SMITH *v.* HALTOM.

Opinion delivered July 2, 1928.

1. DIVORCE—DIVISION OF PROPERTY.—It was proper, in a suit in which a divorce was granted to the wife, to set aside one-third of all the real estate belonging to her husband.
2. DIVORCE—FUNDS OF NONRESIDENT HUSBAND—EQUITABLE GARNISHMENT.—Where, at the request of the plaintiff in a divorce suit, the court ordered funds of her nonresident husband to be impounded, such order constituted an equitable garnishment of the funds in which alimony may be allowed.
3. DIVORCE—ATTORNEY'S FEES PENDING APPEAL.—Where no appeal was taken from a decree of divorce, though an appeal was taken from an order directing the application of funds of the nonresident defendant to the payment of alimony to the plaintiff, a motion in the Supreme Court to allow a fee to plaintiff's attorney pending the appeal will be denied.

Appeal from Nevada Chancery Court; *C. E. Johnson,* Chancellor; affirmed.

STATEMENT OF FACTS.

Lois B. Haltom brought suit for divorce against W. Scott Haltom, in the Nevada Chancery Court, on the statutory ground of desertion. The complaint alleges that plaintiff and defendant were married in Hempstead County, Arkansas, on January 4, 1918, and lived together as husband and wife until September 1, 1923, when defendant deserted her and their infant child, without cause, and has been willfully absent from them ever since.

The suit was filed on the 6th day of July, 1927, and the complaint alleges that the defendant was a nonresi-

dent of the State. The defendant was constructively summoned in the manner and for the time provided by statute, and, in addition, the plaintiff caused a summons to be issued and served upon the defendant at his residence in the State of New York. Attached to this summons was a certified copy of the complaint. The affidavit of personal service of the summons is in the record. Attached to the complaint was an exhibit describing, according to the United States Government survey, certain lands in the counties of Nevada, Columbia and Ouachita, in the State of Arkansas. The complaint for divorce also alleges that plaintiff is entitled to a reasonable sum for the support of their child, and to one-third of the personal property belonging to the defendant which is in the State of Arkansas, and one-third of his real estate for life. The complaint further alleges that W. Scott Haltom is one of the heirs-at-law of J. F. Haltom, deceased, who recently died in Ouachita County, Arkansas; that the defendant, J. B. Smith, was by the probate court of Ouachita County appointed administrator of his estate, and is now acting in that capacity; that all of the debts of said estate have been paid, and that said administrator has in his hands the sum of $2,000 belonging to the defendant, W. Scott Haltom, which he has been ordered by the Ouachita Probate Court to pay, and that said defendant has a 1/28 interest as such heir-at-law in a large body of land lying in Nevada, Columbia and Ouachita counties, in the State of Arkansas, aggregating more than six thousand acres, and that a correct description of the lands is filed with the complaint as an exhibit thereto and made a part of it.

No defense to the action was made by the defendant, W. Scott Haltom.

J. B. Smith, as administrator of the estate of John F. Haltom, deceased, filed a demurrer and answer to the complaint. For ground of demurrer he stated that all funds in his hands belonging to said estate were subject to the orders of the probate court of Ouachita County, and that the chancery court of Nevada County had no

jurisdiction. For answer he admitted that he had the sum of $2,000 in his hands which was due W. Scott Haltom as an heir-at-law of John F. Haltom, deceased.

Upon the trial of the cause, the desertion of the defendant for the statutory period was clearly proved, as well as his failure to provide for or to contribute toward the support of his wife and their infant son. It was also shown by the plaintiff at the trial of the cause that the defendant had a 1/28 interest in 6,000 acres of land, being the land above mentioned, and that these lands had already been set apart to her then husband, as well as the sum of $2,000 which was ready to be paid him as his distributive share of the personal estate of his deceased father.

A decree was entered of record in the chancery court on the 6th day of October, 1927, in which it was recited that the defendant had been constructively summoned as required by statute, and that the plaintiff was entitled to a divorce, to the custody of their infant son, to maintenance, and to one-third of the realty of her husband for life, as provided by statute. A decree was entered of record in accordance with the findings of the chancellor. We copy from the decree the following:

"The court finds from the evidence that the plaintiff should be allowed the sum of $25 per month for the maintenance of said child for three years last past, amounting to the sum of $900; to a full one-third of the personal property impounded in this action, in the hands of the defendant, J. B. Smith, as administrator of the estate of J. F. Haltom, deceased; and that plaintiff is also entitled to a one-third interest for life in the defendant's interest in all the lands belonging to the estate of J. F. Haltom, deceased; and the court finds that, at the time of the death of said J. F. Haltom, he, the said J. F. Haltom, was seized of an undivided one-half interest in the lands hereinafter described, and that defendant, W. Scott Haltom, as one of the heirs-at-law of J. F. Haltom, deceased, became seized of and is now the owner of a 1/14 interest in the interest so belonging

to the said J. F. Haltom, deceased, and that the interest of the said W. Scott Haltom is a 1/28 interest in fee in and to the following lands, to-wit: (Here follows a description of the lands according to the United States Government survey).

