

1940

## State Tax Commission of Utah v. Archie L. Larsen and Lee H. Whitlock : Brief of Appellant

Utah Supreme Court

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Moyle & Moyle; Attorneys for Appellant;

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IN THE  
SUPREME COURT  
OF THE  
State of Utah

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STATE TAX COMMISSION OF  
THE STATE OF UTAH,

*Plaintiff,*

vs.

ARCHIE L. LARSEN and LEE H.  
WHITLOCK, a partnership,  
*Defendants.*

CASE NO.  
6240

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**BRIEF OF APPELLANT**

MOYLE & MOYLE

Attorneys for Appellant.

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*Defendants.*

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**BRIEF OF APPELLANT**

**STATEMENT OF THE CASE**

On August 21, 1936, the plaintiff filed a complaint in the District Court of Duchesne County, State of Utah against Archie L. Larsen and Lee H. Whitlock, a claimed partnership, for claimed delinquent sales tax due the State of Utah. Summons was issued and on August 19,

1936, was personally served upon the defendant, Archie L. Larsen. Thereafter, on November 13, 1936, a default certificate was entered by the clerk of the court, wherein it was stated that in the action Archie L. Larsen and Lee H. Whitlock, a partnership, had been served with process and had failed to appear and answer plaintiff's complaint and that the time allowed by law for answering had expired and that the default of the defendants, Archie L. Larsen and Lee H. Whitlock, a partnership, in the premises was duly entered according to law. (Tr. 1-10-11-13 Ab. 1-2-3.)

On November 19, 1936, judgment was entered in the action, wherein it was again stated that the defendants, Archie L. Larsen and Lee H. Whitlock, a partnership, had been regularly served with process, had failed to appear and answer to the complaint, the time for answering had expired and the default of the defendants in the premises had been duly entered according to law and ordering judgment against the defendants in the sum of \$2,082.79, with interest and court costs. (Tr. 14; Ab. 4.)

Nothing further was done in the matter so far as the defendant, Whitlock, was concerned until December 24, 1936, when a summons and return was filed with the clerk of the court. The return of summons stated that the sheriff received the summons on August 22, 1936 and served the same upon Lee H. Whitlock, one of the partners of a partnership, the within named defendant, personally, by delivering to and leaving with said defendant in Salt Lake City, Salt Lake County, State of Utah, a

true copy of the summons on the 17th day of December, 1936 and that at the time of the service of a copy of the summons served, he endorsed the date and place of service and added his name and official title thereto. The return was dated December 18, 1936. Thereafter, on March 7, 1938, a default certificate was entered and filed by the clerk, purporting to enter the default of Lee H. Whitlock, individually, in the premises. Thereafter, a second judgment was made, entered and filed in the cause, ordering, adjudging and decreeing that plaintiff have judgment against each of the defendants individually in the sum of \$2082.79, with interest thereon at the rate of 1% per month from the date thereof until paid. (Tr. 15-16-22-23; Ab. 5-6-7.)

On March 8, 1939, the defendant, Lee H. Whitlock, by his attorneys, appearing specially for the purposes of the motion, filed a motion, supported by the affidavit of Lee H. Whitlock, to vacate, set aside and quash the alleged or pretended service of summons upon the defendant, Whitlock, for the reason that summons in the cause had not been served upon him. The affidavit is to the effect that summons had not at any time been served upon Mr. Whitlock either by serving the same upon him personally or by leaving a copy of the summons at his usual place of abode; namely, 1207 South 15th East Street, Salt Lake City, Utah, with some suitable person or at any other place or in any other manner or way and that the return of summons filed in the action on December 24, 1936, signed by M. Landau, as deputy sheriff, stating that he served the summons on affiant on December 17, 1936,

is wholly and entirely false, as said M. Landau did receive said summons or copy of the summons or any copy of any complaint upon Mr. Whitlock on December 1, 1936 or upon any other date or at any other time either prior or subsequent thereto or in any manner or way and, further, that no other person or party ever served summons upon him in any manner or way. The affidavit was not denied by the plaintiff. (Tr. 26-27; Ab. 7-8-9-10)

At the time of the hearing upon the motion, evidence was introduced by the defendant, Whitlock, in support of his motion. At the beginning of the testimony of M. Whitlock, the plaintiff made the following objections:

