Griffiths Vs. Frazier

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Appellant : Griffiths

Respondent : Frazier

Judgement :

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Griffiths v. Frazier

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ERROR TO THE CIRCUIT COURT

FOR THE SOUTH CAROLINA DISTRICT

SYLLABUS

So long as a qualified executor is capable of exercising the authority with which he has been invested by the testator, that authority cannot be conferred either with or without limitation by the court of ordinary on any other person. And if, during such

capability of the executor, the ordinary grant administration, either absolute or temporary, to another person, that grant is absolutely void.

If a judgment be rendered against one as executor who is not executor, it does not bind the estate of the testator, and an execution upon such a judgment could not legally be levied upon such estate.

By the law of South Carolina, administration *durante absentia testatoris* cannot be granted after probate of the will and letters testamentary granted.

The acts of a tribunal upon a subject not within its jurisdiction are void.

By the law of South Carolina, the thirty day rule is substituted for a *scire facias* to a judgment in those cases only where lapse of time prevents the plaintiff from suing out execution.

Until probate of the will and letters testamentary are obtained, the executor cannot obtain any judgment, because it cannot appear that he is executor. There is therefore an absolute necessity for appointing some person who, until probate, shall take care of the estate.

This is not the case with an executor who, after taking out letters testamentary, absents himself from the state. He is still capable of performing and is bound to perform all the duties of an executor. There is no legal disability to him, and consequently there is no necessity for transferring to another those powers which the testator has conferred upon a person selected by himself.

The power of appointing an administrator *durante absentia* of an executor who has proved the will, was not exercised by the ordinary in England anterior to the statute 38 Geo. III, c. 87, which first gave him that power.

To give jurisdiction to the ordinary, a case in which, by law, letters of administration may issue must be brought before him.

In a common case of intestacy, letters of administration must be granted by the ordinary to some person, and although they should be granted to one not entitled

by law, still the act is binding until annulled by the competent authority.

If administration is granted on the estate of a person not really dead, the act is void. If on the estate of a deceased person whose executor is present and in the constant performance of his executorial duties, such appointment is absolutely void.

The appointment of an executor vests the whole personal estate in him; he holds as trustee for the purposes of the will, but he holds the legal title in all the chattels of the testator.

The executor is, for the purpose of administering the chattels of the testator, as much the legal proprietor of them as was the testator himself while alive, and this interest is incompatible with any power in the ordinary to transfer these chattels to any other person by the grant of administration.

Such grant conveys no right; it is a void act.

Letters testamentary, when once granted, are not revocable by the ordinary; he cannot annul them or transfer the legal interest of the executor to any other person.

The cases in which administration has been granted notwithstanding the existence of a will are cases in which it is not apparent that there is any other person possessing a right or cases in which that person is legally disqualified from acting, as where administration is granted pending a dispute respecting a will, it is not certain that there is an executor or a will.

If administration be granted during the minority of an executor, it is because the executor is legally disqualified from acting, and indeed has not taken and could not take upon himself the trust. He may, when of age, reject all the right and powers conferred by the will, and consequently the interest is not a vested interest.

So in the case of an absent executor who has not yet made probate of the will and qualified, he having no evidence that he is executor and not being able to act as one and having it in his power to renounce the office, the ordinary is not yet

deprived of that power which he possesses to appoint a person to represent a dead man who has no representative. But that an executor who has proved the will is absent is no reason for granting administration. An absent executor may maintain a suit while he is actually resident abroad; nor is his absence a good plea in bar.

This was an action of trespass *quare clausum fregit* brought by the plaintiff in the circuit court (who was also plaintiff in error), to recover a tract of land lying in the District of South Carolina and in the possession of the defendant, to which the plaintiff asserted a title derived from a certain Joseph Salvadore.

Both parties admitted that Salvadore was legally seized of an estate in fee in the land in dispute. It appeared further that Salvadore had executed several bonds in favor of a certain Daniel Bordeaux; that Bordeaux brought an action against Salvadore on these bonds and obtained thereon a judgment by default which was entered up and signed on 30 August, 1786; that no further steps were taken in the cause, until 2 January, 1787, when an execution issued thereon and was lodged in the sheriff's office on the same day; that Salvadore departed this life on 29 December immediately preceding. Salvadore left a will and two or three codicils by which he appointed his three daughters, a certain William Stevens, and a certain Joseph Dacosta his executors. All these persons were absent out of the state excepting Dacosta, who proved the will and codicils and regularly qualified as executor thereto on 5 January, 1787. He continued to reside in the City of Charleston, South Carolina, until sometime in the year 1789, when he went to Savannah, in the State of Georgia, where he continued to reside

until November, 1790. On 2 October, 1790, one James Lamotte requested and obtained from the ordinary of Charleston a citation in behalf of the principal creditor of Salvadore, who was Bourdeaux, to show cause why letters of administration with the will annexed should not be granted to him. On the return of the citation, no cause being shown to the contrary, the ordinary did, on 8 October, 1790, grant general letters of administration with the will annexed on the estate of

