

2001

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

Utah Supreme Court

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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.)

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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RESPONDENTS BRIEF

BYU LAW YOUNG UNIVERSITY
J. Reuben Clark Law School

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
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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

RESPONDENT'S BRIEF

NATURE OF THE CASE

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

DISPOSITION IN THE LOWER COURT

Judge Edward Sheya dismissed plaintiff's complaint
holding that the Court had neither in rem jurisdiction by
virtue of the attachment statute nor in personam by virtue
of the Utah Long Arm Statute.

RELIEF SOUGHT ON APPEAL

Respondents seek affirmance of the dismissal granted
below.

STATEMENT OF THE FACTS

Defendants object to plaintiff's statement of the facts as reciting information not introduced into evidence. The sole evidence in this case consists of the affidavits of defendants stating generally the location and date of the occurrence and the residence of the parties. The alleged ownership of the land, the transfer of ownership from one party to another, the property settlement agreement of James Wright's cousin, and the basic facts leading up to the shooting are substantially in dispute and no depositions or affidavits are on file in this case supporting the statement of facts given by plaintiffs. The statement that Mr. James Wright was found guilty of first degree murder in Colorado and was sentenced to life imprisonment is so clearly irrelevant that it must be considered only as having been given for prejudicial value. In fact, that conviction was reversed and Mr. Wright was found innocent during later judicial proceedings and released -- all of this information is well known to plaintiff.

Defendants basically agree with plaintiff's statement of the legal proceedings in the Utah Federal District Court and in the 10th Circuit Court of Appeal, with this addition: after the dismissal in the Federal District Court, plaintiff refiled the identical action in San Juan County, Utah. Defendants were served in Colorado, and appeared specially in this case by filing a motion to quash service of process on the basis that the prior decision in the federal case constituted

res judicata, or, in the alternative, the Court had neither in rem nor in personam jurisdiction over defendants in any event. The court sustained defendants position regarding jurisdiction; it never specifically reached the question of res judicata.

ISSUES

1. The prior decision in this case in the Federal Court is res judicata as to jurisdiction.
2. If res judicata doesn't apply, the Court has neither personal nor in rem jurisdiction in any event.
3. The Utah Attachment Statute is unconstitutional.

ARGUMENT

POINT I

THE PRIOR DECISION IN THIS CASE IN THE FEDERAL COURT IS RES JUDICATA AS TO JURISDICTION.

As noted in the statement of facts, the identical case was originally brought in the Federal District Court for Utah and there dismissed for lack of personal and in rem jurisdiction. A copy of that Complaint is contained in the record on page 38 together with the decision of the 10th Circuit located at page 43. The parties and the relief sought are identical in both actions.

A general statement of the doctrine of res judicata is as follows:

A final judgment on the merits, rendered

by a Court of competent jurisdiction, is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, and cause of action, whether the plaintiff failed to recover in the first action, or is successful in recovering a part of his claim. The judgment puts an end to the cause of action, which cause cannot again be brought into litigation between the parties upon any ground, or for any purpose whatever, in the absence of some factor invalidating the judgment. 46 Am. Jur. 2d Judgments, Sec. 404 (1969).

The doctrine of res judicata also applies to questions involving jurisdiction.

The principles of res judicata apply to questions of jurisdiction, whether it be jurisdiction of the subject matter or of the parties. This rule is not less applicable to a decision denying jurisdiction than to one sustaining it. Consequently, it has been generally held that a judgment for the defendant based on lack of jurisdiction is a conclusive adjudication of questions material to the Court's jurisdiction and actually decided by the judgment. Annot., 49 ALR 2d 1036, 1052 (1956).

The view enunciated above is supported by Utah law. In Brandon v. Teague, 5 U.2d 214, 299 P2d 113 (1956) the Court broadly held in successive state court cases that the principles of res judicata apply to jurisdiction. The same ruling was applied where the original case had been brought and dismissed in the federal court and later refiled in the Utah State Court. In sustaining a motion to dismiss on the basis that the original decision of the federal court on jurisdiction was res judicata, the court said:

In the instant case, the conclusion that the Federal Court lacked jurisdiction was necessarily based upon a determination of the critical issue, i.e., that the individual defendants were not personally responsible under the contract....the issue having been squarely presented and determined, it is res judicata as between these parties. McCarthy v. State, 1 U.2d 205, 265 P.2d 385, 389 (1953).

