

1958

Ralph B. Stine and Margaret E. Stine v. Henry Girola and Diane Girola and State Underwriters, Inc. : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

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RALPH B. STINE and MARGARET E.

STINE,

Plaintiffs and Appellants,

Clerk, Supreme Court, Utah

vs.

Case No.

HENRY GIROLA and DIANE GIROLA,
and STATE UNDERWRITERS, INC.,
a Nevada corporation,

8965

Defendants and Respondent.

BRIEF OF RESPONDENT STATE UNDERWRITERS
INC., A NEVADA CORPORATION

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TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	3
STATEMENT OF POINTS	5
ARGUMENT	5
POINT I. THE WRITS OF GARNISHMENT ISSUED AS TO THE DEFENDANT STATE UNDERWRITERS, INC., WERE PROPERLY DISCHARGED.....	5
CONCLUSION	10

CASES CITED

Bristol v. Brent, 35 Utah 213, 99 Pac. 1000	10
Cole v. Utah Sugar Co., 35 Utah 148, 99 Pac. 681	9
Deseret Bank v. Roundy, 13 Utah 265, 44 Pac. 930	10
Dickson v. Simpson, 172 Tenn. 680, 1135 S.W. 2d 1190, 116 A.L.R. 380....	8
Griffin v. Howell, 38 Utah 357, 113 Pac. 326	10
Madsen's Estate, In re 123 Utah 327, 259 P.2d 595	9

	Page
Palmer v. Bank of Sturgeon, 281 Mo. 272, 218 S.W. 873	8
Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed 565	8
Steineck v. Haas-Baruch Co., 106 Cal. App. 228, 288 Pac. 1104	7
Surgical Supply Center v. Industrial Commission of Utah, 118 Utah 632, 223 P.2d 593	9
Walker v. Doak, 210 Cal. 30, 290 Pac. 290	7

ANNOTATIONS

American Law Reports, Annotated Vol. 116, page 389	7
---	---

STATUTES

Utah Code Annotated, 1953 25-1-15	7, 9
Utah Rules of Civil Procedure	
Rule 64 C(a)	5
Rule 64 D(a)	5

In the Supreme Court of the State of Utah

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STINE, *Plaintiffs and Appellants,*

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and STATE UNDERWRITERS, INC.,
a Nevada corporation,
Defendants and Respondent.

Case No.
8965

BRIEF OF RESPONDENT STATE UNDERWRITERS
INC., A NEVADA CORPORATION

STATEMENT OF FACTS

Appellants' statement of facts is substantially accurate. It should be noted, however, that the action herein was originally commenced against the defendants Henry Girola and Diane Girola only (R. 1). Thereafter, plaintiffs, upon the filing of an affidavit alleging an indebtedness as set forth in the complaint, caused a writ of garnishment to be served upon the Continental Bank and Trust Company (R. 10). Said bank

answered the writ that it was not indebted to the Girolas (R. 14). Plaintiffs then amended their complaint alleging the same debts as to the Girolas, and adding a sixth cause of action which purports to be a cause under the Uniform Fraudulent Conveyance Act, alleging that the Girolas had fraudulently transferred funds to the defendant State Underwriters, Inc., and praying that said funds be applied towards the Girolas' alleged indebtedness to plaintiffs (R. 8). Plaintiffs then filed an affidavit (R. 18), based on said amended complaint, alleging that all of the defendants are indebted to plaintiffs in the sum set forth in the original complaint, and upon said complaint and affidavit, caused a writ of garnishment to be served upon the Continental Bank and Trust Company, to which said bank answered, "Garnishee has demand account in name of State Underwriters, Inc., in the amount of \$15,144.05" (R. 23). State Underwriters, Inc., thereafter appeared specially, moving to discharge the writ of garnishment upon the ground that the court had no jurisdiction to issue said writ based upon the allegations of the amended complaint and affidavit for garnishment, and in particular, that said affidavit and complaint allege no claim or obligation from defendant State Underwriters, Inc., upon which a writ of garnishment, prior to judgment, could legally issue (R. 32). Pending the hearing upon said motion, plaintiffs filed another garnishment as to defendant State Underwriters, Inc. (R. 28), based upon the same amended complaint and an amended affidavit for garnishment practically identical to the prior one (R. 30). Defendant State Underwriters, Inc., appearing specially, moved to discharge said second writ of garnishment upon the same grounds (R. 36). Both of the motions to discharge said

writs were granted, from which orders (R. 34, 42) this appeal has been taken by plaintiffs. At the time of the service of said writs of garnishment, and the court's orders discharging same, none of the defendants had been served with process, they all being residents of Nevada, as well as the plaintiffs.

