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Phyllis Lang v. J. Robert Lang, Samuel J. Carter : Brief of Intervenor-Respondent

Utah Supreme Court

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BRIEF

KET NO. 10225 IR

URT

STATE OF UTAH

PHYLLIS LANG,
Plaintiff-Appellant,

vs.

J. ROBERT LANG,
Defendant,

SAMUEL J. CARTER,
Intervenor-Respondent.

Case
No.
10225

BRIEF OF INTERVENOR-RESPONDENT

Appeal from Order setting aside Garnishee Judgment
of the District Court of the Third Judicial District in and
for Salt Lake County

Hon. Ray Van Cott, Jr., *Judge*

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**IN THE SUPREME COURT
of the
STATE OF UTAH**

PHYLLIS LANG,
Plaintiff-Appellant,

vs.

J. ROBERT LANG,
Defendant,

SAMUEL J. CARTER,
Intervenor-Respondent.

Case
No.
10225

BRIEF OF INTERVENOR-RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

On February 28, 1964, in the District Court of Salt Lake County, State of Utah, a garnishee judgment in favor of plaintiff, Phyllis Lang, in the sum of \$9,375.00 was signed, filed and entered against the garnishee-respondent (mistakenly designated intervenor-respondent) Samuel J. Carter, Executor of the Estate of John Lang, deceased.

DISPOSITION OF THE LOWER COURT

Upon motion of the garnishee-respondent (intervenor-respondent), Samuel J. Carter, Executor of the Estate

of John Lang, deceased, the Hon. Ray Van Cott, Jr., a judge of said District Court, on July 31, 1964, signed, entered and filed an Order setting aside, annulling and declaring void the aforesaid garnishee judgment.

RELIEF SOUGHT ON APPEAL

Respondent Carter, as Executor of the Estate of John Lang, deceased, seeks affirmance of the Order of the lower court setting aside, annulling, and declaring void the aforesaid garnishee judgment against respondent, signed, entered and filed on July 31, 1964.

STATEMENT OF FACTS

I. *As to Record on Appeal.*

Respondent Carter, as Executor of the Estate of John Lang, deceased, has filed in this Court and Cause his motion to strike from the record on appeal five certain documents designated as follows: (a) the Affidavit of D. M. Amoss, attorney for appellant, dated August 24, 1964; (b) the Motion of Tracy Collins Bank and Trust Company, Trustee-Intervenor, to set aside garnishee judgment against said Carter as Executor of the Estate of John Lang, deceased, dated February 28, 1964; (c) the Motion of said Tracy Collins Bank and Trust Company as Trustee to intervene in the action of Phyllis Lang vs. J. Robert Lang; (d) Order making

Tracy Collins Bank and Trust Company as Trustee a party to the above entitled action; and (e) all documents filed in a certain action commenced and pending in said Third District Court designated as Civil Action No. 148659, entitled Samuel J. Carter, etc. vs. Phyllis Lang, etc. The bases for said motion are that each and all of the said documents are immaterial and irrelevant to the issues on appeal in this case; that the Amoss affidavit was filed subsequent to the order appealed from and is self-serving, and the facts therein alleged are irrelevant and immaterial to the issues involved on this appeal; and as to (e) supra, the said action No. 148659 and the matters involved therein are entirely irrelevant and immaterial to the issues involved on this appeal, and that said documents were not introduced in evidence at the hearing of the motion to set aside the garnishee judgment against respondent.

(a) *Amoss Affidavit.*

The order appealed from (R-15) was signed by Judge Van Cott on July 31, 1964. No motion to modify or amend said order was made. The Amoss Affidavit is dated August 24, 1964, and was filed in the office of the Clerk of the District Court on August 25, 1964. In paragraph 4 thereof (R-13), the affidavit attempts to set forth the proceedings on the argument of a motion to dismiss interposed by Wilford Burton, a defendant in Civil Action No. 148659 entitled Samuel J. Carter, etc. vs. Phyllis Lang, etc., and also to report the decision of the

Court on said motion. Amoss was and is attorney for the plaintiff-appellant.

