leave to prosecute said intermediate appeal (R. 4) having been granted by this Honorable court, appellant's brief herein is filed.

ARGUMENT

POINT 1.

THAT THE DISTRICT COURT ERRED IN MAKING SAID ORDER IN THAT CONTRARY TO THE PROVISIONS OF THE UTAH RULES OF CIVIL PROCEDURE, AND PARTICULARLY RULE 4(g) WHICH REQUIRES UNDER HEADING "MANNER OF PROOF" THAT A RETURN BE MADE WITHIN "FIVE" DAYS AFTER SERVICE OF PROCESS, IT HELD RETURN MADE OUT OF TIME VALID.

POINT 2.

THAT CONTRARY TO THE UTAH RULES OF CIVIL PROCEDURE AND PARTICULARLY RULE 4(g), THE DISTRICT COURT HELD THAT A RETURN MADE OUT OF TIME WAS AS ACCEPTABLE AS IF MADE WITHIN THE REQUIRED PERIOD.

UTAH RULES OF CIVIL PROCEDURE, RULE 4(g) requires:

> Within 5 days after service of process, *proof* thereof *shall be made* as follows: . . ." (Italics ours)

The return or proof of service of the summons purportedly served herein (R. 7, 11) was made more than five days after service, and contrary to the rule above quoted.

The simple question herein involved is whether the rule as set forth means what it says when it requires proof within said period of time. The intent of the rules in making such a requirement had, no doubt, some salutory purpose. Discussion of Utah Rules of Civil Procedure (Vol. XX, Utah Bar Bulletin, Page 9) only reiterates the rule itself.

Normally, in the context of language used, the word "shall" imports an imperative or mandatory requirement, and it is on this that appellant takes exception to the lower Court's ruling that this requirement is otherwise. (See Black's Law Dictionary, 4th Edition, Pages 54-55, wherein it is stated:

> "As used in statutes, contracts, or the like, this word is generally imperative or mandatory. . . ." [Its use as permissive, is only "where no right or benefit to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense."]
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> "Sec. 28 Terminology: The intention . . . as to the mandatory or directory nature of a particular . . . provision is determined primarily from the language thereof. Words or phrases which are generally regarded as making a provision mandatory, include 'shall' . . ." 50 A.J. Statutes, Page 50.
>
> "Thus, a statute providing that a city "shall by appropriation . . ., create a fund . . . is imperative not only in form, but also in effect, and

> does not invest the city with any discretion" — Deseret Savings Bank vs. Francis (1923), 62 Utah 85, 217 P. 1114, 103 A.L.R. 814, 135 A.L.R. 1294. Accord, State vs. Shockley, 29 Utah 25, (pages 33 & 34), 80 Pac. 865.

So, if the return, as made, and being out of time is deleted upon being quashed, as it should be, there remains nothing to support any alleged service of summons, and, there being no proof of service as required, (and appellant-defendant having appeared specially for the purposes of the motion to quash), there is nothing in the record to bring this defendant-appellant within the jurisdiction of the District Court, and therefore the summons has no basis upon which to stand and should be quashed.

Language in Federal Land Bank vs. Brinton, et al., 106 Utah 149, 146 Pac.2d 200, is particularly pertinent here, although the facts of the case are not those of the instant case:

> "Good practice would always commend adequate service and prompt filing of the return . . ." (Page 154, Utah)

And, our rule, in keeping with this admonition was no doubt so worded and intended, with good reason.

POINT 3.

THE DISTRICT COURT ERRED IN NOT GIVING THE TERMS OF RULE 4(g) FULL AND PROPER EFFECT.

Aside from the contention that the language of the rule should be taken at its mandatory aspect, there remains the further question, as to proceedings, in service upon a non-resident of Utah.

(a) Personal service outside the State of Utah was intended as equivalent to and in lieu of publication of summons, and, such a proceeding, being in derogation of common law, strict construction of statutes relating to such procedures has been required by the authorities in order to make a valid service. For example, it has been stated:

> "The right to serve process by publication being of purely statutory creation and in derogation of common law, the statute authorizing such service must *be strictly pursued, in order* to confer jurisdiction upon the Court." (Emphasis added). Thompson vs. Robbins, 32 Washington 149, 72 Pac. 1043.

To the same effect see footnote in 50 Corpus Juris, 563, Sec. 264, which reads in relevant part:

> "Footnote 21. . . . all holding that a return showing constructive service is to be strictly construed."

The only question here is whether Section 68-3-2 Utah Code Annotated 1953, which relaxes the common law rule or Rule 1(a) U.R.C.P., in statutory construction is to be applied to the construction of this rule, i.e., is the rule to be equated to and given the same force as a

statute? If not, then, of course the above authorities would apply.

(b) There has been considerable development in the constitutional law of permitting non-residents to be served with process outside of a state, and made answerable to the actions commenced against them in states other than that of residence of a defendant, but, such statutes are all subject to the incidents and requirements of "due" process. Examples of such proceedings are found in following cases:

> "Conn vs. Whitmore, 9 Utah 2d 250, 342 Pac. 2d 871 and Wein vs. Crockett, 113 Utah 301 (306), 195 Pac. 222."

While none of these cases discuss the procedural point involved here, it is nonetheless a corollary that due process requirements would apply equally to procedural as to constitutional grounds.

(c) Now for a moment, let us assume that the rule of strict compliance with rule is not required, as the lower Court's ruling would seem to indicate, and see what result attends. The rule (Utah Rules Civil Procedure 4(g)) requires making of return within *five* days. This is directly contrary, and a complete change from the Federal Rules (particularly Rule 4(g) Federal Rules Procedure), so its intendment must therefore be in-

tended as a change from the federal procedure. Now, if we do not hold the rule to be mandatory, or of effect, or of any importance, what result? The result in essence would be that the requirement of the rule is entirely emasculated, or cancelled out, as there would be no period, as now required, left for the performance of this act; and the reason for its inclusion in the rules, and the safeguards that would be lost if the process server tried to recall the facts of service after greater passage of time would be subverted.

All rules of statutory or rule construction point toward a sensible result. Should the time element limited in the rule be read out — there would be no point to the wording of the rule — and an utterly unintended and wholly different result reached.

CONCLUSION

For the reasons above: (a) Necessity for Mandatory construction of the wording of the rule, (b) The requirement of sensibility in interpretation, (c) The necessity for adherence to due process, to give rule viability are the only valid conclusions.

WHEREFORE, the defendant-appellant prays: (1) That this Honorable Court reverse the ruling of the order of trial Court, as to the denial of her motion to quash the summons, or in the alternative (2) That this

Honorable Court enter ruling on the motion in favor of defendant-appellant, or (3) That this Court make its award of costs herein.

Respectfully submitted,

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R. S. JOHNSON,

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Service of two copies of the foregoing brief of appellants acknowledged this ..... day of July, A.D. 1967.

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(REED H. RICHARDS)

Attorney for Plaintiff-Respondent