STATEMENT OF POINTS

POINT I.

THE WRITS OF GARNISHMENT ISSUED AS TO THE DEFENDANT STATE UNDERWRITERS, INC., WERE PROPERLY DISCHARGED.

ARGUMENT

POINT I.

THE WRITS OF GARNISHMENT ISSUED AS TO THE DEFENDANT STATE UNDERWRITERS, INC., WERE PROPERLY DISCHARGED.

Rule 64 D(a) U.R.C.P. defines the procedure in issuing a writ of garnishment prior to judgment, and requires the filing of an affidavit as set forth in Rule 64 C(a) U.R.C.P.—
Attachment:

*“When Attachment May Issue; Affidavit. The plaintiff, at any time after the filing of the complaint, in an action upon a judgment, upon any contract express or implied, or in an action to recover damages for any tort committed by a non-resident * * * may have the property of the defendant, not exempt from execution, attached as security for the satisfaction of any judg-*

ment that may be recovered in such action, * * * by filing with the court in which the action is pending an affidavit setting forth the following: *that the defendant is indebted to the plaintiff, * * * and the nature of the indebtedness; * * * .*" (Emphasis added.)

The amended complaint upon which any judgment is sought against respondent State Underwriters, Inc., alleges, by incorporating by reference the original complaint, a debt as to the defendants Girola, but alleges only as to the defendant State Underwriters, Inc., that the Girolas, "have fraudulently deposited funds and credits and have transferred property to the defendant State Underwriters, Inc.," and upon the basis of said allegation, plaintiffs pray for a money judgment against the Girolas and for an order requiring the defendant State Underwriters, Inc., to transfer the property of the Girolas in its possession to satisfy the Girolas' debt. Based upon said amended complaint, plaintiffs filed an affidavit alleging a debt owing plaintiffs from defendant State Underwriters, Inc.

The rules with respect to garnishment and attachment clearly require an indebtedness from the attached or garnisheed debtor before a writ of garnishment or attachment can issue prior to judgment, and specifically provide that the complaint itself must allege a suit upon a judgment or upon a contract, express or implied, or finally upon an action in tort for damages against a non-resident. Plaintiffs, by their pleadings, conceded no indebtedness as to State Underwriters, Inc., but attach the credit of Continental Bank and Trust Company to State Underwriters, Inc., upon an allegation of indebtedness by the Girolas to plaintiff, and upon a complaint praying for equitable relief against the defendant State Under-

writers, Inc., alleging no judgment, contract, express or implied, or suit for damages.

The courts are uniform in holding that garnishment is not available unless the defendant debtor (Girola) has a claim against the garnishee (Continental Bank) upon which he can maintain debt. That is, a right of action must exist between the principal debtor (Girola) and the garnishee (Continental Bank). 116 A.L.R. 389 Anno.; *Walker v. Doak* (1930) 210 Cal. 30, 290 Pac. 290; *Steineck v. Haas-Baruch Co.* (1930) 106 Cal. App. 228, 288 Pac. 1104.

Title 25-1-15, U.C.A. 1953—the Uniform Fraudulent Conveyance Act as adopted in Utah—allows a creditor with a matured claim, as against a person, not a purchaser for fair consideration and without knowledge of the fraud, to either have the fraudulent conveyance set aside, or disregard the conveyance and attach or levy execution upon *the property conveyed*, provided that a purchaser, without fraudulent intent, who has given less than fair consideration, may retain the property as security for payment. Plaintiffs' action against defendant State Underwriters, Inc., apparently states a cause of action under the Fraudulent Conveyance Act, and seeks to set aside the alleged fraudulent conveyance. But, plaintiffs have not served defendant State Underwriters, Inc., with process, and obviously cannot set aside said alleged conveyance (an in personam action) without service of summons. Nor, have plaintiffs disregarded the alleged conveyance and attached the very property conveyed. Rather, they have attached a general indebtedness of the Continental Bank and Trust Company to State Underwriters, Inc., the alleged fraudulent transferee.

