

1940

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Grant A. Brown; Alvin I. Smith; Garfield O. Anderson; Richard L. Bird, Jr.; Attorneys for Respondent

Recommended Citation

Brief of Respondent, *Utah Tax Commission v. Larsen and Whitlock*, No. 6240 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/656

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

**In the Supreme Court
of the
State of Utah**

STATE TAX COMMISSION OF
THE STATE OF UTAH,
Respondents,

vs.

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

LEE H. WHITLOCK,
Appellant.

Case No.
6240

BRIEF OF RESPONDENT

GRANT A. BROWN,
ALVIN I. SMITH,
GARFIELD O. ANDERSON,
RICHARD L. BIRD, JR.,
Attorneys for Respondent.

FILED

AUG 2, 1940

INDEX

	Page
STATEMENT OF THE CASE.....	2
QUESTIONS	5
ARGUMENT	5
A. The Denial by the District Court of Appellant's Restrictive Motion to Quash Service of Summons Is Not a Final Judgment for the Purpose of Appeal.....	6
B. Appellant's Restrictive Motion to Quash Service of Summons, Made After Judgment, Precluded Respondent from Defending Its Judgment	19
C. The District Court, Regardless of Objections by Respondent, Properly Denied Appellant's Restrictive Motion to Quash Service of Summons.....	22
D. Appellant's Motion Was Not a Direct Attack Against the Judgment	23
E. Appellant's Restrictive Motion to Quash Service of Summons, Made after Judgment, Was Neither a Proper Nor Allowable Motion.	31
SUMMARY	40

CASES CITED

Amy v. Amy, 12 Utah 278, 42 Pac. 1121.....	25, 30
Atkinson v. Atkinson, 43 Utah 53, 134 Pac. 595.....	38, 39
Attorney General of Utah v. Pomeroy, 93 Utah 426, 73 Pac. (2d) 1277	10, 11
Baldwin v. Burt, 54 Neb. 287, 74 N. W. 594.....	32, 34
Bird v. Palmer, 152 Okla. 3 and 7, 3 Pac. (2d) 890 and 894.....	25
Blyth & Fargo Company v. Swenson, 15 Utah 345, 49 Pac. 1027.....	36, 37
Castle Dale City v. Woolley, 61 Utah 291, 212 Pac. 1111.....	7
Coburn v. Coburn, 89 Mont. 386, 298 Pac. 349	25
Dockery v. Central Arizona Light & Power Company, 45 Ariz. 434, 45 Pac. (2d) 656.....	25
Dannenburg v. Powers, 182 Okla. 404, 77 Pac. (2d) 1142.....	32
Fidelity Phoenix Fire Ins. Co. v. Ford and Cantrell, 164 Tenn. 107, 47 S. W. (2d) 558.....	24
Florence Gin Company v. City of Florence, 226 Ala. 478, 147 So. 417	25
In Re Fort Shaw Irrigation District, 81 Mont. 170, 261 Pac. 962....	25
Globe Construction Co. v. Yost, 169 Wash. 319, 13 Pac. (2d) 433....	24
Gregg v. Seawell, 85 Okla. 88, 204 Pac. 908.....	31
Green v. Craig, 164 Tenn. 445, 51 S. W. (2d) 480.....	24
Honerine Mining & Milling Co., et al., v. Tallerday Steel Pipe & Tank Co., et al., 30 Utah 449, 85 Pac. 626.....	17

INDEX—(Continued)

	Page
Hunter v. May, 161 Tenn. 155, 25 S. W. (2d) 580.....	20
Intermill v. Nash, 94 Utah 271, 75 Pac. (2d) 157.....	25, 26, 27, 28, 29, 30
In re Jones' Estate, 56 Utah 291, 190 Pac. 783.....	6
Klepper v. Klepper, 51 Nev. 145, 271 Pac. 336.....	13
Lambie v. W. T. Rawleigh Company, 178 Ark. 1019, 14 S. W. (2d) 245	25
Levinson v. Vanderveer, 169 Wash. 254, 13 Pac. (2d) 448.....	24
Liebhard v. Lawrence, 40 Utah 243, 120 Pac. 215.....	37
Madsen v. Hodson, 69 Utah 527, 256 Pac. 792.....	33
Morrill v. Morrill, 20 Ore. 96, 25 Pac. 362.....	27
North Point Consolidated Irrigation Company v. Utah & S. L. Canal Company, 14 Utah 155, 46 Pac. 824.....	12
Norton v. Atchison, etc., Railroad Company, 97 Cal. 388, 32 Pac. 452	34
Producers' Naval Stores Company v. Brewton, 90 S. E. 735.....	33
Producers' Refining Company v. Missouri K. & T. R. Co. of Texas, 13 S. W. (2d) 679.....	25
Protest of St. Louis - S. F. Railway Co., 163 Okla. 1, 19 Pac. (2d) 162	25
Ryan v. Davenport, 5 S. D. 203, 58 N. W. 568.....	14
Salmons v. Rugyeri, 103 N. J. Law 596, 137 Atl. 568.....	15
Selmer v. Smith, 285 Pa. 67, 131 At. 663.....	20
Shurtz v. Thorley, et al., 90 Utah 381, 61 Pac. (2d) 1262.....	8, 9, 10
State v. Kelsey, 64 Utah 377, 231 Pac. 122.....	7
State v. Olsen, 39 Utah 177, 115 Pac. 968.....	7
Vaughn v. Pine Creek Tungsten Company, 89 Cal. App. 759, 265 Pac. 491.....	20
Wise v. Miller, 215 Ala. 660, 111 So. 913.....	25

REFERENCES AND AUTHORITIES

American Jurisprudence, Vol. 2.....	7
Bancroft's "Code Pleading Practice and Remedies," Ten-Year Supplement, Vol. 5.....	16
Bancroft's "Code Practice and Remedies," Vol. 8.....	16
Constitution of the State of Utah, Article 8, Section 9.....	6
Revised Statutes of Utah, 1933:	
Section 104-14-4	35, 37, 39, 40
Section 104-41-1	6

In the Supreme Court of the State of Utah

STATE TAX COMMISSION OF
THE STATE OF UTAH,
Respondents,

vs.

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

LEE H. WHITLOCK,
Appellant.

Case No.
6240

BRIEF OF RESPONDENT

Appellant in his brief has stated the facts, and respondent will endeavor to avoid unnecessary repetition of the same. However, in order to lay a factual foundation to our legal argument, we will here set forth that portion of the facts we believe pertinent to this controversy.

