DESHA *against* BAKER AND OTHERS.

ERROR *to Hempstead Circuit Court.*

Where a writ of attachment is levied on property, or on the indebtedness of a garnishee, a schedule of the property levied on must be attached to the return, and the return must show that, at the time of summoning the garnishee, the Sheriff declared, in the presence of one or more citizens of the county, that he attached the debt due by him to the defendant.

In every case, this declaration, in the presence of one or more citizens, as to what is attached, is necessary; and a schedule of the property, and the names of the persons in whose presence the writ was executed, are equally necessary.

If these requisites are complied with, the debt is fixed in the hands of the garnishee, in favor of the creditor; and a recovery will protect the garnishee *pro tanto,* and may be pleaded in bar of any future action.

Merely summoning the garnishee, is no attachment of an indebtedness.

The defendants in error commenced, in the Court below, their action of debt, by petition against Robert B. Francis, by suing out a writ of attachment from the Circuit Court, dated the 27th of June, A. D. 1840. The Sheriff returned on the writ, that he executed it, "by seizing and taking, by virtue of the within writ, a certain negro boy slave, named Bill, as the property of the within named Robert B. Francis, and as directed by the plaintiff's attorney, G. D. Royston, on the 29th day of June, 1840; and I further executed the within writ of garnishment, as within I am commanded, by reading the same in the presence and hearing of the within named T. T. Collier and H. W. Smith, in Ozan township, Hempstead county, and State of Arkansas, and then and there, in their presence and hearing, declared that I did attach all and singular the goods and chattels, lands and tenements, moneys, credits, and effects of the within Robert B. Francis; and that I did summon them to be and appear before the Judge, on the first day of the October Term, 1840, to answer what might be objected against them, this the 29th day of June, A. D. 1840; and I further executed the within summons, by reading the same in the presence and hearing of the within named Robert B. Francis, in Ozan township, &c., this 25th day of July, A. D. 1840."

At April Term, 1841, the plaintiffs filed their allegations and interrogatories, against Collier and Smith, as garnishees; and on the 5th of April, 1841, Collier and Smith filed their answer, under oath, in which they admitted that Francis held their joint note, dated December 28, 1839, payable at twelve months, on which $250 was due, the same being for five hundred dollars.

On the 19th of April, Francis appeared, and moved to quash the sheriff's return on the writ, as to the garnishees, and that he should be restored to his rights against the garnishees; and on the same day, the plaintiff in error moved for and obtained leave to interplead. He thereupon, on the same day, filed his interpleader, in which he averred, that on the 28th day of December, 1839, Collier and Smith executed their writing obligatory to Francis, due at twelve months after date, for value received, for $500; and that Francis, on the 25th day of February, A. D. 1841, for a valuable and full consideration, bona fide endorsed the same to the plaintiff in error, in writing; that the same is wholly unpaid; and that when it was so assigned, the amount due thereon had not, nor had any part thereof, been attached in the hands of the garnishees, or either of them; nor was any such attachment of the same, or any part thereof, evidenced by any record or return whatever; and that Francis could therefore rightfully assign the same.

On the 14th of April, Francis, motion to quash the return was overruled, and judgment entered against him.

On the 15th of April, the plaintiffs filed two replications to Desha's interplea. The first alleged, that, long before the endorsement to Desha, to wit, on the 29th of June, 1840, the writ of attachment was executed on Collier and Smith, by reading it in their presence and hearing, at Ozan township, &c., and summoning them; concluding with a verification by the return. The second replication alleges, that the indebtedness of the garnishees to Francis was *attached* on the 20th of June, 1840, with a verification by the return.

To the first replication Desha demurred; and to the second he took issue. The Court overruled the demurrer, and, on inspecting the return, decided that the indebtedness was attached, and rendered judgment on the second issue against Desha. Judgment was accordingly entered against the garnishees, in favor of the plaintiffs below.

PIKE, for plaintiff in error:

The first question presented by the record is, whether *summoning* a garnishee merely, binds a debt in his hands, so that the person to whom he owes it has no longer any control over it?

The second question presented by the record is, whether the indebtedness of the garnishees to Francis, upon their bond to him, was so attached, that a subsequent assignment of the bond, by Francis to Desha, was inoperative? If the indebtedness was legally attached, then the judgment of the Court below may be sustained.

The solution of this question is to be sought in the construction of certain provisions of Chapter 13 of the Revised Statutes. By the provisions of that chapter, the plaintiffs may, upon complying with certain pre-requisites, issue a writ of attachment, containing a triple mandate, commanding the sheriff, first, to attach the defendant by his goods, chattels, &c., no matter in whose hands found; second, to summon the defendant; and third, to summon every person in whose hands or possession the goods, &c., are found, and particularly every such person as shall be named in the writ by the request of the plaintiff. Upon making a certain affidavit, he may have a clause of capias against the garnishee.

The manner of attaching the defendant's goods, chattels, lands, tenements, *credits,* or effects, is provided by section 8. It is to be "by the officer going to the place where, or the person in whose hands or possession, the goods or effects are supposed to be, *or to the person who is supposed to be indebted to the defendant,* and then and there, in the presence of one or more citizens of the county, declaring that he attaches the same."

From the time of this service, the property, money, or effects, so attached, remain in the officer's hands or possession, and must be by him secured, to abide the event of the judgment of the Court.

The summons to the defendant and garnishee is to be served as in other cases. The capias against the garnishee is to be served by taking his body.