There is another compelling reason why the garnishments as to defendant State Underwriters, Inc., are improper. The law is now uniform, resulting from the decision in *Pennoyer v. Neff*, 95 U.S. 714, 24 L. Ed. 565, that even when personal service cannot be obtained upon a defendant, an in rem proceeding may be pursued as to property duly attached within the jurisdiction. However, it has also clearly been established that a statute authorizing the garnishment of a resident debtor (Continental Bank) of a non-resident (State Underwriters, Inc.), who is indebted to a non-resident principal defendant (Girola) does not afford due process of law, in that the res impounded is not one in which the principal defendant has any interest, subject to attachment or garnishment so as to confer upon the courts of the state in which the garnishment proceedings are instituted jurisdiction in rem. *Dickson v. Simpson*, 172 Tenn. 680, 113 S.W. 2d 1190, 116 A.L.R. 380. See also *Palmer v. Bank of Sturgeon*, 281 Mo. 272, 218 S.W. 873.

If plaintiffs' writs of garnishment as to defendant State Underwriters were here sustained, a res in which the principal debtors have no interest subject to garnishment would be attached, and in addition, a res owned by a non-resident corporation, not served with process, and owing no debt to plaintiffs, would be attached, depriving State Underwriters, Inc., of due process of law.

As plaintiffs cannot obtain an in personam judgment against State Underwriters, Inc., in Utah, clearly their remedy is to garnishee State Underwriters in Nevada, where all the parties are present, and traverse and litigate the answer to

said garnishment there, or to sue State Underwriters in Nevada to set aside the alleged fraudulent conveyance.

Briefly answering appellants' statement of points, the authorities cited in their brief expound the following propositions: (1) That the courts of Utah administer both law and equity; (2) That a judgment is not required against a debtor before proceeding against his fraudulent transferee; (3) That the corporate entity may be disregarded; (4) That garnishment statutes are to be construed liberally; and (5) That the averments of the affidavit for garnishment govern, not the complaint. Respondent has no quarrel with propositions (1) and (2), though it fails to see how they are germane to this proceeding. As to disregarding the corporate entity, this court has clearly said that a corporation is a statutory entity which is regarded as having an existence and personality distinct from that of its members or stockholders, even though the stock is owned by a single individual. *Surgical Supply Center v. Industrial Commission of Utah*, 118 Utah 632, 223 P.2d 593. See also *In re Madsen's Estate*, 123 Utah 327, 259 P.2d 595. It is also submitted that in this instance the problem is expressly governed by the Uniform Fraudulent Conveyance Act—Title 25-1-15 U.C.A. 1953.

Appellants state that in any event garnishment statutes are to be construed liberally, and hence, their actions should be sustained, citing *Cole v. Utah Sugar Co.*, 35 Utah 148, 99 Pac. 681. A careful reading of said case will show that it states that garnishment statutes are to be liberally construed to effect their purpose, *but where a failure to observe a statutory requirement constitutes a jurisdictional defect, the courts cannot disregard it*, the precise situation here.

Finally, appellants conclude that the averments of the affidavit, not the complaint govern the issuance of a writ of garnishment. Citing *Griffin v. Howell*, 38 Utah 357, 113 Pac. 326. Again, a careful reading of this case will show that the averments of the affidavit govern as to whether the affidavit complies with the statute, but the allegations of the complaint will support a motion to dissolve the attachment before judgment if they show the nature of the cause of action sued upon is not one upon which garnishment or attachment before judgment lies. The fact situtaion therein was very similar to the instant case.

Attachment and garnishment are not independent proceedings, but depend upon the main action. *Bristol v. Brent*, 35 Utah 213, 99 Pac. 1000. Attachment is an extraordinary remedy, severe and harsh, and will not be aided by judicial interpretation. *Deseret Bank v. Roundy*, 13 Utah 265, 44 Pac. 930.

CONCLUSION

It is respectfully submitted that the orders of the District Court discharging the writs of garnishment served upon the Continental Bank and Trust Company as to the respondent State Underwriters, Inc., should be affirmed.

Respectfully submitted,

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