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Heber W. Glenn v. J. A. Ferrell et al : Brief of Respondent

Utah Supreme Court

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In the Supreme Court
of the State of Utah

FILED

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HEBER W. GLENN,

Plaintiff and Appellant,

vs.

J. A. FERRELL, et al.

Defendant and Respondent.

Clerk, Supreme Court, Utah

No. 8523

BRIEF OF RESPONDENT

E. J. SKEEN

Attorney for Respondent

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In the Supreme Court of the State of Utah

HEBER W. GLENN,

Plaintiff and Appellant,

vs.

J. A. FERRELL, et al.

Defendant and Respondent.

No. 8523

BRIEF OF RESPONDENT

This is an appeal from an order of the District Court of Utah County granting the respondent's motion to vacate the attachment of certain corporate stock, the judgment by default entered thereon, and the attempted judicial sale of such stock.

The motion to vacate the attachment appears in the record on pages 20-22. It will be noted that it raises numerous questions as to the validity of the purported attachment of the stock, the validity of the judgment, and the regularity and validity of the attempted judicial sale. These include:

1. The attachment was not made in the manner provided by Rule 64 C (e) (5), Utah Rules of Civil Procedure, which provides that stock or shares or interest in stocks or share of any corporation or company must be attached by leaving with the president, secretary, cashier or any other managing agent thereof, a copy of the writ and notice stating that the stock or interest of the defendant is attached in pursuance of such writ.
2. The purported judgment does not describe the property of the defendant which was allegedly attached and upon which the jurisdiction of the court was based.
3. There was no valid levy of the execution .
4. The execution expired before any levy was made or attempted and before any sale or attempted sale of the stock.
5. The execution did not state on its face the name of the court issuing it.
6. The certificate seized by the sheriff (No. 33) was surrendered and cancelled thus releasing any attempted attachment.
7. The notice of sale was defective for the reason that it did not properly describe the stock.
8. The notice was not posted for the period required by law.
9. The respondent was not the owner of the stock and had no interest therein.

The district court granted the motion basing the order on the first ground of the motion that the writ of attachment was not served as provided by Rule 64 (C) (e) (5), Utah Rules of Civil Procedure (R. 24). The Court apparently took the position that there was no reason for going into the other grounds raised by the motion; however they are not abandoned or waived by the respondent.

Some of the irregularities referred to in the motion appear on the face of the record and fully support the ruling of the District Court. Others are not in the record because the court granted the motion on the first ground and did not take evidence on the others. The references to the records on the items listed above which appear in the record are given below.

Item 1. It was admitted at the hearing, and it is admitted here in the appellant's brief that the writ of attachment was not served on the officers of the corporation as required by Rule 64. See appellant's brief, page 7.

Item 2. The purported judgment provides in part:

"Wherefore by virtue of the law and by reason of the premises aforesaid it is ordered, adjudged and decreed that said plaintiff do have and recover from the property of the defendant, heretofore attached and within the jurisdiction of the court the sum of \$3,350.21 - - - ." There is no description of the property allegedly attached.

Item 4. The execution was issued on the 3rd day of December, 1953. The sheriff states in his return that he served the execution on December 14, 1955. (He obviously meant

1954.) He says that he noticed the property for sale on March 24, 1955 (R. 19.)

Item 5. The execution does not state on its face the name of the issuing court as required by Rule 69 (b). (R. 18).

Item 8. The notice was not posted for the period of seven days as provided by Rule 69 (e) (1). According to the sheriff's return, it was posted on March 24, 1955, and the sale was held the "31st day of 1955." Assuming that the sheriff meant the sale was held on the 31st day of March, there were only six full days of posting (R. 19).

STATEMENT OF POINTS

1. The writ of attachment was not served in the manner required by Rule 64 C (e) (5), and the service of said writ and all proceedings based thereon are void.

2. Irregularities in the proceedings invalidate the attempted judicial sales of the stock.

ARGUMENT

Point 1.

