

1957

# Irene Paul and Charles J. Paul v. Woodrow Lawrence Kirkendall et al : Brief of Respondents

Utah Supreme Court

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Milo V. Olson; Young, Thatcher & Glasmann; Attorneys for Respondents;

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No. 8572

OCT 31 1957

**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

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**IRENE PAUL and CHARLES J.  
PAUL,**

Clerk, Supreme Court, Utah

*Plaintiffs and Respondents,*

—VS.—

**WOODROW LAWRENCE KIRK-  
ENDALL, JOHN DOE, JANE DOE  
AND JOHN DOE COMPANY,**

*Defendants,*

and

**MARYLAND CASUALTY COM-  
PANY, a corporation,**

*Garnishee and Appellant.*

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**Respondents Brief**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

IRENE PAUL and CHARLES J.  
PAUL,

*Plaintiffs and Respondents,*

—vs.—

WOODROW LAWRENCE KIRK-  
ENDALL, JOHN DOE, JANE DOE  
AND JOHN DOE COMPANY,

*Defendants,*

and

MARYLAND CASUALTY COM-  
PANY, a corporation,

*Garnishee and Appellant.*

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## RESPONDENTS' BRIEF

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### STATEMENT OF FACTS

Respondents (who will be referred to in this brief as the plaintiffs) agree with the statement of facts set forth in Appellant's brief.

However, it is necessary to add thereto one additional fact: the *chose in action* subjected to garnishment herein is a liquidated claim. At the pre-trial conference held in the garnishment proceeding it was admitted by Appellant Garnishee that its liability to the defendant judgment debtor herein, if any there is, is the difference between the amount of the Plaintiffs' judgment and the

amount heretofore paid thereon by the Garnishee under its policy of insurance. The performance of this mathematical subtraction discloses that the claim or credit is liquidated in the sum of \$10,605.39, with interest at 8% from November 20, 1953, for which sum the clerk below issued execution at the same time the garnishment was issued.

The sole and narrow issue presented by this interlocutory appeal is whether or not the liability of the Garnishee alleged in Plaintiffs' reply to the Garnishee's answers herein may be reached by garnishment under Rule 64D, Utah Rules of Civil Procedure.

Throughout this brief a reference to the "Rules" is a reference to the "Utah Rules of Civil Procedure."

## STATEMENT OF POINTS

POINT 1. THE PROVISIONS OF RULE 64D RELATING TO GARNISHMENT MUST BE LIBERALLY CONSTRUED.

POINT 2. GARNISHEE'S LIABILITY TO THE DEFENDANT HEREIN IS A DEBT, CREDIT, CHOSE IN ACTION, OR OTHER PERSONAL PROPERTY OF THE DEFENDANT HEREIN WITHIN THE MEANING OF RULE 64D.

POINT 3. GARNISHEE'S LIABILITY TO DEFENDANT HEREIN IS IN GARNISHEE'S POSSESSION OR CONTROL WITHIN THE MEANING OF RULE 64D.

POINT 4. THE AUTHORITIES RELIED ON BY APPELLANT ARE NOT APPLICABLE TO THIS CASE ARISING UNDER THE PECULIAR UTAH RULES.

## ARGUMENT

POINT 1. THE PROVISIONS OF RULE 64D RELAT-

ING TO GARNISHMENT MUST BE LIBERALLY CON-  
STRUED.

According to the general rule applicable to statutes in derogation of the common law, garnishment statutes are usually construed strictly against the party resorting to the remedy, and, as a corollary to this rule, a liberal construction is indulged in favor of the garnishee.

38 C.J.S. Garnishment, Sec. 3, Page 209.

*The contrary is the rule in Utah*, and our Rules on attachment and garnishment must be liberally construed to fully effectuate their purpose and objects, to promote justice, and to secure the just, speedy and inexpensive determination of the garnishment action or proceeding.

This Court, in *Rule 1(a)*, has enjoined that all of the Rules "shall be liberally construed to secure the just, speedy and inexpensive determination of every action."

The Utah Rules on attachment and garnishment are taken from Chapters 18 and 19, respectively, of Title 104, U.C.A., 1943, and both the legislature and this court have declared that they should receive a liberal construction as stated.