STATEMENT OF THE CASE

A complaint was filed in the Fourth Judicial District Court by the State Tax Commission against Archie L. Larsen and Lee H. Whitlock, a partnership, alleging sales tax liability. In furtherance of said action, a summons was prepared by respondent and given to the Sheriff of Salt Lake County for service. On the 24th day of December, 1936, the original of the said summons, together with a certificate, duly executed and certified by a deputy sheriff, was returned and filed with the clerk of the court in Duchesne County. The certificate of the sheriff certified that he had served the summons, together with a copy of the complaint, upon Lee H. Whitlock personally on the 17th day of December, 1936. Lee H. Whitlock failed to answer the complaint of the respondent or otherwise plead, and on the 8th day of March, 1938, the default of Lee H. Whitlock was duly entered by the clerk of the said court. On the 9th day of March, 1938, the Honorable Dallas H. Young rendered judgment in favor of respondent and against appellant, Lee H. Whitlock. In the judgment the court found Archie L. Larsen and Lee H. Whitlock, individually, had been regularly served with process and had defaulted. On the 8th day of March, 1939, Lee H. Whitlock, by and through his attorneys, Moyle and Moyle, filed the following motion:

“Now comes the defendant, Lee H. Whitlock, by Moyle & Moyle, his attorneys, *appearing here specially for the purposes of this motion only, and moves the court to vacate, set aside and quash the*

alleged or pretended service of summons upon this defendant for the reason that summons in the above entitled cause has never been served upon this defendant.

“This motion is based upon the files and records of said action and the proceedings therein and upon the affidavit attached hereto, which affidavit is hereby referred to and made a part hereof.

“Please govern yourself accordingly.

(Signed) MOYLE & MOYLE,
Attorneys for Defendant Lee
H. Whitlock, *for the purpose of
this motion only.*

STATE OF UTAH {
COUNTY OF SALT LAKE { ss.

“O. W. MOYLE, JR., being first duly sworn, upon oath deposes and certifies that he is one of the attorneys for the defendant, Lee H. Whitlock, *for the purpose of the above motion only*; that in his opinion the objection to the pretended service of summons upon said defendant as set forth in the above motion is well taken.

(Signed) O. W. MOYLE, JR.

“Subscribed and sworn to before me this 8th day of March, 1939.
(SEAL)

(Signed) DAN T. MOYLE,
Notary Public, residing at
Salt Lake County, Utah.

“Received copy of the above motion, together with the attached affidavit, this 8th day of March, 1939.

(Signed) ALFRED KLEIN,
Attorney for the State Tax
Commission of the State of
Utah.”

(Italics ours.)

This motion was supported by an affidavit filed by Mr. Whitlock. The motion was filed in the District Court at Duchesne County on the 8th day of March, 1939. On the day set for hearing of the said motion, respondent appeared through its attorney and objected to the motion on the ground that such a motion would not properly lie after judgment and, hence, any evidence in support of the motion was irrelevant, incompetent and immaterial. The Honorable Abe W. Turner, Judge of the Fourth Judicial District Court, before whom the matter was heard, deferred ruling upon this objection and received the evidence introduced by the appellant. The admissibility of the evidence was, of course, conditioned upon the ruling on the objections interposed by the Tax Commission. The Tax Commission, in turn, refused to submit any evidence, electing to stand upon its position that the motion was entirely out of order and any evidence in support or denial thereof was irrelevant. Judge Turner requested briefs supporting the positions of the respective parties regarding the efficacy of the motion. The briefs were duly submitted, and the court, on the 24th day of June, 1939, denied the motion. It is from the denial of this

motion that the appellant, Lee H. Whitlock, instituted this appeal.

Questions

As analyzed by respondent, there are two questions presented to the Court by this appeal:

1. Is the order denying a restrictive motion to quash service of summons an appealable order?
2. Will a motion restricting itself to the sole purpose of quashing service of summons properly lie after judgment?

Argument

In presenting its negative answers to the two questions, respondent will divide its argument into the following subheads:

- A. The denial by the district court of appellant's restrictive motion to quash service of summons is not a final judgment for the purpose of appeal.
- B. Appellant's restrictive motion to quash service of summons, made after judgment, precluded respondent from defending its judgment.
- C. The district court, regardless of objections by respondent, properly denied appellant's restrictive motion to quash service of summons.
- D. Appellant's motion was not a direct attack against the judgment.
- E. Appellant's restrictive motion to quash service of summons, made after judgment, was neither a proper nor allowable motion.

A.

**The Denial by the District Court of Appellant's
Restrictive Motion to Quash Service of
Summons Is not a Final Judgment
for the Purpose of Appeal.**

The right of appeal is an absolute but limited right guaranteed by the Constitution and Laws of the State of Utah, which provide:

Article 8, Section 9, of the Constitution of the State of Utah:

“From all final judgments of the district courts, there shall be a right of appeal to the Supreme Court. * * *”

Section 104-41-1, Revised Statutes of Utah, 1933:

“From all final judgments of the district courts, except in certain cases specially provided for originating in city courts and in justices’ courts, there shall be a right of appeal to the supreme court. * * * Appeals shall also lie from the final orders and decrees of the court in the administration of decedents’ estates and in cases of guardianship.”

This right of appeal exists only where expressly given by constitutional or statutory provision and cannot be extended. In the case of *In re Jones’ Estate*, (1920) 56 Utah 291, 190 Pac. 783, the Supreme Court of the State of Utah, speaking through Chief Justice Corfman, said:

“No express provision is made in our Code of Civil Procedure giving a right of appeal from an

order appointing a special administrator, nor do we think any such right was intended or may be reasonably implied from the reading of the foregoing constitutional or statutory provisions. The right of appeal does not exist unless given by constitutional or statutory authority, expressed or necessarily implied. Woerner, Am. Law of Adm., (2d Ed.) Sec. 543, p. 1192; *Golding v. Jennings*, 1 Utah 135; *Benson v. Anderson*, 9 Utah 154, 33 Pac. 691; *In re Carpenter*, 73 Cal. 203, 14 Pac. 677. * * * To hold otherwise than that no appeal lies from such an appointive order would nullify and render ineffective the manifest intent and purpose of the Legislature by its enactment."

Substantially the same holding was made by the Supreme Court of Utah in the following cases: *Castle Dale City v. Woolley* (1923), 61 Utah 291, 212 Pac. 1111; *State v. Olsen* (1911), 39 Utah 177, 115 Pac. 968; *State v. Kelsey* (1924), 64 Utah 377, 231 Pac. 122.