The factual background involving each of these cases and more extensive quotations therefrom are found in the record on pages 16-19. Considering these cases, the decision of the Federal Court dismissing the cause of action on the basis of jurisdiction is res judicata as to the instant case since the parties and the causes of action are identical. Plaintiff does not really contest this argument, but she does assert however, that Rule 64C(a) URCP was amended and that this amendment restricts the scope of res judicata. Plaintiff has cited cases in support of this argument, but those cases represent only one side of a split of authority on the question of whether a subsequent change in the law precludes in application of res judicata in a later case. The following cases have held that a change in the law does not preclude the application of res judicata. In Young v O'Keefe, 248 Iowa 751, 82N.W.2d 111 (1957), plaintiff sued to obtain certain retirement benefits provided under a pension plan. The court held that plaintiff did not qualify and the suit was dismissed. After the initial trial, the statute was amended to allow Plaintiff to qualify as a recipient. On the basis of this

change plaintiff again brought the same action for benefits. Defendant raised the defense of res judicata which was sustained by the Court as follows:

The case is further complicated by the fact that there was a former decision. The spectre of res judicata arises to haunt plaintiff. The record conclusively establishes that his case was already adjudicated when the statutory change occurred. He seeks here to establish the same status he sought before, by the same evidence.

The basis of the doctrine of res judicata is usually said to be the necessity of a finality of judicial decision. There is no doubt of its presence here.

. . . .

. . . .

If the purpose of res judicata be to add finality to judicial decisions, the propriety of its presence here cannot be doubted. A judgment based on plain statutory construction, as was our earlier decision, would not be exactly final if the legislature could by subsequent retroactive change of the statute reopen the identical controversy for the benefit of a losing litigant. Young v. O'Keefe, supra, at 114-115.

In a second case, LaBarbera v. Batsch, 10 Ohio St.2d 106, 227 N.E. 2d55 (1967), plaintiff brought suit to recover damages for injuries sustained in an automobile accident. The case was dismissed since the statute of limitations had run. Thereafter, the law concerning the statute of limitations was changed. Plaintiff again sued and defendant moved for summary judgment on the basis of res judicata. The court dismissed the complaint on the basis of res judicata

stating as follows:

Such a result [as urged by plaintiff] would be directly contrary to the policy of res judicata and of statutes of limitation. The policy basis of res judicata is to assure an end to litigation, and to prevent a party from being vexed twice for the same cause Once a matter has been finally determined in favor of a party and is no longer subject to appeal, he has a right to rely on the stability and finality of such determination The strength of this policy is the reason courts refuse to adopt the one of two possible constructions which is not consistent with such policy . . . and to refuse to allow even a retroactive statute to abrogate the res judicata effect of an existing and valid final judgment, in the absence of a clear legislative intent to do so. LaBarbera v. Batsch, supra, at 62.

Although a split of authority does exist on the question of whether changes in the law take a prior determination beyond the scope of res judicata, no question exists that res judicata applies to all issues which were in fact raised and those which could have been raised in a prior proceeding. As stated by the United States Supreme Court in Partmar Corp. v. Paramount Pictures Theatres Corp. 347 U.S.89 (1954) at pp. 90-91,

We have often held that under the doctrine of res judicata a judgment entered in an action conclusively settles that action as to all matters that were or might have been litigated or adjudged therein.

See also 46 Am. Jur. 2d, Judgments, Sec. 417 (1969); Burns v. Kepler, 147 Colo. 153, 362 P.2d 1037, 1039 (1961).

The Utah Supreme Court has taken the same position.

In Richards v. Hodson, 26 U.2d 113, 485 P.2d 1044, (1971), the Court stated:

Strictly speaking, the term "res judicata" applies to a judgment between the same parties who in a prior action litigated the identical questions which are present in the latter case. Not only are the parties bound by the ruling on matters actually litigated, but are also prevented from raising issues which should have been raised in the former action. The rule of law is wise in that it gives finality to judgments and also conserves the time of courts, in that courts should not be required to relitigate matters which have once been fully and finally litigated.

