

1940

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

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

Reply Brief, *Utah Tax Commission v. Larsen and Whitlock*, No. 6240 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/657

This Reply Brief 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,
Respondent,

vs.

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

Case No. -
6240

REPLY BRIEF OF APPELLANT

MOYLE & MOYLE,
Attorneys for Appellant.

INDEX

	Page
Baldwin vs. Burt, 54 Neb. 287, 74 N. W. 594.....	7-9
Black on Judgments, Volume 1, Paragraph 170.....	15
Black on Judgments, Volume 1, Paragraph 220.....	16
Commonwealth, ex rel Howard vs. Howard, 10 Atl. (2d) 779.....	17
Commonwealth of Kentucky for the use and benefit of Kern vs. Maryland Casualty Co. of Baltimore, Maryland, 112 Fed. (2d) 352	18
Condit vs. Condit, 168 Pac. 456.....	15
Covington Trust Co. of Covington vs. Owens, 129 S. W. (2d) 186..	17
Dannenburg vs. Powers, 182 Okla. 404, 77 Pac. 1142.....	7-8-10-14
Davis vs. Davis, 197 Pac. 241.....	17
Ex Parte Cohen, 290 Pac. 512.....	17
France vs. Freeze, et al, 102 Pac. (2d) 687.....	17
Gregg vs. Seawell, 85 Okla. 88, 204 Pac. 908.....	7-10-11-14
Hall vs. Jensen, 249 Pac. 310.....	13
Heiny vs. Sommers, 268 Pac. 287.....	13
Honerine Min. & Mill. Co., et al, vs. Tallerday Steel Pipe & Tank Co., et al, 30 Utah 449.....	2
Intermill vs. Nash, 94 Utah 271.....	10-14-18
Oklahoma Stock Yards Nat Bk. vs. Pierce, 243 Pac. 144.....	11-13
Pappe vs. Law, 35 Pac. (2d) 941.....	14
Phillips Estate, in re, 86 Utah 358, 44 Pac. (2d) 699.....	4
Producer's Naval Stores Co. vs. Brewton, 90 S. E. 735.....	10
Protest of Gulf Pipe Line Co., 32 Pac. (2d) 42.....	14
Protest of St. Louis-San Francisco Ry. Co., 11 Pac. (2d) 189.....	14
Ray vs. Harrison, 32 Okla. 17, 121 P. 633, Ann. Cas. 1914 A, 413..	12
Ryan vs. Davenport, 5 S. Dak. 53, 58 N. W. 558.....	5
Shurtz vs. Thorley, et al, 90 Utah 381.....	3
Stevens vs. Breen, 258 App. Div. 423, 16 N. Y. Sup. (2d) 909.....	16
Winnovich vs. Emery, 33 Utah 345.....	2

IN THE
SUPREME COURT
OF THE
State of Utah

STATE TAX COMMISSION OF
THE STATE OF UTAH,
Respondent,

vs.

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

Case No.
6240

REPLY BRIEF OF APPELLANT

REPLY BRIEF OF APPELLANT

Respondent in its brief for the first time claims that the order signed, made and entered by Judge Abe W. Turner on December 21, 1939, denying appel-

lant's motion, from which order this appeal is taken, is not a final order and, therefore, not appealable and has cited many cases which it claims support this contention.

We respectfully submit that none of the cases cited in any manner, either directly or by inference, sustain such contention. The test of the finality of a judgment or order, as has been repeatedly stated by this Honorable Court, is whether or not the particular action or proceeding taken has been finally terminated. If the judgment or order finally terminates the proceeding, leaving nothing further to be done by the trial court or by the parties, the order is final and appealable.

Honerine Min. & Mill Co., et al. vs. Tallerday Steel Pipe & Tank Co., et al., 30 Utah 449, Page 451: "It is the termination of the particular action which marks the finality of the judgment."

Winnovich vs. Emery, 33 Utah 345, Page 352: "The test of finality for the purpose of an appeal, therefore, is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment. If it is, and, in order to proceed further with regard to the same subject matter, a new action or proceeding must be commenced. Then, as a general rule, the judgment which ends the particular action or proceeding is final for the purpose of appeal, if an appeal is permissible at all."