“MR. BROWN: Now I would like to enter an objection at this time, Your Honor, please, to all of the testimony that is going to be taken with respect to his motion, as it is our contention that the court should not hear this motion at this time and it is entirely out of place.” (Tr. 42; Ab. 10)

The only other objection made by plaintiff was made at the conclusion of the testimony of Oscar W. Moy Jr., a witness for appellant, which was as follows:

“If your Honor please, we have the same objection to Mr. Moyle’s testimony as applied to M. Whitlock’s testimony, that it is incompetent, irrelevant and immaterial and in as much as our contention is that this proceeding is out of line and not before the court at this time, we object to it.” (Tr. 52; Abs. 19)

The court reserved its ruling upon both objections.



By the evidence introduced, it was conclusively established that no summons was ever served upon appellant and that the return of the sheriff to the effect that summons was served upon Mr. Whitlock on December 17, 1936 was wholly false. There was some evidence to the effect that the Sheriff of Salt Lake County left a copy of a summons and complaint entitled in this action in the business office of appellant at 219 South Main Street, Salt Lake City, Utah, during the absence of Mr. Whitlock from the State of Utah and that there appeared across the face of the copy of summons inclosed in the envelope a statement signed by Mr. Landau that the summons was served on December 17, 1936, at Salt Lake County, Utah, on the defendant, Archie L. Larsen (Tr. 60; Abs. 20). It was further conclusively established that no summons or copy of complaint had ever been served upon the appellant personally or by leaving a copy of the summons or complaint at the residence of appellant in Salt Lake City, Utah, to-wit, 1207 South 15th East Street. It was further shown that Mr. Whitlock was advised by counsel that the summons and copy of complaint left in his office was not an attempt to serve him with summons, but was an attempted service upon the defendant, Larsen, as shown by the statement on the face of the summons and, further, that the cause of action set forth in plaintiff's complaint was against the partnership if one existed and would not support a personal judgment against appellant except as to his interest in the partnership if, in fact, he was a partner (Tr. 42-3-4-50-2; Abs. 16-19). Plaintiff did not offer any evidence to refute

or deny any of the matters set forth in the affidavit of appellant or the facts orally testified to at the time of the hearing conclusively establishing that the return of summons was false and that, in fact, no service of any kind had ever been made upon appellant.

### **Statement of Errors Upon Which Appellant Relies for Reversal of the Order of the Court Below**

Appellant has made nine assignments of error upon which he relies for a reversal of the order of the court made December 21, 1939, denying appellant's motion filed March 8, 1939, and refusing to grant appellant the relief prayed for in said motion or any relief (Abs. 21-22). Assignments of Error Nos. 1, 2, 3, 4 and 5 are directed to the failure of the court to grant said motion filed March 8, 1939. Assignments of Error Nos. 6, 7 and 8 are directed to the failure of the court either upon the motion as made or upon its own motion to vacate and set aside the judgment entered against the appellant on March 9, 1938, when it was conclusively established and shown to the court that the court did not have jurisdiction over the appellant to enter said judgment against him. Assignment No. 9 is that the order made December 21, 1939, denying appellant's motion was not supported by the evidence. Appellant relies upon each and all of these errors for a reversal of the order of the court appealed from.

## Statement of Particular Questions Involved for Determination

By reason of the proceedings taken by appellant, is he entitled to the relief prayed for or for any relief? The determination of this question necessitates a determination of the following questions:

1. Is the attack made by the defendant upon the judgment of March 8, 1939 a collateral or a direct attack upon the judgment?

2. If a collateral attack, will it lie when made within a year's time after the entry of judgment when made in the same proceeding and while the court retained jurisdiction over the matter?

3. Should the motion as made be treated as a motion to vacate the judgment?

4. When, as here, the plaintiff permits the appellant to conclusively prove and establish that the court was without jurisdiction to enter its judgment of March 8, 1939, should the court on its own motion vacate the judgment?

5. Should the trial court have sustained the motion and quashed the summons without disturbing the judgment?

6. Is appellant's remedy dependent upon the pro-

visions of Section 104-14-4, Revised Statutes of Utah, 1933, and must he, therefore, submit himself to the jurisdiction of the court and make a showing of a good defense to the action, or is he entitled to relief wholly independent of the provisions of said section?

