

1958

W. L. Beard et al v. White, Green and Addison Associates, Inc. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Greenwood and Swan; Allen M. Swan; Attorneys for Appellant;

Recommended Citation

Brief of Appellant, *Beard v. White, Green and Addison Associates, inc.*, No. 8865 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3102

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

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

FILED

W. L. BEARD, ELDON L. SUTHER-
LAND, and VERNON LEHR

Plaintiffs and Respondents,

vs.

WHITE, GREEN and ADDISON AS-
SOCIATES, INC., a corporation,

Defendant and Appellant,

vs.

E. B. YAKES

Defendant and Respondent.

JUL 28 1958

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

GREENWOOD AND SWAN

and ALLEN M. SWAN

Attorneys for Appellant

TABLE OF CONTENTS

	<i>Page</i>
Statement of Facts.....	1
Statement of Points.....	14
Argument	15
POINT I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO QUASH SERVICE OF PROCESS AND SET ASIDE DECREE AND WRIT OF POSSESSION AS TO THE CROSS-COMPLAINT, SINCE THE FINDINGS WERE WHOLLY UN- SUPPORTED BY COMPETENT EVIDENCE OR WERE MANIFESTLY CONTROLLED OR INFLU- ENCED BY ERROR OF LAW.	15
POINT II. ON THE EVIDENCE IN THE RECORD THE TRIAL COURT SHOULD BE DIRECTED TO MAKE FINDINGS AND ENTER ITS ORDER QUASH- ING SERVICE OF PLAINTIFF'S COMPLAINT ON DEFENDANT COMPANY AND SETTING ASIDE DEFAULT.	23
Conclusion	24

AUTHORITIES CITED

30 A.L.R. 176	15
20 Am. Jur., Evidence, Sec. 598.....	21
42 Am. Jur., Process, Sec. 107.....	17
Bass v. American Products Export & Import Corp., 30 ALR 168, 124 S.C. 346, 117 S.E. 594.....	15, 22
Boston Acme Mines Development Company v. Clawson, 66 Utah 103, 240 Pac. 165	19
Conn. Mutual Life Insurance Company v. Spratley, 172 U.S. 602, 43 L. Ed. 569, 19 Sup. Ct. 308.....	17
18 Fletcher on Corporations, Sec. 8737.....	17
J. B. Blades Lumber Company v. Finance Co. of America, 204 N.C. 285, 168 S.E. 219.....	21
Jameson v. First Savings Bank & Trust Co., 103 ALR 1492, 40 N.M. 133, 55 P. 2nd 743.....	22
Reader v. District Court, 98 Utah 1, 94 P. 2nd 858.....	20, 24
Whitehurst v. Kerr, 153 N.C. 76, 68 S.E. 913.....	21

RULES CITED

Rule 4 (e) (4) Utah Rules of Civil Procedure.....	17
---	----

IN THE SUPREME COURT of the STATE OF UTAH

W. L. BEARD, ELDON L. SUTHER-
LAND, and VERNON LEHR
Plaintiffs and Respondents,

vs.

WHITE, GREEN and ADDISON AS-
SOCIATES, INC., a corporation,
Defendant and Appellant,

vs.

E. B. YAKES
Defendant and Respondent.

Case
No. 8865

BRIEF OF APPELLANT

FACTS OF THE CASE

This appeal is taken from the order of the Trial Court denying the motion of White, Green and Addison Associates, Inc., to Quash Officer's Return of Process and to set Aside Decree and Writ of Possession. Plaintiffs had commenced in the District Court of San Juan County, Utah, an action for eviction and to quiet title to certain mining claims. Process was served at Denver, Colorado, on October 2, 1956, on a Richard Jerris, alleged to be the field manager and agent of Defendant, White, Green and Addison Associates, Inc. A default was entered by the Clerk of the Court on the 31st of October,

1956, no answer or other pleading having been filed by Defendant, White, Green and Addison Associates, Inc. On March 18, 1957, Defendant, White, Green and Addison Associates, Inc., was allegedly served with an Answer and a Cross-complaint wherein Defendant, E. B. Yakes, asked that the lease of White, Green and Addison Associates, Inc. be cancelled and that title to certain mining claims be quieted as against White, Green and Addison Associates, Inc.

