Childress Vs. Emory

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Court : US Supreme Court

Decided On : 1823

Appeal No. : 21 U.S. 642

Appellant : Childress

Respondent : Emory

Judgement :

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Childress v. Emory

21 U.S. (9 Wheat.) 642

ERROR TO THE CIRCUIT

COURT OF TENNESSEE

SYLLABUS

The courts of the United States have jurisdiction of suits by or against executors and administrators if they are citizens of different states, &c.;, although their testators or intestates might not have been entitled to sue or liable to be sued in

those courts.

It is in general not necessary, in deriving title to a bill or note through the endorsement of a partnership firm or from the surviving partner, through the act of the law, to state particularly the names of the persons composing the firm.

A declaration averring that "J.C, by his agent A.C., made" the note, &c.;, is good.

A general profert of letters testamentary is sufficient, and if the defendant would object to their insufficiency, he must crave oyer or, if it be alleged that the plaintiffs are not executors, the objection must be taken by plea in abatement.

Debt, against an executor, should be in the *detinet* only, unless he has made himself personally responsible, as by a *devastavit.*

An action of debt lies upon a promissory note against the executors.

The wager of law, if it ever had a legal existence in the United States, is now completely abolished.

The defendants in error, citizens of the State of Maryland and executors of John G. Comegys, the surviving partner of the late firm of "William Cochran & Comegys," brought an action of debt in the *detinet* on a promissory note executed by

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the said Anderson Childress as the agent of said Joel Childress, both of whom were citizens of the State of Tennessee. The declaration stated the plaintiffs in said suit (now defendants in error) to be the executors of the last will and testament of John G. Comegys, deceased, who was the surviving partner of the late firm of William Cochran & Comegys; that on 1 May, 1817, the said Joel Childress, by his agent, A. Childress, made his promissory note to the firm of William Cochran & Comegys, and thereby promised to pay to William Cochran & Comegys or order the sum of $1,897.28 for value received. That the said Joel in his lifetime did not pay the said firm of William Cochran & Comegys, nor did he

pay the said John G. Comegys, surviving partner of said late firm of William Cochran & Comegys, the said sum of money, or any part thereof, nor has he paid the same or any part thereof to the said plaintiffs, executors as aforesaid, nor hath the said Anderson Childress' executors as aforesaid paid the said sum or any part thereof to the late firm of William Cochran & Comegys, nor to John G. Comegys, surviving partner of the said firm, nor hath he paid the said sum or any part thereof unto the said plaintiffs, executors aforesaid, but so to do hath wholly refused, and still doth, to the damage of said plaintiffs $500, and therefore they sue, and they bring here into court the letters testamentary, by which it will appear they are qualified, &c.;

To this declaration the defendant, now plaintiff

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in error, demurred, and assigned for demurrer the following causes:

1st. That said declaration alleges that said note was made to a late firm of William Cochran & Comegys, and that the plaintiffs are executors of the surviving partner of that firm, but whom said partner survived or who comprised that firm does not appear.

2d. That an action of debt cannot be maintained against the defendant, (now plaintiff in error), as executor upon a promissory note.

3d. That it is not alleged that said pretended promissory note was signed by said Joel Childress or the defendant.

4th. That the declaration omits to state any damages.

5th. There is no sufficient profert of any letters testamentary to show the right of said plaintiffs to maintain this suit.

Joinder in demurrer. After argument, the court overruled all the said causes of demurrer and gave judgment, that the plaintiffs do recover the sum of $1,897.28 debt, together with $360.47 for their damages sustained by reason of the detention

thereof, as also their costs, to be levied of the goods and chattels of Joel Childress, deceased, in the possession of said Anderson Childress, and on default thereof the costs to be levied of the proper goods of said defendant.

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MR. JUSTICE STORY delivered the opinion of the Court.

This is an action brought by the executors of John G. Comegys, who was surviving partner of the firm of William Cochran & Comegys, to recover the contents of a promissory note made by Joel Childress, deceased (whose executor the plaintiff in error is), payable to the firm of William Cochran & Comegys. The cause came before the Circuit Court for the District of West Tennessee upon a special demurrer to the declaration, and the court having overruled the demurrer, it has been brought here by writ of error.