## ARGUMENT

**The Attack Made by the Defendant Upon the Judgment of March 8, 1939 Is a Direct Attack Upon the Judgment and When It Was Shown That the Return of Summons Was False, it Became the Duty of the Court to Quash the Service of the Summons.**

Appellant contends that under the rules and practice of the courts of this state and the decisions of this Honorable Court any proceeding brought in the same action attacking the validity or effect of a purported judgment is a direct attack thereon and that, being a direct attack, the court may hear extrinsic evidence going to the validity or invalidity of the judgment particularly with respect to matters directed to the jurisdiction of the court over the subject matter of the action and to the jurisdiction of the court over the person of the defendant. It cannot be denied that the proceedings here brought by appellant directly attack the validity of the judgment. Regardless of the particular name given to the proceeding, it did, in fact, directly attack the validity of the judgment by conclusively establishing the lack of juris-

diction of the court over the person of the defendant. When it was shown to the court that the judgment was entered without its having jurisdiction over the person of the defendant, the court should and owed a duty to appellant to grant the relief sought.

In the case of *Intermill vs. Nash*, 94 Utah 271, 75 Pac. (2d) 157, decided January 13, 1938, this court, through its Honorable Justice Larsen, very thoroughly reviews the authorities and cases distinguishing between "direct" and "collateral" attacks upon judgments and fully sets forth the distinguishing features of the two types of proceedings. In that case, this court unanimously held that where the proceedings adopted by the defendant in attacking a judgment are pursued in the proceedings wherein the judgment is rendered, it is a direct attack thereon and that the true test is the purpose of the attack and vulnerability of the judgment and not the name or the description of the assault itself. We quote from Page 279 of the Utah report of the decision:

"(4) Remedies pursued in the proceedings wherein the judgment is rendered are direct attacks; otherwise, they are looked upon as collateral. (citing cases)"

And from Page 280:

"To differentiate clearly, one must have in mind not the terms used, but the reason underlying the differentiation. The terms 'direct' and 'collateral,' as used in reference to attacks on judg-

ments, apply to the purpose of, or the method employed in, the attack, and not as descriptive of the assault itself. The term 'direct attack' means a proceeding brought, instituted, or maintained directly for the purpose, that is, with the direct and primary objective, of modifying, setting aside, canceling or vacating, or enjoining the enforcement of the judgment. The term 'collateral attack' means the questioning of the validity of a judgment in a collateral proceeding; that is, a proceeding other than the one in which the judgment is entered, and which is not brought, instituted, or maintained for the express purpose of modifying, setting aside, canceling, or enjoining the execution of the judgment. It is a denial of, or questioning the validity of, a judgment, when the judgment is or becomes involved in the cause, only incidentally and collaterally, and its enforcement or validity is not the primary issue in or purpose of the proceeding."

And Page 285 from the concurring opinion of the Honorable Justice Wolfe:

"There have been many confusing statements as to direct and collateral attacks on judgments. We are interested more in the manner of testing in any given case whether a judgment may be attacked than in nomenclature. As says the prevailing opinion, generally, a direct attack is one the purpose of which is to eliminate what is or purports to be a judgment, whereas a collateral attack attempts not to obliterate the judgment, but to avoid the effect of it when used in another suit. But I think there is a form of direct attack which really only avoids the effect of a purported judgment. In order to make this more clear, I list the

types of direct attacks as I see them: (1) that attack which attempts to set aside a judgment by a motion or proceeding brought in the same suit in which the judgment was rendered. (2) \* \* \* \*”

Of course, in the matter at bar, the very validity of the judgment is being attacked by this proceeding and the very purpose of the proceeding is to invalidate the purported judgment against the appellant. It is a proceeding in the very action in which the judgment is entered and is within the time that the court retains jurisdiction of the cause.