By section 16 it is provided, that when property or effects of any description are attached in the hands of a garnishee, they may be

released, and remain in his possession, on his giving bond. And by section 17, in case of a debt attached in his hands, his body is to be released from custody, on his giving a like bond. By section 18, in the same cases mentioned in sections 16 and 17, if he has been taken with a capias, he may be released, on giving bond.

If, therefore, the garnishee has in his possession any visible and movable property of the defendant, when there is no clause of capias, the property is attached by the officer's going where the property is, and declaring, in the presence of a citizen, that he attaches it. He then takes it in possession, and reads the writ to the garnishee. If the garnishee wishes to retain the possession of the property, he gives bond. But when a debt or indebtedness is to be attached, the officer goes to the garnishee, declares that he attaches the debt, and, as it is intangible, and he cannot otherwise secure it to abide the event of the suit, the statute requires him to take the body of the garnishee, releasing it only on the execution of a bond.

If it be contended that the officer can only take the body of the garnishee where there is a clause of capias, then it must be admitted that section 17 is useless and absurd. It is true that section 18 is inaccurately worded; but it is the true rule of construction, to make every provision of the statute stand, if practicable. Sections 16 and 17 show what is to be done where either visible property or a mere indebtedness is attached; and section 17 defines what shall be the course where the garnishee is taken with a capias, instead of being summoned. It is true that where a debt is attached, the same course is prescribed, whether the process against the garnishee be a summons or capias; but neither repetition nor surplusage vitiates. The provisions contained in the three sections might have been more lucidly arranged, and more briefly as well as more clearly expressed; but their meaning is sufficiently obvious.

Let us then first inquire whether the mere summoning of a garnishee is sufficient, in such a case as the present, to affect his indebtedness by bond, so that the defendant can no longer assign the bond —in other words, whether *summoning* the garnishee is attaching the debt, for this is the issue presented by the demurrer.

Such a debt is to be attached by the officer going to the person

indebted, and declaring, in the presence of one or more citizens, that he attaches the debt, and by securing it so as to abide the event of the suit. Whether it is necessary also to take the body of the garnishee, is not material to be inquired into, as far as the demurrer is concerned; for the naked fact set up in the replication demurred to, is, that the garnishees were summoned.

The proceeding in such case in two-fold. Every attachment with garnishee is a double suit—against the defendant and against the garnishee. The Court can only obtain jurisdiction as against a defendant, by the service of personal process, or some other method pointed out by law. In proceeding by attachment, the jurisdiction is obtained by service *in rem*. If no property of, or indebtedness to the defendant is found and attached, the Court takes no jurisdiction of the defendant, and its proceedings are invalid. Hence, in order to lay a basis for the jurisdiction as against the defendant, his property or credits must be attached. Having obtained this jurisdiction, and not before, the Court then obtained jurisdiction as against the garnishee, by summoning or taking him.

The jurisdiction as against the garnishee, is collateral to and dependent on that as against the defendant. The defendant's rights cannot be affected, unless he has actual or constructive notice of the proceedings. What shall be constructive notice, is fixed only by statutory enactment. In this case, it is the attaching of his property; and the mere summoning of a garnishee is no notice, either actual or constructive, to the defendant.

The second issue presents the same questions. The plaintiff alleged that the indebtedness was attached, which allegation he undertook to maintain by the return. The return does not sustain it. It fails to show, either that the indebtedness was declared by the sheriff to be attached, or that the bodies of the garnishees were taken. The declaration would not, in our apprehension, be an attaching of the debt. The indebtedness must be secured by the officer. Certainly this object would not be attained either by summoning the garnishee, or by declaring the debt to be attached. The garnishee could depart beyond the jurisdiction, and the debt would follow him; and this consideration shows that the construction for which we contend

is correct. Could the jurisdiction of the Court depend upon the volition of the garnishee? If the defendant's property is attached, and *in custodia legis,* and subject to the process of the Court, the Court has jurisdiction, and enforces its judgment against the property. But if by a fiction of law, declaring a debt to be attached, is to be taken as an actual levy and seizure, will the Court still retain jurisdiction, when the indebtedness, which is the basis of the jurisdiction, has accompanied the person of the garnishee beyond the limits of the State? The only ground on which the jurisdiction can be sustained, is, that the Court has laid its hands on the property of the defendant, and will subject it to the claims of the creditor; for it is this property, and this alone, which is operated on by the judgment. Thus STORY says, that the existence of the property so seized or attached within the Territory, constitutes a just ground of proceeding, to enforce the rights of the plaintiff, to the extent of subjecting such property to execution upon the decree or judgment. *Conf. of Laws,* 461. It naturally results, that if the Legislature intended to effect this end, they would provide that the Court should be enabled to hold and keep within its jurisdiction the property or indebtedness attached. For, unless such power were given to the Court, the exercise of its jurisdiction would be a futile act.

So again he says, that if the defendant does not appear and contest the suit, it is to be treated, to all intents and purposes, as a mere proceeding *in rem,* and not as personally binding on the party as a decree or judgment *in personam*—it only binds the property seized or attached in the suit. *Ib.* Thus, the jurisdiction in Scotland is said to be acquired by arresting the defendant's goods, *and so fixing them in the Territory.* 3 *Burge's Comm. on Col. and For. Law,* 1016, 1019, cited in *Conf. of Laws,* 2d ed., p. 462.

So STORY says again, that in this class of cases, we are especially to bear in mind, that to make any judgment effectual, the Court must possess and exercise a rightful jurisdiction over the *res,* and also over the person, at least so far as the *res* is concerned; otherwise, it will be disregarded. *Conf. of Laws,* 496.

We do not question that the Legislature had the power to declare, as has been done in other States, that summoning the garnishee