

Daly's Lessee Vs. James

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Appeal No. : 21 U.S. 495

Appellant : Daly's Lessee

Respondent : James

Judgement :

Daly's Lessee v. James - 21 U.S. 495 (1823)

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Daly's Lessee v. James

21 U.S. (8 Wheat.) 495

ERROR TO THE CIRCUIT

COURT OF PENNSYLVANIA

SYLLABUS

J.B. devises all his real estate to the testator's son, J.B. Jr., and his heirs lawfully begotten, and, in case of his death without such issue he orders A.Y., his executors and administrators, to sell the real estate within two years after the son's

death, and he bequeaths the proceeds thereof to his brothers and sisters by name and their heirs forever, or such of them as shall be living at the death of the son, to be divided between them in: equal proportions, share, and share alike. All the brothers and sisters die, leaving issue. Then A.Y. dies, and afterwards J.B. Jr., the son, dies without issue. Heirs is a word of limitation, and none of the testator's brothers and sisters being alive at the death of J.B. Jr., the devise to them failed to take effect.

Quaere whether a sale by the executors, &c., under such circumstances is to be considered as valid in a court of law?

However this may be, a sale thus made, after the lapse of two years from the death of J.B. Jr., is without authority and conveys no title.

Quare under what circumstances a court of equity might relieve in case the trustee should refuse to exercise the power within the prescribed period or should exercise the same after that period?

A power to A.Y. and his executors or administrators to sell may be executed by the executors of the executors of A.Y.

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This was an action of ejectment brought in the court below by the plaintiffs in error to recover the possession of a messuage and lot in the City of Philadelphia. The special verdict in the case stated that on 8 August, 1768, John Bleakley, of Philadelphia, being then in London, made and duly executed his last will, as follows:

"In the name of God, amen. I, John Bleakley, of Philadelphia, Esquire, now in London and shortly bound to Philadelphia, being in perfect health and of sound and disposing mind, memory, and understanding, and considering the certainty of death, and the uncertainty of the time thereof, do therefore make and declare this my last will and testament in manner following -- that is to say:"

"First and principally, I commend my soul to God and my body to the earth or sea, as He shall please to order, and as for and concerning my worldly estate, I give, devise, and bequeath the same in manner following, that is to say:"

"First I will and desire that all my just debts and funeral expenses (if any) be fully paid and satisfied as soon as conveniently may be after my decease. Also I give and bequeath to my brother, David Bleakley, living in the north of Ireland, the sum of ten pounds sterling. Also I give and bequeath to my brother William Bleakley, living near Dungannon, the sum of ten pounds sterling. Also I

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give and bequeath to my sister Margaret Harkness, of Dungannon, the sum of one hundred pounds sterling. Also I give and bequeath to my sister, Sarah Boyle, wife of the Rev. Mr. Boyle, the sum of ten pounds sterling. Also I give and bequeath to my cousin Archibald Young, of Philadelphia, an annuity of thirty pounds, Pennsylvania money, to be paid to him out of the rents and profits of my real estate on the 25th day of March in every year during the joint lives of him, the said Archibald Young, and my son, John Bleakley or his heirs lawfully begotten. But in case of the decease of my said son without issue lawfully begotten as aforesaid in the lifetime of the said Archibald Young, then the said annuity is to cease, and in lieu thereof I give and bequeath unto the said Archibald Young and his assigns the sum of four hundred pounds sterling, payable out of the proceeds of my real estate when the same is sold and disposed of according to the intention of this my will, hereinafter mentioned and before any dividend is made of the proceeds of my said estate. And this legacy or bequest is made to my said cousin Archibald Young not only for the natural affection I have and bear to him as a relation, but also as a full compensation for the services he has already rendered me and in lieu of his commissions for the trouble he may hereafter have in the execution of this my will. All the rest and residue of my estate, real and personal, of what nature, kind or quality the same may be or consist, and hereinbefore not particularly disposed of, I give,