THE WRIT OF ATTACHMENT WAS NOT SERVED
IN THE MANNER REQUIRED BY RULE 64 C (e) (5),
AND ALL PROCEEDINGS BASED THEREON WERE
VOID.

The respondent was served with a summons in Montana (R. 6). He did not appear generally in Utah and the district court could not enter a personal judgment. The appellant attempted to attach certain stock in the Utah Lake Distributing Company, but admittedly did not comply with the Rules of Civil Procedure.

Rule 64 C (e) (5) provides:

Stocks or shares, or interest in stocks or shares, of any corporation or company must be attached by leaving with the president, secretary, cashier or other managing agent thereof, a copy of the writ, and a notice stating that the stock or interest of the defendant is attached in pursuance of such writ and by taking the certificate into custody, unless the transfer thereof by the holder is enjoined or unless it is surrendered to the corporation issuing it.

The appellant quoted the rule on page 6 of his brief, but made a significant mistake. On line 2 of the quotation the word "*may*" appears instead of the word "*must*." The proper wording appears in the foregoing quotation of the rule. It provides, "stocks or shares, or interest in stocks or shares of any corporation or company *must* be attached, etc." (Emphasis added.)

It will be noted that Rule 64 C (e) (5) requires that two things be done to make a valid attachment:

- (1) a copy of the writ must be left with the president, secretary or cashier or other managing agent, *and*
- (2) the certificate must be taken into custody.

The use of the word "*must*" makes the method of service

mandatory and the word “and” makes it clear that both acts are essential to a valid attachment.

The rule is so clear that further argument would appear to be unnecessary.

The appellant takes the position, as we understand his argument, that service of the writ of attachment on the officers of a corporation is the “old type” of attachment, and that there is a conflict between the old type of attachment and the method provided by the Uniform Stock Transfer Act. See page 9 of the appellant’s brief where he says:

“We have only been able to find one case which presented the problems of a conflict between the old type attachment provisions and the provisions of the Uniform Stock Transfer Act.”

Appellant’s argument is entirely without merit because,

(1) the method of attachment provided by Rule 64 C (e) (5) is the latest word of the legislature on the subject. It became effective upon the promulgation of the Rules of Civil Procedure on January 1, 1950 (See Rule 1 (b)) whereas the Uniform Stock Transfer Act became effective May 10, 1927.

(2) There is no conflict between the Rule 64 C (e) (5) and Section 16-3-13, U.C.A., 1953.

The Uniform Stock Transfer Act was enacted by the 1927 legislature and Section 13 of the Act (now 16-3-13, U.C.A., 1953) has never been amended. The appellant’s argument that this 1927 enactment supersedes the act of the legislature making the Rules of Civil Procedure effective January 1, 1950 is

manifestly unsound. The latest direction of the legislature is the one the appellant chose to ignore.

It is just as unsound to argue that there is a conflict between Rule 64 C (e) (5) and Section 13 of the Transfer Act. It will be noted that the substance of section 13 is incorporated in the rule. The second act required by the rule is that the certificate be seized. This is strictly in compliance with the Stock Transfer Act. Let us examine both the rule and the act.

The Act provides:

No attachment - - - shall be valid until such certificate be actually seized by the officer making the attachment or levy, *or be surrendered to the corporation which issued it, or its transfer by the holder be enjoined.* (Emphasis added.)

The Rule provides:

- - - and by taking the certificate into custody *unless the transfer by the holder thereof be enjoined or unless it is surrendered to the corporation issuing it.* (Emphasis added.)

It will be noted that the rule and the statute not only convey the same meaning, but the emphasized portions are in the same words. It appears that the legislature inserted part of the Act in the Rule. There is no conflict. The rule properly recognizes and carries out the thought in section 13. Furthermore, section 13 of the Transfer Act does not purport to direct how writs of attachment must be served. It is expressed in the negative and imposes one requirement—the seizure of the certificate. The rule imposes two requirements, (1) the service on the corporate officers and (2) the seizure of the certificate.