While the right to appeal cannot be extended beyond constitutional or statutory mandate, the question as to what are final judgments, as that term is used in the Constitution and Laws of the State of Utah and most other states, is not so well settled. In Volume 2 of *American Jurisprudence*, Pages 858, 860, 861 and 862, it is stated:

"At common law error lies only from a final judgment. This general requirement of finality has been carried into the statutes regulating review proceedings; and it may be stated generally that a judgment, decree, or order, to be appealable, must be final or in the nature of a final decision. * * *

“A judgment, order, or decree, to be final for purposes of an appeal or error, must dispose of the cause, or a distinct branch thereof, as to all the parties, reserving no further questions or directions for future determination. It must finally dispose of the whole subject-matter or be a termination of the particular proceedings or action, leaving nothing to be done but to enforce by execution what has been determined. In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the court making the order to place the parties in their original condition after the expiration of the term; that is, it must put the case out of court, and must be final in all matters within the pleadings.”

The Supreme Court of the State of Utah has at various times had occasion to pass upon the question as to what are and what are not appealable orders within the meaning of our Constitution and statutes. In the case of *Shurtz v. Thorley, et al.* (1936), 90 Utah 381, 61 Pac. (2d) 1262, the Supreme Court of this state reviewed the prior decisions of the court which had defined or passed upon the meaning of the term “all final judgments of the District Courts.” In the course of the opinion by Mr. Justice Folland, it was stated:

“After the adoption of the Constitution, this court defined the phrase ‘final judgment’ in the case of *North Point Consolidated Irr. Co. v. Utah & Salt Lake Canal Co.*, supra, as follows (holding an order granting temporary injunction not a final judgment): ‘The word “final” or “final judgment” has a plain meaning. A judgment, to

be final, must dispose of the case as *to all the parties*, and finally dispose of the subject-matter of the litigation on the merits of the case. *Champ v. Kendrick*, (130 Ind. 545) 30 N. E. 635. Bouvier defines a final judgment as used in opposition to interlocutory as “A final judgment is a judgment which ends the controversy between the parties litigant.” “The general rule recognized by the courts of the United States and by the courts of most, if not all, of the States, is that no judgment or decree will be regarded as final, within the meaning of the statutes in reference to appeals, unless all the issues of law and of fact necessary to be determined were determined and the case completely disposed of, so far as the court had power to dispose of it.” *Freem. Judgm. Sec. 34.* (Italics supplied.)

“Notwithstanding what was there said about the words ‘final judgment’ having a plain meaning, this court has had some difficulty in fitting the definition given to the varying circumstances shown in the many cases coming before it. The following orders of the district courts have been held not to be final or appealable judgments: Granting injunction pendente lite, *North Point Consolidated Irr. Co. v. Utah & Salt Lake Canal Co.*, *supra*; granting motion for a new trial, *Eastman v. Gurrey*, *supra*; overruling motion for a new trial, *White v. Pease*, 15 Utah 170, 49 P. 416; *Nelson v. Southern Pac. Co.*, 15 Utah 325, 49 P. 644; appointing receiver pendente lite, *Popp v. Daisy Gold-Min. Co.*, 22 Utah 457, 63 P. 185; *United States v. Church of Jesus Christ of Latter-day Saints*, 5 Utah 394, 16 P. 723; *Oldroyd v. McCrea*, 65 Utah 142, 235 P. 580, 588, 40 A. L. R. 230; for temporary alimony and suit money, *In re Kelsey*, 12 Utah 393, 43 P. 106; for an accounting,

Standard Steam Laundry v. Dole, 20 Utah 469, 58 P. 1109; quashing service of summons, Honerine Min. & Mill. Co. v. Tallerday Steel Pipe & Tank Co., 30 Utah 449, 85 P. 626; granting nonsuit where not followed by judgment of dismissal, Rocky Mountain Stud Farm Co. v. Lunt, 46 Utah 299, 151 P. 521; verdict of jury without proper judgment, Kourbetis v. National Copper Bank of Salt Lake City, 71 Utah 232, 264 P. 724; awarding possession of exhibit after judgment, Omega Inv. Co. v. Woolley, 75 Utah 274, 284 Pac. 523.

“The following orders or judgments have been held final judgments for purposes of appeal: Discharging petitioner of habeas corpus, Winnovich v. Emery, 33 Utah 345, 93 P. 988; quashing garnishment and releasing garnishee, Bristol v. Brent, 35 Utah 213, 99 P. 1000; dismissing action after sustaining motion for nonsuit, Robinson v. Salt Lake City, 37 Utah 520, 109 P. 817; ‘Interlocutory decree’ in divorce cases, Parsons v. Parsons, 40 Utah 602, 122 P. 907; ordering delivery of property and accounting for interest, Wheelwright v. Roman, 50 Utah 10, 165 P. 513; for condemnation of part only of property without assessment of damages, Ketchum Coal Co. v. Pleasant Valley Coal Co., 50 Utah 395, 168 P. 86, 89; decree of partnership, Benson v. Rozzelle, 85 Utah 582, 39 P. (2d) 1113; dismissal of petition to set aside probate proceedings after discharge of administrator, In re Phillips’ Estate, 86 Utah 358, 44 P. (2d) 699; decree of water rights as between certain parties in general water adjudication, Plain City Irr. Co. v. Hooper Irr. Co., 87 Utah 545, 51 P. (2d) 1069, 1076.”

In the case of *Attorney General of Utah v. Pomeroy* (1937), 93 Utah 426, 73 Pac. (2d) 1277, the Supreme Court

of this state, speaking through Mr. Justice Wolfe, cited the above-mentioned case as the oldest case on this point in this jurisdiction and proceeded to quote the first cited paragraph as the court's definition of "final judgment."

Another pertinent statement from this decision is as follows :

"And it is well settled in this jurisdiction that an appeal from what constitutes a finding merely as compared to a judgment which actually adjudicates the rights of the parties is not appealable. Thus, an appeal from a verdict where judgment has not been entered. *Kourbetis v. National Copper Bank*, 71 Utah 232, 264 P. 724. Nor from an order for judgment, *Ellinwood v. Bennion*, 73 Utah 563, 276 P. 159. Nor from a minute order dismissing appeal. *Robinson v. Fillmore Commercial & Sav. Bank*, 61 Utah 398, 213 P. 790. Nor where order for but not judgment of dismissal is entered. *Lukish v. Utah Const. Co.*, 46 Utah 317, 150 P. 298; *Watson v. Odell*, 53 Utah 96, 176 P. 619. Nor from an order quashing summons without dismissing the action. *Honerine Min. & Mill Co. v. Tallerday Steel Pipe & Tank Co.*, 30 Utah 449, 85 P. 626. Nor from an order denying a motion to correct a judgment. *Cullen v. Harris*, 27 Utah 4, 73 P. 1048."