The original return of service was amended to specify the particular papers served. On April 16, 1957, the Clerk of the Court, upon the request of the Defendant, E. B. Yakes, entered a default against White, Green and Addison Associates, Inc. on the Cross-complaint and on the same date, the Court signed a Decree reciting the default of Defendant, White, Green and Addison Associates, Inc., cancelling the lease of said Defendant on certain mining claims and quieting title in the mining claims in Defendant, E. B. Yakes. On July 29, 1957, Defendant, White, Green and Addison Associates, Inc., moved to quash the officers' returns of service of process dated October 2, 1956, and March 19, 1957, and further moved to set aside the Decree and Writ of Possession entered by the Trial Court April 16, 1957. On September 25, 1957, Defendant, White, Green and Addison Associates, Inc., filed an Answer to Plaintiff's Complaint and a Proposed Answer to the Cross-complaint of Defendant, E. B. Yakes. Plaintiffs and Defendant, E. B. Yakes, served notice on counsel for White, Green and Addison Associates, Inc., that on November 7, 1957, at the hearing

on the Defendant's Motion to Quash Return of Service of Process and to Set Aside Decree and Writ of Possession, they would request the Court for leave to amend the returns and proofs of service of process and for an order permitting the amended returns of service of process to be filed in the action nunc pro tunc as of the date of the original returns. Following the hearing which had been continued to December 10, 1957, the Court denied the Defendant's motions. The Court entered findings of fact and conclusions of law and ordered the filing of another amended return of service of process. Defendant's motion to set aside the findings of fact and conclusions of law was denied February 18, 1958.

At the hearing the parties stipulated that White, Green and Addison Associates, Inc., was a foreign corporation not qualified to do business within the state of Utah (Tr. 6). Attorney William Ela of Grand Junction, Colorado, then testified that he accompanied Deputy Sheriff R. D. McAllister of San Juan County on March 18, 1957 to the Hop Creek area where the purported service of summons was made on the Defendant. Upon arriving at the Hop Creek area, Sheriff McAllister took two copies of the summons and two copies of the answer and Cross-complaint together with the attached exhibits and put a rubber stamp on them to show who was making the service, the date of service and his title (Tr. 7). The attorney testified that they had never been able to serve the Defendant in Denver, Colorado, (Tr. 10), although an effort had been made (Tr. 8); that he had discovered the corporation had no process agent in the state of

Utah (Tr. 11). The attorney testified he took a photograph on a prior occasion of a sign posted at the entrance to the Hop Creek property identifying it as being worked by White, Green and Addison Associates, Inc. and that he saw the same sign on March 18, 1957 (Tr. 13). He testified to a conversation in the presence of the Deputy Sheriff and the jeep driver with a man named Bottomley, which gentleman wore a badge on his hat identifying himself with Defendant, White, Green and Addison Associates, Inc. (Tr. 15). The Sheriff first handed the papers to Mr. Bottomley and Ela stated that he asked Bottomley what his name was and he identified himself. Bottomley was then asked if he was in charge of the property and he replied he was the foreman. He was asked whether he worked for White, Green and Addison Associates, Inc., and he replied that he did. He was asked if there was any person of higher authority than himself in charge of the property to which he answered that there was not. He was asked from whom he received his pay checks and he answered that he received them from the Trans World Mining Corporation, but was allegedly confused about whether there was one or two corporations (Tr. 16). At this time the attorney took a picture of a sign on a trailer identifying it as being the property of White, Green and Addison Associates, Inc. Attorney Ela stated he asked Bottomley what he and the other men were doing in the way of work and Bottomley said that everything was going very satisfactorily to him, but that if he wanted any detailed information, he would have to get it from the officers

of the corporation in the Boston Building in Denver (Tr. 17).