The Oregon cases cited by the appellant are not in point. The Uniform Stock Transfer Act was enacted many years after the enactment of the attachment statute, and the attachment statute was couched in language which was directory only. In the case of *Nevael Investment Corporation v. Schrunk*, 279 P. 2d 518, 203 Ore. 268, quoting from the case of *Hodes v. Hodes*, 155 P. 2d 564; 176 Ore. 102, the court stated that under the Uniform Stock Transfer Act there are three alternative means *for making effective* an attachment or levy on stock. The three alternatives do not include the service on the corporate officers, and the court in the *Hodes* case did not say or intend to say that section 13 of the Transfer Act is alternative to the other statutory methods of making an attachment. The Oregon cases can be distinguished from the situation in Utah because in Oregon the Uniform Stock Transfer Act was the latest expression of the legislature on the subject and in Utah Rule 64 C is the latest expression.

It is well settled that statutes providing the method of attachment must be strictly followed. In American Jurisprudence the rule is stated as follows:

Inasmuch as the right to subject corporate stock to levy and sale under execution or attachment is purely statutory, statutory provisions regulating such levy must generally be strictly observed. (4 Am. Jur., sec. 564, P. 897.)

In the case of *Ames v. Parrott*, 86 N.W. 503, 61 Neb. 847, the Court said:

It is a well established rule that where there is a special statutory provision respecting the manner in which levy of an attachment shall be made, it must be

strictly observed, and that departure therefrom will invalidate the levy.

See also *Ireland v. Adair*, 94 N.W. 766, 12 N.D. 29.

The jurisdiction of the district court depended upon the validity of the attachment. In view of the fact that there was admittedly no compliance with the first part of Rule 64 C (e) (5) requiring service on the officers of the corporation, the trial court properly held that the attempted attachment of the stock was null and void.

The law is well settled that where personal jurisdiction has not been acquired, the validity of the judgment depends upon the validity of the attachment. 7 C.J.S. sec. 497 f, p. 656. The court, therefore, properly set aside and vacated the default judgment.

Point 2

IRREGULARITIES IN PROCEEDINGS SUBSEQUENT TO THE ATTACHMENT.

Although we think that the order of the trial court must be affirmed for the reasons stated above, we will briefly, in outline form, state the reasons why we think the attempted judicial sale of the stock was void.

(a) The purported judgment does not describe the property of the defendant allegedly attached and upon which jurisdiction was based.

Any judgment rendered without personal service on

the defendant within the state must be in in rem. Here the judgment is fatally defective because it does not describe the property attached. See 49 C.J.S. sec. 80, p. 203.

(b) The execution expired before any levy was made and before the attempted judicial sale of the stock.

Under the Rules of Civil Procedure, Rule 69 C the execution must be levied within two months. Although the sheriff's return is garbled and contains erroneous dates, when all the dates are considered together it seems clear that the execution was levied about one year after its issuance (R. 19).

(c) The execution did not state on its face the name of the court issuing it.

The title of the court is stated as follows: "The District Court of the Fourth Judicial District of Utah, State of Utah." Rule 69 (b) requires the name of the issuing court. This is not given.

(d) The notice of sale was not posted for the statutory time.

Rule 69 (e) (1) requires the notice of sale to be posted for a minimum of 7 days. The sheriff's return shows that the notice was posted on March 24th, 1955, and the sale was held on March 31st, 1955. The notice was only posted for six full days. Fractions of days are not counted. Therefore the sale was void. See 33 C.J.S. sec. 211 d., p. 454.

CONCLUSION

It is submitted that the district court properly granted the respondent's motion to vacate the attempted attachment of corporate stock and the proceedings based thereon. The order of the trial court should be affirmed.

E. J. SKEEN

Attorney for Respondent