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Shirlee M. Housley and Reese C. Housley v. The Anaconda Company, A Corporation, and Dennis P. Cox and The Travelers Insurance Comp Any, A Corporation : Appellants' Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

SHIRLEE M. HOUSLEY and REESE C. HOUSLEY,
Plaintiffs-APPELLANTS,

vs.

THE ANACONDA COMPANY, a corporation, and DENNIS P. COX,
Defendants,

and

THE TRAVELERS INSURANCE COMPANY, a corporation,
Garnishee,
RESPONDENTS.

No. 10612

APPELLANTS' REPLY BRIEF

Appeal from Orders of the District Court of Salt Lake County, State of Utah

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POINT I

RULE 64D, PROVIDING FOR THE GARNISHMENT OF CHOSES IN ACTION, IS SUFFICIENTLY BROAD TO ALLOW GARNISHMENT OF A CONTRACT CLAIM UN-

DER A POLICY OF INSURANCE WHETHER THAT POLICY BE FIRE INSURANCE, LIABILITY INSURANCE OR ROBBERY INSURANCE.

It is important to remember in this case that garnishment is strictly a statutory proceeding under the laws of each state. This brings into interpretation U.C.A. 1953, Rule 64D, which, it is respectfully submitted, is one of the most liberal garnishment statutes to be found in the United States. In this respect, Utah has been a leader in the trend toward liberalization of garnishment statutes.

Since Utah's garnishment statute is more liberal than any statute interpreted in the cases cited by the plaintiffs, it follows that this Court should be prepared to accept the rationale of those cases cited by the plaintiffs.

The defendant attempted to distinguish *Ackerman v. Tobin,* 22 F. 2d 541 (8th Cir. 1927), *cert. denied,* 276 U.S. 628, 72 L. Ed. 739, 48 S. Ct. 321 (1928), where the court held that an unliquidated contract claim under a property (robbery) insurance policy was subject to garnishment, by referring to fire insurance cases and then attempting to distinguish the latter from liability insurance. The defendant's citation of 6 Am. Jur. 2d 679 and the analogy between fire and robbery insurance are very appropriate; however, the distinction drawn by the defendant at page 29 of his brief (which followed some illogical reasoning taken from the iso-

lated Tennessee case of *Gray v. Houck,* 167 Tenn. 233, 68 S. W. 2d 117 (1934) is clearly untenable.

In *Finch v. Great American Ins. Co.,* 101 Conn. 332, 125 A. 628, 629, 38 A.L.R. 1068 (1924), the question arose as to whether, under the standard form of fire insurance policy, "a debt is due" from the underwriter to the insured within the meaning of the Connecticut foreign attachment statute after a loss by fire but before proof of loss. The loss was not payable until 60 days after notice, ascertainment, estimate and satisfactory proof of loss. Furthermore, the policy provided that no suit or action could be maintained against the insurer until the insured had complied with all policy provisions.

In allowing garnishment by the plaintiff the Supreme Court of Errors said:

> "A policy of fire insurance is an agreement to indemnify the insured against loss by fire to the property insured. Before any loss, and while the policy remains in force, the liability of the underwriter is contingent. When, as here, the policy is in force at the time of a loss by fire which is covered by the policy, the contingent liability of the underwriter is thereby converted into a present contract obligation to pay whatever sum, not exceeding the amount of the policy, will in fact indemnify the insured; payment being necessarily deferred until the amount of the loss is ascertained.
>
> "In the standard form of fire insurance policy, the required process of liquidating the loss is

minutely specified, with reference to protecting the company against excessive or fraudulent claims; and the filing of proofs of loss by the insured is one step in that process. A failure to do so within the time limited may bar the enforcement of the underwriter's obligation, because it is so agreed in the policy; but the obligation itself is manifestly created by the promise to pay in case of a loss by fire, and by the happening of that contingency. The steps which the insured is required by the policy to take, before he can collect or sue for the loss, relate to matters, the performance of which is exclusively within the volition of the insured. In effect, he is required to furnish a bill of particulars in support of his claim. This is not with a view to creating a debt; on the contrary, the filing of proof of loss necessarily involves the assertion by the insured of the existence of an antecedent debt. So the provisions of the policy requiring the filing of proofs of loss tacitly assume the existence of an obligation to indemnify. The whole procedure after the loss is for the purpose of finding out whether the claimed obligation to indemnify has arisen, and, if so, to ascertain its amount."