On cross-examination, the attorney stated that in October of 1956, he had been on the same property and found there present a man who identified himself as Miller who stated that he was foreman (Tr. 18). The attorney had made this trip to determine whether White, Green and Addison Associates, Inc. was still in possession of the mining claims and to see what the status of their workings were on the ground. The attorney denied that he had seen Miller on the property in March of 1957 (Tr. 20), although he admitted that Miller could have been one of the men in the group of workmen. The attorney did not inquire of Bottomley as to the whereabouts of Mr. Miller (Tr. 22) nor did he inquire of Bottomley as to where he obtained his authority. The attorney stated that Bottomley appeared to be confused as to the distinction between White, Green and Addison Associates, Inc. and another corporation, Trans World Mining Corporation (Tr. 22).

Deputy Sheriff Raymond McAllister first testified that he was unable to recall clearly any conversation except when Mr. Bottomley didn't want Mr. Ela to take a picture of the trailer on the property (Tr. 25). When prompted by his counsel (Tr. 26), the Deputy Sheriff was able to recall that Mr. Bottomley told Mr. Ela that he was foreman for both White, Green and Addison Associates, Inc. and Trans World Mining Corporation. On cross-examination the Deputy Sheriff testified that in July of 1956 he was on the same property at which time

he was informed that a Mr. Hank Miller was superintendent (Tr. 27). He stated that he did not know prior to March 18, 1957 that Bottomley was foreman of the property (Tr. 28) and had no knowledge as to Bottomley's capacity with the Defendant company prior to that date; that he did not ask whether any officer or other agent was present other than Bottomley because it didn't matter much to him (Tr. 29), nor did he ask Bottomley where he got his authority; that he heard Bottomley state that he was foreman for both outfits in answer to Mr. Ela's question; that he could not recall on March 18, 1957 whether he asked of the whereabouts of Mr. Miller, but believed that he did not (Tr. 30).

Attorney F. Bennion Redd testified that he was consulted by Mr. Miles White, an officer of the Defendant, White, Green and Addison Associates, Inc., and asked to settle two law suits by paying certain claims (Tr. 36). An attempt had previously been made to show that the papers in the two law suits had been served on Mr. Bottomley (Tr. 33), but the testimony to this effect was objected to and the objection sustained by the Court (Tr. 33). On cross examination Mr. Redd stated that he had never entered an appearance in either case on behalf of White, Green and Addison Associates, Inc. (Tr. 38), nor discussed with his client, agency or the authority of the person served in the matter. He stated he did not know who was served in the matter.

Defendant called Mr. Carl J. Bottomley who testified that on the occasion when Mr. Ela and Deputy Sheriff McAllister came to Hop Creek he was present

in camp with three other employees (Tr. 41) and that he recalled the deputy stating that he had some papers for him. He recalled receiving the papers and the subsequent conversations respecting the taking of a picture of the trailer, but could recall no conversation with Mr. Ela respecting the papers (Tr. 41). He stated that he stuck the papers in a suit case and forgot about them (Tr. 41). He stated that his job on March 18, 1957 was that of handyman or general laborer (Tr. 42); that Mr. Hank Miller was supervisor at the camp and that he did what Mr. Miller told him to; that Mr. Miller was his boss. He stated he had no conversation with Mr. Miller respecting the receipt of the papers nor with any officer of the company (Tr. 42). He stated that he was employed by White, Green and Addison Associates, Inc., in August of 1956, but that he was never employed by Trans World Mining Corporation. He stated that when he was sent to Hop Creek from Denver, he was informed that Mr. Miller would be superintendent of the camp (Tr. 43). He stated that he notified no one concerning the papers served upon him, but a month prior to the hearing while unpacking at another camp, he found them (Tr. 44). He stated that he had never been involved in Court proceedings and didn't think the papers were important (Tr. 45). He denied that he had told Mr. Ela he was foreman of the camp and stated he had never represented to the Sheriff that he was foreman (Tr. 45); that he was never left in charge of the camp (Tr. 46).