The legislature has specifically provided that,

"The rule of the common law that Statutes in derogation thereof are to be strictly construed has no application to the statutes of this state. The statutes establish the laws of this state respecting the subjects to which they relate, *and their provisions and all proceedings under them are to be liberally construed with a view to effect*



*the objects of the statutes and to promote justice.”*  
(Italics supplied.)

Section 88-2-2, U.C.A. 1943;

Section 68-3-2, U.C.A. 1953.

And this court has itself declared:

“The provisions of our statute relating to garnishments are very broad and comprehensive. This court has held (*Cole v. Utah Sugar Co.*, 35 Utah 148, 99 Pac. 681) that the statute should be liberally construed, and so as to fully effectuate the purpose sought to be attained thereby.”

*West Cache Sugar Co. v. Hendrickson*, 56 Utah 327, 190 Pac. 946, 11 ALR 216.

In that case this court approved a court order requiring a garnishee bank to drill open a safe deposit box rented to defendant in order to turn over to the sheriff the property of the defendant which might be found therein. This is certainly a very liberal interpretation.

These rules of construction, of course, are deemed to have been adopted as a part of the Rules of Procedure along with the statutes to which they apply.

With these liberal rules of construction in mind, let us turn then to a consideration of the meaning, purpose and intent of the Rules relating to garnishment as they apply to the undisputed facts.

POINT 2. GARNISHEE'S LIABILITY TO THE DEFENDANT HEREIN IS A DEBT, CREDIT, CHOSE IN ACTION, OR OTHER PERSONAL PROPERTY OF THE DEFENDANT HEREIN WITHIN THE MEANING OF RULE 64D.

This case, of course, must be decided under the applicable Utah Rules of Civil Procedure, which (so far as

we have been able to ascertain) are unique, so that decisions from other jurisdictions are of little, if any, help.

*Rule 64D(a)* is the basic provision as to garnishment, although, of course, it must be read and construed in connection with other provisions related to the same subject matter. The material parts are as follows:

**“(a) When Plaintiff entitled to Writ; Affidavit.**

The plaintiff, at any time after the filing of the complaint, may have a writ of garnishment issue, and attach the *credits, effects, debts, choses in action, money, and other personal property of the defendant* in the possession or in the control of any third person, as garnishee, whether the same are due at the time of the service of the writ or are to become due thereafter, *under the same circumstances* and by filing with the court in which the action is pending an affidavit *as required by subdivision (a) of Rule 64C, relating to Attachments.* \*\*\*” (Italics supplied.)

Where, as here, judgment has been entered on plaintiffs’ claim, *Rule 64D(b)(2)* dispenses with the affidavit, and authorizes garnishment in any action after judgment. However, the reference to the Rule on attachments makes it clear that the two rules are *in pari materia* and must be construed together, as were the statutes from which they were derived under the decision of this court in

Blue Creek Land & Livestock Co. v. Kehrler,  
60 Utah 62, 206 Pac. 287, 288.

*Rule 64C(a)*, on attachments, provides that

“The plaintiff, at any time after the filing of the complaint, in an action on a judgment \*\*\* or in an action to recover damages for any tort committed \*\*\* against the person or property \*\*\*

may have *the property of the defendant*, not exempt from execution, attached as security for any judgment that may be recovered \*\*\* by filing \*\*\* an affidavit \*\*\* *that the defendant is indebted to the plaintiff*, specifying the amount thereof as near as may be. \*\*\*\*" (Italics supplied.)

Note well the significance of this language: upon the basis of a *tort claim* the plaintiff is directed to make affidavit that the defendant is "*indebted*" to plaintiff. Moreover, the "debt" is not necessarily liquidated, for its basis can be a tort against the person, and the amount thereof need only be specified "as near as may be."

Obviously the framers of this rule, in accord with their intent that the rules shall be liberally construed, are using words, and particularly the words "indebted" and "debt" in the broadest possible sense, and intend tort claims to be included in that meaning. This is in accord with general usage, for *Websters Collegiate Dictionary, 5th Edition*, defines "debt" as "That which is due from one person to another; thing owed; obligation; liability." And it is interesting to note, from the discussion of "debt" in *Bouvier's Law Dictionary, Baldwins Edition, 1934*, that the word may properly include "All that is due a man under any form of obligation or promise," and that the old common law action of debt would lie to recover any sum certain or (in the *detinet*) specific goods, without regard to the manner in which the obligation was incurred or is evidenced, as, e.g., to recover a statutory penalty for wilfully cutting trees.