The only statement in respondent's brief that there was anything further to be done in the case at bar is that appellant could have amended his motion to one praying

for an order vacating the judgment because of lack of jurisdiction or because of defective service. If you carry respondent's argument to its logical conclusion, this would then mean that in the event appellant had so amended his motion and the court had denied the same and entered an order dismissing the motion, that order would not be a final appealable order as the appellant might have still further amended his motion to ask for some further relief. Likewise, this argument would mean that if a demurrer is sustained to a complaint and the plaintiff has elected to stand upon the demurrer and a judgment of dismissal has been entered, the judgment of dismissal would not be an appealable order as respondent would claim that the plaintiff in that action could have asked the court for permission to amend his complaint in some respect. The argument of respondent clearly disproves itself.

In all of the cases cited by respondent, there was something further either to be done by the court in order to finally determine the proceeding before it or the proceeding was left pending before the court with the right of one party or the other to take some action to assure the continuance of the proceeding to a hearing upon the merits before the action or proceeding was finally terminated.

In the case of *Shurtz vs. Thorley, et al*, 90 Utah 381, quoted from at length by respondent, an action was brought against two claimed obligors. The separate demurrer of one of them was sustained; an order of

dismissal as to him was made and entered and an appeal taken by the plaintiff from that order, leaving the complaint as against the other defendant undisposed of in the District Court. There, of course, the proceeding, which was the action commenced by the plaintiff, was not terminated. It remained before the District Court undisposed of. It is also interesting to note that this court in that case cites, with approval, *in re Phillips Estate*, 86 Utah 358, 44 Pac. (2d) 699, wherein the dismissal of a petition to set aside probate proceedings after discharge of administrator was held to be a final judgment for purposes of appeal. Such a proceeding is very similar to the proceeding at bar.

The cases cited by respondent involving rulings upon motions to quash Summons prior to judgment are not applicable to the case at bar. When the court sustains a motion to quash a summons and the plaintiff does not choose to stand upon his summons and does not have an order entered dismissing the action, which would clearly be a final appealable order, he can have an alias summons issue and bring the defendant before the court and obtain a final adjudication of the action upon its merits. A party making a motion after judgment obviously has no such choice. When the court denies a motion to quash summons, the defendant may permit the action to go to final judgment and appeal from that final judgment and assign as error the ruling upon the motion to quash the summons or he may appear in the action and answer to the merits. Here again a party bringing

a proceeding after judgment has no such election. There is nothing that either the court or either party can do when the motion is after judgment that would in any way make the determination of the court a more final and complete determination of the proceedings brought by appellant. To hold that the order of December 21, 1939 was not an appealable order would entirely prevent a review by this court of what is claimed by the appellant to be an erroneous ruling by the District Court.

The quotation by respondent from the case of *Ryan vs. Davenport*, 5. S. Dak. 53, 58 N. W. 558, appearing on Page 15 of its brief, recognizes the difference between proceedings taken attacking the jurisdiction of the court before or after judgment. The court states: "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;"

Appellant respectfully submits that the order appealed from finally determined the proceeding taken by appellant and was a final appealable order and the appeal, therefore, must be heard by this court.

In REPLY to the remainder of respondent's brief, appellant respectfully submits the following:

Respondent states under heading "B" of its brief, in substance, that the form of appellant's motion precluded the respondent from defending the judgment and that it was precluded from establishing or attempting to establish facts that would sustain the judgment even

though there was a void or defective service of summons. We submit that appellant's motion was directed to the jurisdiction of the court over the person of the defendant and, of course, any evidence that the respondent might have that would establish that, in fact, the court did have jurisdiction would have been admissible upon the hearing of the motion. Respondent intimates that it might have had proof of the fact that appellant entered an appearance in the action or that laches or inexcusable neglect on the part of appellant might have justified the court in refusing to set the judgment aside. The entire record and all of the evidence taken upon the hearing is before the court in this matter. There is nothing in the record that would in any way support a contention that an appearance was made by appellant; in fact, the judgment itself shows upon its face that it was based upon the claimed service of process, the failure of the defendant, Whitlock, to answer the complaint and the elapsing of the time for answering and the entry of a default for such failure to appear and answer (Abs. 7). There can be no question of laches or neglect on the part of the appellant as the motion was brought within the time that the court retained jurisdiction over the proceeding and, further, there can be no question of laches or neglect where the court has had no jurisdiction over the person of the defendant and the judgment rendered is void as distinguished from merely voidable. The judgment being void due to the lack of any jurisdiction over the defendant, Whitlock, the judg-