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devise, and bequeath to my son John Bleakley and his heirs lawfully begotten, and in case of the decease of my said son without such issue, then I do direct and order my said cousin Archibald Young, his executors or administrators, to sell and dispose of my real estate within two years after the decease of my said son, John Bleakley, to the best advantage. And I do hereby give and bequeath the proceeds thereof to my said brothers David Bleakley and William Bleakley and my said sisters Margaret Harkness and Sarah Boyle and their heirs forever, or such of them as shall be living at the decease of my said son, to be divided between them in equal proportions, share and share alike, after deducting out of such proceeds the sum of 400 pounds sterling, hereinbefore given and bequeathed to the said Archibald Young, immediately on the decease of my said son without issue in lieu of the annuity above mentioned. And in case my said son should die before he attains the age of twenty-one years without issue lawfully begotten as aforesaid, then my will and mind is that the remainder of my personal estate, hereby intended for my said son at his own disposal, if he should live to attain the age of twenty-one years, shall go to and be divided amongst my said brothers and sisters with the proceeds of my real estate, as is hereinbefore directed to be divided. And I do hereby nominate and appoint the said Archibald Young and my said son John Bleakley executors of this my will, hereby revoking and making void all former wills, codicils, and bequests by me at any time or times

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heretofore made, and do ordain this will to be as and for my last will and testament. In witness whereof,"

&c.;

The testator died in the month of January, 1769. His brothers and sisters all died, leaving children (who are still alive) at or about the following periods, *viz.*, Sarah Boyle between the years 1760 and 1770; William in the year 1775; David in the year 1790, and Margaret Harkness in the year 1794. The children were of full age or nearly so when the above will was made, and were personally known to the testator. Archibald Young died in May, 1782, having duly made and executed his

last will and testament, whereby he appointed Robert Correy his executor, who, on 24 April, 1797, made his last will and testament, and thereof appointed Eleanor Curry and James Boyd the executors, and died in June, 1802.

John Bleakley, the son, died on 3 September, 1802, without issue and of full age, having previously executed his last will and testament, whereof he appointed J. P. Norris his executor, and thereby directed his real and personal estate to be sold and the proceeds, after paying certain legacies, to be divided among certain of his relations. On 25 May, 1803, the said Norris, for a valuable consideration, sold and conveyed the premises in dispute to W. Folwell, who, on 21 April, 1810, conveyed the same for a valuable consideration to the defendant. On 1 February, 1805, Eleanor Curry, and James Boyd, the executors of R. Correy (who was the

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executor of A. Young), by deed, bargained and sold the premises in question to James Smith, which deed was afterwards cancelled, and subsequently, on 27 March, 1820, they sold and conveyed the said premises to the lessor of the plaintiff, who, at the time of his purchase, had notice of the death of the brothers and sisters of John Bleakley in the lifetime of his son.

Upon this special verdict, judgment having been rendered *pro forma* for the defendant in the court below, the cause was brought by writ of error to this Court.

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MR. JUSTICE WASHINGTON delivered the opinion of the Court, and after stating the case proceeded as follows:

The material question to be decided is whether the power given to A. Young, his executors and administrators, to sell the real estate of the testator was legally exercised? If it was not, then the plaintiff in error, who claims under a sale made by the executor of Young, acquired no title under it, and the judgment below is right.

It was contended by the counsel for the defendant that by the death of Young as well as of the brothers and sisters of the testator in the lifetime of John Bleakley, the son, the devises to them to arise out of the power to sell never took effect, and consequently, there being no person in existence at the death of the son, to receive the proceeds of the sale, or any part of them, the power was unduly exercised. The premises upon which the above argument is founded, as well as the conclusion drawn from them, being controverted by the counsel on the other side, our inquiries will be confined to those two points.

With respect to the devise of the 400 pounds to A. Young, a majority of the Court is of opinion that by the words as well as from the obvious intention of the testator, that sum was not to be raised except in the event of the death of John

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Bleakley, the son without issue in the lifetime of Young. During the joint lives of the son or his issue and Young, the latter was to receive an annuity of 30 pounds out of the rents and profits of the real estate. But if the son should die without issue in the lifetime of the said Young, the annuity was in that event to cease, and the 400 pounds was to be raised for his use out of the proceeds of the real estate, when the same should be sold according to the intention of the will, as thereafter mentioned. The contingency on which the devise of the 400 pounds was to take effect is in no respect connected with that on which the devise of the proceeds to the brothers and sisters was to depend. The 400 pounds is expressly given in lieu of the annuity in case Young should survive the son without issue, in which event it was to cease.