Clearly, then, a "debt" due the defendant, as that term is used by the framers of the Rules on attachment and garnishment, includes and was intended to include

any claim for the payment of money or the delivery of property, whether founded on contract, tort, statute or otherwise, and whether liquidated or unliquidated. A liberal construction of the broad language so broadly used admits no other logical conclusion.

This conclusion gains added strength from a consideration of the provisions of *Rule 64D(d)*, relating to the interrogatories which the Rules require the garnishee to answer under oath. The garnishee is required to state whether he "is indebted to the defendant, *either in property or money.*" (Italics supplied.) He must also answer whether he "has in his possession, in his charge, *or under his control any property, effects, goods, chattels, rights, credits or choses in action* of the defendant \*\*\* and if so the *value of the same.*" (Italics supplied.) The use of the phrase "indebted \*\*\* in property" clearly and unequivocally indicates that the words "debt" and "indebted" are not being used in their strict, narrow meaning, but are being used in their most liberal, broad meaning, and are intended to cover unliquidated tort obligations as well as liquidated contract obligations.

Still further strong support for this conclusion is found in the provisions of *Rule 64D(h)*, which provides that the plaintiff may reply to the Garnishee's answers,

"and may also allege any matters which would charge the garnishee with *liability.* Such new matter in the reply shall be taken as denied or avoided, and *the matter thus at issue shall be tried in the same manner as other issues of like nature.*" (Italics supplied.)

Note well the use of the word "*liability,*" which denotes legal obligation in its broadest possible sense. See

*Bouvier's Law Dictionary, Baldwin's Edition, 1934, where liability is defined as follows:*

“Responsibility; the state of one who is bound in law and justice to do something which may be enforced by action; 36 Ia. 226; 57 Cal. 209; 36 N. J. L. 145. This liability may arise from contracts either express or implied, *or in consequence of torts committed.*” (Italics supplied.)

It is not even necessary to apply a liberal construction to reach the conclusion that any liability, in tort or contract, of the garnishee to the defendant may be reached by garnishment, as a “debt”, and if liability be disputed, or the amount or extent thereof be unliquidated, the “issue shall be tried in the same manner as other issues.”

The California Supreme Court in,  
Dunsmoor v. Furstenfeldt, 26 Pac. 518, 520,  
in discussing the word “debt” as used in a garnishment statute declares:

“Any kind of obligation of one man to pay money to another is a debt. ‘A debt signifies what one owes. There is always some obligation that it shall be paid; but the manner in which it is to be paid, or the means coercing payment do not enter into the definition.’ ”

A “credit,” as the term is used in *Rule 64D(a)* subjecting credits of the defendant to garnishment, is of course the opposite or correlative counterpart of a “debt.” A “debt” or “debit” on the books of the defendant is a “credit” to the defendant on the books of the garnishee. Thus every person “indebted” to another holds in his possession, or under his control a “credit”

which may be attached by garnishment issued in an action against the other, and which can be cancelled by paying the "debt" to the levying officer under the Rules. Thus the liability of the garnishee here is a "credit" in its hands which is subject to garnishment for the benefit of the plaintiffs.

It must next be noted that by Rule 64D(a) "*choses in action*" of the defendant are subject to garnishment without limitation or restriction. This is an innovation insofar as garnishment *before* judgement is concerned. *Section 104-19-1, U.C.A., 1943*, does not include *choses in action* in the list of things subject to garnishment, although *Section 104-19-23, U.C.A., 1943*, relating to garnishment after judgement specifically authorizes garnishment of a *chose in action*, and a chose in action has always been subject to execution, in which case the sheriff is directed to serve the writ by either "collecting or selling the choses in action and selling the other property." *Rule 69(d) and Section 104-37-17, U.C.A., 1943*. The careful framers of the Rules must have intended some positive result from this innovation.

*Bouvier's Law Dictionary* says that a *chose in action* is

"A right to receive or recover a debt, or money, or damages for a breach of contract or for a tort connected with a contract, but which cannot be enforced without action."

And *Black's Law Dictionary* says also that

"A chose in action is any right to damages, whether arising from the commission of a tort,

the omission of a duty, or the breach of a contract."