Two further Utah cases are of significance in this regard. The first Belliston v. Texaco, Inc., 521 P.2d 379 (Utah 1974), plaintiffs, a group of Texaco lessee dealers, sued defendant initially in federal court for damages under the Sherman Act and Robinson-Patman Act. That case was eventually dismissed on jurisdictional grounds. Plaintiffs then refiled in state court under the Utah Unfair Practices Act. Defendant obtained a summary judgment arguing that this was a theory plaintiffs could have used in the prior case and were now precluded from doing so under the doctrine of res judicata. In sustaining this decision the Utah Supreme Court said:

In Wheaton v. Pearson, this court stated that the doctrine of res judicata applied not only to points and issues which were actually raised and decided in a prior action but also as to those that could have been adjudicated, with the qualification that the claim, demand, or cause be the same in both cases. If the parties have had an opportunity to present their case and judgment is rendered thereon,

it is binding both on those issues that were tried and those that were triable in that proceeding, and they are precluded from further litigating the matter.

Since plaintiffs failed to assert their state claim when the Federal court had the power to adjudicate it with their federal claim, they are barred under the doctrine of res judicata from litigating these issues in the instant action. Belliston v. Texaco, Inc. supra, at 380.

In the second case, which is referred to in Belliston, Wheaton v. Pearson, 14 U.2d 45, 376 P.2d 946 (1962), plaintiffs brought an action initially to establish a right-of-way over adjoining property owned by defendants on a theory of prescriptive easement. In that original case the defendants obtained a summary judgment. Plaintiffs thereafter filed a new action under a theory of implied easement; the complaint was dismissed on the basis of res judicata. Again in affirming this dismissal the Supreme Court held:

Here, we have the same parties litigating the same subject matter - an asserted right-of-way over defendants property. While plaintiffs endeavored to establish their right-of-way by prescriptive easement in the first action, the issue or theory of implied easement, now urged in the second action, could have been urged and adjudicated in the first action

Policy would seem to indicate that when a plaintiff has once attempted to obtain his entire relief, based upon his entire claim, then the matter should be laid at rest. Wheaton v. Pearson, Supra at 947-48.

In the instant case, the attachment statute was

modified on November 1, 1972, before briefs were filed on appeal with the 10th Circuit in the former federal case. Defendants did not file their original brief with the 10th Circuit until January, 1973 and the matter was not argued before the 10th Circuit until May, 1973. The decision was rendered on July 23, 1973 which was followed by a petition for rehearing, which was denied. On August 21, 1973 a mandate issued out of the Appellate Court and an Order of Dismissal without prejudice was entered in the Federal District Court on September 19, 1973 dismissing plaintiffs complaint. Plaintiff therefore had approximately ten months within which to bring this modification to the attention of the federal court. At no time was the change in statute brought to the attention of the court and was a matter which the court clearly could have considered. Under the principals laid down in Wheaton and Belliston, the dismissal by the federal court is res judicata on this case.

POINT II

IF RES JUDICATA DOES NOT APPLY, THE COURT HAS NEITHER PERSONAL NOR IN REM JURISDICTION.

A. The Court lacks personal jurisdiction. The plaintiff concedes on page 17 of her brief that she claims nothing by way of personal jurisdiction over the defendants under the Utah Long Arm Statute. In view of this concession,

defendants will restrict themselves to a consideration of those issues raised by plaintiffs alleged in rem jurisdiction under the attachment statute.

B. The Court lacks in rem jurisdiction. As noted in the statement of facts, all the events which gave rise to this cause of action occurred in Colorado. Nevertheless, plaintiff claims that the estate of Claude Rhoades suffered some undefined loss in the State of Utah and this economic loss has jurisdictional significance as far as the attachment statute is concerned. The question, therefore, is whether the Utah Attachment Statute is designed as a vehicle for imposing in rem jurisdiction in a wrongful death case where the sole contact with Utah is some economic loss to the estate of the decedant. Very little direct law exists on this point. The case of Alpers v. New Jersey Bell Tel. Co., 403 Pa. 626, 170 A.2d 360 (1961), is directly in point, however. In Alpers, 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 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 as follows:

The Court below very properly held that a Writ for an Attachment in an action ex delicto

will not lie for torts committed outside the Commonwealths boundaries. Alpers v. New Jersey Bell Tel. Co., Supra, at 262.

