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A CASE recently pending in the District Court developed many complications and presented an extraordinary situation in addition to various legal problems.

We are all more or less familiar with the facts in the recent attempt by some alleged St. Louis bandits to rob The Golden Eagle Dry Goods Company. However, to present the several problems and entanglements which arose in this case, it is necessary to repeat some of the facts.

On Sunday, May 10, 1931, the three bandits forced their way into department store and thereafter attempted to "blow" the safes, which contained large sums of money. While they were so engaged, the watchman pulled the alarm box, which notified the police. When the police arrived, a gun battle ensued and one of the department managers was seriously wounded.

At the time the bandits were arrested, the police impounded a Cadillac Sedan, approximately $5000.00 in cash, jewelry and personal belongings. This property created the incentive for the subsequent law suits.

On May 12, the injured employe brought suit in tort against the three bandits for injuries sustained, and on the same day, the summons and complaint were served on each of the defendants.

On May 13, the three bandits executed a confession of judgment note in the sum of $7500.00 payable to a St. Louis attorney who had in the meantime arrived to act as counsel for them. On May 15, the case was docketed and judgment on the note was rendered by confession in the sum of $7500.00 plus approximately $1100.00 attorney's fees for services in suing on the note, although the attorney appeared pro se, and no statement had been made in the pleading or otherwise that any such fees had been incurred. Execution on the judgment was immediately issued and a levy was made on the same day attaching all of the property belonging to the said bandits. On May 16, the same property was attached by an Omaha concern claiming that some of the money in possession of the

bandits was stolen. They sued in assumpsit for money had and received, since in order to attach, it was necessary at that time that the claim be founded upon a contract. On May 18, the Legislature passed an act permitting residents to attach on tort in case of nonresident defendants. By virtue of this Legislative act, the injured employe intervened in the attachment suit which was started by the Omaha concern, and both the injured employe and the Omaha concern filed motions for leave to intervene in the case wherein the confession of judgment was obtained, to be made parties defendant for purpose of vacating judgment and recalling the execution.

The opposing counsel contended that the intervenors were strangers to the judgment and as such could not file petitions of intervention in the original proceedings, that the proper method was by separate suit in equity to set aside the judgment, and that such action could only be maintained by a judgment creditor. The intervenors contended, in view of the unusual circumstances of the case, that they had the right to move to vacate the judgment and be made parties defendant; that the execution was issued prematurely since the five day stay had not elapsed; and that the Court on its own motion could in such circumstances vacate the judgment and recall the execution.

It was obvious that, if the judgment and execution were sustained, the judgment creditor would then have a preferred lien upon all the funds and property to satisfy his judgment to the exclusion of the other claimants. If however the execution were recalled, then it would be necessary for the judgment creditor to share pro rata in the attachment suit which was started on May 16 by the Omaha concern.

The authorities and argument presented in this article are merely the contentions of the intervenors and contain but a short brief on the various propositions submitted.

There is direct authority in the case of *Gibson v. Ferrell,* 77 Kan. 454, 94 P. 783, which holds that the provisions of the Code of Civil Procedure for intervention are not exclusive, but the Court may, in furtherance of justice, and upon broad principles of manifest justice, permit such intervention.

"The application to intervene falls within no provision of the Code of Civil Procedure, but, notwithstanding this fact, a district court action upon

principles of manifest justice may, in cases not covered by the Code, permit one not a party to the suit to intervene either before or after judgment for the protection or advancement of some right with reference to the subject-matter of the litigation which he holds. * * * "

The Kansas case is approved in *Sizemore v. Dill,* (Okla.) 220 P. 352.

In the case of *Richfield Oil Company v. Western Machinery Company,* 279 Fed. 852, 855, the Court states:

"Of course the general rule is that an application to intervene is addressed to the sound discretion of the court. But if one presents a situation where he will lose a meritorious claim unless he can obtain relief by coming into the main suit, to say that he may not intervene is to deprive him of the only way by which he can have an opportunity to be heard."

Our Supreme Court has adopted the rule that strangers to a judgment by confession are not concluded by its date or by its recitals; they are at liberty to impeach it for fraud by an original action, and if successful, to restrain the enforcement thereof to the prejudice of their rights.

Schuster vs. Rader 13 Colo. 329, 335, 336.

