

2001

# Mildred Rhoades v. James C. Wright, aka James Clifford Wright and Clifford Wright, and Essie Wright : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

14159 A

IE STATE OF UTAH

MILDRED RHOADES individually and as  
Administratrix of the Estate of Claude  
Rhoades, deceased,

Plaintiff-Appellant,

v.

JAMES C. WRIGHT, also known as JAMES  
CLIFFORD WRIGHT, and CLIFFORD WRIGHT  
and ESSIE WRIGHT, his wife,

Defendants-Respondents.

Case No. 14159

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APPELLANT'S BRIEF

Appeal from the Seventh Judicial District  
Court of San Juan County, Utah, Honorable  
Edward Sheya, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

MILDRED RHOADES individually and as )  
Administratrix of the Estate of Claude )  
Rhoades, deceased, )

Plaintiff-Appellant, )

v. )

Case No. 14159

JAMES C. WRIGHT, also known as JAMES )  
CLIFFORD WRIGHT, and CLIFFORD WRIGHT )  
and ESSIE WRIGHT, his wife, )

Defendants-Respondents. )

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APPELLANT'S BRIEF

---

NATURE OF THE CASE

This is an action to recover for the wrongful death of Claude Rhoades.

DISPOSITION IN THE LOWER COURT

The lower court granted Defendants' motion to quash service of process, held that attachment is an improper method to confer jurisdiction in a wrongful death case where the tort sued upon arose in another state and pursuant to this holding granted Defendants' ex parte motion to vacate the writ of attachment.

RELIEF SOUGHT ON APPEAL

Plaintiff-Appellant seeks to have the decision of the lower court reversed, the writ of attachment reinstated and the case remanded for a trial on the merits.

## STATEMENT OF FACTS

The facts giving rise to this case are as follows:

Plaintiff's decedent, Claude Rhoades, lived about three-quarters of a mile on the Utah side of the Utah-Colorado border. He was a farmer and farmed land that he owned in Utah and land that he leased in Utah and Colorado. (R.44)

Defendant James Wright lived about two miles on the Colorado side of the Colorado-Utah border with his parents, Clifford Wright and Essie Wright, who are also Defendants. James Wright farmed land belonging to himself and his parents, both in Colorado and Utah. The properties of the parties were in close proximity. (R.44)

Claude Rhoades had been married to a cousin of James Wright, from whom he was divorced in 1966. The property settlement provided that Anita, the first Mrs. Rhoades, was to receive a share of the profits from crops grown on certain land. The parties had been keeping an eye on each other as regards the success or failure of the crops, who visited whom and so on. (R.44-45)

In the late afternoon of April 19, 1970, the parties were all inspecting portions of their farmland, Claude Rhoades with his second wife, Mildred Rhoades, Appellant herein, and James Wright with his parents, Clifford and Essie Wright. Claude Rhoades overtook the Wrights and

pulled his pickup over in such a way as to make them stop. He and Appellant got out of the truck and approached the Wright vehicle on the driver's side. Claude Rhoades spoke to James Wright words to the effect of "Get off my back." Thereupon, James Wright shot and killed Claude Rhoades. At the time of the shooting, the parties were on the Colorado side of the Utah-Colorado border. (R.45)

After James Wright was found guilty of first degree murder by a Colorado court and jury and was sentenced to life imprisonment, he transferred his Utah property to his parents for no consideration. (R.45) Plaintiff then filed this wrongful death action in the United States District Court for the District of Utah, Central Division, as a diversity action. The Defendants were served with process in Colorado. The Plaintiff also sought and obtained a writ of attachment on the Utah property that James Wright had transferred to his parents. (R.45)

The United States District Court found, based on the Utah long-arm statute, that the court had personal jurisdiction over the Defendants. The case was then certified for interlocutory appeal. (R.46)

The federal district court's conclusion that there was personal jurisdiction under the Utah long-arm statute, Utah Code Annotated, 1953 Supp., 78-27-24, was based on its view that economic injury in Utah which resulted from the



shooting in Colorado was sufficient to support such jurisdiction. The trial court also stated that the exercise of jurisdiction would not violate due process standards because it was reasonably foreseeable that the act would cause injury in Utah and it was fair in view of the contacts the Defendant had with Utah. (R.46)

The United States Court of Appeals, Tenth Circuit, reversed the decision of the district court, with directions to dismiss the action by reason of lack of personal jurisdiction for the reason that the Utah long-arm statute does not contemplate "economic injury" as a basis for personal jurisdiction. (R.47-48)

The circuit court further held that jurisdiction could not be sustained by the attachment of Defendant's property in Utah for the same reason that the matter of "injury to the person" or "personal injury" is required rather than "economic injury." (R.48-49) The Tenth Circuit decision was filed July 23, 1973.