On cross-examination Mr. Bottomley stated that Hank Miller had left camp the night before March 18,

1957 (Tr. 48), and that he didn't know where he was going. Bottomley again denied that he told Mr. Ela that he was in charge of the camp on that date (Tr. 48); that he was engaged in cooking on the date the process was served. He stated that he saw Miller a couple of days after March 18th, but that he didn't tell Miller about the service of papers because he didn't think it was important (Tr. 51). He stated he had been served with papers three or four times and that all the papers given to him he had kept in his suit case until about a month before the hearing (Tr. 52). He did not know how White, Green and Addison Associates, Inc. had found out about other law suits. He stated that his authority was only that of a common laborer (Tr. 54) even though he had told Mr. Ela to get off the property; he explained that the men understood that nobody was to trespass (Tr. 54). He stated that in January he was on the property when the Sheriff made an attachment of certain personal property (Tr. 57).

On re-direct examination Mr. Bottomley testified that on no occasion did he recall the Sheriff asking whether he was foreman or in charge of the camp, and that at all times while he was there he received his instructions from Mr. Miller (Tr. 58). On re-cross examination, Mr. Bottomley stated that he believed at one time he told the Sheriff that he couldn't accept papers then served on him because he didn't have any responsibility (Tr. 59).

Mr. Henry Miller, called by Defendant, testified that he had been employed by White, Green and Addison

Associates, Inc. for about 18 months on the Hop Creek property and was property superintendent (Tr. 60); that in March of 1957, he was living at the Hop Creek property and that he left the camp for periods of a day or two at a time to attend meetings (Tr. 62); that in July of 1956 he had a conversation with Sheriff Seth Wright in which he told the Sheriff he was in charge of the property at Hop Creek (Tr. 64); that a similar conversation occurred in the presence of Deputy McAllister (Tr. 64); that he was appointed superintendent of the property by Miles White; that he never at any time had a conversation with Mr. Bottomley regarding the receipt of any papers (Tr. 65); that as general superintendent he kept reports and saw that the men got the work done (Tr. 67); that he first learned of this law suit in June of 1957 when Sheriff Seth Wright said he was going to come out and throw them off the property in ten days (Tr. 67).

Mr. Miles White, called by Defendant, testified that he was president of White, Green and Addison Associates, Inc., (Tr. 68); that he hired Bottomley as a general laborer in Denver, Colorado, approximately a year and a half prior to the hearing; that Bottomley never held any other position with the company than general laborer (Tr. 69); that Bottomley was instructed upon his being hired that he would be placed in a camp under a foreman or superintendent and that he would follow that man's instructions explicitly (Tr. 70); that Henry Miller was placed in charge of the Hop Creek camp about the 1st of July, 1956, and had remained in charge of the camp

from that date until the hearing; that he first had knowledge of the commencement of this action about August 1, 1957 (Tr. 72); that Mr. Bottomley never informed him that an action had been commenced, nor did Mr. Miller inform him of the action (Tr. 73); that he was informed of the commencement of the action by an attorney in Denver, Colorado; that he then contacted Utah counsel with respect to handling the matter. Mr. White testified to a conversation July 1st or 2nd, 1956, at the Hop Creek Camp at which Sheriff Seth Wright and some state police and the camp crew were present and at that time Mr. Henry Miller had been introduced to the sheriff as camp superintendent (Tr. 75).

On cross examination, Mr. White testified that White, Green and Addison Associates, Inc., was a Colorado corporation and that the company had an office at 311 Boston Building in Denver, Colorado (Tr. 79). When questioned concerning receipt of a letter dated October 19, 1957, he stated it had not been received (Tr. 80). He stated that the first notice he received of an attachment of certain property by the sheriff of San Juan County was when he telephoned the company's creditor to pay the obligation (Tr. 82); that he did not call Deputy Sheriff McAllister regarding the attachment within twenty-four hours of that event (Tr. 83); that Mr. Addison, his associate, did not telephone the sheriff's office or he would have known of it; that Mr. Green was not conscious of the matter at all. Mr. White then gave the names and addresses of the officers of the

company and stated that his first inkling of this law suit was in July or August of 1957 while passing through Monticello (Tr. 86); that Henry Miller had advised him that the Sheriff was going to evict the company from the Hop Creek property within ten days; that it was on that occasion that an attorney was contacted.