The several causes assigned for special demurrer have been argued at the bar, but before we proceed to the consideration of them, we may as well dispose of the objection taken to the jurisdiction. The parties, executors, are, in the writ and declaration, averred to be citizens of different states; but it is not alleged that their testators were citizens of different states, and the case

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has therefore, been supposed to be affected by the 11th section of the Judiciary Act of 1789, c. 20. But that section has never been construed to apply to executors and administrators. They are the real parties in interest before the court, and succeed to all the rights of their testators by operation of law, and no other persons are the representatives of the personalty, capable of suing and being sued. They are contradistinguished, therefore, from assignees, who claim by the act of the parties. The point was expressly adjudged in *Chappedelaine v. Dechenaux,,* 4 Cranch 306, and indeed has not been seriously pressed on the present occasion.

The first cause of demurrer is that the declaration states the note to have been made to the firm of William Cochran & Comegys, but does not state who in particular the persons composing that firm were. Upon consideration, we do not think this objection ought to prevail. The firm are not parties to the suit, and if Comegys was, as the declaration asserts, the surviving partner of the firm, his executor is the sole party entitled to sue. It is not necessary in general, in deriving a title through the endorsement of a firm, to allege in particular who the persons are composing that firm, for if the endorsement be made in the name of the firm by a person duly authorized, it gives a complete title, whoever may compose the firm. *See* 3 Chitty's Plead. 2, 39. If this be so in respect to a derivative title from the act of the parties, more particularity and certainty do not seem essential in a derivative title by the

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act of the law. A more technical averment might indeed have been framed upon the rules of good pleading, but the substance is preserved. And there is some convenience in not imposing any unnecessary particularity, since it would add to the proofs, and it is not always easy to ascertain or prove the persons composing firms, whose names are on negotiable instruments, especially where they reside at a distance, and every embarrassment in the proofs would materially diminish the circulation of these valuable facilities of commerce.

Another cause of demurrer is that the declaration does not aver that the note was signed by Joel Childress. To this it is sufficient to answer that the declaration does state that "Joel Childress, by his agent, A. Childress, made" the note, and it is not necessary to state that he signed it; it is sufficient if he made it. The note might have been declared on as the note of the principal, according to its legal operation, without noticing the agency, and though it would have been technically more accurate to have averred that the principal, by his agent, in that behalf duly authorized, made the note, yet it is not indispensable, for if he makes it by his agent, it is a necessary inference of law that the agent is authorized, for otherwise the note would not be made by the principal, and that the demurrer itself admits. *See* Chitty on Bills, Appx. Sec. 528. and notes; *id.,* Bayley on Bills 103. 2 Phillips

Evid. ch. 1, s. 1, 4, 6.

Another cause of demurrer is that the declaration

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omits to state any damages; but this, if in any respect material in an action of debt, is cured by the writ, which avers an *ad damnum* of $500.

Another cause of demurrer is that the letters testamentary are not sufficiently set forth to show the right of the plaintiffs to sue. But profert is made of the letters testamentary in the usual form, and if the defendant would have objected to them as insufficient, he should have craved oyer so as to have brought them before the court. Unless oyer be craved and granted, they cannot be judicially examined. And if the plaintiffs were not executors, that objection should have been taken by way of abatement, and does not arise upon a demurrer in bar. It may be added that by the laws of Tennessee, executors and administrators, under grants of administration by other states of the Union, are entitled to sue in the courts of Tennessee without such letters granted by the state. Act of Tennessee, 1809, ch. 121, s. 1, 2.

It was also suggested at the bar, but not assigned as cause of demurrer, that the action ought not to have been in the *detinet* only, but in the *debet et detinet.* This is a mistake. Debt against an executor in general should be in the *detinet* only, unless he has made himself personally responsible, as by a *devastavit.* Comyn's Dig. Pleader, 2 D, 2; 1 Chitty's Plead. 292, 344. 2 Chitty's Plead. 141, note f. *Hope v. Bague,* 3 East 6, 1 Saund. 1, note 1. 1 Saund. 112, note 1. And if it had been otherwise,

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the objection could only have been taken advantage of on special demurrer, for it is but matter of form, and cured by our statute of jeofails. *Burland v. Tyler,* 2 Lord Raym. 1391; 2 Chitty's Pl. 141, note f; act of 1789, ch. 20, s. 32.