A careful analysis of the cases appears to us to indicate that the obvious intent of the Constitution and Laws of the State of Utah, cited *supra*, as well as the common law rules from which they arose, is simply that a litigant must exhaust his procedural remedies in a lower court and thereby finally dispose of the matter there before

requesting a review by the Supreme Court. In short, the lower court must have irretrievably placed the litigant in a position where his only logical remedy is to appeal for a reversal or modification by a higher tribunal. Justice Wolfe, in the cited portion of the opinion in the Pomeroy case, quotes from the case of *North Point Consolidated Irrigation Company v. Utah & S. L. Canal Company* (1896), 14 Utah 155, 46 Pac. 824. Particular attention is respectfully directed to that portion of the quotation which reads:

“A judgment, to be final, must dispose of the case as to all parties, and finally dispose of the subject matter of the litigation on the merits of the case.”

Certainly, an order denying the motion to quash service of summons does not dispose of the case upon its merits. In the immediate controversy, the appellant was not left without further remedies in the district court by the order of the court denying his motion to quash service of summons. All that was necessary was that he amend his motion to one praying for an order vacating the judgment because of lack of jurisdiction or because of defective service. The order could have readily been made restrictive in that regard. It is very possible that the amendment could even have been effected by interlineation. In any event, the further proceeding that could have been taken was obvious.

Proceeding from these well settled and unquestioned principles, the immediate question arises—Is the denial

of the restrictive motion of the appellant to quash service of summons an appealable order? This identical question has been raised and considered by the supreme courts of other jurisdictions, and recognized legal commentators have commented on the same.

In the case of *Klepper v. Klepper* (1928), 51 Nev. 145, 271 Pac. 336, the Supreme Court of the State of Nevada was confronted with the following situation: Plaintiff instituted a suit for divorce. She filed an affidavit of nonresidence of the defendant and had service made upon him personally in a sister state. Defendant appeared specially and moved to quash the service on jurisdictional grounds. This was denied, and as defendant did not plead further, judgment was taken against him by default. Defendant appealed and the court held:

“Section 5329, Rev. Laws, as amended (Stats. 1913, p. 113), provides when an appeal may be taken, and no appeal can be taken except when authorized by statute. Nowhere does our statute provide that an appeal may be taken from an order denying a motion to quash a summons, or the service thereof; hence it is clear that the defendant had no right of appeal from the order in question.”

This case appears to us to be even stronger than the one confronting this Court. The laws of Nevada provide that an appeal to the Supreme Court may be taken by the defendant as a matter of right from any judgment against him; from a final judgment of conviction; from an order denying a motion for a new trial; and from

an order made after judgment affecting the substantial rights of the party. It would seem these provisions give a right of appeal in situations that are not covered by the Utah Constitution and statutes, *supra*, and hence are much broader than our own laws.

In the case of *Ryan v. Davenport* (1894), 5 S. D. 203, 58 N. W. 568, the Supreme Court of the State of South Dakota considered this problem. In this case, the appeal was from an order of the Circuit Court denying a motion to set aside the service of summons as irregular and void. Respondent's counsel moved to dismiss the appeal from the court on the grounds that no appeal will lie from an order denying the motion to set aside the service of summons. The court, in upholding the position taken by respondent, said in the course of its opinion:

“ ‘The following orders when made by the court may be carried to the supreme court: 1, An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken. 2, A final order affecting a substantial right made in special proceedings, or upon a summary application in an action after judgment. 3, * * *. 4, When it involves the merits of the action or some part thereof. * * *’ Unless the order comes within one of the above provisions, no appeal will lie. An order setting aside the service of the summons would have affected a substantial right, as such order would, in effect, determine the action, and prevent a judgment from which an appeal might be taken. The effect of this order is not to determine the action and

prevent a judgment; nor is it in a special proceeding, nor upon a summary application in an action after judgment; neither does it involve the merits of the action, or any part thereof. *Orton v. Noonan*, 32 Wis. 104; *Rahn v. Gunnison*, 12 Wis. 528. The overruling of an objection made to the jurisdiction of a court, or the denial of a motion to set aside the service of a summons on jurisdictional grounds, is not a final order affecting a substantial right, and is not appealable under the provisions of our statute, nor reviewable in this court before the entry of final judgment. An order that involves the merits of an action is one that goes to its substance or subject-matter, and affects the justice of the cause; and it cannot be said that the order from which this appeal is taken is of that character. The appeal is dismissed.”

In the case of *Salmons v. Rugyeri* (1927), 103 N. J. Law 596, 137 Atl. 568, the Court of Errors and Appeals of the State of New Jersey passed upon this question. In this case, the court held that an order overruling a motion to strike out return to summons and to quash the writ was not a final judgment that entitled defendant to appeal therefrom. The court said in this regard:

“Here the order was simply one overruling a motion to strike out the return to a summons and to quash the writ. It was a mere interlocutory order. The defendant should have filed an answer on the merits as directed by Mr. Justice Trenchard, and gone to trial. He had protected himself, upon the record, as to the question which he raised, could have raised it again on the trial, and, in the event of an adverse verdict, could have ar-

gued the invalidity of the service, as well as any other matter, or he could have stayed away and reviewed by appeal a judgment by default, which is what the defendant did in *Pizzutti v. Wuchter*."

Bancroft, in his work on "*Code Practice and Remedies*," Vol. 8, Page 8387, Section 6322, states:

"Where a motion to quash the summons for irregularity is overruled, the case is in no sense finally disposed of, and such an order is not of itself appealable. So, also, it has been held that where the summons has simply been quashed without an order of dismissal, an appeal will not lie; but in some cases, an order quashing the summons has not been held to be appealable."

In the same volume, Page 8388, Section 6323, Bancroft goes on to state:

"In most jurisdictions, an order either sustaining or refusing a motion to set aside service of summons is not appealable, regardless of whether the service has been made personally or by publication. An order quashing service is not a final judgment, but leaves the action pending with the right in the plaintiff to sue out an alias summons."

In Bancroft's "*Code Pleading Practice and Remedies*," Ten-Year Supplement, Vol. 5, Page 4074, Section 6323, it is stated:

"An order denying a motion to quash the summons and the service thereof is not appealable. But in Washington an appeal will lie from an order sustaining the motion if it has the effect of determining the action."