Mr. White was asked on re-direct examination concerning the residence of Mr. Jervis, the party served with the original Complaint in this matter by Plaintiffs. He testified that Mr. Jervis was employed by the Defendant company as a general laborer (Tr. 89), and that the address where service was purportedly made, 3256 Wyandotte Street, Denver, Colorado, was the residence of one Jack Hennessey, another employee; that employees of the company in the field would stay at Mr. Hennessey's home when in Denver (Tr. 90); that the first conversation he had had with Mr. Jervis regarding service of papers was that morning (December 10, 1957); that Mr. Jervis had never contacted him or his company regarding this action prior to that time; that Jervis never gave him any papers served upon Jervis in this action (Tr. 91). On re-cross examination White stated that 3256 Wyandotte Street in Denver was a residential building.

Mr. Richard Malcolm Jervis then testified that during the month of October, 1956, he was employed by Defendant company; that he was at 3256 Wyandotte Street in Denver during October 1956 when an attempt to serve some papers was made on him (Tr. 93); that a fellow knocked on the door and asked him who he was;

that he told him his name and in turn asked him who he was, and he produced credentials from the sheriff's office; that the officer asked Jervis if he worked for White, Green and Addison, and Jervis answered that he did; that the officer had papers in his hand and said "Here"; that Jervis answered "I'm sorry, I can't take those"; that the officer asked, "Why not?"; that Jervis answered, "I don't want to risk my job. I have no authority to accept papers or whatever you have there" (Tr. 94); that the officer went on to explain that the papers were legal process and that Jervis was authorized to take them; that the officer hit him in the chest with the papers while he was standing at his normal stance; that the papers dropped to the front porch; that Jervis stated he wasn't going to pick them up and the officer stated, "It doesn't make any difference to me. They have been served, you can leave them there"; that the officer then walked off the porch and Jervis walked back into the residence; that he never picked the papers up; that he told Hennessey what had happened, at the same time going out the back exit of the residence to meet a party he was expecting, that he had seen neither Mr. Addison or Mr. White, the only officers of the corporation he knew, since the previous summer; that he informed no one of the service of the papers except Mr. Hennessey at that time; that he did not know what the papers were; that he had never held any position with the company other than general laborer (Tr. 96).

Mr. McAllister, called by Plaintiff as a rebuttal witness, testified that after the attachment of the

property on Hop Creek he received a telephone call within the next day (Tr. 97).

Upon the foregoing testimony the Trial Court upheld the validity of service of process by Cross-complainant, E. B. Yakes, upon White, Green and Addison Associates, Inc., by virtue of the delivery of papers by Deputy Sheriff R. D. McAllister to Carl J. Bottomley at Hop Creek, La Sal, Utah, specifically finding that Bottomley was foreman in charge of all of the White, Green and Addison Associates, Inc. properties in the Hop Creek area and that there was no person of higher authority in the employ of White, Green and Addison Associates, Inc. upon whom service could be had in San Juan County, nor in the state of Utah at the time of such service. Findings were also made that the Defendant corporation was doing business within the state of Utah without qualifying and that there was no officer, managing or general agent, or other agent authorized by appointment or law to receive service of process, and that since no such officer or agent was found in San Juan County, Utah, by the Sheriff after diligent search that service upon Bottomley as an agent having the management, direction and control of the properties of said corporation was a sufficient compliance with the provisions of Rule 4 (e) (4) of the Utah Rules of Civil Procedure.

The Court further found that actual knowledge of the service of process upon Bottomley reached the Defendant corporation in sufficient time to allow the Defendant to properly protect itself before the Court

and that actual knowledge of the pendency of the action was received by the corporation as a result of service of process by the Sheriff of the City and County of Denver, Colorado, upon Richard Jervis even though said service was not essential to the determination of the issue before the Court; that the amended return of service signed by Seth F. Wright, Sheriff of San Juan County, should be filed, nunc pro tunc, as of the date of the filing of the original return of service so that the return of service might "speak the truth" as to the service made upon the Defendant.

Based upon the Findings of Fact and Conclusions of Law, the Court ordered that the Defendant's Motion to Quash Service of Process and to Set Aside Decree and Writ of Possession be denied and that the amended return of service dated March 19, 1957, be ordered filed nunc pro tunc as of the date of the filing of the original return of service. The Court made no findings or order with respect to the Motion to Quash the Service of Plaintiff's Complaint on Richard Jervis.