Effective November 1, 1972, subsequent to the ruling of the United States District Court, and while that decision was before the circuit court on appeal, Rule 64C(a), Utah Rules of Civil Procedure, was amended by this Court to read as follows: (R.32)

(a) The plaintiff, at any time after the filing of the complaint . . . in an action against a non-resident of this state, may have the property of the

defendant, not exempt from execution, attached as security for the satisfaction of any judgment that may be recovered in such action. . . . (Emphasis added)

The amendment substituted the phrase "against a non-resident" for the phrase "to recover damages for any tort committed by a non-resident of this state against the person or property of a resident of this state" near the beginning of the rule. (R.32)

On July 29, 1974, Plaintiff-Appellant filed her complaint herein individually and as Administratrix of the Estate of Claude Rhoades, deceased. (R.1)

Without discussing the effect of the amendment to Rule 64C(a), the lower court granted Defendants' motion to quash service of process on the Defendants, stating as its reason the fact that the Defendants are all residents of Colorado and were served in that state and Utah's long-arm statute does not offer a basis for in personam jurisdiction where the claim is for economic injury. (R.61-62)

In addition, the trial court found that attachment is an improper method to confer jurisdiction in a wrongful death case where the tort sued upon arose in another state and therefore concluded that it did not have in rem jurisdiction. (R.62) The district court further found that the prior decision of the federal circuit court regarding jurisdiction "may not be res judicata by reason of the amendment which has been made" by this Court to Rule 64C(a).

Subsequently, on ex parte motion of Defendants, and by order dated June 3, 1975, the lower court vacated the writ of attachment herein, stating that the writ was "without legal significance as far as a means of conferring in rem jurisdiction" on the court by virtue of the court's order and decision dated May 21, 1975. (R.64-65)

#### ISSUES

1. Rule 64C(a) of the Utah Rules of Civil Procedure entitles the Plaintiff in this action to attach the property of Defendants within the State of Utah and confers in rem or quasi in rem jurisdiction on the Utah courts, by virtue of Plaintiff's attachment and action, to determine the rights of Defendants in the subject property.

2. The federal court's decision that it lacked jurisdiction is not res judicata as to the instant action.

#### ARGUMENT

##### POINT I

RULE 64C(a) OF THE UTAH RULES OF CIVIL PROCEDURE ENTITLES THE PLAINTIFF IN THIS ACTION TO ATTACH THE PROPERTY OF DEFENDANTS WITHIN THE STATE OF UTAH AND CONFERS IN REM OR QUASI IN REM JURISDICTION ON THE UTAH COURTS, BY VIRTUE OF PLAINTIFF'S ATTACHMENT AND ACTION, TO DETERMINE THE RIGHTS OF DEFENDANTS IN THE SUBJECT PROPERTY.

Rule 64C of the Utah Rules of Civil Procedure provides in pertinent part as follows:

(a) The plaintiff, at any time after the filing of the complaint . . . in an action against a non-resident of this state, may have the property of the defendant, not exempt from execution, attached as security for the satisfaction of any judgment that may be recovered in such action. . . . (Emphasis added)

The amendment to Rule 64C(a), effective November 1, 1972, substituted "against a non-resident" for "to recover damages for any tort committed by a non-resident of this state against the person or property of a resident of this state." It is Plaintiff's position that the Utah Supreme Court intended to broaden the scope of the attachment rule to include "economic injury."

Rule 64C(a) as amended is consistent with the trend in other states to extend jurisdiction to allow a resident to recover in the courts of his own state in any action against a non-resident not amenable to process in that state, where the defendant owns property within the state and where the cause of action, regardless of whether it sounds in tort or contract, may have arisen in another state. See N.Y. Civ. Prac. Act, §6201 (1963); Seider v. Roth, 17 N.Y.2d 111, 269 N.Y.S.2d 99, 216 N.E.2d 312 (1966); Ill. Ann. Stat. C. 11 §11 (1963); Ind. Ann. Stat. 34-1-11-1 [3-501] (1946). See, also, Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973); Turner v. Evers, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1973); Forbes v. Boynton, \_\_\_\_ N.H. \_\_\_\_, 313 A.2d 129 (1973); Minn. Stat. Ann. §571.41 subd. 2 (Supp. 1974).

