

1980

Palmer L. Clarkson, Et. Al., Western Heritage, Inc.;
Larry J. Sorensen and Jean Sorensen; Cline G.
Campbell, and Jane Doe Campbell, His Wife; C.
Glenn Robertson and Patricia Robertson :
Appellant'S Brief On Appeal

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SALMER L. CLARKSON, et. al.,
Plaintiffs and Respondents,

vs-

WESTERN HERITAGE, INC.; LARRY J.
SORENSEN and JEAN SORENSEN;
ELINE G. CAMPBELL, and JANE DOE
CAMPBELL, his wife; C. GLENN
ROBERTSON and PATRICIA ROBERTSON,
Defendants and Appellants.

APPELLANT'S BRIEF ON APPEAL

Case No. 16917

APPEAL TAKEN FROM THE THIRD JUDICIAL DISTRICT IN AND FOR THE
COUNTY OF SALT LAKE. JUDGE BRYANT E. CROFT.

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MAY 23 1980

Clerk, Supreme Court

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OF THE STATE OF UTAH

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Plaintiffs and Respondents,)	
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)	APPELLANT'S BRIEF ON APPEAL
WESTERN HERITAGE, INC.; LARRY J.)	
SORENSEN and JEAN SORENSEN;)	Case No. 16917
CLINE G. CAMPBELL, and JANE DOE)	
CAMPBELL, his wife; C. GLENN)	
ROBERTSON and PATRICIA ROBERTSON,)	
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CASES CITED

- Brinkerhoff-Faris Trust and Savings Co. v Hill (1930) 281 US 673,
74 L Ed 1107, 1112, 50 S Ct 451
- Hanson v Benckla (1958) 357 US 235, 251, 2 L Ed 2d 1283, 1296,
78 S Ct 1228
- Hovey v Elliott (1897) 167 US 409, 42 L Ed 215, 17 S Ct 841
- International Shoe Co. v Washington (1945) 326 US 310, 90 L Ed
95, 66 S Ct 154, 161 ALR 1057
- Magidow v Coronado Cattle Company, 19 Ariz. App. 38, 504 P2d
961 (1972)

STATEMENT OF THE CASE

This is an action by Plaintiffs/Respondents to recover upon a judgment entered by a court in Maricopa County, Arizona. This judgment was entered upon a default which was through no fault of Defendants/Appellants but rather because of errors and omissions of the attorneys representing Defendants/Appellants in the Arizona court. Jurisdiction in Arizona was claimed over the Defendants, which are all residents of the state of Utah, through the exercise of the so called long-arm doctrine.

DISPOSITION IN LOWER COURT

This case was brought before the Third Judicial District Court in and for the County of Salt Lake, Judge Bryant E. Croft, upon a motion for summary judgment, and summary judgment was granted to Plaintiffs/Respondents.

EXACT RELIEF SOUGHT

Defendants/Appellants respectfully requests the Supreme Court of the State of Utah to reverse the judgment of the Lower Court, and to direct said Lower Court that the full faith and credit clause of the United States Constitution does not require the Utah Courts to enforce the judgment entered in the Arizona Court.

STATEMENT OF MATERIAL FACTS

This matter was brought before the Arizona Court by Plaintiff claiming money damages against Defendants herein. Judgment was entered in the Arizona Court by default. The default

resulted because of failure of the Arizona attorney, representing Defendants herein, to file the answer which had been prepared by Defendants and submitted to the Arizona attorney for filing. Sometime after that answer had been prepared and a copy sent to Defendants in the state of Utah, the Arizona attorney withdrew from the case. Defendants subsequently learned that the answer prepared had not been filed in the Arizona Court. Other counsel was obtained and motion was made to set aside the default. This motion was denied. The Court also refused to delay the hearing of the motion to allow representatives of Defendants to travel to Arizona and to appear before the Court. Defendants were delayed in their appearance because of a delay in the airplane flight upon which they had been booked.