(b) *Motion of Tracy Collins Bank and Trust Company to set aside garnishee judgment against Samuel J. Carter as Executor of the Estate of John Lang, deceased.*

This motion (R-9) was made in the instant action after Tracy Collins Bank and Trust Company as Trustee had been made a party defendant thereto (R-8). The motion to set aside said garnishee judgment against Carter as Executor (R-9) was based on the fact that the judgments in favor of plaintiff, Phyllis Lang, against the defendant, J. Robert Lang, upon which the writ of garnishment against said Carter as Executor was issued are null and void on the ground that no proper service of process was made upon said J. Robert Lang as a basis for obtaining any of said judgments.

(c) *Motion of Tracy Collins Bank and Trust Company as Trustee to intervene in the action of Phyllis Lang vs. J. Robert Lang (R-9).*

The basis for this motion was that said Tracy Collins Bank and Trust Company as Trustee was not adequately represented for the protection of its interests and that it might be bound by a judgment in said action (R-9).

(d) *Order making Tracy Collins Bank and Trust Company as Trustee a party to the action (R-8).*

This order dated July 2, 1964, made Tracy Collins Bank and Trust Company, Trustee, a party to the action.
(R. 8)

(c) *Documents in the case entitled Samuel J. Carter, etc. vs. Phyllis Lang, etc.*

This is Civil Action No. 148659 filed in the District Court of Salt Lake County, Utah, on March 5, 1964, by Samuel J. Carter as an individual and also in his capacity as Executor of the Estate and under the last will and testament of John Lang, deceased, against Phyllis Lang, J. Robert Lang, Wilford M. Burton and George Beckstead, Sheriff of Salt Lake County, Utah. The file in this action was designated by appellant as part of the record on appeal (R-18), and it has been transmitted to the Supreme Court. This action is an interpleader action instituted by the plaintiff therein against the defendants therein praying for a judgment of the Court requiring them to interplead. It alleges that said Carter in his capacity as Executor aforesaid holds the sum of \$9,375.00 to which he makes no claim of interest, but that the defendants have made conflicting demands upon him for payment, and that he is unable to determine the rightful owner thereof, and is willing to pay the same to such persons as should be lawfully entitled thereto. He offers to bring said sum of money into court at such time and under such conditions as the court may order and direct. The garnishee-appellant filed in the District Court on September 15, 1964, his designation of additional record

on appeal and objection to the designation by appellant of the items particularly described in (a), (b), (c), (d) and (e) above (R-21, 22) as being included in the record on appeal.

2. *As to the Merits of the Case.*

(a) The garnishee-respondent, Samuel J. Carter, was appointed Executor of the Estate and under the last will and testament of John Lang, deceased, by an order made, entered and filed in those certain proceedings instituted and now pending in the Superior Court of the State of California in and for the County of Orange, entitled "In the Matter of the Estate of John Lang, Deceased." The said garnishee-respondent qualified as such Executor and has since his appointment been the regularly appointed, qualified and acting Executor of said estate; said garnishee-respondent has not been appointed ancillary executor of the Estate of John Lang, deceased, by any court of the State of Utah (R-10, 11, and 13).

(b) The plaintiff, Phyllis Lang, asserts and represents that she recovered judgments against the defendant, J. Robert Lang, in this action as follows: On April 19, 1962, in the amount of \$2,800.00 with interest and attorney's fees; on March 19, 1963, in the amount of \$8,350.00 with interest and attorney's fees, and on February 26, 1964, in the amount of \$3,850.00 with interest and attorney's fees (R-9).

It was these judgments that Tracy Collins Bank and Trust Company as Trustee attacked by motion to set aside the garnishee judgment against the garnishee-respondent. There is nothing in the record on appeal that indicates the disposition of this motion.

(c) Based on the alleged judgments above described, the plaintiff on February 27, 1964, caused a writ of garnishment to issue against Samuel J. Carter, Executor, and a copy of the same was served upon the said Carter on February 28, 1964. The said Carter, as Executor, responded to the interrogatories contained in said writ of garnishment as follows:

“FIRST.—Are you in any manner indebted to the defendants, or either of them, either in property, or money, and is the same now due? If not due, when is the same to become due? State fully all particulars.

“Answer: Yes — As Executor of the Estate of John Lang, deceased, in the Superior Court of the State of California, in and for the County of Orange.

“SECOND.—Have you in your possession, in your charge, or under your control, any property, effects, goods, chattels, rights, credits, or choses in action of said defendants or either of them, or in which he is interested? If so, state what is the value of the same, and state fully all particulars.