The law of attachment varies from state to state.

Several generalizations are possible, however, because of the common historical development of the remedy. Attachment is the process by which property is brought into the custody of the court. It is used both as a means of securing a potential judgment debt and as a means of acquiring jurisdiction over the defendant to the extent of the property attached. Both of these aspects are relied upon in the present action. If the Plaintiff's claim matures into a judgment, the court may cause Defendants' attached property to be sold to satisfy the judgment. In this manner the Plaintiff effectively acquires jurisdiction over the Defendants who may otherwise not be amenable to process in the state.

The right of a state, through its tribunals, to subject property situated within its limits, owned by non-residents, to the payment of demands against them and the fact that this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled are too well established to admit of argument; and attachment laws directed against citizens of other states have been declared by uniform course of decisions to be valid and not in conflict with constitutional guarantees. 6 AM. JUR. 2d, Attachment and Garnishment, §219 (2d Ed. 1963).

In Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565 (1877), the Supreme Court held that a state may subject property

situated in its territory, but owned by non-residents, to the payment of claims by its own citizens. This jurisdiction affecting non-residents was found permissible because it did not infringe upon the sovereignty of the state in which the owner was domiciled. The court also recognized the interest of each state in the protection of its own citizens. These two factors were found to legitimate the exercise of authority of a state to hold and appropriate for the satisfaction of claims of residents' property owned by non-residents. The due process standard for the assertion of jurisdiction formulated in Pennoyer provides a reliable objective test for determining whether any particular exercise of jurisdiction is constitutional. Where the property attached is physically located within the state, the due process requirement is satisfied.

In a sense, when the Supreme Court approved this practice in Pennoyer, it made the attachment statutes the first long-arm statutes.

The doctrine has now been extended to authorize courts to obtain quasi-in-rem jurisdiction by attaching as property of a non-resident his right under a liability policy to have his insurer defend and indemnify him on his claim. Seider v. Roth, supra; Rintala v. Shoemaker, supra; Forbes v. Boynton, supra.

It is not necessary to personally serve the defendants

in order to acquire in rem or quasi-in-rem jurisdiction over defendants' property located within the state. In the present case, the Defendants were given notice, by means of personal service of the complaint upon them, that their property had been attached and that a proceeding in rem or quasi-in-rem had been commenced against their property to satisfy Plaintiff's claim. For that reason, it was error for the court to quash service of process, even though personal service may have failed to confer personal jurisdiction over the Defendants.

In their memorandum submitted to the court below, the Defendants relied upon the case of Alpers v. New Jersey Bell Telephone Company, 403 Pa. 626, 130 A.2d 360 (1961), as authority for their argument that because the cause of action arose in another state, Utah is precluded from using Rule 64C(a) as a means of conferring in rem or quasi-in-rem jurisdiction. (R.25) In stating their argument, Defendants conceded that they had found only limited authority on this proposition. (R.25)

In the Alpers case, the plaintiff, a resident of Pennsylvania, was injured in New Jersey in an automobile accident allegedly caused by a truck owned by defendant and driven by one of its employees. Plaintiff attached the property of defendant in Pennsylvania and brought an action for damages. Defendant appeared specially for purposes of

contesting jurisdiction, and the Pennsylvania Supreme Court upheld the lower court's ruling dismissing the writ of attachment, stating that the attachment remedy will not lie for torts committed outside the boundaries of the State of Pennsylvania.

In stating the facts of the Alpers case, the Defendants ignored the fact that that decision was based on a 1937 Pennsylvania statutory provision which limited writs of foreign attachment to torts committed within the State of Pennsylvania. That decision was subsequently criticized in a persuasive law review comment. That comment cited a Pennsylvania statute that authorizes the Supreme Court of Pennsylvania to prescribe forms of action, writs and other rules of civil procedure for the courts of Pennsylvania. See Vol. XIX Washington and Lee Law Review, Attachment for a Foreign Tort, p.267 (1962); Pa. Stat. Ann. tit. 17 §61 (Supp. 1960). Under this statutory authority, the Supreme Court of Pennsylvania adopted its Rule 1252 which provides in part that a writ of foreign attachment may issue to attach property of a defendant upon any cause of action at law or in equity in which the relief sought includes a judgment or decree for the payment of money. The author of that article further commented that Pennsylvania's Rule 1252 does not affect any fundamental change in the basic requirements for proceeding by attachment. Prior to obtaining a writ of