For another case to the same effect, see Wood v. Virginia Hot Springs Co., 202 Pa. 40, 551 Atl. 586 (1902).

Plaintiff has gone to some lengths in her brief to distinguish Alpers on the basis of a modification of the Pennsylvania Attachment Statute. The modification did occur, but this, of course, does not debilitate the holding of the Alpers case which is singular in its impact in the instant case. More importantly, plaintiff cites no other cases in her favor where attachment statutes have been used as a vehicle for imposing in rem jurisdiction in a wrongful death case where the sole contact with the foreign state is economic injury to the estate of the deceased. In this regard plaintiff has clearly failed in her burden of proof.

The decision in Alpers finds an analogue in cases where plaintiffs have attempted personal jurisdiction under long arm statutes where a tort arose outside the state, but plaintiff suffered economic loss in the state. The courts have rejected such attempts on grounds of due process. One such case was Hydroswift Corp. v Louie's Boats and Motors, 27 U.2d 233, 494 P.2d 532 (1972). In that case, plaintiff, a Utah corporation, delivered boats to defendant, a foreign corporation in Oregon, where defendant allegedly converted

them. Plaintiff brought suit in Utah for conversion, alleging that, although the tort had been committed in Oregon, plaintiff had suffered economic injury in Utah sufficient to satisfy the requirements of the Long Arm Statute. The Utah Supreme Court affirmed a lower Court's decision quashing service of process stating:

Plaintiff concedes that the conversion . . . was committed in Oregon, but says it resulted in damage to plaintiff in Utah, i.e., non-payment of the purchase price. Plaintiff cites numerous authorities reflecting the liberal expansion of the conflict of laws concept since Pennoyer v. Neff and suggests that they even transcend the "minimum contact" principle enunciated in International Shoe v. Washington. We disagree with the urgency of plaintiff, are unwilling to extend that case, which appears to have inspired our Long Arm Statute, and believe and hold that under the circumstances related hereinabove, that plaintiff legitimately cannot claim jurisdiction that might sanction this litigation in Utah.

Under 78-27-22, it is stated that the provisions of the Act apply "to the fullest extent permitted by the due process clause of the 14th Amendmend. . . .

We believe that the same amendment would protect one from being subject to the jurisdiction of the courts of this state, where he allegedly committed a tort such as claimed here, or a slander or the like in a sister state, but not in Utah, on grounds of denial of due process of law.

The Court therefore held that economic injury to a resident of Utah was insufficient to confer jurisdiction under the Long Arm Statute where a tort arose outside the State. This same holding is reflected in the decisions

from other jurisdictions: Crimi v. Elliot Bros. Trucking Co., 279 F. Supp. 555 (S.D. N.Y. 1968); Jenrette v. Seaboard Coastline Railroad Co., 308 F. Supp. 642 (D. S.C. 1969); Friedrick R. Zoellner Corp. v. Texas Metals Co., 396 F.2d 300 (2d Cir. 1968).

The analogue referred to above was persuasive both on the 10th Circuit Court and on Judge Sheya. In its decision the 10th Circuit held that the attachment statute couldn't be used as a vehicle to impose in rem jurisdiction for the same reasons the Long Arm Statute couldn't be used to impose in personam jurisdiction. Judge Sheya largely concurred, stating the attachment statute couldn't be used to impose in rem jurisdiction in a wrongful death case where the tort sued upon arose in Colorado. (R.62-63).

