

1959

# George H. Conn v. Rich Whitmore : Brief of Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

GEORGE H. CONN,

*Plaintiff and Appellant,*

vs.

RICH WHITMORE,

*Defendant and Respondent.*

FILED  
FEB 16 1959

Utah Supreme Court, Utah

No.

8927

UNIVERSITY UTAH

AUG 6 1959

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## APPELLANT'S BRIEF

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## APPELLANT'S BRIEF

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### STATEMENT OF FACTS

On June 4, 1956 judgment was entered in favor of Plaintiff and against Defendant in a suit involving the parties in Stephenson County, Illinois, in the total amount of \$816.11. This action now before this court was commenced on that judgment, and on June 23, 1958, Judge Aldon J. Anderson, District Court of Salt Lake County, rendered judgment of no cause of action in favor of the defendant, and granted defendant judgment on his counterclaim. Appellant appeals from the judgment

of no cause of action on the complaint. Appellant also disagrees with the District Court's award of judgment to Defendant on the counterclaim, but makes no argument on appeal regarding the same since that decision follows the ruling of the court on the complaint in accordance with No. 6 of the Pre-Trial Order, Record on Appeal, page 8. We assume, therefore, that if this court were to reverse the District Court's ruling on the no cause of action on the complaint, the ruling on the counterclaim would fall as well.

#### STATEMENT OF POINTS

I. THE ILLINOIS JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT IN THE UTAH COURT UNDER ARTICLE 4, SECTION 1, U. S. CONSTITUTION.

II. THE LOWER COURT ERRED IN FINDING THAT THE ILLINOIS COURT WAS WITHOUT JURISDICTION TO RENDER AN ENFORCEABLE JUDGMENT.

#### ARGUMENT OF POINTS

I. THE ILLINOIS JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT IN THE UTAH COURT UNDER ARTICLE 4, SECTION 1, U. S. CONSTITUTION.

Article 4, Section 1, provides that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

It is stated in 50 C.J.S. Judgments 889, at page 470, as follows:

"Under the full faith and credit clause of the Federal Constitution, a judgment rendered by a court of a state, having jurisdiction of the subject matter and of the parties, must, when properly authenticated, be given full faith and credit by every other state. It has been said that the obligation to accord full faith and credit to a valid judgment, other than for lack of jurisdiction of the person or subject matter, or for the enforcement of a penalty, is without limitation."

It is clear that recognition of a judgment of a sister state is required so long as full faith and credit is not sought to enforce a judgment based upon a proceeding wanting in due process of law. Respondent argued in the court below that the Illinois court was without jurisdiction to render the judgment. It is appellant's contention here that the Illinois court did have jurisdiction and that the judgment there rendered is entitled to full faith and credit under the U. S. Constitution in the Utah court.

## II. THE LOWER COURT ERRED IN FINDING THAT THE ILLINOIS COURT WAS WITHOUT JURISDICTION TO RENDER AN ENFORCEABLE JUDGMENT.

The Illinois court acquired personal jurisdiction over the Defendant by reason of personal service upon the Defendant in compliance with the provisions of the Illinois Civil Practice Act, which read as follows: (See Ill. Rev. Stat. 1955, chap. 110, pars. 16, 17),

"Section 16 (1) Personal service of summons may be made upon any party outside the State. If upon a citizen or resident of this State or upon a person who has submitted to the jurisdiction of the courts of this State, it shall have the force and effect of personal

service of summons within this State; otherwise it shall have the force and effect of service by publication."

"Section 17 (1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of said acts:

"(a) The transaction of any business within this State;

"(b) The commission of a tortious act within this State;

"(c) The ownership, use, or possession of any real estate situated in this State;

"(d) Contracting to insure any person, property, or risk located within this State at the time of contracting.

"(2) Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

"(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

"(4) Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law."



In construing this statute and its application to the case presented by this appeal, appellant respectfully submits that the last conclusions of the Supreme Court of Illinois should be controlling. (See *Swift & Co. vs. Weston*, 88 Mont. 40; 289 P. 1035 (1930)).

An analysis of the Illinois Civil Practice Act is contained in the case of *Nelson vs. Miller*, 11 Ill. 2d 378, 143 NE 2d 673 (1957), which is an action brought by a resident of Illinois against a resident of Wisconsin, who was personally served with summons outside Illinois. Plaintiff there alleged Defendant had committed a tortious act in Illinois resulting in injuries to Plaintiff. The lower court granted Defendant's motion to quash service of summons, but the Supreme Court of Illinois reversed that decision and held the provisions of the Illinois Civil Practice Act were not unconstitutional as denying the non-resident due process of law.

Although the Illinois Supreme Court was presented a case coming under the subsection (b) of the Illinois Civil Practice Act relating to the commission of a tortious act within Illinois, while the fact situation here presented falls under subsection (a) relating to the transaction of any business within Illinois, nonetheless, the language and reasoning of the Illinois Supreme Court as to their statute should be viewed with favor here.

At page 676 of the court's opinion in the *Nelson vs. Miller* case, the following is said:

"The foundations of jurisdiction include the interest that a State has in providing redress in its own courts against persons who inflict injuries upon, or otherwise incur obligations to, those within the ambit of the

State's legitimate protective policy. The limits on the exercise of jurisdiction are not 'mechanical or quantitative' (International Shoe Co. v. Washington, 1945, 326 U. S. 310, 319, 66 S. Ct. 154, 159, 90 L. Ed. 95) but are to be found only in the requirement that the provisions made for this purpose must be fair and reasonable in the circumstances, and must give to the defendant adequate notice of the claim against him, and an adequate and realistic opportunity to appear and be heard in his defense."