foreign attachment in Pennsylvania, the plaintiff must show that the defendant is a non-resident of the state and that tangible property belonging to the defendant is within the forum when the attachment is served upon the garnishee. Upon meeting these requirements, the writ of foreign attachment will issue and a suit quasi in rem is formally instituted whereby the plaintiff may proceed against the property of the defendant, rather than against the defendant's person. The author suggested that the doctrine of forum non-conveniens could be applied by the court to effectively control the use of the writ of attachment in actions to recover for foreign torts and further commented as follows:

At the same time, the plaintiff who asserts a good cause of action and seeks recovery by attachment would not be denied all access to the courts of Pennsylvania. It would seem that under the Alpers decision, a resident must either seek recovery in personam within or without the commonwealth since there is little chance the plaintiff can obtain personal service upon the foreign defendant. The desirability of reducing burdensome litigation does not appear to warrant the harsh restriction that denies the fundamental quasi in rem action, especially when the same results may be more equitably achieved by a discretionary use of the doctrine of forum non-conveniens.

The efficacy and desirability of the writ of foreign attachment as extended to foreign actions ex delicto has been well recognized and accepted in other jurisdictions. It is submitted that a decision interpreting Rule 1252 so as to extend to foreign actions ex delicto would have been preferable. The application of the rule could then have been made to depend on the discretionary doctrine of forum non-conveniens. See Volume XIX, Washington and Lee Law Review, Attachment for a Foreign Tort, at pages 270-271 (1962).

The Utah Supreme Court is authorized by Section 78-2-4, Utah Code Annotated (1953), to:

. . . [P]rescribe, alter and revise, by rules, for all courts of the State of Utah, the forms of process, writs, pleadings and motions and the practice and procedure in all civil and criminal actions and proceedings. . . . Such rules may not abridge, enlarge or modify the substantive rights of any litigant.

Unlike the State of Pennsylvania, Utah does not have a statute which limits writs of foreign attachment to torts committed within the state. There is no basis for holding that Rule 64C(a) does not allow such a practice. The rule is broad and unrestricted in that regard.

This Court has long recognized the principle of in rem jurisdiction with regard to attachment proceedings. In the case of Bristol v. Brent, 36 Utah 108, 103 Pac. 1076 (1909), the court held as follows with regard to attachment proceedings against a non-resident defendant and in rem jurisdiction:

In attachment proceedings against a non-resident defendant where prsonal service on him is lacking, it is elementary that the court must obtain jurisdiction of the property of the defendant. This in an ordinary attachment is obtained by seizure of it by the officer, and the seizure places the property in the custody of the law to be so held until the court determines whether or not the plaintiff in the action is entitled to judgment in the main case. When this is determined and judgment is entered, then, and then only, can the property that has been seized be applied to the payment of the judgment.

\* \* \*

A proceeding by which jurisdiction is sought by

attaching property, whether tangible or intangible, such as a debt, is essentially a proceeding in rem; that is, a proceeding against a thing which is brought into the custody of the law and hence within the jurisdiction of the court. To place it into the custody of law and bring it within the jurisdiction of the court, the things which the law requires to be done must be done.

See, also, 6 AM. JUR. 2d, Attachment and Garnishment, §14, §16, §219 (2d Ed. 1963).

The Affidavit for Attachment in the present action clearly states a basis for in rem jurisdiction as follows:

And this affiant further states that the following cause for issuing an attachment in this action actually exists at the time of taking this affidavit, to-wit: That the said defendants are non-residents of the State of Utah; that the defendant James C. Wright has assigned and disposed of real property in the State of Utah with intent to defraud his creditors; and that unless this attachment issue, said defendants, and each of them, will further attempt to assign and transfer real property located in the State of Utah for the purpose of avoiding the payment of the obligation herein sued upon, and particularly the obligation owing to plaintiff; that in order to obtain jurisdiction of the matter, it is necessary that the court issue a writ of attachment, retaining and holding in tact said property for the purpose of satisfying in whole or in part any judgment which may be rendered in favor of plaintiff and against the defendants, or either of them. (R.56)

The complaint of Plaintiff also clearly states a cause of action sounding in rem or quasi-in-rem against the Defendants and their property. (R.1-3)

For the above stated reasons, it was error for the trial court to hold that Plaintiff's attachment failed to confer in rem or quasi-in-rem jurisdiction on the court and the court improperly granted Defendants' ex parte motion to

vacate the writ of attachment.

