IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

GEORGE R. ABEL AND OTHERS,
PLAINTIFFS IN ERROR,

v.

LUTHER D. SMITH AND OTHERS,
DEFENDANTS IN ERROR.

BRIEF IN SUPPORT OF DEFENDANT'S CASE

Appeals Press, Inc., Richmond, Va.

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STATEMENT OF FACTS.

This case came on to be heard upon a petition for attachment filed in the Circuit Court of Fairfax County, Virginia, by the plaintiffs in error against the defendants in

error; a plea in abatement to the jurisdiction of the court based upon fraud, and a second plea to the jurisdiction of the court based on the fact that no property belonging to the defendants in error or either of them was taken before the court under the writ of attachment.

The petition set forth that the defendants in error are indebted to the plaintiffs in error in the sum of $2,615.90 with interest; that the defendants in error are non-residents of the State of Virginia; that there was in the hands of one E. P. Harrison, in the County of Fairfax, Virginia, a certain promissory note executed by Harry B. Knee and Eva Knee, payable to Daniel L. Smith and Sarah E. Smith, in monthly installments of $40.40 each; that said note had been duly endorsed by Daniel L. Smith and Sarah E. Smith, and was held by the said Harrison as collateral security for the payment of a note of $1,000.00, dated July 24, 1924, payable to Marshall McKibbin, signed by Daniel L. Smith and Sarah C. Smith and transferred by the said McKibbin to A. D. Sartwell, and transferred by the said Sartwell to the said Harrison; that the said Smiths are defendants in error in this case.

Then the petition further prays that an attachment issue against the property of the defendants in error in Fairfax County, Virginia.

Thereupon a writ of attachment was issued and the note hereinabove described levied upon; thereupon the defendants specially appeared for the purpose of the pleas and none other, filed two pleas—one a plea in abatement to the jurisdiction, and the other a plea to the jurisdiction. Under the first plea testimony was taken showing the following facts:

That both defendants in error were resident and domiciled in the District of Columbia; that A. D. Sartwell owned a certain note executed by the defendants in error, to which was attached a collateral note amounting to $2,300.00, payable to the defendants in error; that the said Sartwell sold said note and delivered the same with the collateral to E. P. Harrison on or about August 26, 1926; that said note was bought at the instance of the plaintiff in error; that the said Sartwell was personally interested because the plaintiff in error owed Sartwell about $700.00; that he, Sartwell, sold the note to Harrison to help the plaintiff in error collect an alleged indebtedness from the defendants in error; that it was agreed between Sartwell and Abel that said note should be sold to Harrison so both Sartwell and Abel could collect what was due them; that the said Harrison was a resident of Falls Church, Virginia; that the note was bought by Harrison at the instance of Abel so as to get the collateral note into the State of Virginia in order that the same could be attached. The note was bought August 26, and attached August 27, 1926; that the makers of the note levied upon—Harry B. Knee and Eva Knee—are residents of the State of Maryland, and that said note was executed, delivered, and made payable in the District of Columbia.

The plea in abatement to the jurisdiction of the court (R. p. —) was filed October —, 1926, and the plea to the jurisdiction of the Court (R. p. —) was filed January —, 1927, and both were argued together, the first being overruled (R. p. —), to which exception was taken and allowed

to the defendants in error, and the second (R. p. —) was sustained, to which ruling the plaintiffs in error duly excepted, which exception was allowed, and from these rulings of the trial court this appeal has been taken.

For the purpose of this brief the defendants in error will consider the points involved separately.

ARGUMENT

As to the first assignment of error (R. p. 4) none of these questions were raised at the hearing, ruled upon by the learned trial judge, nor are they set forth in the bill of exceptions. (R. p. 4).

It is a general and well recognized principal of law, in fact practically a universal rule, that questions, of whatever nature, not raised and properly preserved for review in the trial court, will not be noticed on appeal.

Virtue v. *Creamery Package Mfg. Co.*, 227 U. S. 8;
So. etc. R. Co. v. *Com.*, 104 Va. 314;
Hilliard v. *Un. Tr. Co.*, 123 Va. 724;
Union Bank v. *Richmond*, 94 Va. 316;
Sweden v. *Swecker*, 87 Va. 305;
Shenandoah Valley Ry. Co. v. *Dunlap*, 86 Va. 346;
Newsum v. *Newsum*, 1 Leigh 28 Va. 86.

The rule that questions not raised in the lower court will not be considered on appeal generally prevents a party from obtaining on appeal relief which was not asked for in the court below.

Peck v. *Tribune Co.*, 154 Fed. 330;
New So. Bldg., etc. Asso. v. *Reed*, 96 Va. 345.