ment was a nullity and had no force or effect whatsoever as shown by the cases set forth in appellant's brief and hereinafter set forth.

Under Subdivision D of respondent's brief, respondent urges and cites cases which it claims support its position that the proceeding brought by appellant was not a direct attack against the judgment. We feel that appellant has covered this matter thoroughly in his brief and cited convincing authorities proving the attack to be direct as distinguished from collateral. The cases cited by respondent under said Subdivision D of its brief are cases of clear collateral attack and are distinguished from the case at bar on the facts and in no instance are cases where as here there was an absolute lack of jurisdiction over either the subject matter or the person of the defendant.

In reply to Subdivision E of respondent's brief to the effect that the motion brought by appellant was not an allowable motion whether considered a collateral or direct attack and contending that the courts have uniformly held such to be the case and in further reply to Paragraphs B, C and D, appellant submits the following:

The cases of *Gregg vs. Seawell*, 85 Okla. 88, 204 Pac. 908, decided in 1922, *Dannenburg vs. Powers*, decided in 1938, 182 Okla. 404, 77 Pac. 1142, and *Baldwin vs. Burt*, 54 Neb. 287, 74 N. W. 594, are all cases distinguishable from the case at bar. They are all cases where the judgment attacked was not void, but was merely voidable. In *Gregg vs. Seawell*, a summons was served upon the

defendant, the summons having been served by an attorney in the case. The only question involved was whether or not the attorney under the statutes of Oklahoma had authority to serve the summons. The defendant clearly had had notice of the proceeding and the judgment was clearly voidable as distinguished from void for lack of jurisdiction over the defendant. The case was also ruled upon a statute of Oklahoma which required the defendant in the event of a voidable judgment to proceed in accordance with the requirements of that statute which required a showing of a meritorious defense somewhat similar to the requirement of our Section 104-14-4, which is applicable when a party wishes to be relieved from a mistake or excusable neglect regardless of whether the judgment is valid or not.

In the case of *Dannenburg vs. Powers*, there had also been a service of summons that at the most was merely voidable and not void. A further element involved in that case was that the motion was not made for more than ten days after the date of the judgment, which had been entered by a Justice's Court, and the court of Oklahoma held that the jurisdiction of the Justice's Court was limited by statute, it not being a court of general jurisdiction, and that the court had no jurisdiction of any kind over its judgment after ten days after the entry of the same. Further in that case the court indicated that if the motion had been made within the time that the court retained jurisdiction, the

motion might have been treated as a motion to vacate the judgment, the court stating:

“Such motion cannot be treated as a motion to vacate because it was filed after the ten days allowed and, in addition, does not meet the other statutory requirements.”

The particular defects in the service in the case of *Baldwin vs. Burt* do not appear from the decision; however, the judgment was attacked over six years after its entry while under the Nebraska statutes the court lost jurisdiction over the cause upon adjournment of the term in which it was entered. In the concurring opinion of Chief Justice Regan, the foundation of the decision is set forth as being that the defendant could only obtain relief as provided by the Code of Civil Procedure of Nebraska and that in order to vacate or attack the judgment, had to show a prima facie defense to the action. This would seem to indicate that the judgment being attacked at the most must have been only voidable, not void, for the cases are unanimous in holding that where the judgment is void, there is no necessity to submit to the jurisdiction of the court or to tender a defense to the action as a condition to the voidance of the judgment. There are two separate opinions in the case. One justice concurred in the result reached in the case; one justice expressed no opinion, and one justice was not sitting. It, therefore, is difficult to determine the exact

holding of the court so far as its technical ruling upon the form of the motion made is concerned.