Garnishment has similarly been allowed in other jurisdictions. In *Hartford F. Ins. Co. v. Citizens' Bank,* 166 Ark. 551, 266 S.W. 675, 39 A.L.R. 1458, the Oklahoma Supreme Court allowed garnishment of a claim under a fire insurance policy even though the proceeds were not yet payable. Also, in *Brainard v. Rogers,* 74 Cal. App. 247, 239 P. 1095 (Dist. Ct. App. 1925), under an insurance policy providing that no action could be maintained by the insured against the

insurer until after proof of loss had been filed, and interpreting the narrow California statute, the issue was resolved against the garnishee.

> "The sole question which is in issue on the appeal is: Are the proceeds of a fire insurance policy subject to garnishment at the instance of the creditor of the insured subsequent to a fire loss, but prior to an adjustment of that loss between the insurer and the insured? Our answer to this question is in the affirmative for the reasons which will follow."

The defendant would distinguish these cases by asserting that an obligation exists under a *fire* insurance policy when the fire occurs, but that no obligation exists under a *liability* insurance policy until the liability of the insured has been established by judgment or agreement. This position is patently untenable for the reasons which will follow.

The rationale of the ***Finch*** case, supra, dealing with fire insurance is clearly applicable to the case at bar. The literal language of that case is appropriate when applied to the facts at hand. In both instances all events which would create liability occur at the time of the loss. The whole procedure after the loss is for the purpose of finding out whether the claimed liability of the insurer has arisen, and, if so, to ascertain its amount. The plaintiffs merely desire to follow this procedure, and for so doing they should not be precluded by the argument that no obligation exists under a liability insurance policy until the liability of the insured has

been established. The defendant obviously begs the question in his attempt to create a narrow and unrealistic distinction wholly inconsistent with modern legal trends involving motor vehicles and a mobile population.

The issue in this case is identical to that in the property insurance cases previously cited: Does an insurance contract provide a *res* which is capable of supporting a garnishment lien after all facts which would create liability have occurred? The question must be answered in the affirmative regardless of the nature of the insurance contract. The required process of liquidating the loss is minutely specified in the standard form of insurance policy in order to protect the insurance company against excessive, fraudulent or spurious claims. The reason for this process will not be defeated by allowing the plaintiffs to establish a lien by garnishment. All defenses which the insurance company had would still be available subsequent to garnishment. This applies to both property and liability insurance. In the property insurance cases the courts have indicated that subsequent to garnishment the underwriter's obligation may be barred by some defense such as fraud, arson, failure to give notice, failure to make proof of loss, failure to make an adjustment or liquidate, or exercise of the insurer's option to replace the property. Likewise, in the liability, insurance cases, the plaitniff's claim is subject to the defenses of contributory negligence, fraud, etc. In fact, the Utah

Safety Responsibility Act has eliminated some of the defenses in liability insurance cases.

It is respectfully submitted that under Utah's broad garnishment statute no reason can be found for distinguishing between property and liability insurance as to the availability of a *res* subject to garnishment. Consequently, the subject insurance contract is subject to garnishment in this case.

POINT II

THE GARNISHEE'S ANSWER TO PLAINTIFFS' INTERROGATORIES SHOWED THAT THE GARNISHEE HAD PERSONAL PROPERTY IN ITS POSSESSION OR UNDER ITS CONTROL BELONGING TO THE DEFENDANT; THEREFORE, THE PLAINTIFFS WERE NOT REQUIRED TO REPLY TO THE GARNISHEE'S ANSWER.

The defendants assert that the plaintiffs are precluded from questioning the correctness of the garnishee's answer to interrogatories by failure to reply to such answer. In support of this contention the defendants quote from U.C.A. 1953, Rule 64 D (i). However, the defendants' quotation ends short of the applicable sentence.

> " . . . If such answer shows that the garnishee has personal property of any kind in his possession or under his control belonging to the defendant, the Court shall enter judgment that

> the garnishee deliver the same to the sheriff, and *if* the plaintiff recovers Judgment against the defendant in the action, such property or so much thereof as may be necessary shall be sold upon execution, and the proceeds applied toward the satisfaction of such judgment, together with the costs of the action and proceedings." (Emphasis added).

This sentence becomes the relevant portion of the subparagraph when considered in the light of the answer to interrogatory No. 4. To that interrogatory the garnishee answered in the affirmative that there was in effect at the time of the accident a policy of liability insurance covering the vehicle driven by the defendant Cox. By answering this specific interrogatory in the affirmative the garnishee has, as a matter of law, admitted that a chose in action exists. The garnishee's contrary answer to the general interrogatory (No. 2) was merely an erroneous interpretation of law which would obviously be contested by plaintiffs if The Travelers Insurance Company had sought any judgment. The plaintiffs are not to be bound by such an erroneous interpretation of law.