“Answer: Yes—As such Executor, I have in my possession \$9,375 owing to defendant in settle-

ment of an action brought against me as such Executor by defendant and others.

“THIRD.—Do you know of any debts owing to the said defendants, whether due or not due, or any property, effects, goods, chattels, rights, credits, or choses in action, belonging to him, or in which he is interested, and now in the possession or under the control of others? If so, state the particulars.

“Answer: No.”

(d) On February 28, 1964, upon motion of the plaintiff, the Court made, entered and filed a garnishee judgment against Samuel J. Carter *as the Executor of the Estate of John Lang, deceased, for the sum of \$9,375.00* (R-14). On the same date the plaintiff caused a garnishee execution to issue against said Samuel J. Carter as Executor of the Estate of John Lang, deceased, (R-5) and it was served on the same date (R-6) and returned unsatisfied.

(e) Samuel J. Carter as Executor of the Estate of John Lang, deceased, thereupon moved the Court for an order setting aside and nullifying the aforesaid garnishee judgment (R-10, 11 and 12). This motion was filed in the office of the Clerk of the District Court on July 22, 1964 (R-12). On July 31, 1964 (R-15) Judge Van Cott signed and filed the order setting aside said garnishee judgment (R-15), and it is from this order that the plaintiff appeals.

ARGUMENT

POINT I

**THE MOTION OF GARNISHEE-RESPONDENT
CARTER, EXECUTOR OF THE ESTATE OF
JOHN LANG, DECEASED, FILED IN THIS
COURT AND CAUSE TO STRIKE FROM THE
RECORD ON APPEAL CERTAIN DOCUMENTS
AND PAPERS SHOULD BE GRANTED.**

Each document which is the subject of this motion will be discussed separately.

I. *Amoss Affidavit.*

(a) This affidavit was filed in the office of the Clerk of the District Court on August 25, 1964. The order setting aside and nullifying the garnishee judgment from which this appeal is taken is dated July 31, 1964, and on that date was undoubtedly filed in the office of the Clerk of the Court. This affidavit was filed subsequent to the order appealed from and therefore it cannot be considered part of the record on appeal.

Broads v. Mead, 159 Cal. 765, 116 Pac. 460;

Southern Insurance Co. v. Anderson, 130 Tenn. 482, 172 S.W. 318;

Thomson v. Wooster, 114 U.S. 104, 29 L.ed. 105, 5 S.Ct. 788;

Hopt v. Utah, 114 U.S. 488, 29 L.ed. 183, 5 S.Ct. 972;

Howard v. Howard, 269 Wis. 334, 69 N.W.(2d) 492;

Berg v. Griffith, 127 Neb. 501, 256 N.W. 44, 102 A.L.R. 1124;

Smolinski v. Kabla, 21 Ohio App. 52, 153 N.E. 104.

(b) The affidavit itself contains self-serving statements of the attorney for the plaintiff-appellant. It is an attempt on his part to rectify a defect in the record on appeal. The Court file in the action of Samuel J. Carter, etc. vs. Phyllis Lang, etc. (Civil Action 148,659) was not introduced in evidence at the time of the argument of the motion to annul and set aside the garnishee judgment. The recital of paragraph 4 of this affidavit attempts to correct this deficiency.

(c) Paragraph 4 of the affidavit contains declarations which are manifestly the rankest type of hearsay. The affiant attempts to recite the occurrences at the argument of counsel upon the presentation of a motion in a separate and distinct action. It sets forth facts upon which no issue was joined at the hearing on the motion to set aside the garnishee judgment. The garnishee-respondent Carter, Executor, had no opportunity to meet and controvert the allegations of this paragraph.

(d) The issue in this instant appeal to be determined is whether or not the garnishee judgment against the garnishee-respondent is valid. The facts set forth in paragraph 4 of the affidavit are entirely immaterial and irrelevant to this issue. There can be no problem as to *res judicata* because the order of Judge Anderson denying the motion of Burton to dismiss the interpleader complaint was not a final judgment upon which such plea could be based,

“***since it is a general rule that a judgment sought to be used as a basis for the application of the doctrine of *res judicata* must be final and not an interlocutory judgment.” (30A Am. Jur. — Judgments — Sec. 340, p. 384).