The case of Norton vs. Atchison, etc. RR Company, 97 Cal. 388, 32 Pac. 452, is probably the leading and most cited case on the question of proceedings brought after judgment to obtain relief from a purported judgment for failure of jurisdiction over the person of the defendant when such failure of jurisdiction does not appear upon the face of the judgment roll. The proceeding followed in that case was very similar to the proceeding followed by appellant. In that case, after entry of judgment, the defendant filed a motion to quash the service of summons, to set aside and vacate the default of the defendant and to set aside and vacate the judgment which had been entered against it. The court, after holding that the proceeding pursued was not brought under Section 473 of the California Code of Civil Procedure, which is identical with our Section 104-14-4, Revised Statutes of Utah, 1933, and after holding that the evidence conclusively established that the defendant had not been served with summons in

the action, on Page 391 of the California report of the case, states:

“It was clearly, then, the duty of the court to quash the service of the summons, when it appeared to it that the return of such service was false; *and the vacating of the judgment was an incident which necessarily followed*, provided that the proceeding by motion by which this result was sought to be accomplished was a proper one.” (Italics ours.)

The court then proceeded to say that the defendant did not base his claim to relief on his own mistake, his inadvertence or surprise, but based it on the ground that the judgment was void and the motion used was the proper remedy. Further, the court states on Page 393:

“Where a return shows that a non-resident was personally served with summons within the state, and it is made to appear to the court that such return was false, it would be strange if, within a reasonable time, the court could not, upon application, set aside the service or the false return of service and vacate the judgment.”

It is clear from this case that the attack is really made upon the service or false service of summons and that the vacating of the judgment is a mere formality or incident which necessarily follows upon the quashing or setting aside of the service of the summons. The motion made by the appellant in the case at bar clearly is an attack upon the judgment though the vacating of



the judgment has not been expressly requested therein. The very foundation of the judgment is attacked. Certainly, it is a direct attack upon it.

See also *Baldwin vs. Burt*, 74 N. W. 594, 54 Neb. 287, Page 595:

“The order or decree of the District Court quashing the officer’s return on the summons, is, in effect, an order vacating the foreclosure decree. It is true, the court does not expressly say that the foreclosure decree is vacated or set aside, but precisely the same result follows from the order as if it was couched in those express terms. To say that the order under review is not one vacating the foreclosure decree is to discredit entirely the purpose and effect of the order. \* \* \* \*  
*When the court made the order under consideration quashing the officer’s return, the foreclosure decree fell of itself.*” (Italics ours.)

**If the Attack Made by the Defendant Upon the Judgment Is Held to Be a Collateral Attack, It Will Lie When Directed Against a Void Judgment when Made Within a Year’s Time After the Entry of Judgment in the Same Proceeding and While the Court Retains Jurisdiction Over the Proceeding.**

There is conclusive authority holding that where a judgment is void as distinguished from being voidable, that is, where there has been a service of summons upon the defendant and the service of summons is defective in some particular but not absolutely void as in this case,

the judgment may be attacked either collaterally or directly if the attack is made within the period of time that the court retains jurisdiction over the cause even though the defect does not appear upon the face of the record.

Gray vs. Hall, 255 Pac. 246, (Calif.), Page 252:

“It cannot be denied that, in those cases in which judgments have been rendered without any or insufficient service, or where the party not only has had no opportunity, but is so ignorant of any proceeding against him as not to have been able to avail himself of the remedies which the law gives him until he has lost them all, the judgment is absolutely void. Such a judgment may be attacked at any time, directly or collaterally. People vs. Harrison, 84 Cal. 607-608, 24 Pac. 311.”

Bancroft Code Pleading Practice and Remedies, 10-year Supplement, Volume 2, Page 1795, Paragraph 963:

“Effect of Irregularities and Defects Generally. Defects in the summons or service are not available on collateral attack *unless they are such as to render the judgment absolutely void.*” (Italics ours.)

There being no service of summons of any nature made upon the appellant in this case and he having not appeared therein in any manner or way, it is clear that the judgment here is void and not merely voidable.

33 C. J. 1082:

“A personal judgment rendered against a de-

pendant without service of process upon him, or other sufficient legal notice to him, is without jurisdiction and void, unless he has appeared voluntarily, because jurisdiction of the person is essential in such cases, and constructive service is insufficient to give jurisdiction in personam."

33 C. J. 1080:

"Formal process or notice served in the manner authorized or required by law is essential to support a judgment; mere informal knowledge of the pendency of the action is not sufficient. Thus, a judgment is a mere nullity where service is made upon a third person instead of upon the actual defendant, notwithstanding defendant had actual knowledge of the action and the attempted service."