But the most important objection remains to be considered, and that is that an action of debt does not lie upon a promissory note against executors. It is argued that debt does not lie upon a simple contract generally against executors, and the case of *Barry v. Robinson,* 4 Bos. & Pull. 293, has been cited as directly in point. Certainly if this be the settled rule of the common law, we are not at liberty to disregard it, even though the reason of the rule may appear to be frivolous or may have ceased to be felt as just in its practical operation. But we do not admit that the rule of the common law is as it has been stated at the bar. We understand, on the contrary, that the general rule is that debt does lie against executors upon a simple contract, and that an exception is that it does not lie in the particular case where the testator may wage his law. When, therefore, it is established in any given case that there can be no wager of law by the testator, debt is a proper remedy. Lord Chief Baron Comyns lays down the doctrine that debt lies against executors upon any debt or contract without specialty where the testator could not have waged his law, and he puts the case of debt for rent upon a parol lease to exemplify it. Com.Dig. Administration, B. 14. *See also* Com.Dig. Pleader, 2 W. 45, tit. 2 D. 2. The same

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doctrine is laid down in elementary writers. 1 Chitty's Plead. 106; Chitty on Bills, ch. 6, p. 426. Upon this ground, the action of debt is admitted to lie against executors in cases of simple contract, in courts where the wager of law is not admitted, as in the courts of London, by custom. So in the court of Exchequer upon a more general principle, the wager of law is not allowed upon a *quo minus.* Com.Dig. Plead. 2 W. 45; Godbolt 291. 1 Chitty's Plead. 106, 93. Bohun's Hist. of London 86. The reason is obvious -- the plaintiff shall not, by the form of his action, deprive the executor of any lawful plea that might have been pleaded by his testator, and as the executor can in no case wage his law, Com.Dig. Pleader, 2 W. 45, he shall not be compelled to answer to an action, in which his testator might have used that defense. Even the doctrine, with these limitations, is so purely artificial that the executor may waive the benefit of it, and therefore, if he omits to demur and pleads in bar to the action and a verdict is found against him, he

cannot take advantage of the objection either in arrest of judgment or upon a writ of error. 2 Saund. 74, note 2, by Williams, and the authorities there cited. *Norwood v. Read,* Plowd. 182; Cro.Eliz. 557. Style, in his Practical Register, lays down the rule with its exact limitations. "No action," says he,

"shall ever lie against an executor or administrator where the testator or intestate might have waged their law, because they have lost the benefit of making that defense, which is a good defense in that action,

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and if their intestate or testator had been living, they might have taken advantage of it."

Style's Pr.Reg. and Comp.Atty. in courts of common law (1707), 666.

In the view, therefore, which we take of this case, we do not think it necessary to enter into the consideration whether the case in 4 Bos. & Pull. 293, which denies that debt will lie against executors upon a promissory note of the testator, is law. There is indeed some reason to question, at least since the statute of Anne, which has put negotiable instruments upon a new and peculiar footing, whether, upon the authorities and general doctrines which regulate that defense, it ought to be applied to such instruments. The cases cited at the bar by the plaintiff's counsel contain reasoning on this point, which would deserve very serious consideration. But waiving any discussion of this point and assuming the case in 4 Bos. & Pull. 293 to have been rightly decided, it does not govern the case now before the Court, for that case does not affect to assert or decide that the action of debt will not lie in cases where there can be no wager of law.

Now whatever may be said upon the question whether the wager of law was ever introduced into the common law of our country by the emigration of our ancestors, it is perfectly clear that it cannot, since the establishment of the State of Tennessee, have had a legal existence in its jurisprudence. The Constitution of that state has expressly declared that the trial by jury shall remain inviolate, and the Constitution of the United

States has also declared that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. Any attempt to set up the wager of law would be utterly inconsistent with this acknowledged right. So that the wager of law, if it ever had a legal existence in the United States, is now completely abolished. If, then, we apply the rule of the common law to the present case, we shall arrive necessarily at the conclusion that the action of debt does lie against the executor, because the testator could never have waged his law in this case.

Upon the whole, the judgment of the circuit court is

Affirmed with 6 percent damages and costs.