Preliminary orders such as sustaining or denying motions to dismiss are not final judgments which can be pleaded as *res judicata* or estoppel by judgment in another action. *Loveless v. Carten*, 64 Ga. App. 54, 12 S.E.(2d) 715. And an order denying a motion to dismiss not being final is not *res judicata*. *Sachs v. Ohio Nat. Life Ins. Co.*, 148 Fed.(2d) 128, 158 L.R.A. 688, 693; cert. denied, 326 U.S. 753, 90 L.ed. 452, 66 S.Ct. 92.

“All judicial and academic authority supports the rule that the issues which are litigated or may be litigated in an action can be finally adjudicated only by final judgment on the merits. Discontinuance or abatement of the action before final

judgment leaves the issues open to contest in other litigation, even though they had been decided provisionally by order entered upon a motion made in the action or by interlocutory judgment.

“The test then is not the form of the decision, but the nature of the proceedings in which the adjudication is made. If in such proceedings the jurisdiction of the court is limited in scope so that particular questions may be decided only provisionally or for a limited purpose, a decision in any form can be given effect only within the same limits. Thus, a motion to open a default for any reason is generally addressed to the discretion of the court, and is in its nature interlocutory. Such a motion can never result in a decision of the issues involved in the controversy, since it is always predicated upon the fact that the defaulting party has lost the opportunity to present the issue to the court, and the question always is whether the party applying should be permitted to plead.” * * * On the other hand, an order entered upon the report of a referee on a motion to cancel a judgment is conclusive adjudication ‘so far as it covers what was actually and necessarily tried on that reference.’ * * * In both cases the proceedings were in form motions in an action, and in both cases the court was required to decide all questions of law or fact presented. The distinction is that in the first case the only relief which was asked, or which the court could grant, upon the motion was provisional in its nature, and even if granted, would leave open for subsequent conclusive adjudication in the same action every issue of fact raised by the pleadings, while in the second case, if the application were granted,

the questions necessarily decided upon the application could not be litigated anew in any litigation pending in the same tribunal. Thus the nature of the first proceeding precluded a final decision of the questions there raised, while the nature of the second proceeding required such decision." (Bannon v. Bannon, 270 N.Y. 484, 1 N.E. (2d) 975, 105 A.L.R. 1401 at 1405).

The order denying Burton's motion to dismiss Carter's interpleader complaint did not finally determine the issues of that lawsuit. It was but preliminary to a final judgment which would be entered after trial on the merits. An order denying a motion to dismiss is but a preliminary order not finally adjudicating the issues. (Rule 12(b) Utah Rules of Civil Procedure). A motion to dismiss does not call for adjudication on the merits of the case but is concerned solely with the question of whether the pleadings sustain the cause of action. (Daehla Greeting Cards, Inc. v. Summerfield, D.C.D.C. 1953, 116 Fed. Sup. 68; Savada Bros. v. Conville, D.C.Pa. 1948, 8 F.R.D. 127).

This affidavit should be stricken from the record on appeal.

2. Motion of Tracy Collins Bank and Trust Company, Trustee, to intervene in the instant action; order making Tracy Collins Bank and Trust Company, Trustee, a party to said action and its motion to set aside the garnishee judgment against garnishee-respondent.

These documents and the action represented thereby are certainly immaterial and irrelevant to the issue on this appeal. While the record on appeal shows that Tracy Collins Bank and Trust Company, Trustee, was made a party to this action, it does not show the disposition by the Court of its motion to set aside the garnishee judgment. These documents should not have been placed in the record on appeal. They give no assistance in determining the validity of the garnishee judgment as between plaintiff-appellant and the garnishee-respondent. They should be stricken.

3. *District Court file in action of Samuel J. Carter, etc. vs. Phyllis Lang, etc., Civil Action 148659.*

(a) This file covers an interpleader action filed by Samuel J. Carter as Executor of the Estate of John Lang, deceased, and as an individual against Phyllis Lang, J. Robert Lang, Wilford M. Burton, and George Beckstead, Sheriff of Salt Lake County, Utah. The file was never introduced in evidence at the hearing of the motion of the garnishee-respondent to set aside, annul and declare void the garnishee judgment against said Carter in his representative capacity aforesaid. It therefore could not be considered by the trial court in the determination of this motion. The affidavit of Amoss, discussed in (a) supra, was an attempt by counsel for the plaintiff-appellant to dragoon this file into the record on appeal.