The attorney was instructed to appeal to the Arizona Supreme Court and indicated that he would. A considerable time later Defendants were notified by counsel in Arizona that they must provide a Two Hundred and Fifty Dollar (\$250.00) bond which must be provided within five days. Defendants immediately submitted the required funds by United States Mail, but delivery of the mail was not accomplished within the five days time allowed by the Arizona attorney, and thus the appeal was never heard. The Arizona Court thus claimed jurisdiction over Defendants without ever having answered any of the jurisdictional questions involved under the long-arm concept. Defendants/Appellants have never had an opportunity to present their defenses, have not had their day in court, and now Plaintiff and Respondent is attempting

to recover by an action in the State of Utah upon the judgment rendered by the State of Arizona against Utah Defendants and Plaintiffs/Respondents is still attempting to deny to Defendants/Appellants the basic right of due process to have opportunity to be heard before the Court.

ARGUMENT

POINT I: THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT PRECLUDE INQUIRY BY THE UTAH SUPREME COURT INTO THE QUESTION OF JURISDICTION OF THE ARIZONA COURT OVER UTAH CITIZENS; INDEED, THE JURISDICTIONAL QUESTION MUST BE INVESTIGATED BY THE UTAH SUPREME COURT.

The editors of ALR3d discuss this question in Volume 23, page 561 as follows:

[I]t is important to note the fundamental principles, particularly as enunciated by the Supreme Court of the United States, as to the extent to which the due process clause of the Fourteenth Amendment affects the power of a state to subject nonresident individuals or foreign corporations to the inpersonam jurisdiction of the local courts. Even if not raised or considered in an individual case, these constitutional questions are always lurking in the record, particularly in a case in which jurisdiction is sustained. . . . While a state may choose not to exercise its jurisdiction over nonresidents and foreign corporations to the full extent permissible by the due process clause of

the Fourteenth Amendment, it has obviously no power to assert in personam jurisdiction in violation of that clause.

The constitutional restriction on jurisdiction of the Fourteenth Amendment was loosened and broadened beginning in 1945 in the leading case of International Shoe Co. v Washington (1945) 326 US 310, 90 L Ed 95, 66 S Ct 154, 161 ALR 1057. The editors of 23 ALR3d commented on the International Shoe case at page 563 as follows:

In lieu of the prior tests, a new test was laid down to the effect that the due process clause requires only that in order to subject a defendant to a judgment in personam, certain minimum contacts within the territory of the forum must be shown so that the maintenance of the suit does not 'offend traditional notions of fair play and substantial justice,' . . . It was also pointed out that an 'estimate of the inconvenience' which would result to the foreign corporation from a trial away from its 'home' or principal place of business is relevant in this connection.

The editors of 23 ALR3d also refer to another leading United States Supreme Court case on page 565. That case is Hanson v Denckla (1958) 357 US 235, 251, 2 L Ed 2d 1283, 1296, 78 S Ct 1228 and indicate that in that matter the Court is

holding that the state trial court lacked in personam jurisdiction over defendant foreign trustee, warned that it is a mistake to assume that this trend 'heralds the

eventual demise of all restrictions on the personal jurisdiction of state courts.' It was pointed out that those restrictions are more than a guaranty of immunity from inconvenient or distant litigation, but a consequence of territorial limitation on the power of the respective state.

Chester J. Antieau, in Volume I of his Modern Constitutional Law §7:14, beginning on page 543, states that the right to be heard on the merits is basic.

The United States Supreme Court has referred to 'the right to be heard' as 'one of the most fundamental requisites of due process.' Again it has stated, 'a fundamental requirement of due process is the opportunity to be heard.'

Antieau cites Brinkerhoff-Faris Trust and Savings Co. v Hill (1930) 281 US 673, 74 L Ed 1107, 1112, 50 S Ct 451 and capitulates the Court's holding as follows:

When the Missouri Court refused to hear a person on the merits of his claim by announcing a new rule that required prior recourse to an administrative agency, at a time when such appeals had already run, the United States Supreme Court held that the Missouri Court had, in so repudiating its earlier position, 'denied to the plaintiff due process of law--using that term in its primary sense of an opportunity to be heard and to defend its substantive right.' 'It is plain,' observed the Court, 'that the practical effect

of the judgment of the Missouri Court is to deprive the plaintiff of property without affording it at any time an opportunity to be heard in its defense. . . . by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property.'