Defendant was personally served with summons in Utah when the Illinois action was commenced against him. He cannot here claim that the Illinois judgment came upon him by surprise, for he chose not to contest the action there following personal service of summons upon him.

The Illinois court continues in the Nelson vs. Miller decision at page 676 as follows:

"The change that has occurred is made most manifest by the decision in International Shoe Co. v. Washington, 1945, 326 U. S. 310, 66 S. Ct. 154. There the court said: 'Historically the jurisdiction of the courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. Ed. 565. But now that the *capias ad respondendum* has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial jus-

tice.' 326 U. S. at page 316, 66 S. Ct. at page 158. The court added that the demands of due process 'may be met by such contacts of (the defendant) to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the (defendant) from a trial away from its 'home' or principal place of business is relevant in this connection.' 326 U. S. at page 317, 66 S. Ct. at page 158. While the precise question related to the jurisdiction of the courts of the State over a foreign corporation, it is clear that the general principle underlying the decision applies equally to jurisdiction over nonresident individuals."

The Illinois Supreme Court, in the *Nelson v. Miller* case, draws an analogy between the provisions of the Civil Practices Act and the statutes providing for substituted service on non-resident motorists who caused injury within a State. The court traces the acceptance of those statutes from the consent theory to the jurisdiction through appointment of an agent to accept service. The decision of Mr. Justice Frankfurter in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 1939, 308 U. S. 165, 60 S. Ct. 153, 128 A.L.R. 1437, is quoted as being the real basis in fact for our present acceptance of the non-resident motorist statutes. In commenting thereon, at page 678, in *Nelson v. Miller*, the Illinois Supreme Court says:

"The basis of jurisdiction was not consent; it was rather that the State was justified in making reasonable provision for redress in local courts against nonresident tortfeasers, so long as it provided reasonable notice and opportunity to be heard."

As the joint committee that drafted the amendments in 1955 to the Illinois Civil Practice Act observed: "There would seem to be no better notice than a summons personally served

on a defendant." Smith-Hurd, Ill. Ann. Stat., chap. 110, sec. 17, p. 165.

Similar statutes to the Illinois statute have been upheld in *Smythe v. Twin State Improvement Corp.*, 1951, 116 Vt. 569, 80 A. 2d 664, 25 A.L.R. 2d 1193, and in *Johns v. Bay State Abrasive Products Co.*, D.C. Md. 1950, 89 F. Supp. 654, and *Companie DeAstral, S.A. v. Boston Metals Co.*, 205 Md. 338, 107 A. 2d 357 (1954).

While it is true that the Defendant did not enter the state of Illinois, he did send his agent there and consummated the sale of two horses in Illinois. Had a cause of action arisen against the Plaintiff, Defendant could have had the protection of the Illinois court. Appellant submits that a like basis exists for service of a non-resident who transacts any business in a state, as for the non-resident motorist who injures someone in the state. Most courts have little difficulty to develop a sound legal basis for support of service upon the secretary of state or other fictional agent in the non-resident motorist statutes, and, therefore, logically, why should we not reason the case at hand similarly? The Defendant having been personally served with summons in the case before the court, Appellant submits, should strengthen the argument that legal reasoning in the non-resident motorist field should be extended here.

Appellant submits, in conclusion, that the trend of the recent decisions by the Utah Supreme Court, indicate a strong desire to abolish all resort to fiction and to provide a forum providing both adequate notice and opportunity for the parties to be heard. It would seem that this was the aim in *Wein v.*

Crockett, 113 Utah 301, 195 P. 2d 222 (1948), which case appeared to accept the reasoning of the International Shoe Co. v. Washington case although does not mention it by name. In the Wein v. Crockett case a single contract made within the state was held sufficient to assert jurisdiction. In the case of McGriff v. Charles Antell Inc., 256 P 2d 703, (Utah 1953), the Utah Supreme Court held service upon the foreign corporation ineffective through an attempt to serve a local television station as agent, saying that to hold otherwise would perhaps impede commercial intercourse. In commenting on the Court's decision in the Charles Antell case, the Utah Law Review states at page 527, 4 Utah Law Review: "It is difficult to see how commercial intercourse would have been hampered had the court found the corporation liable to suit. Following the reasoning of the court, the corporation was, for all practical purposes, relieved from liability for its torts committed within the state, for in the usual case prohibitive expense will preclude the individual plaintiff from going elsewhere to maintain the action. In the background of United States Supreme Court pronouncements, a constitutional requirement of due process did not compel or require the Utah court to deny jurisdiction. The case of Western Gas Appliances, Inc., v. Serel, Inc., 257 P 2d 950 (Utah 1953) also illustrates the acceptance of the philosophy of balancing the conveniences of the parties.

Appellant respectfully suggests to this Court that in the case at hand is an opportunity for the Utah Supreme Court to extend this modern approach to the assertion of jurisdiction to a fact situation deserving of favorable consideration in the same degree, if not more, than in the cases of the non-resident motorists, now so generally accepted. To so do here would

be to only accord Appellant that which the Full Faith and Credit clause of the U. S. Constitution assures him.

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