

1940

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

Utah Supreme Court

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

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IN THE  
SUPREME COURT  
OF THE  
State of Utah

STATE TAX COMMISSION OF THE  
STATE OF UTAH,

*Plaintiff,*

vs.

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

*Defendants.*

CASE NO.  
**6240**

APPELLANT'S ABSTRACT OF RECORD

MOYLE & MOYLE,  
*Attorneys for Appellant.*

ranscript

8 and contrary to and in opposition to the law  
of the case.

That in support of all and each and every one of  
the foregoing exceptions plaintiffs herein incorporate  
and makes a part of this Bill of Exceptions, as proof  
of all and each and everyone of said exceptions the com-  
plete record and testimony taken at and during the  
trial by the Court reporter of said Court as herein-  
after follows to-wit:

REPORTER'S TRANSCRIPT

I N D E X

	<u>Direct</u>	<u>Cross</u>	<u>Rodirect</u>	<u>Recross</u>
Fred A Gross	10	14	16	17
Lucy Pocatello Johnson	23	29		
Josephine Pocatello	30			
Amasa L. Clark	37	42		
Joseph E. Robinson	47	51		

(Title of Court and Cause Omitted)

BE IT REMEMBERED, that on Thursday, September  
14th, 1939, at ten A.M., the trial of the above entitled  
cause was had before Hon. Lewis Jones, District Judge.

IN THE  
SUPREME COURT  
OF THE  
State of Utah

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STATE TAX COMMISSION OF THE  
STATE OF UTAH,

*Plaintiff,*

vs.

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

*Defendants.*

CASE NO.

**6240**

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APPELLANT'S ABSTRACT OF RECORD

From the District Court of Duchesne County before  
the Honorable Abe W. Turner, Judge.

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COMPLAINT

- 1 Plaintiff's complaint is brought by the plaintiff against Archie L. Larsen and Lee H. Whitlock,

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a claimed partnership, for claimed delinquent sales tax due the State of Utah, praying for judgment in the sum of \$1,992.67, together with interest at 1% per month on the principal amount of \$1,502.07 from May 1, 1936 until paid, and for its costs of suit.

Filed in the office of the District Court for Duchesne County, August 21, 1936.

10-11

## SUMMONS AND RETURN

(Summons in statutory form.)

## RETURN

STATE OF UTAH }  
COUNTY OF DUCHESNE } ss.

I, Arzy H. Mitchell, Sheriff of Duchesne County, State of Utah, hereby certify and return that I received the within and hereunto annexed Summons on the 19th day of August, 1936, and that on the 19th day of August, 1936, I served the same upon the within named defendant Archie L. Larsen Copy of Complaint was attached and served thereto, by delivering to, and leaving with said defendant personally at Roosevelt, Duchesne County, Utah, a true copy of said summons.

I further certify that I endorsed upon said copy of said summons so served, the date of re-

Trans.

ceipt, the time and place of service and signed my name and official title thereto.

ARZY H. MITCHELL, Sheriff.

Dated at Duchesne, Utah, this 25th day of August, 1936.

Summons and Return filed August 31, 1936.

### DEFAULT CERTIFICATE

#### 13 The State of Utah to the Said Defendant :

In this action the defendant Archie L. Larsen & Lee H. Whitlock, a Partnership, having been regularly served with process, and having failed to appear and answer the Plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant Archie L. Larsen and Lee H. Whitlock, a Partnership in the premises is hereby duly entered according to law.

ATTEST my hand, and the seal of said Court, this 13th day of November, 1936.

G. A. GOODRICH, Clerk.

By EDNA LEMON, Deputy Clerk.

(Seal)

Filed November 14, 1936.