The contingency upon which the devise of the proceeds of the real estate to the brothers and sisters was to take effect was the death of the son without issue, and since it was possible that the particular estate of the son might endure beyond the life of Young, the power to sell for the benefit of the brothers and sisters is extended to his executors and administrators. It is true that by the clause which gives the power to sell, taken independent of the devise to Young, it would seem as if the 400 pounds was at all events to be first deducted out of the proceeds of

the sale and paid to him in the same event as the residue was to be paid to the brothers and sisters -- that is, on the death of the son without issue. But the

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two clauses must of necessity be taken in connection with each other, the one as containing the bequest to Young and the contingency upon which it was to take effect, and the other as pointing out the fund out of which it was to be satisfied. If the former never took effect, it is clear that the latter was relieved from the burden imposed upon it.

A very good reason appears for making the devise of the 400 pounds to Young to depend upon his surviving the son without issue, since it would be in that event only that he would want it, the annuity, which it was intended to replace continuing until that event happened. But no reason is perceived why the devise over to the brothers and sisters of the testator or the execution of the power for their benefit should have been made to depend on the same event, a trustee to sell being provided in the executors of Young in case he should die before the power could be executed.

Having shown, it is believed, that the devise of the 400 pounds to Young never took effect in consequence of his death in the lifetime of John Bleakley, the son, it becomes important to inquire whether the devise to the brothers and sisters of the testator failed in consequence of their having all died in the lifetime of the son. The operative words of the will are

"I give the proceeds thereof [of his real estate] to my said brothers and sisters and their heirs forever, or such of them as shall be living at the decease of my son, to be divided

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between them in equal proportions, share and share alike."

The court has felt considerable difficulty in construing the above clause, with a view to the intention of the testator, to be collected from the whole of the will, and

of the circumstances stated in the special verdict. Some of the judges are of opinion that the devise is confined, both by the words and by the apparent intention of the testator, to the brothers and sisters who should be living at the death of the son without issue, considering the word "heirs" as a word of limitation, according to its general import, and that there is no evidence of an intention in the testator to give the part of a deceased brother or sister to his or her children, which ought to control the legal meaning of that word, when used as it is in this clause. On the contrary, they think that the use of it in the devise of the proceeds of the real estate, and the omission of it in the devise of the personal estate, and yet declaring that the latter is to be divided amongst his brothers and sisters, with the proceeds of his real estate as thereinbefore directed to be divided, strongly indicates the intention of the testator to give the proceeds of the real estate to the same persons who were to take the personal estate. Others of the judges are of opinion, that an intention to give the proceeds of the real estate to the children of a deceased brother or sister, as representing their ancestor, is fairly to be collected from the will, which strongly intimates that the testator did not

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mean to die intestate, as to any part of his real or personal estate.

Upon a question of so much doubt, this Court, which always listens with respect to the adjudications of the courts of the different states, where they apply, is disposed, upon this point, to acquiesce in the decision of the Supreme Court of Pennsylvania, in the case of *Smith's Lessee v. Folwell*, 1 Bin. 546, that the word "heirs" is to be construed to be a word of limitation, and consequently that the devise to the brothers and sisters failed to take effect by their deaths in the lifetime of the son.

Whether the conclusion to which that court came, and which was pressed upon us by the plaintiff's counsel, that the contingencies on which the power to sell was to arise having never happened, the sale under the power was without authority, is well founded in a court of law need not be decided in this case, because the majority of the Court is of opinion that by the express words of the will, the sale

was limited to the period of two years after the decease of John Bleakley, the son. The circumstance of time was no doubt considered by the testator as being of some consequence, or else it is not likely that he would so have restricted the exercise of the power. But whether it was so or not, such was the will and pleasure of the creator of the power, and that will could only be fulfilled by a precise and literal exercise of the power. The trustee acts, and could act, only in virtue of a special authority conferred upon him by the will; he must act, then, in the way

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and under the restrictions which accompany the authority. If an adjudication were wanted to sanction so plain and obvious a principle of law, it is to be found in a case reported in the Year Book, 15 Hen. VII, pp. 11-12.