STATEMENTS OF POINTS

POINT I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO QUASH SERVICE OF PROCESS AND SET ASIDE DECREE AND WRIT OF POSSESSION AS TO THE CROSS-COMPLAINT, SINCE THE FINDINGS WERE WHOLLY UNSUPPORTED BY COMPETENT EVIDENCE OR WERE MANIFESTLY CONTROLLED OR INFLUENCED BY ERROR OF LAW.

POINT II.

ON THE EVIDENCE IN THE RECORD THE TRIAL COURT SHOULD BE DIRECTED TO MAKE FINDINGS AND ENTER ITS ORDER QUASHING SERVICE OF PLAINTIFF'S COMPLAINT ON DEFENDANT COMPANY AND SETTING ASIDE DEFAULT.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO QUASH SERVICE OF PROCESS AND SET ASIDE DECREE AND WRIT OF POSSESSION AS TO THE CROSS-COMPLAINT, SINCE THE FINDINGS WERE WHOLLY UNSUPPORTED BY COMPETENT EVIDENCE OR WERE MANIFESTLY CONTROLLED OR INFLUENCED BY ERROR OF LAW.

It has been stated by good authority that a Supreme Court cannot, in a law case, review the findings of the trial judge on the question of the existence of an agency which will sustain a service of process unless they were wholly unsupported by the evidence, or were manifestly controlled or influenced by error of law. *Bass v. American Products Export & Import Corp.*, 30 ALR 168, 124 S.C. 346, 117 S.E. 594. It will be our purpose in this argument to show that the findings of the trial court in this case were based upon incompetent evidence or manifestly controlled or influenced by error of law.

General principles with respect to service upon an agent by implication of law are set out by the text writer at 30 ALR 176. It is noted that in dealing with service of process on an agent, especially in case the process is directed against a foreign corporation, the

Court is confronted with the question whether due process of law is being allowed to the party Defendant; for, as the service of process goes to the jurisdiction of the Court over the person, the word "agent", as used in the statute authorizing service of process on agents of foreign corporations, must be so construed as to conform with principals of natural justice, so that the service will constitute due process of law.

In cases discussing the sufficiency of service of process on a person in the employment of the party named in the writ, the Courts have, in general, taken the view that the agent must be one whose connection with the company is such, or whose employment is of such character, that it would be implied that he had authority to receive service of process, and would be likely to inform the party of the service.

The United States Supreme Court has said that in the absence of any express authority given to a person to receive service of process on behalf of a foreign corporation, the question as to whether the service upon such person is sufficient service upon the corporation depends upon a review of the surrounding facts, and upon the inferences which the Court might properly draw therefrom; and if it appears that there is a law of the state in respect to the service of process on foreign corporations and that the character of the agency is such as to render it fair, reasonable, and just to imply an authority on the part of the agent to receive such service, the law will and ought to draw such inference and imply such authority, and service under such cir-

cumstances upon a person of that character would be sufficient. *Conn. Mutual Life Insurance Company v. Spratley* (1899) 172 U.S. 602, 43 L. Ed. 569, 19 Sup. Ct. 308. As stated at 42 Am. Jur. Process Sec. 107, pg. 93, "The fundamental object of all laws relating to service of process is to give that notice which will, in the nature of things, most likely bring the attention of the corporation to the commencement of proceedings against it."

The question, then, in this case is whether the character of the agent served was such as to imply an authority on his part to receive service on behalf of the corporation, or, more precisely, was Bottomley an agent within the meaning of Rule 4 (e) (4) Utah Rules of Civil Procedure which states in part, "If no such officer or agent can be found in the county in which the action is brought, then (service may be had) upon any such officer or agent, or any clerk, cashier, managing agent, chief clerk or other agent having the management, direction or control of any property of such corporation, partnership, or other unincorporated association within the state". At 18 Fletcher on Corporations, Sec. 8737, it is stated, "What persons come within the meaning of the term 'agent' has been the subject of much discussion. However, the word 'agent' in a statute authorizing service of process on an agent of a foreign corporation does not mean every man who is entrusted with a commission or employment, but designates the principal officers of the corporation who either generally or in respect to some particular department of the corporate business have a controlling

authority either general or special.*** He must be its representative within the jurisdiction, either as acting therein on its behalf by its authority, or as expressly or impliedly authorized by it to receive service.*** In other words, the 'other agent' must possess some of the powers possessed by the persons named immediately preceding the phrase, 'or other agent'". In short, the rule of ejusdem generis should be applied to a statute such has been enacted in Utah and the words "or other agent having the management, direction or control of any property of such corporation, partnership, or other unincorporated association within the state", should be construed in the light of the phrases immediately preceding.