## JUDGMENT

IN THIS ACTION, the defendants, ARCHIE L. LARSEN, and LEE H. WHITLOCK, a partnership, having been regularly served with process, and having failed to appear and answer the plaintiff's Complaint filed herein, the legal time for answering having expired, and the default of the said defendants in the premises having been duly entered according to law, and the court having been fully advised in the premises; now upon motion of the attorneys for the plaintiff, on the 18th day of November, 1936, before the Honorable Abe W. Turner, Judge of the above mentioned court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff have judgment against the defendants in the sum of \$2,082.79, with interest thereon at the rate of 1% per month from the date hereof, until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$12.00 court costs and \$1.20 sheriff's service of summons fees.

Done in open court this 18th day of November, A. D. 1936.

ABE W. TURNER, Judge.

Filed November 19, 1936.

Trans.

## SUMMONS AND RETURN

15-16 (Summons in statutory form.)

## RETURN

## SUMMONS, PERSONAL SERVICE

## SHERIFF'S OFFICE

STATE OF UTAH  
COUNTY OF SALT LAKE } ss.

I hereby certify and return that I received the within and hereto annexed SUMMONS on the 22nd day of August, 1936, and served the same upon Lee H. Whitlock, one of the partners of a partnership the within named defendant, personally, by delivering to and leaving with said Defendant, in Salt Lake City, Salt Lake County, State of Utah, a true copy of said Summons, on the 17th day of December, 1936. Together with a copy of the complaint referred to in said Summons. I further certify that, at the time of such service, on the copy of the summons so served, I endorsed the date and place of service and added my name and official title thereto.



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Dated at Salt Lake City, Utah, this 18th day  
of December, 1936.

S. GRANT YOUNG,  
Sheriff of Salt Lake County,  
State of Utah.

By M. LANDAU, Deputy Sheriff.

Summons and Return filed December 24, 1936.

22

## DEFAULT CERTIFICATE

IN THIS ACTION the defendant LEE H. WHITLOCK, individually having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant LEE H. WHITLOCK, individually in the premises is hereby duly entered according to law.

ATTEST my hand, and the seal of said court,  
this 8th day of March, 1938.

G. A. GOODRICH, Clerk,

By EDNA L. PETERSON, Deputy Clerk.

(Seal)

Filed March 7, 1938.

Trans.

## JUDGMENT

23        IN THIS ACTION, the defendants ARCHIE L. LARSEN, and LEE H. WHITLOCK, having each been regularly served with process, and each having failed to appear and answer the plaintiff's complaint filed herein, the legal time for answering having expired, and the default of each defendant in the premises having been duly entered according to law, and the court having been fully advised in the premises; now upon motion of the attorneys for the plaintiff, on the 9th day of March, 1938, before the Honorable Dallas H. Young, Judge of the above mentioned court;

IT IS HEREBY ORDERED, ADJUGDED AND DECREED that plaintiff have judgment against each of the defendants individually in the sum of \$2,082.79, with interest thereon at the rate of 1% per month from the date hereof, until paid.

Done in open court this 9th day of March, A. D. 1938.

DALLAS H. YOUNG, Judge.

Filed March 9, 1938.

## MOTION

26        Now comes the defendant, Lee H. Whitlock, by Moyle & Moyle, his attorneys, appearing here specially for the purposes of this motion only,

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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 yourselves accordingly.

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

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.

O. W. MOYLE, JR.

(Duly sworn to before a Notary Public.)

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

ALFRED KLEIN,  
Attorneys for State Tax  
Commission of the State of Utah.

Filed March 8, 1939.

### AFFIDAVIT

27        LEE H. WHITLOCK, being first duly sworn,  
on oath deposes and says:

That he is one of the defendants named in the above entitled action and that he makes this affidavit in support of his motion to set aside and quash the alleged or pretended service of summons upon him, which is attached hereto;

That at no time has summons been served upon him in the above entitled action, either by serving the same upon him personally or by leaving a copy of the same at his usual place of abode; namely, No. 1207 South 15th East Street, Salt Lake City, Utah, with some suitable person or at any other place or in any other manner or way;

That the return of summons filed in the above entitled cause on the 24th day of December, 1936, signed by M. Landau, as deputy sheriff, stating

Trans.

that he served said summons on affiant by delivering to and leaving with affiant in Salt Lake City, Salt Lake County, State of Utah a true copy of said summons on the 17th day of December, 1936, together with a copy of the complaint referred to in said summons, is wholly and entirely false, as said M. Landau did not serve either said summons or a copy of summons or any copy of any complaint upon affiant either on said December 17, 1936, or upon any other date or at any other time, either prior or subsequent thereto or in any manner or way.