The case of *Producer's Naval Stores Co. vs. Brew-ton*, 90 S. E. 735, (Ga.), most certainly would not be authority in this jurisdiction as it is certainly not the practice in this jurisdiction to traverse the return of a sheriff or his deputy and the sheriff and deputy are certainly not necessary parties to the proceedings.

The only objection raised by the Supreme Court of Oklahoma in the *Gregg vs. Seawell* and *Dannenburg vs. Powers* cases to the form of the motions brought therein was that the motions were directed to the summons and return thereof and not to the judgment itself and that they were, therefore, collateral and not direct attacks upon the judgment. We submit, first, that when you attack the very jurisdiction of the court to render a judgment, you most certainly are attacking that judgment as the judgment cannot stand without the presence of jurisdiction, and further, this court in the case of *Intermill vs. Nash*, 94 Utah 271, has held that any proceeding brought in the same proceeding in which the judgment is entered is a direct attack and, therefore, has held contrary to the Oklahoma Supreme Court upon this point; secondly, we contend that the two Oklahoma cases referred to do not state the law of the State of Oklahoma with respect to judgments void for lack of jurisdiction over the person of the defendant as distinguished from judgments merely voidable because of

error in the granting of the same or in the process upon which they are based. In support of this contention, we cite the case of *Oklahoma Stock Yards Nat. Bk. vs. Pierce*, decided Nov. 24, 1925, rehearing denied Jan. 19, 1926, subsequent to the *Gregg vs. Seawell* case, reported in 243 Pac. 144. In the Oklahoma Stock Yards case, an action was brought by the plaintiff to recover a bank deposit from the defendant bank. The bank defended on the ground that the deposit had been taken by virtue of a garnishment issued in aid of execution upon a judgment against the plaintiff held by a third party. The plaintiff filed a reply denying the allegations of the answer and averring that she had never been served with summons and had no knowledge of the action and that the return of the constable though regular on its face was false, the facts, therefore, being very similar to the facts in the case now at bar. This attack made by plaintiff upon the judgment introduced by the defendant under all of the authorities would be considered a collateral attack upon the judgment as it was being attacked in another proceeding and it was regular upon its face. The court, however, held that when a judgment is void for lack of jurisdiction over either the subject matter or the person, the judgment can be attacked, directly or collaterally, and in any proceeding wherein the validity of the judgment is claimed. The court at Page 144 states:

“If the return of this officer may be attacked at all, it may be done by the oral testimony of the

defendant in error, and, if not, the return must be held immune from attack. This court, however, in *Ray vs. Harrison*, 32 Okla. 17, 121 P. 633, Ann. Cas. 1914 A, 413, held:

“ ‘When an officer makes a false return of personal service on which a judgment is rendered, when in fact there has been no service at all, such return is not conclusive evidence against the fact.’

“In the body of the opinion, the court uses this language:

“ ‘While such a return is prima facie evidence of its truthfulness, and while it requires clear and convincing proof to set it aside, it is the duty of the court when evidence meets this test, to act upon it, and not permit an established falsehood to stand as true.’

“A judgment procured without the service of process is a fraud, not only on the party against whom the judgment is rendered, but on the court as well, and it is always, as between the parties thereto, subject to attack either collateral or direct, regardless of the name the remedy employed may bear.

* * * *

“We are constrained to say that the name of the procedure by which the judgment is attacked for fraud is not material. It may be attacked by bill in equity. It may be attacked by petition under Section 812, C. O. S. 1921, or it may be attacked in any proceeding where such judgment is relied on as the basis of an action or

as a defense, and to sustain the attack evidence dehors the record is competent.”

In running down the Oklahoma Stock Yards case through the Shepard Citator, we find the case has only been cited in two subsequent cases, one being *Hall vs. Jensen*, 249 Pac. 310 (Okla.), in which the Oklahoma Supreme Court distinguishes the case of void service and irregular service and holds the doctrine not applicable. Page 311:

“Defendants, in their brief and argument, assume that the defect in the service of the summons was jurisdictional and consisted in a false return of the sheriff as to the services made on the defendants, and they cite many authorities to support the contention that they had the right to show this defect by motion and evidence as to the true facts in the case, but this court can not consider assumptions for facts. There is no record showing the facts assumed and stated by defendants in their brief, and, therefore, nothing to apply the law so cited and quoted by them. If there was no service of the summons on the defendants, the judgment rendered against them is void, and they can raise this question of jurisdiction at any time by proper application (*Oklahoma Stock Yards Nat. Bank v. Pierce*, 144 Okl. 25, 243 P. 144), unless they have waived it by general appearance.”