It is so generally recognized that the phrase "chose in action is substantially all inclusive that we hesitate to belabor the point. However, we refer to a few of the cases. The phrase includes demands arising out of tort as well as contract:

Sharp v. Cincinnati (etc) Ry. Co. (Tenn.),  
179 S. W. 375, 376;

Stirling v. Sims, 72 Ga. 51, 52;

Gillet v. Fairchild (N.Y.), 4 Denio 80, 82;

City of Cincinnati v. Hafer (Ohio St.), 30  
N.E. 197, 198;

and includes a cause for personal injury,

Carver v. Ferguson (Cal. App.), 254 Pac.  
2nd 44, 45;

and a cause for wrongful death,

In re Arduino's Est., 20 Ohio Dec. 461, 4 Ohio  
N.P., N.S. 369;

and a cause of action against a constable for failure to  
deliver replevied property,

People v. Weaver (Ill. App.), 40 N.E. 2nd  
83, 84;

and a cause of action for fraud,

Conaway v. Co-operative Home Builders  
(Wash.), 117 Pac. 716, 718.

Whatever may be the rule elsewhere, and whatever the rule might have been in Utah prior to the adoption of the Rules of Procedure, or (in garnishment after

judgement) of *Section 104-19-23, U.C.A., 1943*, a chose in action in tort as well as one in contract is now subject to garnishment here. Thus, even if we were to concede Appellant's premise that the chose garnished in the case at bar sounds in tort, its conclusion that the chose is not subject to garnishment is nevertheless unsound and should be rejected by the Court.

However, the plaintiffs do not concede that premise. It is true that it has been said that an action against a liability insurer for mishandling the defense and compromise negotiations sounds in tort, but it is submitted that such statements are based on an insufficient and inaccurate analysis of the facts and the law, and are erroneous. In fact and law the defendant's claim against the garnishee, here attached by garnishment, is based, and can be based only on a contract—the insurance policy. If there were no contract, there could be no duty on the insurer garnishee to defend or to act on offers of settlement with any degree of care whatsoever. It would be utterly absurd to contend that an insurance company owes any duty to defend or settle a claim against a stranger. The insurance contract is and must be the source of all the insurer's duties and of all the rights of the insured.

The duty to use "due care" and "good faith" in responding to offers of settlement by the holder of a claim against an insured arises and is implied from the contract provisions requiring the insurer to defend and giving it the *exclusive* right to compromise and settle. The situation is analagous to those where a physician is required, whenever retained, to use ordinary and



reasonable care and diligence, and his best judgement, in treating his patient (70 C.J.S. *Physicians and Surgeons*, Sec. 41, p. 947); where an architect is bound to bring to the performance of his contract reasonable intelligence befitting his profession, and a proper investigation and knowledge of the business in hand, by his contract implying that he has skill and ability in his field and that he will exercise them reasonably and without neglect (6 C.J.S. *Architects*, sec. 19, pp. 316-317); and where a building contractor is impliedly obligated by his contract to perform his work in a proper and workmanlike manner and with ordinary skill and care (9 C.J. 749-750). All of these duties, as well as the duties involved in the case at bar are implied *contract duties*, not duties imposed by law on all and sundry, and hence an action for the breach thereof sounds in contract and not in tort.

*Bouvier's Law Dictionary* defines *tort* as "A private or civil wrong or injury. *A wrong independent of contract.*" (Italics supplied.) The same work comments:

"The word *tort* is used to describe that branch of the law which treats of the redress of injuries which are neither crimes *nor arise from the breach of contracts.*" (Italics supplied.)

An implied *contract* provision of the insurance policy here is that in defending claims and acting on offers received for the settlement thereof the insurance company will act with due and ordinary care, and in good faith, and (conversely) will not act unreasonably, negligently, or in bad faith. When the courts use the term "negligence" in holding an insurer liable under the

circumstances they are not classifying the cause of action as one in tort; they are merely using an appropriate term to describe a breach of the contract to use due care.

This is made clear by the fact that some courts have held that, in the absence of a policy provision authorizing such action, the claimant judgement creditor cannot sue the insurer directly on its liability to the insured for an excess judgement, *because there is no privity of contract* between the insurer and the claimant.

Annotation: 40 ALR 2nd 195.

It may be noted in passing that the policy here involved has a specific provision that a claimant on a covered claim may, after judgement is entered (as here) sue the insurer directly on the policy.