Antieau also cites Hovey v Elliott (1897) 167 US 409, 42 L Ed 215, 17 S Ct 841 and capitulates the findings of that Court as follows:

When the Supreme Court of the District of Columbia attempted to deprive a defendant of his right to answer a suit brought against him, and struck his answer, then entered judgment against him, because of his refusal to deliver to a court-appointed receiver certain funds which were the subject of the litigation, a New York court refused to honor the judgment and it was affirmed by the United States Supreme Court which ruled that the first court had deprived the defendant of his property without due process of law by denying him his constitutional right to a day in court.

In 16 Am Jur 2d under Conflict of Laws §13:33 the editors state that "the constitutional requirement of full faith and credit does not automatically compel a forum state to subordinate its own statutory policy to a conflicting public act of another state;" and refers to several citations thereunder.

Public acts can be defined as both statutory or acts of the court.

The Arizona Courts claim to jurisdiction in this matter, based as it is on the long-arm statute concept, must uphold those traditional notions of fair play and substantial justice required by the United States Supreme Court. It should be obvious that these traditional notions of fair play and substantial justice are to be applied equally to the in-state Plaintiff and the out-of-state Defendant. Absent equal application of those traditional notions of fair play and substantial justice, the out-of-state Defendant is now just as much at the mercy of the in-state Plaintiff as formerly the in-state Plaintiff was at the mercy of the out-of-state Defendant. Traditional notions of fair play and substantial justice require that the Utah Supreme Court deny the claim of jurisdiction of Arizona through the long-arm statute concept over Utah citizens, and should deny the Arizona Plaintiff the judgment sought.

POINT II: THE INDIVIDUAL MALE DEFENDANTS WERE ACTING ONLY AS CORPORATE OFFICERS, AND NOT AS INDIVIDUALS, AND EVEN IF JURISDICTION OVER THE CORPORATION WERE ALLOWED OR HELD TO BE PROPER, JURISDICTION OVER THE INDIVIDUAL MALE DEFENDANTS SHOULD NOT BE ALLOWED.

The Court of Appeals of Arizona, Division 1, Department B, in Magidow v Coronado Cattle Company, 19 Ariz. App. 38, 504 P2d 961 (1972) considered very similar facts to those in the present case. The Court cited Hanson v Denckla, previously cited in this brief, with approval indicating that there are still restrictions on the personal jurisdiction of state courts. They also cite

International Shoe Co. v Washington, also previously cited in this brief, as authority for the rule that the United States Constitution does not allow a state to make binding judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. And that in order to subject a defendant to a judgment in personam he must have certain minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The Court then indicates that the only exception to this general rule which might be applicable to the case is found in Rule 4(e) (2), Rules of Civil Procedure, 16 A.R.S., which provides in part: "When the defendant . . . is a person . . . which has caused an event to occur in this state out of which the claim which is the subject of the complaint arose . . ." he may be served personally without the state with the same effect as if served within it. This Rule is intended to give Arizona courts the maximum jurisdiction permitted under the minimum contacts doctrine of the International Shoe case. The Court held,

Reviewing the facts of the present action, it is apparent that neither of the Magidows had any contacts, minimum or otherwise, with Arizona in connection with the subject of the complaint. The contract on which respondent is suing was between itself and Hi-Pro, a corporation. The order for shipment of the cattle which gave rise to this contract was placed by that corporation through one of its agents. . . . It thus appears that

Eloise Magidow had no contacts with respondent of Arizona whatsoever other than those arising from her membership in the marital community with Aaron Magidow; that Aaron Magidow had no such contacts except in his capacity as president of Hi-Pro; and that there is thus no basis for imposing personal liability or personal jurisdiction on either of them by virtue of personal service of the summons outside of the State of Arizona. Respondent has failed to meet its burden of establishing jurisdiction, which is imposed on it when jurisdiction is challenged.

In this matter, as in the case cited above, there has been no showing that the individual male defendants were other than corporate officers nor that they acted in a manner inconsistent with their corporate agency and there has been no showing of any unity of interest between the individual male defendants and the corporate defendant such that it can be said that the separate personalities of each cease to exist. The claim of jurisdiction of the Arizona Court over the individual male defendants herein therefore cannot be sustained and should not be enforced by this court.

POINT III: THE INDIVIDUAL FEMALE DEFENDANTS HAD NO CONTACT WITH ARIZONA, WERE NOT CORPORATE OFFICERS, AND JURISDICTION OVER THEM CANNOT BE CONFERRED BY THE LONG-ARM CONCEPT.