Furthermore, the sentence quoted by defendants from subparagraph (i) of Rule 64 D indicates that judgment *may* be entered upon the answer in favor of the garnishee and defendant. However, neither the garnishee, The Travelers Insurance Company, nor defendant Cox, has moved for an entry of *judgment* thereon. The plaintiffs are not precluded thereby and remain free to issue another garnishment in the same

matter if they so desire. Further, Cox could never secure a judgment—nor would he attempt to do so, since such attempt would constitute a general appearance on his part. In this respect, it is interesting to note that no attempt is being made in this appeal to have the garnishee represented (as can be seen from the caption of respondent's brief).

POINT III.

THE QUASHING OF SUMMONS SERVED ON COX IN MARYLAND, BASED UPON CONSTITUTIONAL GROUNDS, WAS CLEARLY ERRONEOUS.

The defendant Cox openly admits in his brief (p. 4) that his motion, which was granted by Judge Anderson, to quash service of summons was based upon the proposition that he was being deprived of his property without due process of law, contrary to Section 7, Article I of the Constitution of the State of Utah and contrary to Amendment XIV to the Constitution of the United States. That basis for granting the motion was clearly erroneous, for the United States Supreme Court has sanctioned the procedure whereby constructive service or personal service in a foreign state can be used to obtain *in rem* jurisdiction, allowing the plaintiff to proceed in the main action against property of the defendant in the hands of a third party. *Chicago R. R. Co. v. Sturm,* 174 U.S. 710, 19 S. Ct. 797 (1899); *Harris v. Balk,* 198 U.S. 215, 25 S. Ct. 625 (1905).

The defendant's contention that *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1877), prohibits a determination of personal liability when personal service is not made within the State is not contested; however, under this theory the plaintiffs are proceeding only against a policy of liability insurance as a *res;* there is no personal liabilty involved.

The question involved in this case is the availability of a res subject to garnishment. The constitutional question would arise only if it were to be determined that no res existed. However, Judge Jeppson ruled that a res did exist which could be reached by plaintiffs to acquire *in rem* jurisdiction (R. 60-61).

Furthermore, Judge Jeppson's ruling that a chose in action existed which could be the subject of an *in rem* proceeding was tied to the ruling as to the nature of the appearance. Judge Jeppson's ruling that the appearance was special was specifically dependent upon considering the action to be one *in rem.* This was made evident by the Order (R. 61):

> " . . . such appearance did not constitute a general appearance *since* the aforesaid ruling of the court that in rem jurisdiction can be had therein is considered by the Court to be a special appearance." (Emphasis added).

This correlative treatment of the two issues by Judge Jeppson points out the inconsistency in the defendant's position. Nevertheless, the defendant sought to overturn Judge Jeppson's ruling on only one of the

mutually dependent issues. Judge Jeppson's thinking was that since *in rem* jurisdiction could be had then the defendant Cox would be considered to have made a special appearance, but if no chose in action existed, then the action could not be *in rem* and Cox would have made a general appearance inasmuch as he appeared in resistance to a Motion to Amend the Complaint. Again we come back to the question of the availability of a res subject to garnishment.

It appears from the defendant's brief that he did not consider the action to be *in rem,* as did Judge Jeppson, but rather a personal action against a non-resident of the State of Utah. This basic faulty thinking on the part of the defendant has permeated the entire record and the Respondent's brief (P. 12) wherein he contends:

> " . . . Cox's attorney appeared to resist the proposed Amendment . . . on the ground (that) Cox had *no property in the State of Utah which could be made the subject of an in rem proceeding. The substance of the appearance was to resist jurisdiction over the person of Cox."*

The two sentences of the foregoing argument are clearly contrary positions. The only possible meaning which can be derived from the statement is that Cox was claiming that plaintiffs were seeking " . . . a personal judgment . . . under the label of an 'in rem theory' . . . " (Resp. Br. 30). Appellants have consistently pointed out that they are *not proceeding in personam;* rather, they are proceeding only against the *res.*

On page 13 of his brief, the defendant gives his ground for making the motion to quash service of summons (which was granted by Judge Anderson) as being that " . . . the court did not have jurisdiction over his *person* . . . " (Emphasis added). Furthermore, the defendant repeatedly cites *Pennoyer v. Neff,* supra, for the proposition that extra-territorial service of process will not confer jurisdiction which will support a *personal* judgment.

That the service of summons upon Cox in Maryland was pursuant to an *in rem* action is obvious from the Summons. The Summons informs Cox that a policy of liability insurance issued by The Travelers Company would be garnished and that—

> " . . . Proceedings thereunder will be had 'in rem', and your rights under said policy, and the liabilities of the insurer to you concerning those rights, will be garnished and attached."

