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ATTACHING CREDITOR AS GARNISHEE

The problem of the right of a plaintiff in an attachment to garnishee himself was presented to the West Virginia Supreme Court of Appeals for the first time in the recent case of *Emery v. C. D. Beck & Co. et al.*¹ In this case, *P* had purchased a bus from *D*, for which a part of the purchase price remained unpaid. *P* institutes this action for damages for breach of warranty of quality, and sued out a writ of attachment against *D*, as a non-resident, and designated himself as being one indebted to *D*. It was held that the court acquired no jurisdiction by virtue of the garnishment. The West Virginia statute provides that "The plaintiff in an attachment may . . . designate *any person* as being indebted or liable to, or having in his possession, the effects of the defendant . . ."² Without a doubt, the literal language of the statute is broad enough to include the plaintiff in an attachment proceeding as a possible garnishee, but the court, on the basis of public policy, limited this section by construing into the statute the word "other", as though it read ". . . designate any *other person* . . ."³

Among the foreign jurisdictions today, there is an almost even split of authority on the validity of this procedure.⁴ Two states have, by statute expressly provided that the plaintiff and the garnishee may be one and the same person.⁵ Several other states have reached the same result under a general statute, such as the one in the instant case. Some of these have reached the result by reasoning that the statute apparently permits the plaintiff to garnishee himself, and they see no sound reason of public policy which would justify them in denying to the attaching creditor a right which could be enforced by every other creditor, namely the right to garnishee the debt owing to or property of⁶ the

¹ 22 S. E. (2d) 458 (W. Va. 1942).

² W. VA. CODE (Michie, 1937) c. 33, art. 7, § 15. Italics supplied.

³ ALA. CODE (1940) tit. 7, § 995; ARK. CODE (Pope, 1927) § 540; FLA. COMP. GEN. LAWS (1927) § 5284; REV. STATS. (1941) c. 11, § 21; LA. CODE OF PRACTICE (Bobbs-Merrill, 1942) § 242; TENN. CODE (Michie, 1938) § 9428.

⁴ "The jurisdictions on the respective sides are almost exactly equal, with a slightly larger number of cases favoring the right." Note (1924) 31 A. L. R. 711, 712. *Accord*: 4 AM. JUR. Attachment & Garnishment § 138. The seeming weight of authority denies the right. 28 C. J. 50.

⁵ ARIZ. CODE (Bobbs-Merrill, 1940) c. 25, § 201; MD. CODE (Flack, 1939) art. 9, § 10.

⁶ It should make no difference as a matter of theory whether the plaintiff is indebted to the defendant or has property of the defendant in his hands. See in accord, *Lyman & Co. v. Wood*, 42 Vt. 113, 114 (1869); *United States*

defendant.⁷ As one court stated it, "The law is remedial, and the words of it general, extending the remedy to all creditors, without distinction; and it would seem strange, that the only person who cannot obtain justice, against a nonresident, should be the one who has in his hand, the funds out of which that satisfaction may be had."⁸

About an equal number of states deny the right of the plaintiff to garnishee himself. One decision was based on the wording of the statute to the effect that the plaintiff may garnishee "any other persons";⁹ other cases turned on an expression in the statute that the plaintiff and the garnishee are to be considered as adverse parties,¹⁰ and the common law principle that the same party can not occupy adverse positions in the same suit. Other courts have implied from general terms of the garnishment statute (*e. g.*, the common provisions for summons, requiring the garnishee to answer, contempt proceedings or a *capias* should he fail to answer, and the rendition of judgment and issuance of execution against him) that the plaintiff and garnishee occupy adverse positions and therefore can not be the same person.¹¹ A few cases say that the garnishee represents the defendant in the suit, and therefore should not have an adverse interest.¹² Other cases state that the garnishee is a mere stakeholder, impartial as between the other parties, and therefore the plaintiff should not be the garnishee.¹³ The court, in the instant case, remarks that an unhealthy situation would arise if a party to the litigation

F. & G. Co. v. Wrenn, 67 App. D. C. 94, 89 F. (2d) 838, 840 (1937); Note (1924) 31 A. L. R. 711, 712. But see Beach v. Fairbanks, 52 Conn. 167, 172 (1884).

⁷ Graigle v. Notnagle, Pet. C. C. 245, 10 Fed. Cas. No. 5679 (1816); Norton v. Norton, 43 Ohio St. 509, 525 (1885); Moyer v. Lobengeir, 4 Watts 390 (Pa. 1835); Lyman & Co. v. Wood, 42 Vt. 113, 114 (1869).