We do not admit that the appellant had even informal knowledge of any pending suit against him for personal judgment and the evidence produced conclusively shows that the appellant was advised by counsel that no such action was pending against him.

We, therefore, contend, as hereinabove stated, that it is wholly immaterial in this case whether the procedure followed by the appellant is termed by the court as a collateral or direct attack on the judgment, for the reason that the proceeding is brought within a year's time as permitted by law while the court still had jurisdiction in the matter and where, as here, it has been conclusively established that the court had no jurisdic-

tion whatsoever over the appellant to enter the judgment against him.

**Plaintiff Permitted the Appellant to Conclusively Prove and Establish That the Court Was Without Jurisdiction to Enter Its Judgment of March 8, 1939 and the Manner of Attack, Therefore, Is Immaterial.**

The plaintiff did not file any reply or denial of any kind to the sworn affidavit of the appellant conclusively establishing that the return of summons upon which the judgment was based is utterly false nor did the plaintiff offer any evidence to refute the oral evidence presented at the hearing upon the motion to the same effect. The only objections made were as set forth on Pages 14 and 19 of the abstract of record. The first objection which was presented only to the introduction of the oral evidence was that the court "should not bear this motion at this time and it is entirely out of place." The other objection was that the evidence was incompetent, irrelevant and immaterial and that the proceeding was out of line and not before the court at the time. The reasons, if any, why the court should not hear the motion at the time, or why the motion was out of place or why the proceeding was out of line and not before the court at the time of the hearing or why the evidence was incompetent, irrelevant or immaterial do not appear in either of the objections or elsewhere in the record. We contend that the objections made if, in fact, the proceeding was technically objectionable, being directed to the quashing

of the summons and not to the vacating of the judgment in express terms, were insufficient to raise any question as to the technical form of the motion, especially in light of the fact that the facts stated in the affidavit supporting the motion were not denied. The objections were directed only to the offering of oral evidence and did not attack the motion itself or the affidavit filed in support thereof. The motion and the affidavit without the oral evidence introduced were sufficient to entitle appellant to the relief sought.

It has been definitely held that where the evidence is undisputed and is established beyond all controversy, the judgment may be vacated at any time or in any manner either by direct attack or collateral attack, the rule being the same as when the judgment appears to be void upon its face. We quote from *Hill vs. City Cab and Transfer*, 79 Cal. 188, 21 Pac. 728, Page 191:

“But this rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, then, as a question of law, upon such facts, we do not see why the case is not like that where a judgment is void upon its face. In the present case, the findings established the fact that there was no service of summons upon or authorized appearance by the defendant. And none of the evidence is brought up, nor does the question appear to have been raised by exception or demurrer or in any other way. The facts, there-

fore, must be taken to be established by the record beyond all controversy and, upon such facts, the law is that the judgment is void.”

The above case was clearly a case of a collateral attack upon the judgment, the invalidity of the judgment being set up as a defense to a separate suit brought for the renewal of the judgment.

See also *People vs. Harrison*, 107 Cal. 541, 40 Pac. 956, in which case proceedings attacking the judgment were brought three years after judgment. The attack was clearly an indirect or collateral attack thereon and the defects did not appear upon the face of the record. The court held that where the facts showing no service were admitted or not denied it remained a question of law as to the character of the service, quoting with approval the above quotation from the *Hill vs. City Cab and Transfer* case.

As above stated, the plaintiff has not in any manner or way denied the facts set forth in the sworn affidavit attached to appellant's motion, which conclusively show no service of summons, and, further, introduced no evidence upon the hearing of this cause to refute appellant's oral evidence conclusively establishing that no service of summons was made upon the appellant or appearance made by him in the action. The above authorities are, therefore, applicable.

**Appellant's Remedy Is Independent of Section 104-14-4 and He Need Not Submit Himself to the Juris-**

## **diction of the Court or Support His Motion with a Showing of a Good Defense to the Action.**

The Supreme Court of California, construing Section 473 of the California Code of Civil Procedure, which is identical to Section 104-14-4 of our Revised Statutes of 1933, has definitely held that the relief provided for by said Section 473 of the California Code is applicable only where the party attempting to attack a judgment or process is proceeding on the ground of excusable neglect, mistake, inadvertence or surprise on the part of the party so attacking the judgment or proceeding and that where the attack is on the ground that the court has never obtained jurisdiction over the party due to no neglect of any kind upon the part of said party, he is entitled to relief wholly independent of said Section 473.