Salvadore to Lamotte. A certificate was also obtained from the ordinary by which it appeared that it was the custom of the ordinary court to grant letters of administration *durante absentia* of the executor. Bourdeaux, on 27 January, 1791, obtained a rule from the court of common pleas against Lamotte, as administrator of Salvadore, to show cause within thirty days why the judgment obtained against Salvadore as aforesaid should not be revived and an execution issue thereon. This rule was made absolute on 15 March, 1791, "subject to future argument." On 16 April following (no further argument or proceeding having been had on the said rule and no court intervening in the meantime), an execution issued on said judgment against Lamotte, administrator, &c.;, was lodged in the sheriff's office and levied upon the land in question by the sheriff on 11 May, 1791. The land was sold at public outcry to the highest bidder on 6 June, 1791, and by a deed of the same date was conveyed by the sheriff to Peter Freneau, the purchaser. On 16 July, 1796, a decree was rendered in the suit, *Butler v. Bourdeaux,* directing the said Peter to convey to such person as Butler should appoint. In pursuance of this decree, Peter Freneau conveyed to Samuel Jackson, under whom Griffith, the plaintiff in this case, claims by regular conveyances. Frazier, the defendant, represents the heirs of Salvadore.

On the motion of the defendant, the circuit court instructed the jury that the letters of administration granted to James Lamotte were totally void; that therefore the judgment of Bourdeaux was not revived against the estate of Salvadore; that the sale and conveyance by the sheriff passed no title to the purchaser; and that

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the evidence was not sufficient to maintain the plaintiff's action. The jury found a verdict for the defendant, and judgment was rendered in his favor. The plaintiff excepted to the opinion of the court and sued out a writ of error to the judgment.

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MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court as follows:

The plaintiff in error, who was also plaintiff in the circuit court, brought a writ of trespass *quare clausum fregit* in order to try his title to certain lands lying in the District of South Carolina which were in possession of the defendant.

The title of the plaintiff, which constituted the sole question in the cause, appeared, on the trial, to be as follows:

Joseph Salvadore, being seized of the lands in which the trespass is alleged to have been committed, departed this life sometime in the year 1786, having first made his last will in writing, in which he named several executors, one of whom, Joseph Dacosta, made probate of the will and took upon himself the burden of executing the same, after which, in the year 1789, he left the State of South Carolina and resided in Georgia. In the year 1790, letters of administration on the goods of Salvadore, unadministered by Dacosta his qualified executor, were granted to James Lamotte.

In August, 1786, a judgment was obtained by Daniel Bourdeaux against Salvadore. In January, 1791, a thirty-day rule, which, by an act of the State of South Carolina, was in certain cases substituted in the place

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of a *scire facias,* was issued to revive this judgment against Lamotte as administrator of Salvadore. This role being served and returned, the following endorsement was made on it:

"15 March, 1791, made absolute subject to a future argument."

" *Fi. fa.* 16 April, 1791."

An execution issued on this judgment, under which the land was sold and was conveyed by the sheriff to Peter Freneau by a deed dated 6 June, 1791. On 16 July, 1796, a decree was rendered in the suit, *Butler v. Bourdeaux,* directing the said Peter to convey to such person as Pierce Butler should appoint. In pursuance of this decree, Peter Freneau conveyed to Samuel Jackson, under whom the plaintiff claims by regular conveyances.

On the motion of the defendant, the circuit court instructed the jury that the letters of administration granted to James Lamotte were totally void; that therefore the judgment of Bourdeaux was not revived against the estate of Salvadore; that the sale and conveyance by the sheriff passed no title to the purchaser; and that the evidence was not sufficient to maintain the plaintiff's action. The jury found a verdict for the defendant, and judgment was rendered in his favor. The plaintiff excepted to the opinion of the court, and has sued out a writ of error to the judgment.

The sole defect alleged in the title of the plaintiff being in that part of it which depends on the sale and conveyance of the sheriff to Peter Freneau, the validity of that sale is the principal if not the only question in the cause. In support of it the plaintiff contends,

1st. That the letters of administration, being *durante absentia* of the executor, were properly granted to James Lamotte.