“Documentary evidence consisting of copies of court records in other proceedings are not properly a part of the record and cannot be considered on appeal, where the evidence is not reported, the trial judge made no report of material facts found by him, and there is nothing to show that such copies were all the evidence presented at the hearing below.” (Syllabus). (Damon v. Damon, 312 Mass. 268, 44 N.E.(2d) 657, 143 A.L.R. 463).

“The record contains no copy of the answer of the defendant Laura Powers in the partition suit and no statement of its substance. We cannot consider a copy of Laura Powers’ answer attached as an exhibit to the application for the writ and made from an abstract of title used on the trial. References in the statement of facts to pages of the abstract on which other instruments which were copied in the statement of facts appear do not make the answer of Laura Powers a part of the record when it is nowhere copied or referred to in the statement of facts.” (Davis v. First Nat. Bank, 139 Tex. 36, 161 S.W.(2d) 467, 144 A.L.R. 1).

(b) The institution and pendency of said Civil Action No. 148,659 and the issues therein involved are matters entirely irrelevant to the issues raised by the aforesaid motion of Carter as Executor, etc. to annul the garnishee judgment.

The District Court file in this action should be stricken from the record on appeal.

POINT II

PLAINTIFF-APPELLANT HAS PROCEEDED IN THIS ACTION AGAINST CARTER IN HIS CAPACITY AS EXECUTOR OF THE ESTATE AND UNDER THE LAST WILL AND TESTAMENT OF JOHN LANG, DECEASED, AND NOT AGAINST CARTER AS AN INDIVIDUAL.

The copy of the writ of garnishment served on Carter (R-1) was addressed to him in his capacity as Executor. He answered the same in his capacity as "Executor of the Estate of John Lang, deceased" (R-1), and by his answers he specifically declared that his possession of the sum of \$9,375.00 was in his role as Executor and not as an individual. The garnishee judgment (R-4) was against "Samuel J. Carter as Executor of the Estate of John Lang, deceased"; it was not against Carter as an individual. The garnishee execution (R-5) based on said garnishee judgment was against Carter as Executor. The notice of appeal in this action (R-17) designated the order appealed from as "setting aside, annulling and declaring void that certain garnishee judgment rendered in this action on the 28th day of February, 1964, *against Samuel J. Carter, Executor of the Estate of John Lang* and in favor of plaintiff above named" (R-17) (Italics supplied).

In its manifest, therefore, on the face of the record that Carter was before the District Court as Executor of the Lang Estate and not as an individual. He is before this Court in his role as Executor and not as an

individual. The plaintiff-appellant, by her own action, chose to bring Carter before the Court in his representative capacity and not as an individual.

The foregoing facts proved by the record on appeal decisively deny the assertion by plaintiff-appellant found at the top of page 12 of her brief to the effect that "the proceeding is not against Mr. Carter in his representative capacity as executor of the estate of John Lang, but rather in his capacity as a personal debtor to the defendant. In the subject case no attempt is being made to substitute Mr. Carter as a party for the deceased."

POINT III

A PERSONAL REPRESENTATIVE OF A DECEASED PERSON CAN SUE OR BE SUED, OR CAN BE A PARTY TO AN ACTION OR PROCEEDING IN HIS OFFICIAL CAPACITY AS REPRESENTATIVE, ONLY IN THE STATE WHERE HE WAS APPOINTED, AND HIS ROLE AS EXTENDED PERSONALITY OF THE DECEASED DOES NOT EXIST EXTRATERRITORIALLY BUT ONLY WITHIN THE FOUR CORNERS OF THE STATE OF HIS APPOINTMENT, EXCEPT WHERE, BY SPECIAL APPEARANCE OR EXTRAORDINARY WRIT THE COURT'S JURISDICTION TO ENTERTAIN THE LITIGATION ITSELF IS ATTACKED.

I. *This case is governed by the general rule. The above principle of law is firmly established in Utah. (Wilcox v. District Court of Salt Lake County, et al.,*

2 Utah (2d) 227, 272 Pac. (2d) 157). It is also the law of the State of California (Kaplan v. Superior Court, 191 Cal. App.(2d) 482, 12 Cal. Rep. 781, 782; Winbigler v. Shattuck, 40 Cal. App. 562, 195 Pac. 707). The doctrine is generally applied (MacMaster v. Gould, 239 N.Y. 606, 147 N.E. 214, 40 A.L.R. 792; Nat. Bank of Topeka, et al. v. Mitchell, et al., 154 Kan. 276, 118 Pac.(2d) 519; 4 Bancroft's Probate Practice (2d), Sec. 1225 p. 573; Lefebure, et al. v. Baker, et al., 60 Mont. 193, 220 Pac. 1111).