It would be manifestly unjust to a litigant to reverse his judgment on a question which he was not called upon to contest in the lower court by either pleadings or objections, when it might easily happen that if it had been an issue at the time he could have met it successfully.

Collins v. *Fidelity Trust Co.*, 33 Wash. 136.

The object of requiring the parties to present all questions and issues to the lower court before they can be presented to this court is to have the lower court pass thereon, so that this court upon appeal may determine whether or not such ruling was erroneous. The purpose is also in furtherance of justice to require the party to first present the question he contends for in the lower court, so that the other party may not be taken by surprise.

Jones v. *Seymour*, 95 Ark. 593.

FIRST.

The whole object of attachment before judgment is to give the courts a jurisdiction of either the person or property of an absconding debtor, or a debtor who is beyond the seas, and is simply in the nature of a process for the purpose of setting in motion the machinery of the courts so that it may have jurisdiction of the subject matter, in order that the courts may have the proper authority to proceed to the final disposition of a case, and adjudicate the rights of the parties. In all types of cases of this sort, when reduced to a final judgment, the judgment is purely a judgment *in rem*. This observation is equally applicable to both pleas filed in this case.

> "That such a method of procedure is purely statutory and in derrogation of the common law, and should be carefully watched, and strictly confined to the ground covered by the statute."

Kelso v. *Blackburn*, 3 Leigh (30 Va.) 299;
Bank v. *Merchants Bank*, 1st Robb (40th Va.) 573;
McAllister v. *Guggenheimer*, 91 Va. 317.

It is the contention of the defendants in error that service of process upon the defendants in error was void, in that the facts show that the note upon which levy of attachment was made was gotten into the jurisdiction of the Virginia courts by reason of the collusion, fraud, and wrongful conduct of the plaintiffs in error. We contend that the attachment of the property of the defendants in error is solely a service of process to be served under the same conditions and restrictions as that of any other form of process; it is undoubtedly the rule that where a defendant is wrongfully or fraudulently brought within the jurisdiction of a court, and that service of process is then had, the courts will not then entertain jurisdiction.

> "While a person who is found within the territorial jurisdiction is subject to its jurisdiction, even where he was improperly or wrongfully brought or induced to come within its jurisdiction, it is well established that as a general rule a civil court will not take jurisdiction based upon a service of process on a defendant who was brought within reach of its process wrongfully, or fraudulently, or by deceit, or any other improper service."

Commercial Mutual Acco. Co. v. *Davis*, 213 U. S. 245;
Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S. 98;
Olean Street Railway Co. v. *Fairmont Construction Co.*, 55 App. Div. (N. Y.) 92.

> "It is undoubtedly true that if a person is induced by artifice or fraud to come within the jurisdiction of a court for the purpose of procuring service of process, such fraudulent abuse of a right will be set aside upon a proper showing."

Commercial Mut. Acco., 213 U. S. 245.

This rule is not based on a lack of jurisdiction, but on the fact that it is improper for a court to exercise jurisdiction so obtained.

Cherhbuck v. *Cleveland*, 37 Minn. 466;
Hurlburt v. *Palmer*, 39 Neb. 158;
Townsend v. *Smith*, 47 Wis. 623.

> "As to whether the conclusion necessitates further proceedings we should say that, in our view, if the allegations of appellees are found to be true, the service should be quashed—'if a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process is there served, it is such an abuse that the Court will on motion set the process aside.'"

Fitzgerald Construction Co. v. *Fitzgerald*, 137 U. S. 98;
Frawley v. *Penna. Casualty Co.*, 124 Fed. 259;
Cavannah v. *Manhattan Transit Co.*, 133 Fed. 818;
Toof v. *Foley*, 87 Iowa 8.

> "A court of justice ought not and will not permit a party to profit by such artifice. If appellant was induced by representatives of appellee to come within the jurisdiction of the Court for the purpose of a conference having for its object 'an amicable settlement,' service upon him was an act of bad faith amounting to misrepresentation."

Fischer v. *Munsey Trust Co.*, 44 App. D. C. 212.

> "Fraud on the part of the attaching creditor is sufficient ground for setting aside his attachment."

Spear v. *Pickering*, 8 Pickering 143;
Matthews v. *Eddy*, 168 Mo. App. 134.

It is the contention of the defendants in error that this form of procedure is simply the adoption of a different form of process in substitution of the regular form, and that the same rules of law must of necessity apply. It certainly cannot be successfully contended that if a trial court cannot proceed when the service of process upon the defendant personally is made as the result of fraud, wrongful conduct, or by deceit, that by the same token when property or evidence of debt are gotten within a jurisdiction of a court wrongfully, fraudulently, or as the result of deceit that the Court has power to proceed with the case.