The most recent and comprehensive discussions of the duty of the insurer to settle, and its liability for failure to act with due care on offers of settlement are found in an annotation in

40 ALR 2nd 168, 170, et seq.,  
and in

8 Appleman: Insurance Law and Practice,  
Sections 4712-4713.

It should also be observed that

“Where plaintiff in an action for damages has recovered judgement, he may garnish the defendant’s claim under a policy insuring him against liability for damages of the kind recovered by plaintiff against him.”

38 C.J.S. Garnishment, Sec. 110d., p. 318.

There is no reason why this rule should not be equally applicable to the appellant garnishee's liquidated contract liability to the defendant in the case at bar. Where the liability is liquidated, as here, and arises under contract, as here, it is quite immaterial whether the obligation arises under the direct promise to pay the liability, or under the promise to defend and handle settlement offers with due care. Even under the authorities relied on by Appellant the subject claim is garnishable.

Finally, this claim may be garnished under *Rule 64D(a)* as "other personal property of the defendant." Again it must be recalled that garnishment Rule is in *pari materia* with the Attachment Rule, and that the latter (*Rule 64C(a)*) provides only for attachment of "the property of the defendant, not exempt from execution." Debts and choses in action are not specifically mentioned, but the Rule on the "Manner of executing Writ" (*Rule 64C(e)(6)*) makes it clear that such claims are intended to be included in the term "property," for specific provision is made for the manner of attaching "debts, credits and other personal property not capable of manual delivery," and the Rule on Executions (*Rule 69d*) specifically provides for levy of execution on, and the "collection or sale" of choses in action.

The conclusion is irresistible that the garnishee's liability to the defendant in this case is subject to garnishment as a "debt, credit, chose in action, or other personal property of the defendant" within the meaning of the Rule and of the statutes from which the Rule was

derived, and there is no error in the order appealed from.

POINT 3. GARNISHEE'S LIABILITY TO DEFENDANT  
HEREIN IS IN GARNISHEE'S POSSESSION OR CONTROL  
WITHIN THE MEANING OF RULE 64D.

Appellant, in its Point I, argues that defendant's claim against the Appellant Garnishee is not subject to garnishment because (so it is argued) it is not in the "possession or control of a third person."

Here again we must take issue with appellant both on the premise and on the conclusion it advocates. Appellant assumes that the limiting phrase "in the possession or in the control of any third person" applies to credits, debts and choses in action as it does to tangible personal property. We submit that this is not so.

Tangible personal property in defendant's possession or not in the possession, custody or control of anyone, is attached or levied upon by taking it physically into the custody of the sheriff, as provided in *Rule 64C(e)(3)*, whereas debts and credits and tangible property in the possession or control of a third person (as a bailee or pledgee) may be reached by garnishment of the person in control or possession. The two procedures are complementary, and together afford a remedy by which any kind of property can be reached by a judgment creditor. To some extent the two procedures may even overlap, as where tangible property in the hands of a third person may be either garnished or levied on under attachment or execution, the plaintiff being entitled to elect his remedy.

But under our Rules a debt (which is also a chose

in action) can clearly be reached by garnishment, and indeed, under the universal practice it is so reached, without reference as to who has "the possession or control." It is abundantly apparent that the framers of the Rule intended the limitation as to possession or control to be applicable only to tangible personal property, and not to debts, credits, or choses in action, *i.e.*, to intangible personal property.

The conclusion that the subject claim is not in the possession or control of the garnishee here is equally unsound. For all essential purposes under the garnishment rules a debtor, or the obligor of a chose in action is in the control of the subject debt or damage obligation: he can pay, or withhold payment to the creditor, or he can pay or withhold payment to an assignee, or he can pay or withhold payment to the levying officer (at least until judgement has been entered in the garnishment proceeding). And even after assignment of the debt or chose, he can, unless notified, discharge the obligation by paying the original creditor instead of his successor.

By specific provision of the Garnishment Rule, the Garnishee may deliver to the levying officer the property belonging to the defendant, together with the money due the defendant and be relieved from further liability in the proceedings.

#### Rule 64D(g).

If the garnishee answers that he has possession or control of defendant's property or is indebted (liable) to the defendant, the Court must enter judgement for the delivery of the property to the sheriff, to be sold

under execution, and, as to money obligations, must "enter judgement in favor of the defendant for the use of the plaintiff against the garnishee" for the amount due.