“If we go back to the historic origin of the executor's position, we find that he once took the assets in his own right. Executors in Earlier English Law by Holmes, 9 Harvard L. Rev. 42. No reason could then be given why he should not be sued wherever he could be found. But at the present day both executors and administrators hold the assets of the estate in a fiduciary capacity. The will is the source of the executor's power, and letters testamentary are evidence of his authority, but the rights and liabilities of both executors and administrators in respect to the fund in their hands are like those of trustees. The wide distinction between the nature of the title of executors and administrators has disappeared, but this essential difference as to the source of title remains: The foreign administrator exists only by virtue of the statute of another state; the executor's authority springs from the will and not from the letters testamentary.” (MacMaster v. Gould, *supra*).

The plaintiff-appellant proceeded against Carter, as above demonstrated in Point II, in his capacity as a

foreign executor by the issuance of the writ of garnishment against him in such capacity. Carter answered the writ as Executor of the Lang Estate. The garnishee judgment was against Carter as Executor of the Lang Estate, and the execution garnishment ran against him in the same capacity. Carter as a California executor did not and does not exist in Utah. The plaintiff-appellant, therefore proceeded against less than a shadow — a non-existent personality and entity. The garnishee judgment she obtained has no legal efficacy; it is a blank piece of paper. Under the rule announced, Carter as California executor was authorized to appear specially on his motion to set aside this imaginative, fictitious judgment of no legal effect. The District Court had no alternative but to cancel and annul this fictitious judgment.

2. *This case is not within any exception to the general rule.* Plaintiff-appellant, under Point II of her brief, asserts that the garnishee judgment in this action may be sustained under an exception to the general rule. The complete answer to this contention is that there is not an iota of evidence in the record on appeal that there were or are any funds of the estate within the jurisdiction of the District Court of Salt Lake County which must be disposed of or preserved. There is a presumption, in the absence of negative proof, that inasmuch as Carter was and is a California executor the funds are within the State of California and under the jurisdiction of the Superior Court of Orange County. No effort has been

made by plaintiff-appellant to prove that the funds were or are within the State of Utah. The record is completely silent on that point. Secondly, Carter as Executor of the Lang Estate has been guilty of no act which could stamp him as "an individual wrong-doer." He promptly responded to the interrogatories of the writ of garnishment. He honestly stated that he held funds as Executor of the Lang Estate "owing to defendant (J. Robert Lang) in settlement of an action brought against me as such Executor by defendant and others." In his response he made no claim to these funds as an individual. Thirdly, there is no failure of justice in the action of Judge Van Cott in annulling the fictitious garnishee judgment against the California executor. If the exception exists it can be justified only in those instances where a creditor is denied other relief or the enforcement of his rights is an onerous and almost impossible accomplishment. Such is not the fact in the instant case. The California courts were open to her at all times to enforce her claim against the funds in the possession of the California executor.

This case might well end at this point.

POINT IV

THE FUNDS HELD BY CARTER AS CALIFORNIA EXECUTOR DO NOT REPRESENT A DISTRIBUTIVE SHARE OF THE LANG ESTATE.

Carter in his answer to the second interrogatory contained in the writ of garnishment answered: "Yes —

as such executor I have in my possession \$9,375.00 owing to defendant in *settlement of an action brought against me as such executor by defendant and others.*" (Italics supplied.) There is no denial of Carter's statement in the record on appeal. It stands uncontroverted and undenied. These funds do not represent the defendant's distributive share in the Lang Estate inasmuch as there has been no segregation of the estate's assets for purposes of distribution to the heirs or beneficiaries of the estate. They were funds which remained part of the estate's assets but which the executor intended to use in payment of the settlement of the defendant's claim against him. There cannot be found in the record on appeal any evidence other than the assertion made by Carter in his return to the writ of garnishment identifying these funds. It therefore follows that the argument and authorities presented in Point I of plaintiff-appellant's brief do not relate to or cover the situation in the present case.