The decision in Hydroswift and its related cases, together with the decision in Alpers, reflects a general concern that a state should protect its citizens only for torts or substantial injuries actually committed within the state. Fictional, illusory or insubstantial injuries should not be used as vehicles to impose jurisdiction. These cases also square in with the basic policy behind the Attachment Statute. Clearly, one of the purposes of the act is to provide residents of the state with an effective means of redress for wrongs committed by non-residents. The procedure allows residents to bring the action in a local state court

thereby inducing a non-resident defendant to appear and defend. This, of course, reduces the expenses of litigation as far as the plaintiff is concerned because he need not travel out of state to find the non-resident defendant. The state therefore has a legitimate interest in protecting its citizens against wrongs committed against them by non-residents in the state. Where the situation is otherwise, as it is in this case, where Mr. and Mrs. Rhoades left the state and were injured using facilities and services provided in Colorado, it would then seem that the injured party should prosecute their action for alleged injuries in the state of the occurrence. No obvious state purpose is realized by allowing in rem jurisdiction in Utah.

The question of in rem jurisdiction has particular significance to defendant James C. Wright. The statement of facts indicates that he is presently not a title owner of any part of the attached property in Utah. If jurisdiction is to be acquired by virtue of the attachment, it would then extend only to the property owners, Clifford and Essie Wright. Since jurisdiction is predicated on the attached property, plaintiff must proceed against Clifford and Essie Wright only, the title owners of the property, to impose liability for the wrongful death action. If liability is established, then plaintiff could move against the attached property. As the matter now stands, however, defendant

James C. Wright has no interest in the property; and since the property is the basis of in rem jurisdiction, the Court has no jurisdiction over this defendant and the complaint in any event should be dismissed as against him.

POINT III

THE UTAH ATTACHMENT STATUTE IS UNCONSTITUTIONAL

In her brief plaintiff asserts that Attachment statutes are not in conflict with constitutional guarantees. Attachment and garnishment statutes of various states have nevertheless been declared unconstitutional on the basis that they violate due process in failing to provide any pre-attachment hearing. The Utah Attachment Statute suffers from the same infirmity. The cases invalidating the various attachment statutes stemmed from the Supreme Court case of Fuentes v. Shevin, 407 U.S. 67 (1972). In Fuentes the Supreme Court declared the replevin statutes of Florida and Pennsylvania unconstitutional since they worked a deprivation of property without procedural due process of law insofar as they denied the right to a hearing before chattels were taken from their possessor. A pre-recovery hearing was constitutionally required in all cases except in certain 'extraordinary situations' which would justify postponing the needed hearing. In this regard the Court stated as follows:

There are "extraordinary situations" that justify postponing notice and opportunity for a hearing. . . . These situations, however, must

be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important government or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in a particular instance. Thus, the Court has allowed summary seizure of property to collect the internal revenue of the United States, to meet the needs of the national war effort, to protect against the economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food. Fuentes v Shevin, supra at 90-92

Finding that the Florida and Pennsylvania Statutes did not qualify under any of the exceptions listed above, the Court invalidated respective replevin statutes. It should be noted at this point, however, that the sole question before the Court was whether or not a pre-seizure hearing was required; under all circumstances a post-seizure hearing was necessary to test the validity. Extraordinary circumstances may allow the postponement of the pre-seizure hearing, but no exception is allowed to a post-seizure hearing!

Following the decision in Fuentes, various state statutes came under attack. In the following cases, the attachment statutes of the respective jurisdictions were declared unconstitutional on the basis of the Fuentes case: Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974); Sugar v. Curtis Circulation Co., 383 F. Supp. 643 (D. N.Y. 1974);

Roscoe v. Buller, 367 F. Supp. 574 (D. My. 1973); Bay State Harness Horse Racing and Breeding Ass'n., Inc., v PPG Industries, Inc., 365 F. Supp. 1299 (D. Mass. 1973); In re Northwest Homes, 363 F. Supp. 725 (D. Wash. 1973); Gunter v Merchant's Warren Nat'l Bank, 360 F. Supp. 1085 (D. Me. 1973); Clement v Four North State Street Corp., 360 F. Supp. 933 (D. N.H. 1973); McClellan v Commercial Credit Corp., 350 F. Supp. 1013 (D. R.I. 1972).