Rule 64D(i).

And if the garnishee denies liability to the defendant, and the denial is traversed, or facts alleged charging the garnishee with liability, that "issue shall be tried in the same manner as other issues of like nature. *Judgement shall be rendered on the verdict or finding the same as if the garnishee had answered according to such verdict or finding.*" (Italics supplied.)

Rule 64D(h).

And that judgement "shall acquit him (the garnishee) from all demands by the defendant for all goods, effects or credits paid, delivered or accounted for by the garnishee by force" thereof, just as under the attachment rule "Payment of such debts, or delivery or transfer of such property or debts, to the officer shall be a sufficient discharge of the same as to the defendant."

Rules 64D(k), and 64C(m).

What more control is necessary than the garnishee's authority and power to acquit himself of all obligations to the defendant by paying his obligation to the officer or into court in obedience to the process and judgements of the court? We confess we cannot imagine. All parties are protected, and justice is done speedily and economically, and in full accord with established and recognized procedures.

The case of *Mortmer vs. Young*, 127 Pac. 2nd 950, relied on by Appellant is not in point in this issue. It

holds merely that a chose in action for fraud is sufficiently in the control of the owner thereof that notice to him will support an *execution sale* of the chose upon which the purchaser might later bring action against the tortfeasor. It is not a case such as the one at bar in which the judgement creditor seeks to *collect* the chose in action by judicial process. And it held the *chose subject to levy by execution*.

Neither is Appellant's case of *Bassett v. McCarty*, 101 P. 2nd 575, where the Washington Court, manifestly strongly influenced by what it felt would be unwarranted hardship on the garnishee, under the Washington Statute, held generally that "unliquidated" tort claims are not subject to garnishment, and that the rendering of a verdict does not change this rule while the action is still pending in court before entry of judgement, as the claim is not under the control of the garnishee. The latter ruling can perhaps be justified on the ground that once action is filed on the claim, the matter is in the control of the court, which, for orderly procedure, must control the parties appearing and consent to any substitution. An action was already pending on the claim, and a second garnishee action manifestly should abate. The effective result might well have been different if the plaintiff had levied on the claim and then filed a petition to intervene or to be substituted as a plaintiff in the action pending. No prior action was pending when garnishment was served herein. It must be remembered also that the claim in the case at bar has been liquidated from its inception.

Moreover, California has reached the contrary conclusion. See

Department of Water and Power of the City  
of Los Angeles v. Inyo Chemical Co., 108  
Pac. 2nd 410.

See also

Sniderman v. Nerone (Pa.), 9 Atl. 2nd 335,  
and

Barr v. Warner (Ore.), 62 Pac. 99.

POINT 4. THE AUTHORITIES RELIED ON BY APPELLANT ARE NOT APPLICABLE TO THIS CASE ARISING UNDER THE PECULIAR UTAH RULES.

Each case is, of course, limited by the facts involved, the statutes controlling and the rule of construction applicable.

Few of the cases cited by appellant appear to come from jurisdictions where, as here, a liberal rule of construction must be followed. Certainly the decisions cited apply a very strict rule of construction to the garnishment statutes considered.

And, as we have before indicated, none of the jurisdictions relied on by appellant have statutes which even approach our Rules in their broad and comprehensive scope and terminology, which conforms so well to the basic philosophy behind the Rules that every right shall be supported by a direct, speedy, simple and inexpensive remedy. Accordingly decisions from other jurisdictions restricting and limiting garnishment therein can have little if any application under the Utah Rules.

Other decisions relied on by Appellant are distinguishable on their facts. In an effort to assist the court we will consider some of these very briefly.

The case of *Brenau College v. Mincey*, 61 S.E. 2nd



301, cited on Page 7 of Appellant's Brief, involved a tort claim for loss of the services of claimant's wife—a claim which was purely personal to the claimant and which he could not assign, even voluntarily. It was unliquidated. The claim here is liquidated and it is assignable, as we shall see. The fact that such a claim is not assignable is of the utmost significance, as appears from *Lewis v. Barnett* (Kan.), 33 Pac. 2nd 331, 93 A.L.R. 1082, cited on page 7 of Appellant's Brief. There attempt was made to garnish an unliquidated chose in action for *personal injuries*, which is universally held to be incapable of assignment, as is an injury to reputation. See

6 C.J.S. Assignments, Sec. 33, p. 1081.

The Kansas Court declared, "Garnishment is in effect a formal judicial assignment of such actual property, money and credits that would be capable of being voluntarily assigned." It held that as the claimant could not have transferred it voluntarily, it could not be transferred involuntarily by garnishment.