Our investigation has disclosed no case in Utah precisely on this point. The Supreme Court of the State of Utah has, however, passed upon a situation which, in our opinion, substantiates the position we have taken as fully as if the case were directly in point. This case is *Honerine Mining & Milling Co., et al., v. Tallerday Steel Pipe & Tank Co., et al.*, (1906), 30 Utah 449 85 Pac. 626. In this case an appeal was taken from an order made by the district court quashing the service of summons. The defendant appeared specially and moved to quash the service upon the ground that it was not made upon the proper person. His motion was granted. On appeal the defendant argued that the order was not a final judgment within the meaning of the statute or the constitution and was, therefore, not appealable. The court held this point was well taken. In the course of the unanimous opinion of the court, written by Mr. Justice Straup, it was stated:

“* * * the Utah statute gives the right of an appeal only from a final judgment. From what has been said by this court in prior cases, where the question as to what is a final judgment within the meaning of the statute was considered, this order cannot be regarded as a final judgment. *North Point Irr. Co. v. Utah Canal Co.*, 14 Utah 155, 46 Pac. 824; *Eastman v. Gurrey*, 14 Utah 169, 46 Pac. 828; *Watson v. Mayberry*, 15 Utah 265, 49 Pac. 479; *Laundry Co. v. Dole*, 20 Utah 469, 58 Pac. 1109; *Popp v. Min. Co.*, 22 Utah 460, 63 Pac. 185. * * * While plaintiff is here seeking to have determined that it has the defendant in court upon the process served, it may, at the same time, also

apply for and obtain an alias summons from the district court with which it may serve the defendant and bring it in.”

This same contingency that was considered by Mr. Justice Straup in the cited case is possible in the present controversy. There was nothing to prevent the appellant from entering a special appearance in the district court on a motion to vacate the judgment because of improper service of summons. We submit it is an inescapable aphorism that if the Constitution and Laws of Utah do not permit an appeal from an order quashing a service of summons, they will not authorize an appeal from an order denying such a motion.

The only question, as we interpret the situation, that arises is whether or not the fact that the restrictive motion of appellant to quash the service of summons was made after a default judgment had been entered should alter the well settled rule presented. We maintain in the present situation that this fact should not result in a modification of or different holding from the rule expressed by the cited cases and commentators. Appellant has urged in his brief that his motion must be considered as one directed to the vacating of a judgment because of a void service of summons. We are at a complete loss to understand how this position can possibly be taken. The motion, by its own terms, restricts its attack to the service of process and eliminates thereby any consideration of the judgment. In short, by the terms of the motion, both the trial court and respondent

were powerless to even look to the judgment but were forced to direct their entire attention to the alleged void service. We submit that both by common law and the constitutional and statutory provisions of most of the states, including the State of Utah, it is conclusively shown that the order appealed from is not an appealable order.

B.

Appellant's Restrictive Motion to Quash Service of Summons, Made After Judgment, Precluded Respondent from Defending Its Judgment.

At the risk of belaboring the obvious, respondent will endeavor to present to the Court the impossible position in which it was placed by appellant's motion.

The record, upon its face, established a valid service of summons. In light of this and additional facts, respondent in good faith took its judgment. Appellant then proceeded to request relief by his restrictive motion to quash the service of summons. Appellant was apparently proceeding under the theory that if he could destroy the foundation of the judgment, to wit, the service of summons, the judgment must fall of its own weight. In order to present the equities of the matter to the court and to defend itself against this indirect attack against the judgment, respondent should have been entitled to present any facts that would sustain its judgment, even assuming appellant had been able to maintain

the position he had taken to the effect that at the inception of the action there was a void or defective service of summons. The form and substance of the motion makes it clear that the attack was not against the judgment as such, but was confined to an attack against the service of process. The validity or merits of the judgment, or any of the facts or proceedings subsequent to the service of process, were not raised in the motion, the affidavit in support thereof, or in the oral evidence introduced at the hearing. Proof of the fact that the appellant entered an appearance either in person or by counsel would be sufficient to sustain the judgment, even though no service had been made. Laches or inexcusable neglect on the part of the appellant in moving to set aside the judgment may well have justified the court in refusing to set the same aside.

A few of the multitudinous cases supporting this position are as follows: *Hunter v. May* (1930), 161 Tenn. 155, 25 S. W. (2d) 580; *Selmer v. Smith* (1926), 285 Pa. 67, 131 Atl. 663; *Vaughn v. Pine Creek Tungsten Company* (1928), 89 Cal. App. 759, 265 Pac. 491.

The form and contents of the appellant's motion expressly precluded respondent from defending its judgment on any of these grounds, and, likewise, limited the court's consideration only to the alleged void service.

In Volume 20 of American Jurisprudence, Page 242, Section 248, it is stated:

“It is fundamental that evidence to be admissible must relate and be confined to the matter

or matters in issue in the case at bar and must tend to prove or disprove these matters or be pertinent thereto, or, to put it another way, the proof must correspond to the issues raised by the pleadings. This rule excludes evidence of collateral facts or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute—those which are remote, collateral, and irrelevant.”

At Page 278, Section 302, same authority and volume, it is stated:

“The fundamental principle is that evidence must be relevant to the facts in issue in the case on trial and tend to prove or disprove such facts; evidence as to collateral facts is not admissible.”

It must be remembered that appellant's restrictive motion was directed entirely and exclusively to the alleged void service of summons and in no way was directed to the validity of the judgment itself. It is self-apparent that the procedure taken by appellant placed respondent in a position that was not only unreasonable but was manifestly unfair and inequitable. Appellant in his brief has argued that respondent permitted the appellant to conclusively prove and establish that the court was without jurisdiction to enter its judgment. An examination of the record discloses this is not the fact. Respondent objected to any testimony being offered in support of appellant's motion upon the grounds that the motion itself was improper and any evidence taken in support of the same was irrelevant and immaterial.

Appellant further contends that respondent did not offer any evidence to support the validity of its judgment. It appears to us rather anomalous that appellant takes this position, in view of the fact that by the express terms of his motion he precluded respondent from offering any such evidence. Appellant states in his brief that his motion was for the purpose of attacking the validity of the judgment to the end that the judgment would be declared invalid. We submit that such being the fact, appellant's restrictive motion to quash service of summons, made after judgment, placed respondent in an impossible position and one not calculated to fully and impartially present the pertinent facts of the controversy to the court. In light of this, it was not only the right but the duty of the trial court to deny the motion.

C.

The District Court, Regardless of Objections by Respondent, Properly Denied Appellant's Restrictive Motion to Quash Service of Summons.

Appellant in his brief argues that the plaintiff did not file a reply or denial of any kind to the sworn affidavit of the appellant and intimates that the objections made by respondent were not sufficient to justify the court in its holding. We believe the objections made by respondent, or the form thereof, are entirely immaterial. If the motion of the appellant to quash service of summons, made after judgment, was a valid and allowable motion, it should have been granted regardless of any objections

made by respondent. On the other hand, if the motion was not a permissible motion, the trial court should have denied the same regardless of objections or lack of objections on the part of respondent. To go even a step further, if the motion made by appellant was injudicious, the trial court should have denied the same even though its allowance was urged by both the appellant and respondent. We submit that inasmuch as appellant's motion was, in light of the facts, injudicious and improper, the court not only had the discretion but the duty to deny the same.

D.

Appellant's Motion Was not a Direct Attack Against the Judgment.