In Magidow v Coronado Cattle Co. cited in the previous point the Arizona Court of Appeals disposed of the idea that

jurisdiction over the wife of one of the corporate officers could be obtained under the long-arm concept. The Court of Appeals of Arizona held in that matter, "It thus appears that Eloise Magidow had no contacts with respondent or Arizona whatsoever other than those arising from her membership in the marital community with Aaron Magidow; . . . Respondent has failed to meet its burden of establishing jurisdiction, which is imposed on it when jurisdiction is challenged."

POINT IV: THE DEFENDANTS WERE PRECLUDED FROM DEFENDING THEMSELVES IN ARIZONA BY THE ERRORS AND OMISSIONS OF ARIZONA COUNSEL FOR DEFENDANTS AND BY THE ACTIONS OF ARIZONA COURT IN FAILING TO GIVE ALLOWANCE FOR THE INCONVENIENCE OF TRIAL AWAY FROM THE DEFENDANTS' HOME OR PRINCIPAL PLACE OF BUSINESS.

The International Shoe case previously cited held that in addition to the certain minimum contacts that the Court must also make an estimate of the inconvenience which would result to the foreign corporation of a trial away from its home or principal place of business. In this matter the Arizona Court completely failed to give any relevance or weight to that requirement. Before jurisdiction is conferred upon the Court all of the constitutional requirements of that jurisdiction must be met. In this matter the Arizona Court has failed to give any consideration at all to those inconveniences. Because of those inconveniences the Defendants have been unable to comply with the rules of procedure of the Arizona Court, and the Arizona Court thus entered

a default against them and refused to set aside the default knowing full well the particulars of the matter and that the failure to answer was not due to fault on the part of the Defendants but rather to an error and omission on the part of counsel retained by Defendants. The default judgment is a severe and drastic measure and should not be taken unless it is clear that the Defendant has willfully failed to avail himself of the opportunities to present his defenses. In this matter the Court might well take judicial notice of the tendency of Utah Courts to set aside defaults for any showing of an excusable neglect on the part of Defendants' attorney. And certainly the courts of Utah are not inclined to punish Defendants for the failure of Defendants' attorney where Defendants themselves are not at fault. In this matter the errors and omissions of the Arizona attorneys, which may well be a result of the difficulties of communication through the mail and by telephone and lacking face-to-face conferences and cooperative efforts on the part of Defendants and counsel, gave the Arizona Court the legal justification to enter the default of Defendants and to fail to set aside the default. It is also the reason that the Court of Appeals of Arizona did not hear this matter. Where Defendants have been denied due process by being denied the opportunity to be heard in court because of the failure of the Arizona Court to give relevance to the inconveniences experienced by the out-of-state Defendants the Court has deprived itself of jurisdiction if it could have sustained it on any other grounds. Let us note again

that jurisdiction in this matter could only be found in the Arizona Court upon the exception to the general rule denying it jurisdiction which is available through the long-arm statute concept. Thus, by failing to meet all the requirements set up by the United States Supreme Court in the International Shoe case the Arizona Court has failed to meet the requirements of the exception, thus falls under the general rule and is denied any jurisdiction over Defendants in this matter.

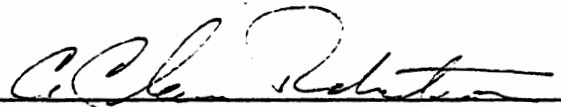
CONCLUSION

The Utah Supreme Court is not required to give automatic approval of foreign court actions under the full faith and credit clause. Indeed, under the traditional notions of fair play and substantial justice Utah Supreme Court must inquire into the jurisdictional questions presented here in order to prevent an unconscionable miscarriage of justice.

The Court of Appeals of Arizona acting in similar fact situations have denied the extension of jurisdiction to corporate officers and to wives of corporate officers. The Defendants herein have been denied due process of law which is required by the United States constitution and the Utah constitution. Defendants herein are entitled to have their day in court to satisfy due process of law and to be protected from the actions of the foreign court in claiming jurisdiction over them contrary to the constitutional requirements established to govern such matters.

Justice will best be served by reversing the decision of the Lower Court and by dismissing the complaint of Plaintiff/Respondent in this matter.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "C. Glenn Robertson", is written over a horizontal line.

C. GLENN ROBERTSON
Attorney for Defendants/Appellants