The other case in which it is cited is the case of *Heiny vs. Sommers*, 268 Pac. 287, in which case the case was followed and held applicable where the sum-

mons had been served at a place other than at the usual residence of the defendant.

The only explanation for the Oklahoma Supreme Court in the Stock Yards case for not citing or referring to *Gregg vs. Seawell*, decided at an earlier date by the same Court, and for the Oklahoma Supreme Court in the *Dannenburg vs. Powers* case failing to refer to the Oklahoma Stock Yards case, would be that the Oklahoma Supreme Court considered the cases clearly distinguishable upon the facts. In the one case, at the most, the judgment was voidable only by reason of some claim defect in the service of the summons, and, in the other case, the judgment was void for lack of jurisdiction over the person of the defendant.

The Shepard Citator shows the case of *Gregg vs. Seawell* cited five times: (1) in *Intermill vs. Nash*, our Supreme Court case; (2) in *Dannenburg vs. Powers*; (3) in *Pappe vs. Law*, 35 Pac. (2d) 941; (4) *Protest of Gulf Pipe Line Co.*, 32 Pac. (2d) 42; (5) *In re Protest of St. Louis- San Francisco Ry Co.*, 11 Pac. (2d) 189. In each of the last three cases, the case of *Gregg vs. Seawell* is cited for authority for the well recognized rule of law that where the court has jurisdiction over the subject matter *and the parties*, errors and irregularities in the proceedings by which the judgment was obtained will not render the judgment void until vacated or set aside in proper proceedings upon direct attack and that the only question that can be raised upon a collateral attack upon the judgment is as to whether or not the court

did, in fact, have jurisdiction over the subject matter and of the parties, and not whether the jurisdiction when existent, was properly exercised.

In the case of *Condit vs. Condit*, 168 Pac. 456, decided in 1916, the Oklahoma Supreme Court in the second syllabus, which is by the court, states:

“A judgment rendered without jurisdiction of the person is no judgment at all; it is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever. As to the person in whose favor it professes to be, it places him in no better position than he occupied before, and gives him no new right. As to third persons, it can neither be a source of title, nor an impediment in the way of enforcing claims. It is not necessary to take any steps to have it reversed, vacated or set aside, and whenever it is brought up against the party he may assail its pretensions and show its worthlessness. It is supported by no presumptions, *and may be impeached in any action, direct or collateral*. It is a judgment which is entirely void, and may be shown to be void in a collateral as well as a direct proceeding, by extrinsic evidence as well as by the record itself.” (Italics ours.)

This syllabus is taken almost verbatim, if not entirely so, from Black on Judgments, Volume 1, Paragraph 170.

These cases clearly set forth the general rule of law applicable where the judgment is void as distinguished from voidable and definitely hold that the attack can be made upon such a judgment in any manner at any time as the judgment is not a judgment at all. It is a mere nullity and has no protection by inference or presumption.

Black on Judgments, Volume 1, Paragraph 220: "A personal judgment rendered against a defendant without notice to him, or an appearance by him, is without jurisdiction and is utterly and entirely void. (Citing numerous cases.)."

Stevens vs. Breen, decided January 15, 1940 by the New York Supreme Court, Appellate Division, 258 App. Div. 423, 16 N. Y. Sup. (2d) 909. This was a suit to foreclose a mortgage. The defendant offered in evidence a decree in a partition action. Plaintiff introduced evidence to show that the summons had not been served upon one of the defendants in that action. The defendant claimed that the plaintiff could not collaterally attack the partition judgment in the foreclosure suit. The court on Page 913 of the New York Supplement report of the case held:

"In this defendant was mistaken. The rule is that the 'want of jurisdiction to render the particular judgment may always be asserted and raised, directly or collaterally, either from an inspection of the record itself, when offered in behalf of the party claiming under it, or upon

extraneous proof, which is always admissible for that purpose.' (Citing cases.)''