At the outset of our presentation, in furtherance with Point D, we desire clearly to define our position. We believe appellant's motion to quash service of process, restricting itself to that purpose and nothing more, will not lie when made after judgment. We further maintain that the propriety of such a motion is in no way affected by a determination that the motion is a direct or collateral attack against the judgment. In any event, a motion, such as the one made by appellant, should not be granted. Appellant has, however, directed a considerable portion of his brief to the proposition that his motion was a direct attack against the judgment, as distinguished from a collateral attack. Assuming, without admitting, that the question of direct and collateral attack in relation

to this controversy is material, we cannot agree that this motion was a direct attack against the judgment.

It is interesting to note that nowhere in the motion is there any reference made to the merits of the action or the judgment. In fact, the term "judgment" is not even used.

To refer briefly to the record, there is nothing to indicate that the service of summons was not legally and effectively made. It is only by evidence dehors the record that any contrary position can be taken.

Many courts, including the Supreme Court of the State of Utah, have passed upon the efficacy of direct and collateral attacks against judgments. The holdings have been almost as varied as the number of courts passing upon this question. It is practically impossible to lay down any general rules or principles in regard to direct and collateral attacks against judgments. Some of the leading cases, however, in our opinion show a decided trend to a rule that evidence dehors the record is inadmissible to impeach a judgment legal on its face. In this regard we direct the Court to *Globe Construction Co. v. Yost* (1932), 169 Wash. 319, 13 Pac. (2d) 433; *Green v. Craig* (1932), 164 Tenn. 445, 51 S. W. (2d) 480; *Levinson v. Vanderveer* (1932), 169 Wash. 254, 13 Pac. (2d) 448.

Courts have many times held that final decrees and judgments are not open to collateral attacks.

Fidelity Phenix Fire Ins. Co. v. Ford and Cantrell
(1931), 164 Tenn. 107, 47 S. W. (2d) 558;

Producers' Refining Company v. Missouri K. & T. R. Co. of Texas, (Tex.) 13 S. W. (2d) 679;

Amy v. Amy (1895), 12 Utah 278, 42 Pac. 1121.

What constitutes a collateral attack, as distinguished from a direct attack, is, as stated, by no means settled. It would seem, however, that many of the better reasoned cases hold that where a judgment is not void on its face, it is not subject to a collateral attack.

Dockery v. Central Arizona Light & Power Company (1935), 45 Ariz. 434, 45 Pac. (2d) 656;

In re Fort Shaw Irrigation District (1927), 81 Mont. 170, 261 Pac. 962;

Coburn v. Coburn (1931), 89 Mont. 386, 298 Pac. 349;

Bird v. Palmer (1931), 152 Okla. 3 and 7, 3 Pac. (2d) 890 and 894;

Protest of St. Louis - S. F. Railway Co. (1933), 163 Okla. 1, 19 Pac. (2d) 162;

Wise v. Miller (1927), 215 Ala. 660, 111 So. 913;

Florence Gin Company v. City of Florence (1933), 226 Ala. 478, 147 So. 417;

Lambie v. W. T. Rawleigh Company (1929), 178 Ark. 1019, 14 S. W. (2d) 245.

The Supreme Court of the State of Utah, in the case of *Intermill v. Nash* (1938), 94 Utah 271, 75 Pac. (2d) 157, passed upon this question. Appellant has cited this case as authority for the position he has taken. We believe the case stands for the exact opposite of his position and, therefore, will endeavor to analyze the

decision. The facts of the case are, briefly, as follows: The plaintiff instituted a suit against the defendant to quiet her title to real estate located in Salt Lake City. Defendant answered, denying plaintiff's allegations, and in a counterclaim, alleged title in herself. Plaintiff filed an answer to defendant's counterclaim. The answer to the counterclaim alleged that plaintiff had bought the land in question from Hoffman Brothers, and that subsequent to her acquiring the land, one Lulu B. Burrows had brought an action in the district court against Hoffman and others, including the plaintiff, to foreclose a mortgage given by Hoffman Brothers. The plaintiff further alleged she was not properly served in the prior action as the only service made was by publication and there was no affidavit of jurisdictional facts authorizing such service of summons. Plaintiff, therefore, had defaulted and a judgment of foreclosure had been entered and a sale of the property made to Lulu B. Burrows, which thereby created a cloud on the plaintiff's title; the plaintiff, therefore, prayed the court to vacate and set aside the pretended judgment and thereby remove the said cloud upon her title. The trial court excluded any evidence tending to show that the service upon the plaintiff in the foreclosure action was bad. The court's reason for so holding was that the evidence constituted a collateral attack against the judgment in foreclosure and hence was inadmissible. From this ruling plaintiff appealed.

Mr. Justice Larson, in upholding the decision of the lower court to the effect that a judgment cannot be col-

laterally attacked, even though the ground for the attack be a void service of process, said in the course of his opinion :

“A direct attack is an action or motion for the specific and primary purpose of setting aside or annulling the judgment; *and any action which has for its purpose the accomplishment of any other relief than the setting aside or modifying of the judgment is not a direct attack.* Wayne v. Brimley, 190 Ky. 488, 227 S. W. 996. When the *direct* purpose and aim of the proceeding is to attain relief other than the setting aside or modifying of the judgment, and the attack upon the judgment is involved merely incidentally, the attack is collateral.” (Italics ours.)

It is difficult to conceive that a motion limiting itself to a request to quash service of summons without any mention or reference made to the judgment can be said to be “a motion for the specific and primary purpose of setting aside or annulling the judgment.” On the question of quashing service of summons, Mr. Justice Larson further clarifies the position of the court when he quotes with approval from the case of *Morrill v. Morrill* (1890), 20 Ore. 96, 25 Pac. 362, which held :

“ ‘An attempt to impeach the decree in a proceeding not instituted for the *express* purpose of annulling, correcting, or modifying the decree or enjoining its execution’ is a collateral attack.” (Italics ours.)

To refer again to appellant’s motion, it is apparent on its face that its express purpose is to quash service of

summons and not to vacate, annul or correct the judgment. The opinion of Mr. Justice Larson goes on to state in regard to direct and collateral attacks:

“The terms ‘direct’ and ‘collateral,’ as used in reference to attacks on judgments, 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, cancelling 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.*” (Italics ours.)

Mr. Justice Wolfe, in his concurring opinion in the case of *Intermill v. Nash*, says:

“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) A separate suit brought and designed directly to set aside a voidable judgment or what is not a judgment but which purports to be one; in other words, a void judgment. (3) Where a party brings a suit or defends a suit relying for recovery or for a defense on what purports to be a judgment rendered in another suit, the opposing party may show such judgment to be void.”