As will be noted, the rule names as a superior class upon whom service can be made, an "officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process". The inferior class is then listed as follows, "If no *such* officer or agent can be found in the county in which the action is brought, then upon any *such* officer or agent, or any clerk, cashier, managing agent, chief clerk or other agent having the management direction or control of any property of such corporation, partnership, or other unincorporated association within the state". The use of the word "such" in the rule would seem to clearly refer the reader back to the general tenor of the preceding sentence and require that the person served have some of the characteristics of the general or managing agent.

The Utah Rule on service of process on corporations is unlike the Federal Rule in that the Federal Rule does not contain the portion of the rule upon which service in this case is founded. We are thus unable to refer to federal cases which have construed the portion of the rule in question. In *Boston Acme Mines Development Company v. Clawson*, 66 Utah 103, 240 Pac. 165, the Supreme Court of this state had occasion to construe the statute in effect at that time which provided that service of a foreign corporation must be made on the "president, secretary, treasurer or other officer thereof or on the person designated by such corporation as one upon whom process may be served." If no such person could be found, "then upon any clerk, superintendent, general agent, cashier, principal director, ticket agent, station keeper, or other agent having the management, direction or control of any property of such corporation, company or association." In that case, the sheriff served an inferior agent of the Boston Acme Mines Development Company, a Mr. M. K. Heavner, and the Defendant challenged the sufficiency of the service, first, on the ground that the return did not show what kind of an agent Heavner was, and second, even if he were agent upon whom service could be made, such service could not have been made until efforts had been diligently made to find and serve the president, the secretary, treasurer or other person of the superior class named in the statute. The Court sustained the defendant and held the agent upon whom service was made must be such as is named in the statute; otherwise, the service

is insufficient. In a later case, *Reader v. District Court*, 98 Utah 1, 94 P. 2nd 858, the secretary of a corporation was served by delivering a copy of the process to his wife, and the Court found that it did not acquire jurisdiction over the corporation and that the judgment rendered against the corporation was void. These Utah cases emphasize the need for strict compliance with the statute involved.

In the instant case, the Trial Court made a finding that Bottomley was foreman of Defendant corporation in charge of the property at Hop Creek. The testimony of Attorney Elā and Deputy McAllister as to the agency of Bottomley was accepted in the face of contradictory testimony by Mr. Bottomley, Mr. White and Mr. Miller. Whether the Supreme Court is bound by the findings of the Trial Court in this respect will be hereafter discussed, but it should be emphasized that if Bottomley's testimony were, in fact, true, and the process served upon him put in a trunk until approximately a month before the hearing on Motion to Quash Service, Defendant has most certainly been deprived of its property without due process of law.

It has been stated, generally, that the person served with process must be, instead of a mere subordinate employee without discretion, one regularly employed, having some charge or measure of control over the business entrusted to him or of some feature thereof, and he must be of sufficient character and rank as to afford reasonable assurance that he will communicate to his company the fact that the process has been served upon

him. *Whitehurst v. Kerr* (1910) 153 N.C. 76, 68 S.E. 913; *J. B. Blades Lumber Company v. Finance Co. of America* (1933) 204 N.C. 285, 168 S.E. 219. There would seem to be little assurance, if any, that a camp cook, who had never completed his secondary education (Tr. 58) and who had never himself been involved in a legal proceeding, would communicate the fact of service to his company.