Under what circumstances, a court of equity might relieve in case the trustee should refuse to exercise the power within the prescribed period or should exercise the same after that period need not be adverted to in this case, since this is a question arising in a case purely at law.

The sale in this case, then, having been made about eighteen years after the death of John Bleakley, the son, the trustee acted without authority, and the sale and conveyance was absolutely void at law.

MR. JUSTICE JOHNSON.

I have no hesitation in conceding that if all the objects had failed for which the power in this will was created, the power itself ceased both at law and in equity. Those objects were:

1. The raising of the legacy of 400 pounds for Young.
2. The sale and distribution of the testator's estate among his own relatives.

If neither of these objects remained to be effected, the power under which the plaintiff makes title was at an end.

The words on which the legacy depends are these:

"but in case of the decease of my said son without issue, as aforesaid, in the lifetime of the said Archibald Young, then the said annuity is to

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cease, and in lieu thereof I give and bequeath unto the said A.Y. and his assigns the sum of 400 pounds sterling, payable out of the proceeds of my real estate when the same is sold and disposed of according to the intention of this my will herein after mentioned and before any dividend is made of my said estate."

The question which this clause presents is whether the legacy was given upon the single contingency of the son's death without issue or upon the double contingency of his death without issue in the lifetime of A.Y.

This question appears to me to be settled by the testator himself, for in a subsequent part of the will, speaking of this same legacy and of course with reference to the clause bequeathing it, he says, "the sum of 400 pounds sterling, hereinbefore given and bequeathed to the said A.Y. immediately on the decease of my said son without issue." The testator, then, has attached this construction to his own words, and that the clause containing this bequest will well admit of that construction is obvious, for there is no necessity for joining the first member of the sentence, which contains the double contingency, to the last member, which contains the bequest. And the effect of the will, without this connection (which I cannot but think forced and unnecessary) will be to give the pecuniary legacy absolutely on the event of the son's death without issue, but at the same time to declare that the annuity should no longer run on whenever this bequest took effect. This would literally be giving it in lieu of the annuity,

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and would fully satisfy those words in the will.

Indeed this construction appears irresistible when we consider another part of the will.

The power to sell is extended to the executors and administrators of A.Y. They therefore were authorized to sell in the event of the death of the son without issue although he should survive A.Y. Yet we find the testator, when obviously contemplating the event of the son's surviving Young, expressly directing the payment of this legacy before the proceeds should be distributed among his devisees over. This could only be consistent with a bequest upon the single contingency of the son's death without issue, independently of Young's survivorship.

Nor is there the least ground for contending that this bequest is upon a contingency too remote, since the sale and devise over are expressly limited to take effect upon the death of the son, thereby restricting the generality of the words "issue" and "heirs," so as to mean issue living at his death. This too is consistent with those acknowledgments of the testator of a debt of gratitude to A.Y., and not only of a debt to accrue, but of a subsisting debt. The annuity is given *in praesenti*, and so is its substitute, the legacy. The words are, "I give and bequeath," thus vesting a present interest, although the payment is deferred to a future time and event. The views of the testator are easily explained: if his son or his issue took the estate, his bounty to Young was to be limited to the annuity. But if it should go over to his collateral

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kindred, the testator enlarges his bounty, and gives this substitute for the annuity, at the same time that he frees his estate from a charge that would embarrass the sale.

Nor can I possibly admit the doctrine that the power to sell was either at law or in equity limited to the duration of two years after the death of the son without issue. The words are

"then I direct and order my said cousin, A.Y., his executors and administrators, to sell and dispose of my real estate within two years after the decease of my said son."