In other words, the Summons made it abundantly clear that the plaintiffs were proceeding against The Travelers Insurance Company's obligation to pay under the liability insurance policy. The plaintiffs are not proceeding against property held in the possession of Cox, but rather property in the possession of The Travelers Insurance Company. This *in rem* action is not an attempt to make an *attachment* of transitory, intangible property in the possession of Cox, but rather effectuates a *garnishment* of the obligation held by The Travelers Insurance Company.

The plaintiff's course of action under Count II of the Amended Complaint is the same as that used by the plaintiffs in *Ackerman v. Tobin,* supra; *Finch v. Great American Ins. Co.,* supra; *Brainard v. Rogers,* supra; and *Hartford Fire Ins. Co. v. Citizens' Bank,* supra. In those cases the plaintiffs garnished the underwriters' obligations under insurance contracts and constructively served the non-resident defendants, thereby creating *in rem* jurisdiction. The constructive service in those cases did not create *in personam* jurisdiction, but rather gave the defendants notice that obligations due them from the insurance companies had been garnished and were subject to being taken in satisfaction of the plaintiffs' claims.

In those cases the garnishee-insurance companies objected to the garnishment on grounds similar to those used by defendant Cox in the case at bar, *i.e.,* no obligation was due and owing the defendant by the garnishee at the moment of garnishment. The garnishees in the cited cases attempted to secure judgments in their favor against the plaintiffs just as Utah Rule 64D(i) provides. Those judgments would not have settled the conflicts between plaintiffs and defendants, but merely those between plaintiffs and garnishees as to the existence of a *res* sufficient to support a garnishment lien. However, in all of those cases the garnishees were unsuccessful in their attempts to defeat in rem jurisdiction. As has been previously mentioned in this brief, The Travelers Insurance Company took no action towards the entry of a judgment in its favor in this case.

As will be carefully noted, the objections in the cited cases were made by the garnishee-insurance companies, whereas, in the case before this Court, the objection was (as appears from the face of the record) made by the defendant Cox. In fact the objection made by defendant Cox went to a matter clearly separate and distinct from the possession of a *res* by the garnishee. As previously mentioned, Cox filed a Motion to Dismiss the Amended Complaint on the ground that the Court did not have jurisdiction over his person and consequently would be depriving him of his constitutional rights since The Travelers Insurance Company had no obligation then due to him. Cox undoubtedly had a right to attempt to quash the service of summons but not on the ground he used—namely, that no property existed which could be the subject of an *in rem* action. If Cox had no property as he asserts, then why should he be concerned about its disposition? Why should he bother to appear in court to protect his non-existent property?

The truth of the matter is that The Travelers Insurance Company is, and has been, the party concerned with the existence of a *res* subject to garnishment. It is The Travelers Insurance Company that would normally object to the garnishment on the basis that it was not obligated to Cox—not Cox who would object to an obligation owed him by Travelers. Yet, The Travelers Insurance Company has not sought a judgment against the plaintiffs, nor has it sought any order. As a matter of fact, The Travelers Insurance

Company has made no appearance save to answer the garnishment interrogatories. The Travelers Insurance Company has not even appended its name to the Respondent's Brief.

Therefore, the only effective Order that Judge Anderson could, or in fact did, issue was one quashing *personal* service upon Cox. Judge Anderson made it abundantly clear on May 25, 1964 (R. 62-63), that he would not reverse the prior order of Judge Jeppson involving the same matters of law and fact (See App. Br. 10). Judge Jeppson's prior order (R. 60-61) had emphatically stated that Cox had a chose in action under a liability insurance policy which could be reached by the plaintiffs to acquire *in rem* jurisdiction.

Thus, the order of Judge Jeppson that a chose in action existed which was subject to garnishment still exists as a viable and enforceable order—and Cox has not appealed from that Order! The case is consequently still at issue since The Travelers Insurance Company has obtained no judgment relieving it of liability as garnishee.

CONCLUSION

It is respectfully submitted that an insurance contract does provide a *res* which is subject to garnishment as a chose in action under Rule 64D. The attachment of such a chose in action in the possession of a garnishee creates no personal liability, and is therefore constitutionally valid.

The extensive argument relating to garnishment of the insurer's obligation under a liability insurance contract should not be considered to detract from the viability of the other two points made by these appellants. This emphasis has been necessitated by the respondent's failure to squarely face the real issue involved and the nationwide importance of that issue being soundly and realistically decided in this case.

It is also strongly contended by the appellants with equal sincerity that (1) defendant Cox's appearance before Judge Jeppson on November 6, 1963, waived his objection to personal jurisdiction and constitutes a general appearance, and (2) the Order granting summary judgment in favor of defendant Anaconda Company on the merits of the controversy is unsupportable under the facts and the record before this Court.

Respectfully submitted,

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