A discussion of two of the above cases is illustrative of the rationale and holding of each. In Bay State Harness Horse Racing and Breeding Assn. v PPG Industries, Inc., 365 F. Supp. 1299 (D. Mass. 1973), the constitutionality of the Massachusetts attachment statute was put in question. In that case plaintiffs had attached the real estate of defendants as security for a possible judgment to be obtained on a breach of contract action. No prior notice or hearing was given and none was provided in the Massachusetts attachment statute. Defendants argued in that case that the attachment of real estate was not a deprivation of property within the meaning of that phrase given in Fuentes, and even if it did, extraordinary circumstances were present which as defined in Fuentes would eliminate the necessity of notice and hearing. The Court rejected both of these contentions and invalidated the attachment statute. With respect to the first argument, the Court stated:

Viewing the attachment as a non-possessory lien. . . or as merely an encumbrance or cloud on the title. . . the interest created by the attachment operates as a superior interest against subsequent purchasers, mortgagees or attaching creditors, and thus restricts the owners ability to sell or mortgage the property at its full value. The determinative impact of the attachment is that it deprives the owner of a property right or interest significant not only to him in his use of the property but to his use of the attaching party as well.

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We therefore conclude that the Massachusetts Attachment procedures applicable to real estate, when invoked, do effect deprivation of a significant property interest of the owner without notice or opportunity to be heard. Bay State Harness, supra at 1304-06.

With respect to the argument that extraordinary circumstances were present which would allow dispensing with prior notice and hearing, the court stated as follows:

Neither the cases before us, nor the statutory scheme permitting the attachment, reveal any important or significant governmental or societal interest served by the statute. . . . Accordingly, the real estate attachment procedures. . . are facially constitutional defective under the due process of the Fourteenth Amendment, and as a result must fall. Bay State Harness, supra at 1306.

In a second case, Gunter v. Merchant's Warren Nat'l. Bank, 360 F. Supp. 1085 (D. Me. 1973), the Maine attachment statute was under consideration. Defendants real estate had been seized without prior notice and hearing and that procedure was challenged. The Court rejected the same arguments

raised by the defendants in the Bay State Harness case, (1) that the attachment of real estate did not constitute a taking of property protected by the Fourteenth Amendment, and (2) that extraordinary circumstances were present which dispense with the requirement of prior hearing and notice.

With respect to the first argument the Court stated:

A restriction on the power of a real estate owner to alienate his property is such a deprivation. A real estate attachment under Maine law, while not disturbing possession, creates a lien on the property. . .and effectively deprives the owner of his ability to convey a clear title while the attachment remains outstanding. . .As the record in the present case discloses, substantial hardship to the defendant may result. . . In light of the principles of due process enunciated in Fuentes, it cannot be said that the right of an owner of real estate to alienate his property is not a "significant property interest" the deprivation of which is within the Fourteenth Amendment's protection. Gunter, v. Merchants Warren Nat'l. Bank, supra at 1090.

With respect to the second argument, the Court held that no extraordinary circumstances were present.

The asserted public interest - the protection of creditors' rights - is no different in this case than it was in Sniadach and Fuentes. There will normally be no need for prompt action since the property in question is real estate, which cannot be removed or destroyed, and the Maine Statutes are not narrowly drawn to meet any special situation in which the plaintiff could make a showing of immediate danger that a defendant will alienate or otherwise encumber his property. . . .Nor does any government official exercise effective state control over the process, which is entirely within the power of the plaintiff and his attorney.

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For the foregoing reasons, we hold that those provisions. . . of the Maine Rules of Civil Procedure which permit the prejudgment attachment of real estate without prior notice and hearing violate the Due Process of The Fourteenth Amendment to the Constitution of the United States, and are hence void and unenforceable.

Gunter v. Merchants Warren Nat'l. Bank, supra at 1090-91.

In the above two cases, the attachment procedure was used as a means of securing a possible judgment. In a third case, the attachment procedure was used as a means of obtaining in rem jurisdiction where a personal jurisdiction was lacking. In that case, Roscoe v. Butler, 367 F. Supp. 574 (D. My. 1973), the Court invalidated the Maryland attachment statute which had been used as a vehicle to impose in rem jurisdiction. One question before the court was whether the use of the attachment statute as a means of acquiring in rem jurisdiction constituted an exception to the requirement for prior notice and hearing. In reviewing the "extraordinary situations" delineated in Fuentes, the court first held that attachment in aid of acquiring in rem jurisdiction constituted an important government or general public interest and that a need for prompt action was needed thereby satisfying the second requirement, but held that Maryland did not maintain strict control over its monopoly of legitimate force in issuing writs of attachment. No independent

party reviewed the basic documents supporting the attachment; the attachment could be obtained ex parte, and no investigation was made into the necessity of issuing an immediate writ of attachment. In the absence of this strict state control, the court held that the issuing of writs of attachment under Maryland's Attachment Statute was purely ministerial and as such failed to satisfy the requirements of due process.

