

1959

Ralph B. Stine and Margaret E. Stine v. Henry Girola and Diane Girola and State Underwriters, Inc. : Petition for Rehearing

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.

Draper, Sandack & Draper; Attorneys for Respondent;

Recommended Citation

Petition for Rehearing, *Stine v. Girola*, No. 8965 (Utah Supreme Court, 1959).

https://digitalcommons.law.byu.edu/uofu_sc1/3215

This Petition for Rehearing 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.

AUG 6 1959

LIBRARY

IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

APR 20 1959

RALPH B. STINE and MARGARET
STINE, *Plaintiffs and Appellants,*

vs.

HENRY GIROLA and DIANE GI-
ROLA and STATE UNDERWRIT-
ERS, INC., a Nevada corporation,
Defendants and Respondent.

Supreme Court, Utah

Case No.
8965

PETITION FOR REHEARING

DRAPER, SANDACK & DRAPER
Delbert M. Draper, Jr.

Attorneys for Respondent
State Underwriters, Inc.

405 Executive Building
Salt Lake City, Utah

TABLE OF CONTENTS

| | Page |
|---|------|
| STATEMENT OF POINTS..... | 3 |
| ARGUMENT | 4 |
| POINT I. EVEN IF IT BE CONCEDED THAT PLAINTIFFS HAVE SUFFICIENTLY AVERRED A SHAM TRANSACTION, GARNISHMENT WILL NOT LIE BEFORE JUDGMENT AND WITHOUT PERSONAL SERVICE UPON THE ALLEGED TRANSFEREE, STATE UNDERWRITERS, INC..... | 4 |
| CONCLUSION | 8 |

AUTHORITIES CITED

| | |
|-------------------------------------|---|
| American Jurisprudence—Judgments | |
| Vol. 30, Sec. 132, p. 24 | 7 |
| Restatement of Law—Conflict of Laws | |
| Section 43 | 7 |
| Section 106 | 6 |
| Section 107 | 5 |
| Section 108 | 5 |
| Utah Code Annotated, 1953 | |
| Title 25-1-15 | 7 |
| Utah Rules of Civil Procedure | |
| Rule 64 D(a) | 7 |

IN THE SUPREME COURT
of the
STATE OF UTAH

RALPH B. STINE and MARGARET
STINE, *Plaintiffs and Appellants,*

vs.

HENRY GIROLA and DIANE GI-
ROLA and STATE UNDERWRIT-
ERS, INC., a Nevada corporation,
Defendants and Respondent.

Case No.
8965

PETITION FOR REHEARING

Comes Now State Underwriters, Inc., a Nevada corpora-
tion, and moves for a rehearing in the above-entitled matter
and in support thereof alleges that this court erred in reversing
the order of the lower court herein.

STATEMENT OF POINTS

POINT I. EVEN IF IT BE CONCEDED THAT PLAIN-
TIFFS HAVE SUFFICIENTLY AVERRED A SHAM TRANS-

ACTION, GARNISHMENT WILL NOT LIE BEFORE JUDGMENT AND WITHOUT PERSONAL SERVICE UPON THE ALLEGED TRANSFEREE, STATE UNDERWRITERS, INC.

ARGUMENT

POINT I.

EVEN IF IT BE CONCEDED THAT PLAINTIFFS HAVE SUFFICIENTLY AVERRED A SHAM TRANSACTION, GARNISHMENT WILL NOT LIE BEFORE JUDGMENT AND WITHOUT PERSONAL SERVICE UPON THE ALLEGED TRANSFEREE, STATE UNDERWRITERS, INC.

This court, in its decision, apparently concedes that all of the propositions in respondents' brief and argument are accurate but for the proposition that the corporate entity shall not be disregarded where a fraudulent transfer has occurred. In other words, this court affirms that a debt from defendant to plaintiff is pre-requisite to the issuance of a writ of garnishment prior to judgment, but asserts that an allegation that there has been a fraudulent transfer from the principal debtor establishes (for the purpose of pleading, and thereby issuance of attachment or garnishment) a debt owing from the transferee.