2d. If the ordinary erred in granting these letters, still Lamotte was administrator *de facto,* and his acts bound the estate of Salvadore until those letters should be revoked.

3d. That the judgment on which the execution issued was properly revived by a court of competent jurisdiction, and its judgment can be questioned only in an appellate court.

The negative of these propositions is maintained by the defendant in error.

That the appointment of an executor and his acceptance of the office constitute a complete legal owner of the personal estate of the deceased is admitted, but it is contended that these acts suspend without annihilating the power of the ordinary. So long as the executor is capable of exercising the authority with which he has been invested by the testator, it can be conferred on no other person; but when he becomes incapable from any cause whatever, as by insanity or death, the power

of appointing some person who shall secure the estate from ruin necessarily reverts to that tribunal which the law appoints for the general purpose of providing for the management of the property of dead persons. All cases of temporary administration, as during the minority of an executor or during his absence previous to the probate of the will, are considered as exercises of the same power, though in a less degree, and as proving that the ordinary may, after the executor has qualified, if he shall absent himself so as, in the opinion of the ordinary, to disqualify him from performing his duty, appoint an administrator *de bonis non* with the will annexed, whose power shall continue until the return of the executor.

The Court does not concur in this reasoning. In the cases stated at bar and in all cases where temporary administration has been granted, unless under a special act of the legislature, the executor was, for the time, absolutely incapable of performing his duty. There existed an actual legal disability to perform the functions of his office. Until probate of the will and until letters testamentary are obtained, the executor cannot obtain any judgment, because it cannot appear that he is executor.

There is therefore an absolute necessity for appointing some person who, until probate, shall take care of

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the estate. But this is not the case with an executor who, after taking out letters testamentary, absents himself from the state. He is still capable of performing, and he is still bound to perform, all the duties of an executor. There exists no legal disability in the executor, and consequently there is no necessity for transferring to another those powers which the testator has conferred on a person selected by himself.

This power does not appear ever to have been exercised by the ordinary in England anterior to the statute of 38 George III, and in South Carolina the ordinary possesses no power which was not possessed by the ordinary in England previous to that statute. The practice of the particular ordinary who acted in this

case would not be sufficient to constitute the law had it even never received judicial reprobation; but the case of *Ford v. Travis* puts an end to any doubt on this point.

The second point is one of more doubt and greater intricacy. That the ordinary erred in granting letters of administration to Lamotte is thought very apparent, but the effect of these letters is less obvious. By the plaintiff it is contended that they constituted Lamotte an administrator *de facto,* rendered his acts valid, so far as third persons are interested, and exempted them from question where they can be examined only incidentally. By the defendant it is contended that they were granted by a person having no jurisdiction in the case, and are therefore an absolute nullity. That Lamotte was not *de facto* the administrator of Salvadore and that his acts as administrator stand on no better or higher ground than the acts of any other person who should assume that character.

The well known distinction between an erroneous act or judgment by a tribunal having cognizance of the subject matter and the act or judgment of a tribunal having no cognizance of the subject is not denied, but it is contended that the ordinary had jurisdiction in this case. The ordinary in South Carolina is the court in which wills are proved -- in which letters testamentary and letters of administration are granted. He judges whether the applicant be entitled to administration or not, and rejects or admits the claim according

to his opinion of the law. Whether his judgment be correct or not, still it is his judgment, and when exercised upon an application for administration, it is exercised on a subject cognizable in his court.

That he grants letters of administration in cases not expressly authorized by statute and in which a will exists in which an executor is named proves that he has jurisdiction in such cases, and if he grants administration in one of them improperly, the judgment is erroneous and voidable, but not void.

This argument has been very strongly urged, and there is great force in it. The difficulty of distinguishing those cases of administration in which a court having general testamentary jurisdiction may be said to have acted on a subject not within its cognizance is perceived and felt. But the difficulty of marking the precise line of distinction does not prove that no such line exists.

To give the ordinary jurisdiction, a case in which by law letters of administration may issue must be brought before him. In the common case of intestacy, it is clear that letters of administration must be granted to some person by the ordinary, and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority, because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void. Yet the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law. And although one of the points occurs in all cases proper for his tribunal, yet that point cannot bring the subject within his jurisdiction.

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The case of letters of administration granted on the estate of a person in full life is not the only one which may serve for illustration; suppose administration to be granted on the estate of a deceased person whose executor is present in the constant performance of his executorial duties. Is such an appointment void, or is it only voidable?