The undisputed law of this State as of any other State is that before the courts may function suitable and proper process must be served, and certainly no court can be or will be a party to conduct such as is set forth herein. The defendants in error, therefore, submit that the Court erred in overruling the plea in abatement to the jurisdiction of

the Court, and for the foregoing reasons should be overruled.

SECOND.

The plea to the jurisdiction of the trial court was based on the following grounds: That the note made and executed by Harry B. Knee and Eva Knee, payable to Daniel L. Smith and Sarah E. Smith, the same being subject to this attachment, is not "property" within the meaning of the law.

The makers of said note are residents of the State of Maryland, the note was executed, delivered, and made payable in the District of Columbia, and that no process of attachment was served upon the makers of said note.

The contention of the defendants in error is that a promissory note is not property, but simply evidence of debt, and that the only method by which a court could get jurisdiction would be by attaching the debt in the hands of the maker of said note or the debtor. Certainly had there been no note given by Harry B. Knee and Eva Knee, this attachment could not have given the trial court jurisdiction.

The sections of the Virginia Code under which this proceeding was had provides for the attachment of specific property within the State of an absconding debtor, or one who is absent or about to remove from the State, or who has concealed himself or his property for the purpose of defrauding his creditors.

> "Absconding, absence, or concealment statutes are generally held to apply only to debtors who are residents of the State and not to non-residents."

Lagerwell v. *Smith,* 154 Ky. 162;
Castellanos v. *Jones,* 5 N. Y. 164;
Shugart v. *Orr,* 5 Yerg (Tenn.) 192;
Baxter v. *Vincent,* 6 Vt. 614.

The defendants in error contend that the law is that a promissory note is only an evidence of debt and not the debt itself and, therefore, not being the debt itself is not property, estate, debts, lien, "legal or equitable" within the meaning of the law.

> "When a debtor absconds an attachment of notes and mortgages received by him as security for the purchase price of land in another State, the notes being made by residents of such other State, is void as such notes are merely evidences of debt."

Owen v. *Miller,* 10 O. St. 136.

> "And it is a fundamental rule that in any attachment proceedings the *res* must be within the jurisdiction of the Court issuing the process in order to confer jurisdiction."

Plympton v. *Bigelow,* 93 N. Y. 592.

> "If the laws of Massachusetts go to the extent claimed, and assume to authorize attachment proceedings to seize a credit owing to a resident of this State, when neither the paper nor the creditor are within the jurisdiction, this State is not, we think, bound to recognize them."

Carr v. *Corcoran,* 44 App. Div. N. Y. 97.

It was also held in the above case that an attachment of the debt could only be against the creditor by service upon the debtor when he was domiciled within the State, and that in such case the *res* of the debt was at the domicile of the debtor, and that the Court could not obtain jurisdiction by service upon a non-resident debtor who at the time was temporarily sojourning there. The debtor being a non-resident and the creditor being a non-resident there would be nothing for the court to take hold of.

It is the further contention of the defendants in error that when a debt due to an absconding creditor is to be attached that this can only be accomplished at the *situs* of the debt, and there can be no question but that the *situs* of the debt herein attempted to be attached and brought before the trial count was the District of Columbia.

> "A debt payable out of the State from a non-resident to a non-resident cannot be attached."

Wood v. *Furtech,* 39 N. Y. St. 173;
Bridges v. *Wade,* 113 N. Y. App. Div. 350.

> "An attachment against a non-resident can be levied only upon his estate and effects within the State."

Carrington v. *Didier,* 8th Grattan (49 Va.) 260.

> "Credits, choses in action, and other intangible interests are made by statute susceptible of seizure by attachment. The same principle applies when the defendant is out of the jurisdiction, and the debtor is also out of the jurisdiction, an attachment will not lie."

Plympton v. *Bigelow*, 93 N. Y. 592;
Douglas v. *Phoenix Ins. Co.*, 138 N. Y. 209;
Williams v. *Ingersol*, 89 N. Y. 568.

> "Debts due non-resident debtor by open account may be attached in the hands of resident garnishees."

Kern v. *Wyatt*, 89 Va. 885.

> "A debt whether it is regarded as having its *situs* at the domicile of the debtor or of the creditor cannot be attached when its *situs* is foreign to the State in which the action is brought."

Nat. Broadway Bank v. *Sampson*, 179 N. Y. 23;
Carr v. *Corcoran*, 44 N. Y. App. Div. 97.

> "Even though the evidence of the debt is within the State."

Bates v. *The N. O. etc. R. Co.*, 4th App. Pr. N. Y. 72;
Owen v. *Miller*, 10 O. 136.

The defendants in error, therefore, respectfully submit that the Court erred in overruling the first motion and plea to the jurisdiction, and should be reversed on that ground, and correctly ruled as to the second motion for dismissal and on that ruling should be affirmed.

Respectfully submitted,

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