⁸ Graigle v. Notnagle, Pet. C. C. 245, 10 Fed. Cas. No. 5679 (1816).

⁹ Rice v. Sharpleigh Hdwe. Co., 85 Fed. 559 (W. D. Tenn. 1898) (under a Tennessee statute). See note 3, *supra*.

¹⁰ First National Bank of Fort Scott, Kansas v. Elliott, 62 Kan. 764, 64 Pac. 623 (1901); First International Bank of Minot v. Brehmer, 56 N. D. 81, 215 N. W. 918, 61 A. L. R. 1454 (1927).

¹¹ Belknap v. Gibbens, 54 Mass. 471 (1847); Knight v. Clyde, 12 R. I. 119 (1878); Gerber v. Ogle Coal Co., 195 Wis. 578, 218 N. W. 361, 57 A. L. R. 838 (1928). But see, in answer to this argument, Graigle v. Notnagle, Pet. C. C. 245, 10 Fed. Cas. No. 5679 (1816).

¹² St. Louis & S. F. R. Co. v. Crews, 51 Okla. 144, 151 Pac. 879 (1915); Knight v. Clyde, 12 R. I. 119 (1878); 28 C. J. 399.

¹³ Nevian v. Prochinger, 23 Ind. App. 695, 700, 55 N. E. 1033 (1900); Belknap v. Gibbens, 54 Mass. 471 (1847); Wood v. Bangs, 199 Minn. 208, 271 N. W. 447 (1937).

could by his own action, place himself in a position in which he is supposed to remain neutral.¹⁴

If the judgment in the attachment suit is to be *res adjudicata*,¹⁵ there is a serious objection to the entire procedure of attachment and garnishment as a basis of jurisdiction, namely that the non-resident may have a valid claim extinguished without getting actual notice of the proceeding or having a chance to defend. In spite of this, there is provision for foreign attachment and garnishment in every state, and the question is reduced to whether it is any more iniquitous or objectionable for the plaintiff to garnishee himself than it is to garnishee a stranger. Many cases suppose that the garnishee will either defend the foreign attachment proceeding for the defendant or will give him notice of the garnishment.¹⁶ No doubt, in many cases, this will be the result when the garnishee is a stranger, but the statute in West Virginia is so drafted that the garnishee is relieved of all liability to either the plaintiff or the defendant upon payment of the debt or delivery of the property under order of the court in which the attachment is brought. The effect of this statute is to make the garnishee a helpless and impotent party to the suit.

¹⁴ 22 S. E. (2d) 458, 461 (W. Va. 1942).

¹⁵ In *Graighle v. Notnagle*, Pet. C. C. 245, 10 Fed Cas. No. 5679, at page 951 (1916), the court said the defendant in an attachment proceeding could sue the plaintiff in a separate action, and when the judgment in the attachment proceeding be set up as a plea, deny the existence of the debt upon which the attachment was brought. Similar result in *Moyer v. Lobengeir*, 4 Watts 390 (Pa. 1935). The same result was reached under an attachment order the custom of London (the historical ancestor of our modern attachment statutes) in *Paramore v. Pain*, Cro. Eliz. pt. 2, 598, 78 Eng. Rep. 841 (1597), and *Coke v. Brainforth*, Cro. Eliz. pt. 2, 830, 78 Eng. Rep. R. 1057 (1601). See also the dissenting opinion of *Jos. Joseph & Bros. Co. v. Hoffman & McNeill*, 173 Ala. 568, 578, 56 So. 216, 38 L. R. A. (n. s.) 924 (1911), in which the dissenting judges refused to consider a judgment in a foreign attachment suit in which the plaintiff was garnishee as binding on the defendant in the attachment, even though such a judgment was valid under the law of the state rendering it.

¹⁶ In the leading case of *Harris v. Balk*, 198 U. S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905) the court held it was the duty of the garnishee to notify his creditor (the defendant in the attachment) of the suit; if he failed to give such notice, the payment by the garnishee to the plaintiff in the attachment would not be conclusive when the garnishee is sued by his creditor. *Accord*: *Morgan v. Neville*, 74 Pa. St. 52 (1873); *Stewart v. Northern Assurance Co.*, 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101 (1898); *RESTATEMENT, CONFLICTS* (1934) § 108, comment c. The West Virginia garnishment statute. *W. VA. REV. CODE* (Michie, 1937) c. 38, art. 7, § 15 *et seq.*, has no requirement that the garnishee give notice to the principal defendant. *Quaere* as to the conclusiveness of such a judgment when pleaded in a sister state if the principal defendant did not know of the suit. See 5 *AM. JUR.*, Attachment & Garnishment § 804; 28 *C. J.* 399.