Affiant further deposes and says that no other person or party has ever served summons in the above entitled matter upon him in any manner or way.

LEE H. WHITLOCK.

(Subscribed and sworn to before a Notary Public.)

Filed March 8, 1939.

### ORDER

- 34        The motion of the defendant, Lee H. Whitlock, to vacate, set aside and quash the alleged or pretended service of summons upon said defendant having come on regularly for hearing before the court and evidence having been presented for and

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in support of said motion and the matter having been duly argued and submitted to the court and the court having heretofore, on or about the 24th day of June, 1939, ordered a minute to be made denying said motion, and, whereas, no order or judgment has been heretofore entered by the court in accordance with said minute order,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUGDED AND DECREED that said motion of the defendant, Lee H. Whitlock, be and the same is hereby denied.

BY ORDER OF THE COURT made this 21st day of December, 1939.

ABE W. TURNER, Judge.

Filed January 5, 1940.

### NOTICE OF APPEAL

35 To the plaintiff and to its attorneys:

You and each of you will please take notice that the defendant, Lee H. Whitlock, in the above entitled action appeals to the Supreme Court of the State of Utah from that certain order made and entered in favor of the plaintiff and against the defendant, Lee H. Whitlock on the 21st day of December, 1939, denying the defendant, Lee H. Whitlock's, motion to vacate, set aside and quash

Trans.

the alleged or pretended service of summons upon the defendant, Lee H. Whitlock.

This appeal is taken on both questions of law and of fact.

MOYLE & MOYLE, Attorneys for  
Defendant, Lee H. Whitlock.

Received copy of the above and foregoing  
Notice of Appeal this 17th day of January, 1940.

GRANT A. BROWN,  
Attorneys for Plaintiff.

Filed in the office of the Clerk of the District  
Court of Duchesne County, Utah, January 20,  
1940.

#### ACKNOWLEDGMENT OF SERVICE OF NOTICE OF APPEAL AND WAIVER

60 Comes now the defendant, Archie L. Larsen,  
and hereby acknowledges that service of notice of  
the appeal of Lee H. Whitlock in the above en-  
titled cause has been duly and regularly served  
upon him and hereby waives service of any fur-  
ther notices of any kind or nature of any instru-  
ments that may be filed either in the District  
Court in and for Duchesne County or the Supreme  
Court of the State of Utah relative to said appeal.

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DATED this 23rd day of February, 1940.

ARCHIE L. LARSEN.

Filed in the office of the Clerk of the District Court of Duchesne County, Utah, March 1, 1940.

### EVIDENCE

40       The motion of the defendant, Lee H. Whitlock, came on regularly for hearing before the Honorable Abe W. Turner, judge, sitting without a jury, on May 5, 1939, at Duchesne, Duchesne County, Utah. The following proceedings were had:

41       MR. MOYLE: I would like to have the record here show that I am appearing for and on behalf of the defendant, Lee H. Whitlock, and only for purposes of the motion on file herein, asking that the purported service of the summons on Mr. Whitlock be quashed.

THE COURT: Yes.

42       Mr. Lee H. Whitlock, a witness in his own behalf, being first duly sworn on oath, testified on direct examination as follows:

BY MR. MOYLE:

Q. Your name is Lee H. Whitlock is it?

A. Yes, sir.

Q. And you are one of the defendants re-



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ferred to in the proceedings in this case?

A. Yes, sir.

Q. And you are appearing today in support of your motion to quash the service of the summons purported to have been served on you on the 17th day of December, A. D. 1936, are you?

A. Yes, sir.

Q. And you are appearing only for that reason?

A. Yes, sir.

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

MR. MOYLE: I think you will probably want some authorities on that question.