The serious question which arose in this matter is whether the intervenor must seek his relief thru equity by a separate action, or could the same object be accomplished by motion in the main case. An elaborate discussion on this proposition is contained in *Debois vs. Clark,* 12 Colo. App. 220, 228. In this case, a judgment was taken against the defendant who claimed that no service was made upon him. The defendant filed a motion to vacate and be relieved from the judgment. The plaintiff contended that defendant was a party to the suit and should have moved to vacate the judgment within the time prescribed by the Code. The Court states:

"The privilege is granted to parties, but a person who was never served with process and who never appeared IS NOT A PARTY within the meaning of that provision."

Thus we have the same situation that a person not a party filed a motion to vacate. The Court says on pages 228 and 229:

"The next question is whether relief can be obtained by a motion, entitled in the cause, and addressed to the court which rendered the judgment of whether the party complaining must resort to bill in equity to set aside the judgment. In several of the cases which we have cited, it is held that a judgment rendered without jurisdiction of the person may be impeached in equity,

especially where a showing is made that injustice would result from the enforcement of the judgment; and it has been decided by our supreme court in *Wilson v. Hawthorne,* 14 Colo. 530, that a court of equity will entertain jurisdiction, in a proper case, to set aside a judgment so obtained. But, because equity will not decline jurisdiction, it does not follow that the same purpose may not be accomplished by motion. * * * And there is no reason in sight why the questions of fact involved in a proceeding to set aside a judgment, may not be tried and determined as well and as satisfactorily upon motion as upon bill. * * *"

And at page 230, the Court further states:

"There are other decisions to the same purport, but those which we have noticed are enough for present purposes. In view of the consideration that a complete investigation can be had on motion, there is no valid reason why the complaining party, who has commenced by motion, should be driven to a proceeding in equity. THE REMEDIES ARE CONCURRENT, AND EITHER MAY BE SELECTED.

Likewise in the case of *Jotter v. Marvin,* 165 P. (Colo.) 269, the Court states on page 270:

"To all intents and purposes this constituted a direct attack upon it, which takes the place of a suit in equity and stands exactly on the same plane. By thus doing he gave jurisdiction to that court of his person, and when his motion was denied, it has precisely the same force and effect as if he had brought an independent suit in equity for that purpose."

From the cases quoted in both of these decisions, the Court recognizes that there are four methods by which a judgment may be attacked:

1. By motion, or
2. By answer or cross complaint, or
3. By equitable action to cancel or enjoin its enforcement, or
4. By Writ of Error or possibly Bill of Review.

(Quoting from *Kavanaugh vs. Hamilton,* 53 Colo. 157, 163.)

The right of an attaching creditor to intervene and question judgment has been recognized in other jurisdictions. *O'Keefe vs. Foster,* 5 Wyo. 343; 40 Pac. 526.

Upon argument the Court permitted the intervenors to file their petition.

Aside from the main issue, two collateral matters were also presented:

1. Can an attorney who appeared pro se include attorney's fees in the judgment although the Complaint does not contain the necessary

allegations that the plaintiff paid or obligated himself to pay an attorney's fees?

2. Can the Court, notwithstanding the Code provisions and the Rules of the Supreme Court, waive the five day stay of execution when the note contains such provision?

Section 425 of the Code provides, inter alia, as follows:

"Execution shall stay until the expiration of said five days, and upon motion within said five days the Court shall grant a further stay of execution. * * *"

Rule 9 of the Rules of the Supreme Court, as adopted July 1, 1929 provides:

"The Trial court shall stay execution until the expiration of five days from the time of the entry of the judgment * * *"

This question was not decided by the District Court and indeed raises a very interesting point for discussion.

Prior to the time a hearing was had upon the intervention, a surety company by a separate action sued the bandits and attached the same property in order to be reimbursed for money paid to The Golden Eagle Dry Goods Company, the insured, for damages caused by these bandits. This raised a question as to whether a creditor must intervene in the original attachment case within the thirty days, or can a separate suit in attachment be started.

One of the bandits was seriously wounded in the gun battle and was removed to a private hospital. It then became necessary for the City to place additional policemen at the hospital, although the bandit, of course, contended that guards were unnecessary. While guarding the bandit, the policemen were fed by the hospital, for which the City incurred additional expense. The City filed intervention in the five cases on the theory that it should be reimbursed for funds expended in guarding the bandit and feeding the policemen.

Here certainly was a hodge-podge, everybody claiming the same fund. Finally as a result of many conferences, the funds were divided proportionately to all the claimants to the exclusion of the bandits who are now sojourning at Canon City and it did not become necessary for the trial court to decide any of the points of law involved. And so "all is well that ends well."