At first blush, it does seem a violation of all concept of due process to allow a person to go into court, garnishee himself, have service by publication, and then litigate the matter with himself, and thereby extinguish an obligation owed by him to a party who was never before the court and likely never knew of the proceedings. But what additional safeguard is there when the garnishee is a stranger instead of the plaintiff? In West Virginia, the garnishee has no duty to notify the defendant or to defend the suit, or even any right to defend the suit other than is given to any other interested party. Whether the garnishee be the plaintiff or a stranger, the proceeding is *quasi in rem* and essentially one-sided.

The language of this decision is broad enough to cover two fundamentally different situations, first, where the garnishment is the sole basis for the jurisdiction of the court, the so-called foreign attachment suit (the instant case) and second, where the court has jurisdiction of the defendant by personal service or general appearance, and the garnishment is merely ancillary to the main suit, a situation apparently not considered by the court in delivering its opinion.¹⁷ However, the syllabus clearly limits the holding of the case to the first situation, where the garnishment is the sole basis for the jurisdiction of the court. This raises the old question, "Is the Syllabus the Law?,"¹⁸

While the public policy of this state has been declared to prohibit a plaintiff in a foreign attachment suit from naming himself as garnishee, it is difficult to see what harm could result from such procedure when the court has personal jurisdiction over the defendant. When, under the West Virginia garnishment law, the garnishee can neither hinder nor aid either party, is there any reason in requiring the garnishee to be neutral, a mere stakeholder? When the statute does not expressly forbid, there would seem no reason to deny to the plaintiff the right to garnishee himself, at least where the court has independent jurisdiction.

The court, in the instant case, in which the sole basis for jurisdiction was the garnishment, has declared that the public policy of this state forbids the plaintiff from garnisheeing himself. Wheth-

¹⁷ In no case which came to the attention of the writer did the court make any clear distinction between these two situations.

¹⁸ From the language of the opinion, it is apparent that the court was thinking of the case in which the garnishment was the sole basis of jurisdiction, but there are many statements in the opinion which are not limited to such a case, and would deny to the plaintiff the right to garnishee himself even where the court had personal jurisdiction over the defendant.

er the court will, when faced with the problem of whether the plaintiff can garnishee himself as to a debt owing to or property of a defendant in a situation in which the court has personal jurisdiction over the defendant, literally follow the language of the decision and hold that this can not be done, or whether it will distinguish that case and limit the holding of the instant case to the scope of the syllabus, only time can tell.¹⁹

D. C. H.

“MINABLE” AND “MERCHANTABLE” COAL

The recent case of *Tressler Coal Mining Co. v. Klefeld*,¹ has revived a question to which, although potentially present in many coal leases relatively little judicial attention has been directed. By way of dicta the court discussed the meanings of the terms “minable” and “merchantable” coal and cited the few available authorities but undertook no discussion of the subject. Briefly, the court said that “minable and merchantable coal is coal so situate that it may be profitably mined and of such quality as to be salable.”

Is there any difference between the terms minable and merchantable, and, if so, what is it? The fact that each term, on the surface at least, lies within the connotation of the other does not alleviate the necessity of independent consideration of each within its own sphere. In *Atwater v. Fall River Pocahontas Collicries Co.*,² the court rejected as “narrow and arbitrary” the proposition that minable coal is any coal that can be mined, regardless of costs, and adopted the view of the Kentucky court which declared minable coal to be that which “could be profitably mined by judicious methods”.³ The adoption was qualified, however, by assertion that “the words must be defined in view of the wording of the leases.” In *Ellis v. Cricket Coal Co.*,⁴ the Iowa court presents a more comprehensive analysis of the terms in question:

¹⁹ See Hardman, “The Law” - *In West Virginia* (1941) 47 W. VA. L. Q. 23; “The Syllabus Is the Law”, *id.* at page 141; “The Syllabus Is the Law” - *Another Word*, *id.* at page 209; “The Syllabus Is the Law” - *Another Word by Fox, J.* (1942) 48 W. VA. L. Q. 55.

²⁰ See, in addition to the cases herein cited, Notes (1924) 31 A. L. R. 711 and (1929) 61 A. L. R. 1458.

¹ 24 S. E. (2d) 98 (W. Va. 1943).

² 119 W. Va. 549, 195 S. E. 99 (1937).

³ *Auxier Coal Co. v. Big Sandy Coal Co.*, 194 Ky. 14, 238 S. W. 189 (1922).

⁴ 166 Iowa 656, 661, 148 N. W. 887 (1914).