## POINT II

THE FEDERAL COURT'S DECISION THAT IT LACKED JURISDICTION IS NOT RES JUDICATA AS TO THE INSTANT ACTION.

The general rule is that a judgment for the defendant based on lack of jurisdiction does not bar the plaintiff from bringing another action on the same cause in another court having jurisdiction. 46 AM. JUR. 2d, Judgments, §500, p.656 (2d Ed. 1969).

46 AM. JUR. 2d, *supra*, further states the law as follows:

. . . [E]ven though a judgment disposes of the action without a determination of the merits of the cause of action, it is nevertheless conclusive as to the issues or technical points actually decided therein, and this rule has been applied to a judgment based on want of jurisdiction, so as to render conclusive the prior court's determination of its lack of jurisdiction, as well as questions material to the issue of jurisdiction and actually decided by the judgment. Under this rule, a subsequent action by and against the same parties on the same cause in the same court is barred, but the maintenance of a subsequent action in another court is not precluded by a prior judgment based on the determination of a lack of jurisdiction, even if such determination is erroneous, although, as to this precise point, there is some authority to the contrary. (Emphasis added)

Of course, a judgment based on lack of jurisdiction does not preclude a party from litigating in another action a question not determined by the judgment, such as a jurisdictional question not identical with the one decided by the former judgment. . . . (Emphasis added)

Literally, *res judicata* means a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. As stated in many cases, the doctrine

of res judicata is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. 46 AM JUR, supra

There is no issue or matter now before this Court that has been decided by prior judgment by a court of competent jurisdiction.

As noted previously, the circuit court merely held that the federal district court lacked personal jurisdiction over the Defendants to the extent personal jurisdiction was sought under Utah's long-arm statute. The court also found that "jurisdiction" could not be sustained by the attachment of Defendants' property under Utah's attachment Rule 64C [as that rule read prior to amendment].

The lower court in the present action found that the prior decision of the federal court in this case regarding jurisdiction may not be res judicata by reason of the amendment which has been made by this Court to Rule 64C(a).

(R.63) Then, without citing any authority, the lower court found that attachment is an improper method to confer jurisdiction in a wrongful death case where the tort sued upon arose in another state. (R.62-63) The rest of the court's decision deals with construction of the Utah long-

arm statute which has no application in the present action.  
(R.61-62)

Defendants in their memorandum of authorities before the lower court present considerable argument on the questions of res judicata and interpretation of the Utah long-arm statute, both of which are without merit under the facts of this case.

Plaintiff in the present action claims nothing by way of personal jurisdiction over the Defendants by virtue of Utah's long-arm statute. Admittedly, if Plaintiff were so asserting, the same may be res judicata since the federal court already decided that question. The federal court also interpreted Rule 64C(a) as it read prior to amendment and did so in connection with its interpretation of the Utah long-arm statute. The federal court concluded that neither the long-arm statute nor Rule 64C(a)[as it then read] included economic injury.

A. A change in the law between the commencement dates of the federal action and the state action precludes the application of the doctrine of res judicata.

It is a well established principal of law that a change in circumstances, either law or fact, precludes application of the doctrine of res judicata.

50 C.J.S., Judgments, §650, p.95, states the law as follows:

In accordance with the general rule stated supra this section that the estoppel of a judgment extends only to the facts and conditions as they were at the time the judgment was rendered, it has been broadly held that res judicata is no defense where, between the time of the first judgment and the second, there has been an intervening decision or a change in the law creating an altered situation, as where the second suit seeks an adjudication of rights under a statute enacted subsequent to the determination of the first action.

Accord 49 ALR2d 1036, 1039-40:

Consequently, the judgment is conclusive in another proceeding as to questions material to the jurisdiction of the court rendering it, but it is not conclusive . . . where, subsequently to the rendition of the judgment, there has been a change . . . in the governing statutes or rules of court.