It is respectfully submitted that this court has failed to consider several principals involved in the foregoing proposition. Recall that State Underwriters, Inc. (the alleged transferee) has never been served with process, and that the

res attached is a general obligation of the Continental Bank to State Underwriters, Inc. and no one else, and that all of the parties are present in Nevada where the same suit is pending. Plaintiffs, to recover the fund attached, must, in addition to obtaining a judgment in debt against the defendant Girola, obtain an in personam decree as to defendant State Underwriters ordering State Underwriters, Inc., to transfer said funds to plaintiffs. The reply to this proposition might well be that the district court has jurisdiction to determine in an in rem proceeding that State Underwriters, Inc., has no interest in the fund. This overlooks, however, the fact that the property attached is not the alleged property transferred but a credit due State Underwriters from the garnishee, Continental Bank and Trust Company. The American Law Institute has codified this problem in Section 108 of the Restatement of Law—Conflict of Laws, which section provides:

“A state can exercise through its courts jurisdiction to compel payment by a debtor who is subject to the jurisdiction of the state of a claim against him in favor of his creditor and to apply the proceeds to the satisfaction of a claim asserted by a third person, as plaintiff, against the creditor, although the state has no jurisdiction over the creditor.”

This section enunciates the traditional garnishment rule and establishes jurisdiction as far as the garnishee, Continental Bank is concerned. However, as far as the court's jurisdiction with respect to respondent, State Underwriters, Inc., Section 107 provides:

“Except as stated in § 50, a state can exercise through its courts jurisdiction to apply to the satisfaction of a claim a chattel belonging to the person against whom

the claim is asserted, in the possession or under the control of another person, by compelling that other person to surrender the chattel, if

- (a) *the person who is in possession or has control of the chattel to be applied is subject to the jurisdiction of the state; and*
- (b) *the chattel to be applied is within the jurisdiction of the state.*" (Emphasis added).

It will be observed that Comment c. under this section states that:

"If the chattel is within the territory of the state, but the person who is in possession or has control of the chattel is not subject to the jurisdiction of the state, the chattel can be reached by attachment or by a bill in equity in accordance with the rule stated in § 106."

Section 106 provides:

"Except as stated in § 50 a state can exercise through its courts jurisdiction to apply to the satisfaction of a claim, interests in things subject to the jurisdiction of the state, *belonging to the person against whom the claim is asserted*, although the state has no jurisdiction over him." (Emphasis added.)

Said section limits the in rem action to property belonging to the debtor and against whom the claim is asserted. It cannot be said that the obligation from Continental Bank belongs to anyone other than State Underwriters, and that plaintiffs have any claim against State Underwriters except to attach the very property conveyed, or to obtain an in personam order requiring it to reconvey, or to determine in an in personam proceeding that State Underwriters is the alter ego of Girola. Furthermore, plaintiffs' proceeding under any of these remedies would not

amount to an action upon a contract, express or implied, from which garnishment prior to judgment may issue as prescribed in Rule 64 D(a).

The Uniform Fraudulent Conveyance Act, Title 25-1-15, U.C.A. 1953, allows a suit to set aside the fraudulent transfer or the attachment of the very property conveyed. Plaintiffs pray that State Underwriters be ordered to reconvey. This is a prayer for relief in personam. They have not attached the very property conveyed. Obviously, a judgment binding on the person cannot be rendered either in an action in rem or in personam in which the court lacks jurisdiction over the person. 30 Am. Jur., Judgments, Sec. 132, p. 247.

Respondent has no quarrel with the court's proposition that the corporate entity in certain situations may be disregarded, but to render a judgment affecting a corporate entity by decreeing that the entity shall be disregarded, service of process must be made upon the corporation. Such a decree would necessarily be in personam. Section 43 of the Restatement of Law—Conflict of Laws, provides:

“Under the constitution of the United States, the States cannot create interests if they have no jurisdiction.

Comment:

a. Effect of Fourteenth Amendment to Constitution.

If a State attempts to exercise power by creating interests with respect to persons or things which it has no jurisdiction to create, its action is in violation of the Fourteenth Amendment to the Constitution and is void in the State itself. The Supreme Court of the United States may review all cases whether from a lower

Federal court or from a State court of last resort which involve a question of the exercise of power on the part of a State when it has no jurisdiction.

Illustrations:

1. A court, in accordance with the statutes of its State, renders judgment against a citizen of another State over whom it has no jurisdiction; under the Constitution this judgment is not 'due process of law', and is invalid even in the State which rendered it."

The authorities cited by this court in support of the proposition that the corporate entity may be disregarded all involved personal service upon the corporation operating as a fraudulent transferee, and all involved the attachment of the very property conveyed and an in personam prayer to set aside the attachment.

CONCLUSION

WHEREFORE, respondent prays that this court grant a rehearing in this matter, and that upon such rehearing, reverse its decision and affirm the order of the District Court discharging the writs of garnishment in question.

Respectfully submitted,

DRAPER, SANDACK & DRAPER
Delbert M. Draper, Jr.

Attorneys for Respondent
State Underwriters, Inc.

405 Executive Building
Salt Lake City, Utah