In the opinion of the Court, it would be an absolute nullity.

The appointment of an executor vests the whole personal estate in the person so appointed. He holds as trustee for the purposes of the will, but he holds the legal title in all the chattels of the testator. He is, for the purpose of administering them, as much the legal proprietor of those chattels as was the testator himself while alive. This is incompatible with any power in the ordinary to transfer these chattels to any other person by the grant of administration on them. His grant can pass nothing; it conveys no right, and is a void act.

If the ordinary possesses no power to grant administration where an executor is present performing his duty, what difference can his absence make, provided that absence does not disqualify him from executing his trust? If all his powers as an executor remain, if he is still capable of appearing in courts of justice as the representative of the deceased, if he is still the legal owner of the chattels of the deceased and still capable of disposing of them, it would seem that he is potentially present, though personally absent. It is not easy to perceive any principle on which the ordinary can assert his power to take the estate out of the executor and vest it in an administrator. If he cannot do this, then the attempt to do it must be a void act. If the administrator *durante absentia* be only the agent of the executor, it still occurs that the executor can himself appoint, and is the proper person to appoint, his own agent. There is no necessity for the intrusion of the ordinary.

Let the case be supposed of a suit by the executor while actually resident abroad. Would he be incapable of sustaining the action? Would his absence be a good

plea in bar? If it would not, how can the grant of letters of administration to another take the property in the thing sued for out of the executor and place it in that other?

Letters testamentary, when once granted, are not revocable by the ordinary. He cannot annul them or transfer the legal interest of the executor to any other person. His rights and his duties are beyond the reach of the ordinary. How, then,

can this be effected by the grant of letters of administration?

The cases in which administration has been granted notwithstanding the existence of a will appear to be cases in which it is not apparent that there is any person possessing right in the chattels of the testator or cases in which that person is legally disqualified from acting.

Where administration is granted pending a dispute respecting a will, it is not certain that there is an executor or that there is a will.

If it be granted during the minority of an executor, it is because the executor is legally disqualified from acting, and indeed has not taken upon himself, and could not take upon himself the trust reposed in him. He may, when of age, reject all the rights and powers conferred by the will, and consequently the interest is not yet a vested interest. The rights and powers of the ordinary remain until those of the executor commence.

So in the case of an absent executor who has not yet made probate of the will and qualified. Those letters testamentary which are indispensable to his character as executor and which, during their existence, leave the ordinary without any further power over the subject are not yet granted. The executor has as yet no evidence that he is executor. He is not yet able to act as one. He may never be able to act, for he may never take out letters testamentary. He may renounce the executorship. The ordinary, then, is not yet deprived of that power which he possesses to appoint a person to represent a dead man who has no representative. His

jurisdiction over the subject remains until he parts with it by issuing letters testamentary.

The difference between granting administration in cases where there is a qualified executor, capable in law of acting, and where he has not qualified, is such as, in reason, to justify the opinion that though, in the latter case, the ordinary may have

jurisdiction, and his act, though erroneous, may be valid till repealed, yet, in the former case he can have no jurisdiction, and his act is in itself an absolute nullity.

If under any circumstances the ordinary could grant administration during the absence of an executor who has made probate of the will and is legally competent to act, then he would have jurisdiction of the subject, and would judge of those circumstances; but if in no possible state of things he could grant such administration, it would be difficult to conceive how he can have jurisdiction.

If we refer to authority, we can find no case and no *dictum* which admits the jurisdiction of the ordinary where there is an existing executor capable of acting. In many cases it is stated that an administration granted where there is such an executor is void. Toller, in his "Law of Executors," page 120, says

"If there be an executor, and administration be granted before probate and refusal, it shall be void on the wills being afterwards proved, although the will were suppressed or its existence were unknown or it were dubious who was executor or he was concealed, or abroad at the time of granting the administration."

It is also void if granted because the executor has become a bankrupt, or if granted, " *durante minoritate* where the infant had attained his age of seventeen," until the statute of 38 G. III. So "if granted by a bishop where the intestate had *bona notabilia,* or by an archbishop of effects in another province."

The case of *Ford v. Travis,* decided in South Carolina, is express to this point and renders a further reference to English books unnecessary.

The counsel for the plaintiff admits this to be the law

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where an absolute administration is granted, but denies the law to be applicable to the grant of a temporary administration.

However correct this distinction may be in many cases, its application to that at bar is not admitted.

No temporary administration can be granted where there is an executor in being capable of acting, and where the case will not justify the grant of a temporary administration, it would seem to be as completely out of the jurisdiction of the ordinary as the grant of an absolute administration where that is not within his power.