42 THE COURT: At this time the record may show that the objection has been made, and the court will not rule on it at this time, but will allow testimony to be presented, subject to being stricken after the court has had an opportunity of an examination of the authorities.

Mr. Whitlock then proceeded to testify as follows:

42-3-4 That the first date he knew of the pendency of

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this action was sometime about December 20, 1936; that at that time he was in California, he having left Salt Lake City for California on December 14, 1936, and returned to Salt Lake City January 2, 1937; that he was at the time of the hearing and for many years prior thereto a resident of Salt Lake City, Utah; that while he was in California his secretary, Charlotte Lewis, called him and informed him that there had been an envelope left in his office at 212 South Main Street, Salt Lake City, Utah, from the sheriff's office and he asked her to open it and read it to him; that after reading the paper he directed her to take it to the office of Oscar W. Moyle, Jr., an attorney-at-law, in the First National Bank Building, Salt Lake City, Utah; that after he returned from California he called to see Mr. Moyle concerning the summons and that Mr. Moyle informed him that it was not a summons on him and not to pay any more attention to it at that time; that Mr. Moyle stated it was an action against the partnership and not directly against him; that he did nothing further about the matter; that he first knew of a judgment claimed to have been entered or purported to have been entered against him when the Sheriff of Duchesne County met him on the street at Roosevelt and stated that there was an execution out against him; that he then contacted Mr. Moyle again and, as he re-

Trans.

called, Mr. Moyle stated not to do anything about it; that Mr. Moyle went to Roosevelt and made some investigation concerning the matter and reported back to him.

### CROSS-EXAMINATION

46        That his present address is 207 South 15th East, Salt Lake City; that he is a mechanical dentist with the Union Dental Laboratory and an officer of that corporation; that the address of the company is 212 South Main Street, Salt Lake City; that he remembered receiving a letter from the State Tax Commission concerning this matter, but does not remember its contents; that he thought he gave it to Mr. Moyle at the time he got it; that he knew there was an action pending against him by the State Tax Commission at that time; that is, he knew of this particular suit being pending at that time.

### REDIRECT EXAMINATION

49        That he has not at any time had any summons or any paper purporting to be a summons served upon him in this action.

50-52     Oscar W. Moyle, Jr., was sworn as a witness for the defendant, Lee H. Whitlock, and testified as follows:

That he is an attorney duly licensed to prac-

Trans.

tice law in the State of Utah with his office at 810 First National Bank Building, Salt Lake City; that sometime during the month of December, and to the best of his recollection it would be around the 18th or 21st of December, Charlotte Lewis, whom he knew to be the secretary in the office for Mr. Whitlock in his place of business in Salt Lake City, brought to him defendant's exhibit 1, which purports to be a summons out of the District Court of the Fourth Judicial District in and for Duchesne County, State of Utah in the case of State Tax Commission of the State of Utah, plaintiff, vs. Archie L. Larsen and Lee H. Whitlock, a partnership; that the instrument at the time of its introduction in evidence was in the exact condition it was in at the time it was handed to him with the exception that one page was fastened to the other with a pin to keep them together; that he examined the purported summons and copy of the complaint attached to the summons and on a subsequent date, sometime after January 1, Mr. Whitlock came in to see him concerning the same; that he called to Mr. Whitlock's attention the fact that the purported summons carried upon its face the notation "served this summons on the within named defendant, Archie L. Larsen, on the 17th day of December, 1936, Salt Lake County, Utah, Grant Young, Sheriff of Salt Lake County, Utah, by M. Landau, deputy;"

Trans.