"The court further finds that plaintiff is not entitled in this action to attorney's fees sued for in the complaint. * * *.

"It is further by the court considered, ordered and adjudged that the defendant, J. B. Smith, as administrator of the estate of J. F. Haltom, deceased, be and he is hereby charged as an equitable garnishee herein, and the funds in his hands belonging to the defendant are hereby impounded, and the said J. B. Smith is ordered and directed to pay out of the funds now in his hands or which he may hereafter receive from the estate of J. F. Haltom, deceased, one-third of all amounts which may be due the said Scott W. Haltom.

"He is further ordered and directed to pay out of the funds in his hands, as such administrator, belonging to W. Scott Haltom, to the plaintiff, Lois D. Haltom, the sum of $900 and all costs herein. He will pay said sum to the said Lois D. Haltom or her attorneys of record, and charge the same to the said W. Scott Haltom.

"It is further by the court considered, ordered, adjudged and decreed that the plaintiff, Lois D. Haltom, is entitled to and is decreed a one-third interest for and during her natural life in and to all the above-described lands, or said 1/28 interest, being the interest which the court finds belongs to the defendant, W. Scott Haltom, subject to the interest herein decreed to the said plaintiff, Lois D. Haltom."

To reverse that decree, J. B. Smith, as administrator of the estate of J. F. Haltom, deceased, has duly prosecuted an appeal to this court.

W. Scott Haltom, through his attorneys, has tendered a copy of the record and proceedings in the chancery court, and asks this court to issue a writ of certiorari to quash the decree of the chancery court as void.

Haynie, Parks & Westfall, for appellant.

McRae & Tompkins, for appellee.

HART, C. J., (after stating the facts). At the outset it may be stated that we have carefully read and considered the record, and if the defendant, W. Scott Haltom, had appealed we could have reached no other conclusion than that the chancery court properly granted the plaintiff, Lois B. Haltom, a divorce from her husband, W. Scott Haltom, and awarded her the custody of their infant son. The court also was right in setting apart to the plaintiff one-third of all the real estate described in the complaint as belonging to her husband.

The case of *Allen* v. *Allen*, 126 Ark. 164, 189 S. W. 841, was a case where constructive service was had upon the husband, and the wife in her complaint described real estate belonging to her husband, and asked that one-third of it be set apart to her for her natural life. There was a decree granting her a divorce and awarding her one-third of the lands of her husband for her life. The court held (quoting from syllabus): "The statute authorizes the court to set apart to the plaintiff in a divorce case one-third of all the husband's real estate, and the filing of a complaint describing the property gives the court jurisdiction over it for the purposes of making an award in accordance with the terms of the statute; no attachment or other method of sequestration is necessary in order for the court to acquire jurisdiction."

Again, in *Hegwood* v. *Hegwood*, 133 Ark. 160, 202 S. W. 35, the court held (quoting from syllabus): "The division of the property is a mere incident to the divorce, and it is not essential to the jurisdiction of the court that the pleadings should set forth the property. The decree for divorce draws to the court the power to ascertain the description of the property owned by the husband, for the purpose of awarding to the divorced wife her share thereof."

From the contract of marriage springs a relation or status in which the State and the public are interested

and which has always been deemed subject to the control of the Legislature by laws which, amongst other things, prescribe the effect of the relation upon property rights of the contracting parties. *Closson* v. *Closson,* 30 Wyoming 1, 215 Pac. 485, 29 A. L. R. 1371; *Maynard* v. *Hill,* 125 U. S. 190, 8 S. Ct. 723.

In *Forrester* v. *Forrester,* 155 Ga. 722, 118 S. E. 373, 29 A. L. R. 1363, it was held that the property of a nonresident husband which may be found in the State of Georgia may be seized and appropriated to the support of his wife by proper proceedings *quasi in rem,* in a court of equity which has jurisdiction of the subject-matter of the suit and possession of a *res* which may be subjected.