The case of Norton vs. Atchison, etc. RR Company, hereinabove cited, is clear authority for this contention. On Page 390 of the California report, the Supreme Court of California states:

“The recent case of Jacks v. Baldez, 97 Cal. 91, might also be cited in support of what appellant deems to be the correct position. But those authorities relate to cases which come clearly within, or should have been brought under, the provisions of said section 473. The main provision of that section is, that a court may relieve a party from a judgment taken against him ‘through his mistake, inadvertence, surprise, or excusable neglect’; and it is quite clear that the provision just quoted has no application to the ground

upon which respondent moved in the case at bar. Defendant here is not asking relief from its neglect or mistake or default or any character; its contention is, that the court has no jurisdiction over it, and no power to compel it to answer to the action. It does not ask to be allowed to come in and answer, but contends that, in its situation, it cannot be called upon to answer; therefore, there can be demanded of it no affidavit of merits. In the cases cited the parties making application to set aside the judgment confessed some neglect or misconduct from which they sought to be relieved, and thus come clearly within the provisions of said section, and, of course, were compelled to comply with the provisions of the section, under the construction which the court had given them."

The California court also quotes the following from Freeman on Judgments, Paragraph 108:

"In all cases an affidavit of merits must be made and filed, except where it appears that the court has never acquired jurisdiction of the moving party, and that its judgment against him is void; but in this class of cases he is entitled to relief, independently of those statutes."

The case of Vaughn vs. Pine Creek Tungsten Company, 265 Pac. 491, is a later California case holding to the same effect, and there are other California cases so holding, and our own Supreme Court in the case of Atkinson vs. Atkinson, 43 Utah 53, likewise has held that, where the court had no jurisdiction over either the subject matter or the party, the party affected could ob-



tain relief wholly independent of that section. We quote from the Atkinson case as follows, Page 56:

“Where a judgment is obtained by default upon constructive service, and the defendant moves to set the judgment aside by motion within the year allowed by our statute, or if he seeks to be permitted to open up the default judgment for the purpose of making a defense to the original action upon the ground of the excusable neglect or inadvertence, or for some other sufficient cause, the practice is well settled that, in order to have the judgment set aside and the cause reopened, he ordinarily must submit himself to the jurisdiction of the court, and must also set up a good defense to the action in the form of an affidavit or answer. But is this the rule without exception, and must a party also do this in a case wherein the plaintiff has been guilty of fraud in inducing the court to assume jurisdiction of the action in which the default judgment is entered, or where, as here, the court never acquired jurisdiction of the person, because the order for service by publication and the pretended summons were void? If a plaintiff can enforce such a rule, then he in a divorce action would be permitted to take advantage of his own wrong, since he could compel the defendant in such an action to submit his or her person to the jurisdiction of the court, when neither personal nor subject-matter jurisdiction (the marriage which constitutes the res) could be obtained in any other way.”

“There may be some good reason why a party may not desire to have the case tried in a particular court or state, and if so such person need not, under circumstances like those in this case, subject his person to the jurisdiction of the

court in order to be entitled to the relief sought. Under such circumstances the respondent was entitled to have the judgment set aside as a matter of right and not as a matter of grace. See *Dobins v. McNamary*, 113 Ind. 54, 14 N. E. 887, Am. St. Rep. 626; 1 Black on Judgments (2d Ed. section 348.)"

From the above authorities, it is very clear that where, as here, the court has not obtained jurisdiction over the defendant to render a judgment, the defendant is entitled to relief wholly independent of Section 10-14-4 of our Revised Statutes. Appellant is not claiming relief because of any mistake, inadvertence or excusable neglect on his part as he has not been guilty of any such mistake, inadvertence or neglect. He is merely claiming and asking relief against a void judgment entered against him without jurisdiction and without notice of any kind to him of the pendency of the proceeding.

WHEREFORE, appellant respectfully contends that the trial court erred in denying appellant's motion and refusing to grant appellant any relief from the void judgment entered against him and that this Honorable Court will rectify said errors.

Respectfully submitted,

MOYLE & MOYLE

Attorneys for Appellant.