We are aware that the Trial Court found Bottomley to be foreman at Hop Creek, and if he had been such, perhaps the service in this case would have complied with the statutory requirements. But the evidence supporting that finding is not sufficient to uphold it since it was apparently based wholly upon the alleged declaration of the agent himself that he was "foreman." This evidence is incompetent and is the only evidence in the record of Bottomley being anything but a laborer, subject to the immediate supervision of Mr. Miller who was at all times within the state of Utah and in charge of Hop Creek.

As a general rule, the admissions, statements, and declarations of one alleged to be the agent of another, other than his testimony in the case in which the issue arises, are not admissible either to prove the fact of his agency or the extent of his authority as an agent, 20 Am. Jur. Evidence Sec. 598, pg. 508. This rule is for the protection of the party whom it is sought to bind as principal. In other words, the agency sought to be established must, *prima facie*, be proved independently of the declaration of the alleged agent. If this require-

ment be met, then the declarations become admissible in corroboration only where they constitute a part of the *res gestae* and were made at the time of the transaction in question. *Jameson v. First Savings Bank & Trust Co.*, 103 ALR 1492, 40 N.M. 133, 55 P. 2nd 743.

While the *employment* of Bottomley by the Defendant may have been established independently of Bottomley's declaration, and thus, Bottomley's statement, as narrated by Ela and Deputy McAllister, may have been admissible to show the nature of Bottomley's authority, the Trial Court did more than admit the evidence. It made the declaration the basis for its finding of the quality of agency required by the Utah Rules of Civil Procedure in the absence of any competent corroborative testimony. This is the very thing the courts have said cannot be done. *Bass v. American Products Export and Import Corp.*, *supra*.

What evidence is there in this case tending to establish an agency on the part of Bottomley more than that of mere employment, except his own alleged declaration? The sheriff had obtained personal knowledge a short time before that the superintendent of the property was a man named Henry Miller whom he knew by sight. The officer of the corporation who appointed Bottomley employed him as a general laborer only. Nothing about the signs on the property or the badges worn by the men identified Bottomley as foreman or in charge. The evidence respecting settlement of certain claims on which suit had been brought in other actions

and in which actions service had allegedly been made on Bottomley, is hardly the type of evidence to support an agency in view of the fact that the corporation never at any time appeared in the actions and in view of Mr. White's uncontradicted testimony that he first learned of the attachment of property in one of the other actions in a telephone conversation with the company's creditor after the attachment occurred. The Trial Court's finding was obviously based on incompetent evidence or controlled or influenced by error of law, the error of law being a belief by the court that the alleged declaration of Bottomley was sufficient alone.

POINT II.

ON THE EVIDENCE IN THE RECORD THE TRIAL COURT SHOULD BE DIRECTED TO MAKE FINDINGS AND ENTER ITS ORDER QUASHING SERVICE OF PLAINTIFF'S COMPLAINT ON DEFENDANT COMPANY AND SETTING ASIDE DEFAULT.

What has been said with respect to the service on Bottomley of the Answer and Cross-Complaint can be said with respect to the service of the complaint on Jervis, the Denver employee, with the added observation that there was no testimony of alleged declarations pertaining to that attempted service. All of the evidence at the hearing supported a finding that Jervis was an inferior employee, without any authority sufficient to bring him within the definition of "other agent" as required by statute.

The Trial Court should have found that the service of the Complaint on Jervis was insufficient, and on this

ground, should have quashed the return of service of process and set aside the default entered by the Clerk of the Court.

Actual notice of the pendency of the action acquired by corporate officers, even if this fact were shown, would not be sufficient to sustain a service of process clearly invalid under the statute in view of the strict compliance of the statute required by our Court. See *Reader v. District Court*, supra.

CONCLUSION

This case points up the dangers inherent in attempting service of process on corporations by delivery of the papers to inferior employees. We are unable to estimate how many times inadequate service is actually allowed to pass in our courts because unchallenged by the corporate Defendant, but we suspect that it occurs quite frequently. When challenged, this type of inadequate service should be quashed in the interests of natural justice and the parties seeking to acquire jurisdiction be directed to comply strictly with the statute as construed in the light of the requirements for due process.

Respectfully submitted,

GREENWOOD AND SWAN

and ALLEN M. SWAN

Attorneys for Appellant