The case, put by Toller, of administration *durante minoritate* where the executor is of the age of 17 seems full in point. This is a temporary administration, and the minority of the executor is a fact for the consideration of the ordinary. Yet if in such a case he grants administration, the act is void because in fact it is not a case in which he can grant it.

The reasoning of the court in the case of *Ford v. Travis* appears applicable to this case. It said the executor, having proved the will, was in the nature of a trustee; he could neither abandon his trust nor be deprived of his interest in the estate of the deceased by any act of the ordinary. The ordinary, by proving the will and qualifying the executor, executed his power, and no law exists in this state authorizing him to resume it during the lifetime of the qualified executor notwithstanding he may be absent from the state. Letters of administration granted under such circumstances are void *ab initio.*

If the ordinary cannot resume his power so as to grant an absolute administration, he cannot resume it for a limited time. He cannot by any act of his divest the interest of the executor for an instant. The power may revert to him by operation of law, but cannot be assumed by any act of his own.

The grant of a temporary administration, as during the minority of an executor, is *ad usum et commodum*

executoris. But in this case, the administration is, for the time, absolute, and makes the administrator the entire representative of the deceased. It would not be unworthy of remark, if the case depended on it, that though the application of Lamotte was for administration during the absence of the executor, yet the grant

itself is without limitation.

But in its very nature the appointment of an administrator during the absence of an executor under no disability is essentially nothing more than the appointment of an agent for that executor. This the ordinary has not the power to do. The executor alone can appoint his agents.

If the ordinary had no jurisdiction in the case, then the grant of administration was void *ab initio,* and all the acts of the grantee are void. Toller 128; 3 Term. 125.

It is contended by the plaintiff that could this administration even be considered as null, where that forms the direct question before the court, as it did in *Ford v. Travis,* yet that point cannot be examined where it is collateral and incidental.

The answer which has been given at bar to this argument is entirely satisfactory. The question has never been examined in a court of law sitting as an appellate court. The question has never been whether the letters of administration shall be revoked or not, but whether they were originally void, so as not to warrant the particular act in support of which they were alleged.

But in this case the letters of administration come as directly before the court as in the case of *Ford v. Travis.* The conveyance from the sheriff to Freneau forms a part of the plaintiffs title, and the validity of that conveyance may depend on the question whether Lamotte was or was not the administrator of Salvadore. The question therefore must necessarily be decided, and a majority of the Court is of opinion that administration was granted by a court having no jurisdiction in the particular case, and is therefore absolutely void.

3d. It is contended on the part of the plaintiff that the judgment on which the execution issued was properly revived by a court of competent jurisdiction, whose judgment is therefore conclusive until reversed.

The first objection made to this judgment of revivor is that it was made without legal process. The thirty-day rule is substituted for the *scire facias* only in cases where lapse of time prevents the plaintiff from suing out execution.

However this Court might construe the law on an appeal from a judgment of revivor in such case, that question has been decided by a court of competent jurisdiction and cannot be reviewed here.

The second objection is that, the letters of administration being a mere nullity, no party representing the estate of Salvadore was before the court, and consequently the judgment could not bind that estate.

This question is one of considerable difficulty. Had the judgment been revived against the executor himself without the service of process, it would perhaps, while in force, have protected all proceedings under it. But this judgment is revived against Lamotte, who was not the representative of Salvadore. In the opinion of a majority of the Court, an execution on this judgment could not legally be levied on the property of Salvadore, and if so, the title was not vested in the sheriff by the service of the execution, and could not be conveyed by him to the purchaser. Upon this point, the case cited from 1 Wilson 302 is a strong one against the opinion of the court; but in that case, the execution, though irregular, was issued on a real judgment, and justified the sheriff in taking the effects of the deceased. On its face, it was unexceptionable. It issued at an improper time, but in all other respects was correct. In this case, the execution issued on a judgment which was itself a nullity, and it authorized the sheriff to take the effects real and personal of Joseph Salvadore in the bands of James Lamotte to be administered. Now the property of Salvadore was not in the hands of Lamotte, but was in the hands of his executor.

The case in Wilson, too, is so briefly -- I might say obscurely -- reported as to leave the principle on which the court decided entirely uncertain. It does not appear that the object of the motion extended further than the restoration of the

money. This was not an attempt to set aside the sale, and nothing appears in the case from which is to be conclusively inferred what the opinion of the court would have been on that question.

In the opinion of a majority of the Court, there is no error in the judgment of the circuit court, and it is

Affirmed with costs.