See also *Commonwealth, ex rel Howard vs. Howard*, 10 Atl. (2d) 779; *Covington Trust Co. of Covington vs. Owens*, 129 S. W. (2d) 186:

“ ‘Jurisdiction’ of a court, so as to render its judgment immune from collateral attack after it becomes final is easy to comprehend, but difficult to state. It consists of two primary elements, (1) jurisdiction of the subject matter, and (2) jurisdiction of the person complaining of the judgment.”

Ex Parte Cohen, (Calif.), 290 Pac. 512, sets forth the same rule in the State of California. *Davis vs. Davis*, 197 Pac. 241, sets forth the rule in Colorado, the court stating:

“To recognize the decree (foreign divorce decree) to the extent required to affirm the judgment in this case, however, would give it greater force than we give our own, since in this state we permit collateral attack on a judgment rendered without sufficient service.”

France vs. Freeze, et al, Washington Supreme Court, decided May 11, 1940, 102 Pac. (2d) 687, Page 690:

“It matters not what the general powers and jurisdiction of a court may be. If it act without authority in a particular case, its orders and judgments are mere nullities, protecting no one

acting under them and constituting no hindrance to the prosecution of any right. A judgment which is absolutely void is entitled to no authority or respect and may be impeached in collateral proceedings by anyone whose rights or interests it conflicts. If the judgment is rendered by a court without jurisdiction, either of the persons or of the subject matter, such judgment may be subjected to collateral attack."

Commonwealth of Kentucky for the use and benefit of *Kern vs. Maryland Casualty Co. of Baltimore, Maryland*, decided June 5, 1940, C.C.A., 6th Circuit, 112 Fed. (2d) 352:

"Appellant's contention that the judgment of the state court is immune from collateral attack is without merit. Such immunity cannot exist unless the court awarding the judgment has jurisdiction of the person and the subject matter and the lack of either may be plead against the judgment when sought to be enforced or when benefit is claimed under it.

"Judicial proceedings in personam against one not served with legal process and not being within the jurisdiction, neither appearing in person nor by attorney, are null and void. *Webster vs. Reid*, 52 U. S. 437, 459, 11 How. 437, 439, 13 L. Ed. 671; *Combs vs. Combs*, 249 Ky. 155, 60 S. W. (2d) 368, 89 A.L.R. 1095. When a judgment by default is impugned, whatever may affect its competency or regularity is open to inquiry in a collateral proceeding."

This Honorable Court in *Intermill vs. Nash* recog-

nizes this same distinction between voidable judgments and judgments void by reason of lack of jurisdiction over the subject matter or the persons. The Honorable Justice Larsen on Page 278 of the report states:

“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.” (Italics ours.)

And on Page 282:

“A judgment that is *voidable* cannot be attacked collaterally.”

And in the concurring opinion of Judge Wolfe at Page 286:

“But so jealous is the law of its judgment recorded as such, that only such type of direct attack can be made when it is claimed the judgment is void, not when it is only voidable, and only can evidence be introduced of its voidness when the pleadings set up wherein it is void.”

Both in the opinion of Justice Larsen and in the concurring opinion of Justice Wolfe, it is apparent that the reason this Honorable Court refused to permit the attack on the judgment in the Intermill case then before it was due to the fact that the pleadings in the cause did not sufficiently or at all set forth the defects claimed

to have been present in the service of the summons, nor was the entire record of that case before the Supreme Court as it is in the case at bar.

WHEREFORE, appellant respectfully submits that the proceedings taken by appellant and the ruling of the court thereon are reviewable by this court; that the proceedings taken were sufficient in all respects; that the record and evidence conclusively establishes that the court had no jurisdiction to render judgment against appellant, and that the court, therefore, erred in denying appellant's motion and in refusing to grant plaintiff any relief from said void judgment.

Respectfully submitted,

MOYLE & MOYLE,
Attorneys for Appellant.