Here the words are clearly imperative, and their effect is both to confer the power generally and to exact the execution of it in two years. The intention of the testator must prevail both at law and in equity in construing his words, and when they will admit of a construction which will make the power commensurate with the views of the testator in creating it, I hold that to be the true construction both in law and equity. It is only when the power given admits not of this latitude by construction that the aid of courts of equity is resorted to in order to carry into effect the views of the testator. By possibility, the executors of A. Young may have been minors, or may not have proved his will until the two years had expired, or a sale during that time may have been stayed by injunction or by the want of purchasers, and it would be difficult to show why in any one of these events the power should have ceased. Certainly no reason can be extracted from the provisions of the will, whence an intention could be inferred to restrict the power to sell to the

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period of two years. Everything favors the contrary conclusion. For whose benefit was this injunction to sell within the specified period imposed upon the executor? Clearly for that of the brothers and sisters, in order that under it they may have compelled the executor to proceed to sale within the time limited. It would be strange, then, if a provision so clearly intended for their interests should have put it in the power of the executor, either willfully, or by laches, to defeat their interests, and let in the heir at law.

This is not the case of a mere naked power; it is a power coupled with a trust. The executor was to sell, that he might possess himself of the value in money and distribute it among the *cestuis que trust*. In such cases it has been well observed that "the substantial part is to do the thing," and that "powers of this kind have a favorable construction in law, and are not resembled to conditions, which are strictly expounded."

I am therefore of opinion that the words creating this power will well admit of being construed into a general devise of the power, and that the object intended to be answered necessarily requires that construction.

The *dictum* cited from the Year Books, therefore (besides that it has not been very correctly translated), has no application to this case, since it supposes the actual restriction under the will, which I deny to be imposed in the present instance upon the true construction of its words.

Being therefore of opinion that both the legacy to Young and the power to sell subsisted

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at the date of the sale to the plaintiff, these views of the case are sufficient to sustain the sale to the plaintiff, and the subsequent questions would arise only upon the distribution of the remainder of the purchase money after satisfying the legacy. Nevertheless, I will make a few remarks upon that part of the will which relates to the devise over to the testator's family, since it serves to elucidate by another application the principle upon which I have formed my opinion respecting the legacy to A. Young.

On the subject of the devise over to his brothers and sisters, the testator has again been his own expositor. It is very clear that if the words "or such of them as shall be living at the decease of my said son" stood alone and unexplained, the relative them might be applied grammatically with more propriety to the word "heirs" than to the words "brothers and sisters," and thus perhaps give those words the effect of words of purchase. But the testator himself gives these words a distinct application in the latter part of his will when disposing of his personal estate, concerning which he says that it shall be "divided among my brothers and sisters with the proceeds of my real estate as hereinbefore directed to be divided." Under the words here used by the testator, it is clear that the brothers and sisters only could take, and not the brothers' and sisters' children, thus restricting the word "heir" to its natural and appropriate signification, from which, it can be converted into a word of purchase only by the clear and controlling intent of the testator. This

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construction is further supported by those words which require a distribution of the proceeds of the real estate equally, share and share alike, to the legatees -- a distribution which could not take place *per stirpes*, or in the event of one or more brothers surviving, and the death of the rest, leaving issue, living at the death of the son.

On this point, therefore, I concur with the Supreme Court of Pennsylvania, and only regret that I cannot concur both with that court and this on the other bequest.

Upon the question so solemnly pressed upon this Court in the argument how far the decision of the court of Pennsylvania ought to have been considered as obligatory on this Court, I would be understood as entertaining the following views:

As precedents entitled to high respect, the decisions of the state courts will always be considered, and in all cases of local law, we acknowledge an established and uniform course of decisions of the state courts in the respective states as the law of this Court; that is to say that such decisions will be as obligatory upon this Court as they would be acknowledged to be in their own courts. But a single decision on the construction of a will cannot be acknowledged as of binding efficacy, however it may be respected as a precedent. In the present instance, I feel myself sustained in my opinion upon the legacy to A.Y. by the opinion of one of the three learned judges who composed the state court.

Judgment affirmed.