POINT V

THE UTAH DISTRICT COURT HAD NO JURISDICTION OVER THE FUNDS HELD BY THE CALIFORNIA EXECUTOR AND AS PART OF THE ASSETS OF A CALIFORNIA ESTATE AND THEREFORE COULD NOT RENDER A BINDING OR EFFECTIVE JUDGMENT DISPOSING OF THE SAME.

The record on appeal shows conclusively that Carter held these funds in his role as California executor. He made a voluntary appearance in the garnishment pro-

ceedings by filing his return to the writ of garnishment. He conferred jurisdiction of the Court over himself personally, but he could not and did not confer jurisdiction of the Court over the res. The res in this instance were the funds in his possession as executor appointed by a California court. It was beyond his authority to confer upon the District Court any jurisdiction over these funds. In the case of *Bristol v. Brent*, 36 Utah, 108, 103 Pac. 1076 at 1079, the Court wrote:

“The regularity of this service, in so far as it is personal to the garnishee, may be waived by him, and he may appear before the court, either in person or by answer, if the law authorizes one to be made and filed, and thereby confer jurisdiction over his person. But when the garnishee has thus conferred jurisdiction upon the court over his person, only one of the essential elements to its complete jurisdiction to proceed in the case is present. The other, jurisdiction over the res, is still lacking. While the defendant, no doubt, may insist that, unless the court have jurisdiction over the person of the garnishee, the debt owing from the garnishee to the defendant cannot be seized, yet the defendant cannot prevent the garnishee from waiving any defects in the service in so far as it affects merely the jurisdiction of the court over the person of the garnishee. But when it affects the res, the very thing to be taken from the defendant, he may insist upon a full compliance with the law, and without such compliance the court can acquire no jurisdiction over it without the consent of the defendant. Whether

the court has jurisdiction over the res or not, therefore, does not depend on whether the garnishee objects, but it depends entirely on whether the statute, by virtue of which alone the court is authorized to act, has been complied with. If the return of the officer discloses an essential defect in this regard, the court is without power to proceed, and hence should arrest the proceedings on its own motion."

This rule has been followed in a great number of cases.

"The court had no jurisdiction of the res in this case, and therefore was in no position to render a binding or effective judgment in so far as the property or credits of the principal defendant were concerned." (Federal Truck Co. v. Mayer, 216 Mo. App. 443, 270 S.W. 407).

"As the justice was without jurisdiction of the res (the real subject matter) for two reasons: first, that the service of process was invalid and not cured by appearance although appearance was made; and, second, because the subject matter itself is not in the state nor subject to the process of its courts * * *. The answer of the garnishee, setting up its non-residence, was not controverted, so far as the record shows, and must be taken as true. That establishes a want of jurisdiction by showing that the subject matter is beyond the territorial jurisdiction of the court. It is an utter want of jurisdiction, in defiance of which the justice went on and gave judgment. * * * What purports to be the return of service being void under the statute and decisions of this court,

it could not confer any jurisdiction of the subject matter, although the garnishee appeared and subjected itself to the jurisdiction of the court." (Pennsylvania Railroad Co. v. Rogers, et al., 52 W. Va., 450, 62 L.R.A. 178, 189).

"Obviously, the trial court was without power to render a judgment against the garnishee in the first instance because the court was without jurisdiction of the res. A judgment rendered without jurisdiction is, of course, void." (Upjohn Co. v. Board of Commissioners, 25 N.M. 526, 185 Pac. 279).

The funds held by Carter as Executor until actually paid by him to the person entitled thereto remained part of the assets of the California estate and were under the jurisdiction and protection of the Orange County Superior Court. While Carter acknowledged in his garnishment answer that he was indebted as executor to J. Robert Lang, this acknowledgment was simply his statement of an indebtedness due from the California executor to Lang. Unless and until Carter as executor paid these funds to Lang they remained part of the California estate. There had been no segregation of the same from the general assets of the estate. These funds did not arise from a distribution of the California estate to the devisees or legatees of John Lang, deceased. Nothing in the record on appeal denies that these funds, together with all other assets of the estate, were within the State of California and not within the jurisdiction of the Utah courts. The consequence is that no judgment

of a Utah court could affect this res which was beyond its jurisdiction.