As already discussed, Rule 64C(a), Utah Rules of Civil Procedure, was amended between the commencement of the federal court action and the commencement of the instant state court action. For that reason, the federal court decision interpreting the old Rule 64C(a) in connection with the long-arm statute has no binding effect on the present action which was initiated under the new Rule 64C(a).

It is also the general rule that amendments to procedural statutes will be liberally construed. 1A Southernland Statutory Construction, §22.9 (4th Ed. 1972).

In the absence of a saving clause or statute or some other clear indication that legislative intent is to the contrary, provisions added by the amendment that affect procedural rights--legal remedies--are construed to apply to all cases pending at the time of its enactment and all

those commenced subsequent thereto, whether the substantive right sought to be enforced thereby accrued prior or subsequent to the amendment, unless a vested right would thereby be impaired. 1A Southerland Statutory Construction, §22.36 (4th Ed. 1972).

A fortiori, a statutory amendment which furnishes a new remedy, but does not impair or affect any contractual obligations or disturb any vested rights, is applicable to proceedings begun after its passage, though relating to an accident previous thereto. 73 AM. JUR. 2d, Statutes, §354 (2d Ed. 1974).

In Shelby-Downard Asphalt Co. v. Enyart, 670 Okl. 237, 170 Pac. 708 (1918), the plaintiff brought the same action three different times against defendant for personal injuries sustained in a construction accident. All three actions were commenced in the same county, the situs of the injury. Action No. 1 was commenced in March, 1912, and on defendant's motion to quash service of process the court ruled that it lacked in personam jurisdiction over defendant and dismissed the action without prejudice. The basis for the court's decision was an Oklahoma statute permitting a plaintiff to bring a personal injury action against a corporation only in the county where the defendant corporation has its principal place of business, which in that case happened to be a county other than the county where the injury took



place. In August, 1912, plaintiff commenced Action No. 2, identical to Action No. 1, in the same county; and the court dismissed it again for the same reason. Then, in March, 1913, the foregoing statute was amended in order to permit actions against corporations to be commenced in the county where the plaintiff was injured. Plaintiff then commenced Action No. 3, identical to Actions Nos. 2 and 3 except for the change in the statutory law; and this time the court denied defendant's motion to quash. The Oklahoma Supreme Court affirmed, holding the amendment procedural, and therefore retroactive in application, and also holding that the change in the law precluded defendant from successfully asserting the doctrine of res judicata as a bar to the suit.

Hence, under the well-established rule that a statute which applies to procedure only should be given a retrospective effect, unless it appears that the Legislature intended it should operate prospectively only, we think this act should be construed to embrace causes of action existing at the time the act went into effect, as well as those that should arise thereafter.

The plaintiff in error next contends that it was res adjudicata for the court to assume jurisdiction of this case in Osage County after it had previously entered a judgment dismissing the case, on the ground that Osage County was the wrong venue. But this contention is not tenable. For it does not follow that because Osage County was the wrong venue at the time the first action was commenced, that Enyart would be precluded from bringing the action again in the same county, provided conditions so changed as to make that the proper venue. . . . And . . . the procedure so changed while the cause of action was still alive as to make Osage County the proper venue. And under these conditions the court, in passing upon the motion

to dismiss in the instant case, had an entirely different question before it to that presented by the motion to dismiss in the former case. 170 Pac. at 710.

In the case of Barry v. Koehler, 84 Idaho 170, 369 P.2d 1010 (1961), the Idaho Supreme Court held that the redefinition of the practice of dentistry was within the police power of the legislature and did not violate the Fourteenth Amendment or deprive dental technicians of a valuable property right without due process. In reaching this result, the court also found that the doctrine of res judicata is not applicable where the law under which the first adjudication was obtained was different from that applicable to the second action:

The contention by appellants that the doctrine of res judicata is applicable here by reason of Barry v. Summers, supra, is without merit. This court there considered the 1953 amendment and held it unconstitutional. The present action concerns the provisions of . . . amending the definition of "practice of dentistry." The previous case cannot be expanded to prohibit subsequent legislative action. The doctrine of res judicata is not applicable where the law under which the first adjudication was obtained is different from that applicable to the second action.

Rule 64C(a), a procedural rule, applies to all actions pending at the time it was amended, as well as to actions commenced after its amendment.