Similarly the cases of *Coty v. Cogswell*, 50 Pac. 2nd 249; *Pacific Gas and Electric Co. v. Nakano*, 87 Pac. 2nd 700, 121 A.L.R. 417; and *McNeilly v. Furman*, 95 Atl. 2nd 267, 35 A.L.R. 2nd 1436, cited on page 7 of Appellant's Brief, all involve *unliquidated* and *non-assignable* claims based on personal injury.

The case of *Black v. Plumb*, 29 Pac. 2nd 708, 91 A.L.R. 1334, cited on page 5 of Appellant's Brief, also involves an *unliquidated* claim. While it is true that the claim there was assignable (a claim for conversion of property), the Colorado Court there does not consider that matter, nor does it consider the possible application

of the phrase "chose in action" in the Colorado Statute, but blindly, and (we believe) erroneously followed *Donald Co. v. Dubinsky*, 219 Pac. 209, in which it was properly held that garnishment was not available in aid of an action for *deceit*, a tort claim, where under the Colorado Code of Civil Procedure, Section 97, garnishment is available only in aid of an action on a contract. Certainly, from the fact that garnishment will not issue except in a contract action it does not follow that tort claims are not subject to attachment by garnishment where the writ has been properly issued. If this were true, we would claim this case as authority to support the position of plaintiffs herein, for here we have the converse: a rule authorizing garnishment in aid of unliquidated non-assignable tort claims, so that, by the same reasoning, unliquidated, non-assignable, tort claims should be garnishable.

We have already mentioned briefly the cases of *Mortimer vs. Young*, 127 Pac. 2d 950, and *Bassett v. McCarty*, 101 Pac. 2d 575 (page 8 of Appellant's Brief). The first held that a *chose in action* for fraud is subject to levy and sale under execution, and hence supports plaintiffs' position here, and the second involved an unassignable tort claim for slander. Interestingly enough the same court has held that a cause of action for alienation of affections is a "*debt*" in aid of which garnishment may issue under the Washington Statute!

As we have said, it is admitted that the claim involved in the case at bar is, and since its inception it has been *liquidated*. As it arises either on contract or (according to Appellant's view) on tort for injury to the

defendant's property or estate (as distinguished from his person or reputation) it is assignable :

6 C.J.S. Assignments, sections 31 and 34, pp. 1080 and 1082.

Even an unliquidated claim on an insurance policy may be subject to garnishment. See,

Brainard vs. Rogers, 239 Pac. 1095, and  
Security Building and Loan Association vs.  
Ward (Okla.), 50 Pac. 2nd, 651.

It is submitted that the proper rule in Utah is that any *chose in action*, in contract, in tort, or statute, or otherwise, and whether liquidated or unliquidated, is subject to garnishment if it is assignable. However, inasmuch as the claim here is liquidated, it is unnecessary to decide in this case whether an unliquidated claim is within the rule.

It may well be that the legislature, by the adoption of the statute last appearing as section 104-19-23, U.C.A., 1943, intended to make otherwise non-assignable choses in action subject to garnishment under the liberal construction there specifically required. If so, this would make a change in the substantive common law on assignability of claims which the Court could not properly change by a rule of procedure. But here again it is unnecessary to decide the point, as our claim is assignable.

## CONCLUSION

It is respectfully submitted that the claim of the defendant Kirkendall against the appellant garnishee is a liquidated, assignable debt, credit, or chose in action,

or is otherwise property of the defendant in the garnishee's control, and as such it is subject to the garnishment issued on plaintiffs' judgement and served on the Garnishee.

Common justice requires that if the defendant has a valid claim it be made subject to the payment of plaintiffs' modest judgement which is one of the factors on which the claim is based. Defendant has nothing else on which to levy. The liberal construction for which the Rules themselves provide equally requires this result.

It is respectfully submitted that there is no error in the interlocutory order appealed from, and it should be affirmed and the garnishment proceeding remanded for trial under the provisions of Rule 64D(h).

Respectfully submitted,

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