The rationale of these cases is directly applicable to the Utah Attachment Statute, and the procedure followed in this case. No notice, nor prior hearing was provided before defendants' property was attached in Utah. The cases clearly hold that a substantial property interest is at stake in view of the lien and the cloud on the title which an attachment brings. Moreover, none of the extraordinary situations are satisfied in this case as required by Fuentes to dispense with prior notice and hearing. First, no apparent direct governmental or general public interest is at stake. As noted in the statement of facts, all events leading up to this action took place in Colorado and the sole connection with the State of Utah is an undefined economic loss to the estate of Claude Rhoades. Colorado is the State which has the more substantial contact and the more substantial government interest. Secondly, no special need for prompt action is needed. The cause of action in this case

arose in April, 1970; a transfer of interest as between the defendants was made in 1970 and no further change in title ownership has taken place from that time to the present. This is so, in spite of a prior Federal Court case and the threatened filing of this case in Utah, and the filing of a third case in Colorado. Clearly, the case does not present an absconding debtor situation. Thirdly, with respect to the State's strict control over the person initiating the seizure, this procedure has been totally relegated to plaintiff's attorney. No one oversees the issuance of the writ of attachment; the allegations of the affidavit supporting the attachment are not challenged, and no hearing of any type is required. The sole State involvement with the issuance of the attachment is the filing of the same after it is served by a constable. The failure to have notice and a prior hearing is therefore not justified under the extraordinary situations exception under Fuentes.

The above discussion has centered on the question of whether a pre-judgment attachment without notice and hearing is unconstitutional when it lacks prior notice and hearing. Of significance in the instant case is the fact that the Utah Attachment Statute provides no post-attachment hearing where the legitimacy of the attachment can be tested. Under the decision in Fuentes the sole question was whether or not in certain exceptional circumstances the requirement

for a pre-attachment hearing and notice could be waived. In any event, a post attachment hearing must be held to satisfy the requirements of Due Process. Under the Utah Attachment Statute, such a post-attachment hearing is not provided for, and constitutes the most fundamental constitutional defect in the Statute. Defendants urge that the absence of any hearing or notice procedure are fatal defects rendering the Statute in violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

Defendants urge that the decision below be affirmed. In the first place, the issue of jurisdiction has been fully litigated in the Federal courts and the decisions there constitute res judicata. The subsequent change in the Utah Attachment Statute took place while the appeal from the federal district court was being pressed in the 10th Circuit Court of Appeals. Plaintiffs had ample opportunity to bring this modification to the attention of the court and failed to do so. In view of their opportunity to alert the Court of this change, they are now precluded under principles of res judicata from making that argument in this court. Secondly, the Utah Attachment Statute is an improper vehicle to impose in rem jurisdiction in a wrongful death case where the tort sued on arose in Colorado. No state interests are satisfied by sustaining jurisdiction in this state and the imposition

of such jurisdiction would be contrary to the basic philosophy surrounding the act. If jurisdiction is upheld, it should then extend only to Clifford and Essie Wright, and not to James Clifford Wright who is not an owner of the property. Thirdly, the Utah Attachment Statute is unconstitutional in view of its failure to provide the pre-seizure of a post-seizure hearing. For these reasons, defendants respectfully urge that this court sustain the decision entered by Judge Edward Sheya below.

Respectfully submitted.



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MAILING CERTIFICATE

I certify that on the _____ day of October, 1975
I mailed two copies of Respondents Brief to Arthur H. Nielsen
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Salt Lake City, Utah 84111 and two copies to Duane A. Frandsen,
Attorney for Plaintiff-Appellant, FRANDSEN AND KELLER, Pro-
fessional Bldg., Price, Utah 84501, postage prepaid.