In Jensen v. Eames, 30 Utah 2d 423, 519 P.2d 236 (1974), one of the issues was whether Rule 64C(f)(1) of the Utah Rules of Civil Procedure applied retroactively. The facts indicate that plaintiff had attached defendant's property

in August, 1972. Defendant furnished a \$10,000.00 bond and in March, 1973, made a motion to release his property. The trial court granted the motion. Plaintiff objected to the motion, arguing that defendant was required to furnish a bond equal in value to the property to be released, which was approximately \$170,000.00. The basis of the controversy was an amendment to Rule 64C(f), issued by the Utah Supreme Court on November 1, 1972, stating that a defendant must furnish a bond "in a sum not less than the value of the property to be released," which supplanted the former maximum \$10,000.00 requirement. Plaintiff argued the amendment applied retroactively. The trial court ruled for defendant, but the Utah Supreme Court reversed, holding that:

Rule 64C(f), U.R.C.P., is primarily designed to secure plaintiff's claim; the provision in the former rule, limiting the maximum value of defendant's bond, does not appear within the context of the rule to confer a substantive right upon the defendant. The trial court erred in its ruling that the amended rule was not applicable in the instant action. 519 P.2d 239.

Applying the court's reasoning to the amendment to Rule 64C(a), the former provision does not appear to confer a substantive right upon the defendant that would be impaired by retrospective application of the amendment. The amendment clarifies the original intent of the rule and provides Plaintiff with a forum in which to pursue her claim.

Along a similar vein are those cases holding that the long-arm statutes apply retroactively. Such cases are

particularly relevant to the instant case because they stand for the proposition that a statute that provides more circumstances for in personam jurisdiction over a non-resident defendant is retroactive in effect.

In the case of Merme's v. Weeden and Co., 8 Ariz. App. 166, 444 P.2d 524 (1968), the Arizona Supreme Court held that the New York long-arm statute has retroactive effect. That case concerned a dispute over the sale of stock. The court held as follows:

The above-mentioned statute was to become effective September 1, 1963. The sale of the stock in question occurred the previous April of 1963. The first question, therefore, would be to determine whether the act applies to the instant case. We believe so. The New York court has held that the statute is procedural and one which merely makes available an additional forum to plaintiff to enforce whatever substantive right he might have against a defendant, and, as such, may be applied retroactively. 444 P.2d at 526.

Accord, Gordon v. Granstedt, 513 P.2d 165 (Hawaii 1973).

The same function is being served by Rule 64C(a), as amended. It merely adds an additional circumstance, that of "economic injury," to those of direct injuries to person or property, under which plaintiffs can obtain quasi-in-rem jurisdiction over non-resident defendants. It also eliminates bothersome language which might be construed to restrict the attachment remedy and quasi-in-rem jurisdiction to actions arising within the state. The new Rule 64C(a) imposes no restrictions in that regard and clearly applies to actions

arising in other states.

#### CONCLUSION

It was error for the court below to grant Defendants' motion to quash service of process for the reason that personal service was necessary to give the Defendants notice that their property had been attached and that a proceeding in rem or quasi-in-rem had been commenced against the property to satisfy the claim of Plaintiff.

The lower court likewise erred by granting Defendants' ex parte motion to vacate the writ of attachment.

Based on the foregoing argument, Plaintiff had a valid writ of attachment by virtue of which quasi-in-rem jurisdiction was conferred on the court to determine the interest of Plaintiff in Defendants' property pursuant to Plaintiff's claim.

If this Court were to hold otherwise, Plaintiff would be denied her only remaining forum, since the statute of limitations has run in Colorado and Colorado does not have a savings clause similar to Utah, with regard to the statute of limitations applicable to wrongful death actions. This matter was decided by the Colorado court on April 16, 1975, in an action almost identical to the present action, filed by the Plaintiff in Dolores County, Colorado, on July 29, 1974. Plaintiff's case has yet to be heard on the merits.

This is certainly a case which warrants liberal

interpretation of Rule 64C(a) in view of the many contacts of Defendants with Utah, the close proximity of the parties' properties and the fact that it was reasonably foreseeable that Defendant's act would cause injury in Utah.

Quasi-in-rem jurisdiction in the Utah court in this action in no way infringes upon the sovereignty of Colorado. It recognizes the interest of Utah in the protection of its own citizens. These two factors legitimate the exercise of authority by Utah to hold and appropriate for the satisfaction of Plaintiff's claim property owned by non-residents where that property is physically present in Utah.

Respectfully submitted,

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