Mr. Justice Wolfe explains his position even more fully at the end of his opinion, when he states:

“At least in this case it was necessary to go outside of the judgment roll by the introduction in evidence of an affidavit of jurisdictional facts claimed to be deficient in order to prove the judgment void. *This could not be done without such pleadings as would be required in an independent action to set the judgment aside.*” (Italics ours.)

To adopt the proceeding designated by Mr. Justice Wolfe in his opinion, it certainly cannot be contended in the present controversy with any degree of logic or reason that a motion limiting itself to a request for the quashing of a service of summons can be said to be “such pleadings as would be required in an independent action

to set the judgment aside.” An analytical examination of the cited case fails, in our opinion, to give any support to the position taken by appellant. In fact, the case clearly stands for the contrary to his position.

The Supreme Court of the State of Utah has in other cases clearly held that a collateral or indirect attack against a judgment, fair and proper on its face, is not permissible. In the case of *Amy v. Amy*, *supra*, the court said:

“We think that the court having found, judicially that service was legally made upon the defendant Butterworth, in this collateral proceeding recourse could not be had to the files in the case, aside from the judgment roll, and that no evidence would be admissible other than that contained in the judgment roll *dehors* the recital in the judgment.” (Italics the court’s.)

This ruling was reiterated and clearly established in the case of *Intermill v. Nash*, *supra*, when the court held at Page 278 of 94 Utah:

“A judgment, once entered by a court of competent jurisdiction, having the res and the parties duly brought before it as provided by law, imports verity, proves itself, and is invulnerable to attacks by any indirect assaults. It can only be questioned in the manner and the proceedings established by law. And since a judgment is established and proved by the record thereof, unless an inspection of that record establishes its invalidity, shows it to be void, the judgment is conclusive and may not be questioned collaterally by any matters *dehors* the record thereof. *Amy v. Amy*, 12 Utah 278, 42

P. 1121, 1124; Hoagland v. Hoagland, 19 Utah 103, 57 P. 20; Liebhart v. Lawrence, 40 Utah 243, 120 P. 215.”

In light of the foregoing authorities, it is our position that appellant’s motion, if it can be classified as either, was a collateral or indirect attack against the judgment and, therefore, not permissible under the laws of the State of Utah.

E.

Appellant’s Restrictive Motion to Quash Service of Summons, Made After Judgment, Was Neither a Proper Nor Allowable Motion.

Regardless of whether or not the attack attempted to be made by appellant was collateral or direct, the courts have uniformly held that such a motion as filed by the appellant in the present controversy is not permissible after judgment.

In the case of *Gregg v. Seawell* (1922), 85 Okla. 88, 204 Pac. 908, a motion to quash the service of summons in the action was filed on the 27th day of August, 1918, several days after the rendition of the judgment in the action. The court said:

“The plaintiffs in error have cited no authority in their brief authorizing them to move to quash the service of a summons after the court has tried the cause and rendered judgment. It is obvious that such a summary proceeding is in effect an attack upon the judgment of the court at least to the extent that the judgment adjudicated

that the service of the summons was regular and effectual to vest the court with jurisdiction to adjudicate the issues involved in the action. The plaintiffs in error in their motion to quash the service of summons in no way challenged the correctness of the judgment rendered in the cause upon any grounds.

“We conclude that the plaintiffs in error in this cause cannot in a summary manner have adjudicated the jurisdictional facts which were adjudicated by the judgment of the trial court that entered the judgment in the original action. We do not want to be understood as passing upon the validity of the service of a summons served by an attorney of record in an action, as we deem it unnecessary in view of our conclusions herein to pass upon that question. We conclude that a motion to quash summons after judgment is unauthorized by law, as such a motion is only properly filed prior to the rendition of judgment.”

In the case of *Dannenburg v. Powers* (1938), 182 Okla. 404, 77 Pac. (2d) 1142, the same result was reached by the court when the plaintiff, after judgment had been taken against him by default and after execution was issued and returned “nothing found,” filed a motion to quash the service of summons. The court held:

“We hold that a motion to quash a summons, filed after judgment has been rendered, is not a proper method of attacking the validity of the summons.”

In the case of *Baldwin v. Burt* (1898), 54 Neb. 287, 74 N. W. 594, the court held that, after the entry of a decree, upon the showing that no service of the summons

upon which the decree was based had, in fact, been made, it was erroneous to quash such summons upon a motion asking solely for that order.

In the case of *Producers' Naval Stores Company v. Brewton*, (Ga. 1916), 90 S. E. 735, the court had before it the question of a defective service and in the course of its opinion said:

“Objections to the return of a Deputy Sheriff which shows legal service on a defendant must be raised before judgment, by a plea in abatement, and in connection therewith the return must be duly traversed, and both the Sheriff and the Deputy Sheriff are necessary parties to the traverse.

“When the record shows a valid return of service, and it is necessary to resort to extrinsic testimony to show that there has been no service, or that the service was for any reason invalid, the objection can be made only by plea in abatement (if before judgment), and in connection therewith the sheriff's return must be duly traversed.”

The Supreme Court of the State of Utah has, in our opinion, clearly intimated that the proper procedure for vacating or setting aside a judgment is by a motion to set aside and vacate the judgment.

In the case of *Madsen v. Hodson* (1927), 69 Utah 527, 256 Pac. 792, the court said:

“To obtain relief against a default judgment, the proper practice is not by motion for a new trial, but by a motion to set aside and vacate the judgment. *Thomas v. Morris*, 8 Utah 284, 31 Pac. 446.”

A study of appellant's brief fails to disclose one authority in favor of the position he has taken. The case most relied upon, and cited by appellant as the leading and most cited case on the question, is that of *Norton v. Atchison, etc., Railroad Company* (1893), 97 Cal. 388, 32 Pac. 452. An examination of this case indicates, if anything, that the decision is against appellant's position rather than in support thereof. In the *Atchison* case, after the 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 in the case in favor of the plaintiff*. It is obvious in this case that the entire proceedings, including the judgment, were brought before the court by the motion filed by the defendant. The plaintiff had a right under the pleadings to defend his judgment in any legitimate manner he could, independent of a defective service of process at the inception of the action. In fact, respondent's principal objection to appellant's motion and any evidence introduced in support thereof in the case at bar was due to the fact that the appellant failed to do the very thing that was done in the *Atchison* case.

Appellant also cites the case of *Baldwin v. Burt, supra*, in support of his position. Any question as to what this authority stands for was settled by the court in its own syllabus of the holding of the case. In the syllabus the court states:

“After the entry of a decree, upon a showing that no service of the summons upon which the de-

cree was based had in fact been made, *it was erroneous to quash such summons upon a motion asking solely for that order.*" (Italics ours.)