The verity and legal soundness of the conclusion above set forth that the Utah District Court could not acquire jurisdiction over the res is confirmed by posing the simple question: Could J. Robert Lang have sued Carter as California executor of the Estate of John Lang, deceased, in the District Court of Salt Lake County? The answer is an emphatic and unqualified "No." This conclusion is supported by the statement of Mr. Justice Peckham in the case of *Harris v. Balk*, 198 U.S., 226, 49 L.ed. 1028, 25 S.Ct. 625:

"If there be a law of the state providing for the attachment of the debt, then if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff and condemn it, *provided the garnishee himself could be sued by his creditor in that state.*" (Italics supplied).

The principle enunciated by the Supreme Court of the United States, *supra*, was adopted by the Supreme Court of Utah in *Bristol v. Brent*, 38 Utah, 58, 110 Pac. 356 at page 362:

"The United States Supreme Court, to our minds, makes it quite clear that a debt can only be condemned in the hands of a garnishee in a jurisdiction where *the creditor of such garnishee could*

himself enforce payment of such debt against the garnishee. This is logical, for the reason that if nothing tangible is attached by the process of garnishment, and nothing is arrested except the obligation to pay the debt by the garnishee, it must follow that a court may not disregard the conditions upon which the obligation to pay rests, and may not enforce it against the garnishee unless the garnishee's creditor could enforce it at the time when, and at the place where, the action is commenced against the creditor of the garnishee." (Italics supplied).

It is clear beyond all doubt that J. Robert Lang could not have sued Carter as California executor of the Estate of John Lang, deceased, in the District Court of Salt Lake County, Utah. (See Point III supra). Beyond peradventure it then follows that a creditor of J. Robert Lang could not garnish Carter as executor aforesaid in an action against said J. Robert Lang in said District Court, and that garnishee judgment resultant upon said action is absolutely void.

The conclusion is irrefutable that not only the indebtedness due from Carter as California executor to J. Robert Lang but also funds in the custody of such California executor intended for the payment of such indebtedness were in the custody of the California Superior Court of Orange County, State of California. The conclusion of the matter may thus succinctly be stated:

“While property or money is in *custodia legis*, the officer holding it is the mere hand of the

court; his possession is the possession of the court, and to interfere therewith is to invade the jurisdiction of the court itself, an officer so situated being bound solely by the orders and judgments of the court whose mere agent he is, and having no right to make any disposition of such money or property without the consent of his own court, express or implied. Hence, in the absence of express statutory authority therefor, the general rule is that property or funds in custodia legis are not subject to either attachment or garnishment." (6 Am. Jur. (2d), Sec. 196, p. 702).

CONCLUSION

Carter was and is an officer of the Superior Court of Orange County, California, being appointed by that court Executor of the Estate and under the last will and testament of John Lang, deceased. The plaintiff-appellant proceeded against Carter in his representative capacity as Executor of the Estate of John Lang, deceased. The garnishee judgment obtained by the plaintiff-appellant was against Carter in his representative capacity. Carter as a California executor could not and cannot be sued or proceeded against in a Utah court. Neither can Carter in his representative capacity sue in a Utah court. Carter, as a California executor, by his garnishment answer conferred jurisdiction on the Utah court over his person, but he could not and did not confer jurisdiction over the res. The res was funds of the California estate in the possession of the executor. The garnishee judgment against Carter as Executor of the

Lang Estate was therefore void, and the District Court had no alternative except to nullify the same. It is respectfully submitted that the order appealed from should be affirmed.

Respectfully submitted,

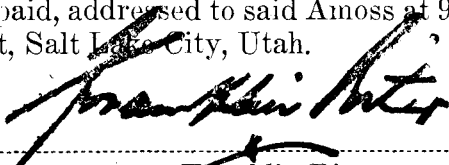
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(Intervenor-Respondent)*

CERTIFICATE OF SERVICE

I, FRANKLIN RITER, one of the attorneys for the Intervenor - Respondent (Garnishee - Respondent), hereby certify that on the ^{22nd} day of April, 1965, three copies of the foregoing Brief were mailed by me to Dudley M. Amoss, attorney for Plaintiff-Appellant; said copies of said Brief were inclosed in an envelope with postage prepaid, addressed to said Amoss at 974 East 3rd South Street, Salt Lake City, Utah.



Franklin Riter