that he advised Mr. Whitlock at that time that in his opinion the summons was an attempted service on Archie L. Larsen and did not amount to a service of summons upon him; that he further advised Mr. Whitlock that he had examined the complaint in the action and that in his opinion the complaint was an action against the partnership and would not support an individual judgment against him except for whatever interest he may have had in the partnership in the event he was a partner; that he advised him that as the matter then stood there was nothing further for either himself or Mr. Whitlock to do in the matter; that he is familiar with the signature of Mr. Landau, the deputy sheriff who signed the notation on the summons and also signed the return of service of summons that is on file, due to the fact that Mr. Landau has served many instruments for his office and he has had occasion to examine the signature on returns that he has made and that he is certain that the signature that appears on the face of the summons is that of Mr. Landau; that sometime subsequent to this time Mr. Whitlock came into his office and said that the Sheriff of Duchesne County had said something to him about an execution having been issued in this matter; that he made an investigation personally of the records and file in the clerk's office immediately thereafter and found

Trans.

that no personal judgment had been taken against Mr. Whitlock and that the only judgment was a judgment taken on November 18th, which was a judgment against the partnership.

After Mr. Moyle's evidence, the following objection was made by Mr. Brown:

- 52        If Your Honor please, we have the same objection to Mr. Moyle's testimony as applied to Mr. Whitlock's testimony, that it is incompetent, irrelevant and immaterial and in as much as our contention is that this proceeding is out of line and not before the court at this time, we object to it.

THE COURT: The record may show that to be the case.

- 52        Mr. Whitlock was then recalled as a witness for himself and, after the reading to him by Mr. Moyle of the purported summons and return filed on December 24, 1936, testified that Mr. M. Landau, deputy sheriff, did not serve him or hand him a summons and copy of the complaint upon that date, as stated by the return, or upon any other date either prior to or subsequent to that date.

DEFENDANT'S EXHIBIT 1  
(Title of Court)

STATE TAX COMMISS-  
SION OF THE STATE  
OF UTAH,

Plaintiff

vs.

ARCHIE L. LARSEN,  
and LEE H. WHIT-  
LOCK, a partnership,  
Defendants

"Served this summons on  
the within named defendant,  
*Archie L. Larsen*  
on the 17 day of *December*,  
1936, at Salt Lake County,  
Utah.

SUMMONS

GRANT YOUNG,  
Sheriff Salt Lake  
County, Utah.

By *M. Landau*,  
Deputy."

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The body of said instrument reads:

The State of Utah to the Said Defendant:

You are hereby summoned to appear within twenty days after the service of this summons upon you, if served within the county in which this action is brought; otherwise, within thirty days after service, and defend the above entitled action; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which has been filed with the Clerk of said Court. A copy of the complaint is attached hereto.

NED WARNOCK,  
ALFRED KLEIN,  
Attorneys for Plaintiff.

P. O. Address  
118 State Capitol  
Salt Lake City, Utah

## ASSIGNMENTS OF ERROR

1. The trial court erred in denying defendant's motion filed March 8, 1939 praying for an order of the court vacating, setting aside and quashing the alleged or pretended service of summons upon the defendant, Lee H. Whitlock.

2. The court erred in not granting defendant's motion filed March 8, 1939 praying for an order vacating, setting aside and quashing the alleged or pretended service of summons upon the defendant, Lee H. Whitlock.

3. That the order of the court made December 21, 1939 is not supported by the evidence, the evidence conclusively establishing that the said defendant, Lee H. Whitlock, was not served with summons and the court, therefore, had no jurisdiction to enter judgment against him as it did in its judgment dated March 9, 1938.

4. The court erred in disregarding the uncontradicted and uncontroverted evidence conclusively establishing that no service of summons was made upon the defendant in this matter.

5. The court erred in not granting defendant's motion as the evidence is uncontroverted that defendant was not served with summons.

6. The court erred in failing to vacate and set aside the judgment made and entered against



this defendant on March 9, 1938.

7. The court erred in entering its judgment of March 9, 1938 in favor of the plaintiff and against this defendant.

8. The court erred in failing to vacate and set aside the judgment of March 9, 1938 upon its own motion upon it conclusively appearing to it that this defendant had not been served with summons.

9. That the order of the court made December 21, 1939 is not supported by the evidence.

Filed with the Clerk of the Supreme Court  
April 4, 1940.