

LACKETT *et al.* v. RUMBAUGH *et al.*

(Circuit Court, W. D. North Carolina, January 15, 1891.)

1. ATTACHMENT—SERVICE BY PUBLICATION—JURISDICTION.

Where an action is commenced in a federal court against three partners, one of whom is not served, and no *alias* summons is issued, the suit as to him is at an end, and a subsequent attachment upon an affidavit of non-residence and order of publication, though authorized by the Code of North Carolina, is void, as the federal court cannot thus acquire jurisdiction without the service of process *in personam* on defendant.

2. APPEARANCE—GENERAL—JURISDICTION.

The general appearance of defendant partner not served with process without entering any plea is not a waiver of the lack of jurisdiction of the court in respect to the subject-matter.

3. GARNISHMENT—TRUST FUNDS.

Where partners among whom dissensions have arisen finally compromise their differences by two of them agreeing to pay the debts, releasing the third from all liability, in consideration of himself and wife conveying to the others their interest in the partnership realty and being paid \$2,075 out of the insurance money for the buildings destroyed before the compromise, and the partner thus released empowers his attorney to receive the insurance money in trust for his wife, and it is paid to the attorney by the other partners on condition that it shall not be paid to the wife until she and her husband have executed the deeds according to the compromise, the fund in the hands of the attorney is a trust fund, not subject to garnishment by the partnership creditors, prior to a compliance by all of the parties with the conditions of the compromise.

4. FRAUDULENT CONVEYANCES—CONSIDERATION—WIFE'S INTEREST IN HUSBAND'S LAND.

The insurance money was collected, and the sum agreed to be paid to the released partner was by his direction paid to an attorney for the benefit of his wife, at the urgent demand of the trustee of her separate estate who had invested part of the wife's property in the partnership realty, though she was never a partner. The consideration for transferring this fund to her was her interest in the property released to the other partners. Partnership creditors sued the firm and garnished this fund. *Held*, that it was not subject to their debts.

5. HUSBAND AND WIFE—WIFE'S SEPARATE ESTATE—TRUSTEE OF—RIGHTS.

Where a husband and wife purchase an interest in partnership realty, the husband being a partner, but the wife not, and the cash payment is made with funds of the wife's separate equitable estate, a deed being made to the husband and to a trustee for the wife, and a mortgage for the unpaid balance given back by the grantees, which deed and mortgage are afterwards destroyed by the consent of the parties, except the trustee for the wife, and another deed is executed to the husband and wife, who give a deed of trust for the unpaid purchase money, the rights of the trustee for the wife are not affected, but he is entitled as against the husband's creditors to the latter's proportion of the insurance money arising from the destruction of the property by fire.

At Law.

This is an action at law in which a controversy has arisen between the plaintiffs and persons who have been allowed to interplead and set up title to a fund brought into the custody of the court by attachment proceedings instituted by the plaintiffs.

Moore & Merrick, F. A. Soudley, P. A. Cummings, and Charles Price, for plaintiffs.

Cobb & Merrimon and Joseph S. Adams, for interpleaders.

DICK, J. The counsel of the parties have waived a trial by jury and submitted all questions of fact to trial by the court. In performing this duty I will conform as near as I can to the principles of law and the rules of practice which have been announced by the state and federal

supreme courts in the cases *Raimond v. Terrebonne Parish*, 132 U. S. 192, 10 Sup. Ct. Rep. 57; *Battle v. Mayo*, 102 N. C. 413, 9 S. E. Rep. 384. The counsel on both sides have submitted arguments and briefs presenting statements of facts which they deem established by the evidence, and their views upon the questions of law involved. I will state my findings of facts separately, somewhat in the form of a special verdict, containing the ultimate facts presenting questions of law; and in giving my conclusions of law I will refer to the pleadings, the evidence, and the surrounding circumstances tending to prove, directly or by inference, the ultimate facts found by the investigation.

FINDINGS OF FACTS.

(1) The defendants James H. Rumbaugh, W. W. Rollins, and Joseph Pettyjohn composed the Warm Springs Company, and were jointly indebted to the plaintiffs in the sum stated in the complaint in this action. (2) The Warm Springs Company was dissolved by the mutual consent of the partners, and upon terms expressed in a written contract executed on the 23d day of May, 1885. This contract was the result of a compromise effected by M. E. Carter, the legal counsel and mutual friend of the parties. There had been personal difficulties and much litigation between the parties, and these were all adjusted and settled by the compromise. (3) The hotel buildings and furniture belonging to the Warm Springs Company were destroyed by fire in December, 1884, and the insurance companies refused to pay any part of the insurance money until Joseph Pettyjohn, one of the insured, should sign the proof of loss, as well as the other parties insured. This Pettyjohn refused to do until some agreement should be made adjusting the claims of himself and wife as to their insured interests in the destroyed property. (4) The terms of the compromise were, in substance, that all litigation between the partners was to be discontinued, and all claims of indebtedness against Pettyjohn were to be canceled and surrendered; that he was to be relieved from all liability to creditors incurred as a partner in the Warm Springs Company; that all the indebtedness of the company was assumed and agreed to be paid by Rumbaugh and Rollins; and that he was to receive \$2,500 of the insurance money, if the whole amount (\$53,000) of the policies was recovered, or a proportional sum if a less amount was obtained. Pettyjohn and wife were to convey to Rumbaugh all their interest in the property of the company, and release all claims that might arise out of former joint business relations; and Pettyjohn was to assist Rumbaugh and Rollins, as far as he could, in collecting the insurance money. (5) A compromise was effected with the insurance companies, and Rumbaugh and Rollins received \$44,000, and they paid to M. E. Carter \$2,075, to be held by him under a power of attorney executed by Pettyjohn for the benefit of Jesse M. Pettyjohn, trustee of the separate equitable estate of Mrs. Pettyjohn. Under instructions from Rumbaugh and Rollins this fund was to be kept by M. E. Carter, and was not to become the property of Pettyjohn or to be paid over to Jesse M. Pettyjohn until Joseph Pettyjohn and wife executed the quit-