In a case-note to 29 A. L. R., 1381, the principle is recognized and the rule is stated as follows:

"While it has been held in many cases that a purely personal decree or judgment for alimony, rendered against a nonresident, who is notified constructively by publication or actual service out of the State, and who does not appear, is void, not only in the State in which it is rendered but in other jurisdictions as well, yet a different rule prevails as to property of the nonresident so served which is within the jurisdiction of the court. Assuming that the nature and *situs* of the property are such as to support a proceeding *in rem* or *quasi in rem,* the rule is that constructive service of process or personal service outside of the State, even in the case of a nonresident, will give jurisdiction to render a decree for alimony or maintenance, which is binding upon property belonging to him which is within the jurisdiction of the court and which has been specifically proceeded against;" and among the cases cited are *Pennington* v. *Fourth Nat. Bank,* 243 U. S. 269, 37 S. Ct. 282, L. R. A. 1917F, 1159, and *Allen* v. *Allen,* 126 Ark. 164, 189 S. W. 841.

In the application of the rule in *Walker* v. *Walker,* 147 Ark. 376, 227 S. W. 762, in an action for divorce against a nonresident on constructive service of process, it was held that a personal judgment could only be ren-

dered upon personal service of process, and that in such a case a personal decree for alimony and attorney's fee against the husband was void on its face.

In the case at bar the court specifically refused to allow attorney's fees, and also refused to make a personal decree for alimony. The decree provided that the alimony was to be paid out of the portion of the estate of J. F. Haltom, deceased, which had been ordered distributed to W. Scott Haltom and which had been impounded for that purpose in the hands of the administrator as a part of the personal estate of the decedent ready to be distributed to his heirs-in-law.

The chancery court, at the commencement of the suit, was asked to impound only that part of the personal estate of J. F. Haltom, deceased, which had been specifically ordered to be distributed to W. Scott Haltom. This constituted an equitable garnishment of the funds, and brings the case squarely within the rule announced in *Pennington* v. *Fourth Nat. Bank,* 243 U. S. 269, 37 S. Ct. 282, where it was held that the alimony obligation of a nonresident husband, served only by publication, though inchoate at the commencement of the divorce suit, may, consistently with the due process of law guaranteed by the 14th Amendment of the United States Constitution, be enforced out of a bank deposit in a local bank, where, upon the filing of the suit, the court entered a preliminary order enjoining the bank from paying out any part of the deposit, such an order being as effective a seizure as the customary garnishment or taking by trustee process. In discussing the question the court said:

"The power of the State to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, inchoate, to be perfected only by time or the action of the court. The only essentials to the exercise of the State's power are

presence of the *res* within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt; that is, it will be valid not *in personam*, but as a charge to be satisfied out of the property seized."

This rule applies here. The defendant, J. B. Smith, as administrator of the estate of J. F. Haltom, deceased, was made an equitable garnishee when the divorce complaint was filed. His answer admits that he has in his hands as such administrator a sum of money which the probate court has already ordered to be paid by him to W. Scott Haltom as his distributive share of the estate. The administration was closed, so far as the sum garnisheed was concerned; nothing remained to be done except to pay out the amount to W. Scott Haltom as his distributive share of the personal estate. Hence equitable garnishment of the same could in no way affect the jurisdiction of the probate court over the administration of the estate of J. F. Haltom, deceased. The answer of the defendant, J. B. Smith, as such administrator, made him a party to the proceeding, and, as a result, he was required to follow the suit to its end or stand the consequences. Hence he had the right to appeal to this court, and, indeed, it was his duty to do so if he thought the decision of the chancery court was wrong. But, as we have already determined, the decree of the chancery court was correct as far as he is concerned.

For the reasons above given, the application of the defendant, W. Scott Haltom, for a writ of certiorari to quash the decree of the chancery court in the divorce case must be denied. No appeal has been taken from the decree for divorce, and, for that reason, the motion of the attorneys of Lois B. Haltom for attorney's fees pending the appeal in this court must be denied. The appeal of J. B. Smith, as administrator of the estate of J. F. Haltom, deceased, does not give us jurisdiction to

grant attorney's fees in the divorce case, which was not appealed. Nor can the cross-appeal of Lois B. Haltom have that effect, because it does not affect her rights as to the equitable garnishment against J. B. Smith, administrator of the estate of J. F. Haltom, deceased.

The result of our views is that the decree of the chancery court will be affirmed, and the application of the defendant, W. Scott Haltom, for a writ of certiorari to quash the decree of the chancery court will be denied. It is so ordered.