We respectfully submit that a reading of the authorities upon this question clearly indicates that the unanimous opinion of the courts who have passed upon the problem is that a motion asking solely for an order quashing service of summons, after judgment, is not a permissible nor allowable motion. Respondent, after a careful search, has been able to find not one authority to the contrary of this position, nor has appellant cited any in his brief.

It was not the opinion of the respondent herein that, providing the appellant could establish that the judgment against him was invalid and void, he could have no relief therefrom. Assuming the facts as stated by the appellant, which, however, respondent does not admit, the Legislature of Utah has seen fit to give a fair and equitable remedy. This remedy is fair to both parties to the action and was certainly available to the appellant at the time he brought his motion to quash the service of process. The remedy referred to is found in Section 104-14-4, Revised Statutes of Utah, 1933, which, among other things, provides:

"When, from any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representative, at any time within one year after the entry of any judg-

ment in such action, to answer to the merits of the original action. Nothing but the actual, taxable costs of the action accruing on and after the default, not including attorneys' fees, shall be imposed by the court under the provisions of this section authorizing the imposition of terms as a condition upon which relief is granted."

The equity of such a statute is self-evident. Assuming, for the sake of argument, that, as appellant contends, no service was made, neither of the parties to the action could be injured. To further assume, for the sake of argument, that appellant is allowed to destroy a judgment in the indirect way he has attempted, and without regard to the Utah statutes, the reasoning behind the quoted section of the statute would be circumvented. A plaintiff, who in good faith had taken the judgment which was fair and proper on its face, might be barred by the statute of limitations from his legal remedy when a defendant saw fit to raise the objection to the service of summons.

The case of *The Blyth & Fargo Company v. Swenson* (1897), 15 Utah 345, 49 Pac. 1027, is enlightening in regard to the quoted section of the Utah statutes. In this case, the plaintiff brought suit against the defendants in their individual names on two promissory notes. Personal service was made on part of the defendants but there was no service on one of the defendants. One of the defendants moved the court to set the judgment aside. This motion was overruled, and the defendant appealed. The Supreme Court reversed the lower court and re-

manded the case with the instructions that the defendant be given leave to file his answer and to try the case upon the issues made, and, if found for him, to set the judgment aside; otherwise, to permit it to remain in force. The court, in the course of its opinion and after referring to the statutes cited *supra*, said:

“The court has a reasonable discretion,—a legal discretion. But when the defendant was not served with summons before judgment, and there was no appearance in fact, the statute quoted gives him a year after its entry, in all such cases, to ask leave to answer.”

In the case of *Liebhart v. Lawrence* (1911), 40 Utah 243, 120 Pac. 215, the court held that an action in equity to set aside a default judgment on the ground of false statements as to defendant's residence, in the affidavit for publication, was a permissible action and a direct attack on the judgment. The court held that the plaintiff's deceit was sufficient ground in equity to set aside the default judgment in the suit and *to permit defendant to answer to the merits*. We present that the cited cases merely demonstrate the desire of the Supreme Court of the State of Utah to construe the quoted provisions of Section 104-14-4, Revised Statutes of Utah, 1933, to mean that when from any cause the summons in an action has not been personally served on the defendant, the court may allow him to answer to the merits of the action. It is self-evident that this alleviates any hardship on either party.

Appellant in his brief cites the case of *Atkinson v. Atkinson* (1913), 43 Utah 53, 134 Pac. 595, for the proposition that this section of the statute can be circumvented, and if the judgment is void because of a defective service of process, the defendant need not answer to the merits in order to have the judgment set aside but may, at his option, have the judgment vacated without answering to the merits of the case. Respondent respectfully submits this case does not stand for that proposition. This case was a proceeding in equity to set aside and annul a judgment or decree of divorce. The appellant brought an action to obtain a divorce from the respondent, who had never lived in Utah. The service of summons in that action was made by publication, the order for which was based upon an affidavit which stated that the respondent was a non-resident of the State of Utah and that her last known address was Cleveland, Ohio. This affidavit was false and was known to be so by the appellant, inasmuch as the respondent was a resident of Bridgeport, Connecticut. The trial court found it had obtained no jurisdiction of the person of the respondent and that the decree of divorce was void and the respondent was entitled to have the same set aside and annulled. From this decision appellant appealed. The Supreme Court upheld the decision on the ground that the court had no right as a condition to the setting aside of the judgment to require the respondent to submit herself to the jurisdiction of the court for the purpose of the original action. Mr. Justice Frick, in the course of his opinion, stated:

“* * * 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.”

Mr. Justice Frick went on to say, however, that where the appellant had been guilty of fraud in inducing the court to assume jurisdiction, a different rule would prevail. He reasoned that under the circumstances of the particular case, the district court was right in refusing to require the respondent to subject herself to the jurisdiction of the court in the original action as a condition to having the decree of divorce set aside. The court, in our opinion, based its decision in this case upon the proposition that it was through appellant's fraud that the court has assumed jurisdiction of the action and rendered a judgment thereon. The court further assumed that in some situations it might work a decided hardship upon the adverse party to cause him to submit himself to the jurisdiction of the court, which otherwise could not get jurisdiction over him, in order to have a void judgment set aside.

In short, we do not believe the Atkinson case can be said to be authority for the proposition that the quoted portion of Section 104-14-4, Revised Statutes of Utah, 1933, can be circumvented and nullified at the option of the litigant. There is nothing in the record to indicate that it would result in any hardship on the appellant

herein to request the court to reopen the case and permit him to answer to the merits. In the absence of such a showing, we do not believe the Atkinson case is authority for the position taken by appellant, and we respectfully submit that appellant had a clear and equitable remedy at the time he filed the motion which is the subject of this controversy. We further submit that under the facts and circumstances of this case, the remedy provided for by the cited portion of Section 104-14-4 was the exclusive remedy.

Summary .

It has been the purpose of respondent in this brief to present to this Court its position that the denial of a restrictive motion to quash service of summons, made after judgment, is not an appealable order, inasmuch as said order is not a final judgment as that term is used in the Constitution and Statutes of the State of Utah. It has further been our purpose to demonstrate that appellant's motion was one which if granted would not have served the ends of justice but would have defeated and circumvented the same. We have further presented that reason, equity and authority are unanimous in requiring a holding that a restrictive motion to quash service of summons, made after judgment, is not a proper or allowable motion.

The arguments in respondent's brief not directed to the foregoing propositions have been made merely in refutation of contentions of appellant in his brief.

Upon the foregoing propositions, respondent maintains that the trial court ruled correctly in denying appellant's restrictive motion to quash service of summon made after judgment.

Respectfully submitted,

GRANT A. BROWN,
ALVIN I. SMITH,
GARFIELD O. ANDERSON,,
RICHARD L. BIRD, JR.,

Attorneys for Respondent.