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Appellant : Burwell

Respondent : Cawood

Judgement :

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Burwell v. Cawood

43 U.S. (2 How.) 560

APPEAL FROM A DECREE OF THE CIRCUIT COURT OF

THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

SYLLABUS

Although by the general rule of law, every partnership is dissolved by the death of one of the partners where the articles of co-partnership do not stipulate otherwise, yet either one may, by his will, provide for the continuance of the partnership after

his death, and in making this provision, he may bind his whole estate or only that portion of it already embarked in the partnership.

But it will require the most clear and unambiguous language, demonstrating in the most positive manner that the testator intended to make his general assets liable for all debts contracted in the continued trade after his death, to justify the court in arriving at such a conclusion.

Where it appears from the context of a will that a testator intended to dispose of his whole estate and to give his residuary legatee a substantial beneficial interest, such legatee will take real as well as personal estate, although the word "devisee" be not used.

The case was this.

In July, 1836, Joseph Mandeville and Daniel Cawood, both of the Town of Alexandria, entered into articles of co-partnership under the firm of Daniel Cawood & Company, which was to continue until 1 September, 1838. Numerous stipulations were made which it is not necessary to mention.

In June, 1837, Mandeville made his will, which began thus:

"I, Joseph Mandeville, of Alexandria, in the District of Columbia, thankful to Divine Providence, which has ever rewarded my industry and blessed me with a fair portion of health, do hereby direct the disposal which I desire of my earthly remains after my decease, and of such real and personal property as I may possess when called hence to a future state."

After sundry legacies, he said:

"If my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay them,"

and then added:

"John West, formerly of Alexandria, now of Mobile, I hereby make my residuary legatee, recommending him to consult with and follow the advice of my executors in all concerning what I leave to him. "

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Robert J. Taylor and William C. Gardner were appointed executors.

In July, 1837, the following codicil was added:

" *Codicil to the preceding will, made this eleventh day of July, 1837* "

"It is my will that my interest in the co-partnership subsisting between Daniel Cawood and myself, under the firm of Daniel Cawood & Company, shall be continued therein until the expiration of the term limited by the articles between us, the business to be conducted by the said Daniel Cawood, and the profit or loss to be distributed in the manner the said articles provide."

"In witness whereof I have hereto subscribed my name."

"JOSEPH MANDEVILLE"

Shortly after adding the above codicil, Mandeville died, in July, 1837. Taylor renounced the executorship, and Gardner obtained letters testamentary upon the estate.

Cawood & Company continued to carry on the business as before.

In July, 1838, the following note was given and draft drawn:

"Alexandria, 28 July, 1838"

"Dolls. 800"

"Thirty days after date, we promise to pay to the order of Mr. N. Burwell, eight hundred dollars for value received, negotiable and payable at the Bank of Potomac."

"DANIEL CAWOOD & Co."

"Alexandria, 28 July, 1838"

"Dolls. 1,000"

"On the 31st inst. pay to the order of Mr. William H. Mount one thousand dollars for value received, and charge to account of yours."

"NATH'L BURWELL"

"To Daniel Cawood and Co., Alexandria, D.C."

"Accepted DAN'L CAWOOD & Co."

Neither the note or draft was paid at maturity, and both were protested.

In December, 1838, Burwell, the appellant in the present case, filed a bill on the equity side of the circuit court against Cawood and Gardner reciting the above facts and praying relief.

In June, 1839, Gardner answered. He admitted those facts, but denied that the assets in his hands as executor were liable to the payment of the debts of the firm of Daniel Cawood & Company, and required the complainant to make proof of it. He further alleged a deficiency of personal assets.

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In October, 1839, Cawood filed his answer admitting in substance the facts set forth in the bill, but neither admitted nor denied the insolvency of the firm.

The case was referred to a commissioner with instructions to adjust the accounts of the executor and also of the firm of Cawood & Company.

In May, 1841, the commissioner made an elaborate report, the particulars of which it is not necessary to state.

In November, 1841, on the motion of John West, claiming to be interested in the subject matter of the suit, it was ordered by the court that the complainant have leave to amend his bill and make John West a defendant. The case was again referred to a commissioner with instructions to state, settle, and report to the court the account of William C. Gardner as executor of Joseph Mandeville, deceased, stating the personal estate of the said Mandeville left by him at his death and how much thereof has come to the hands of the executor, the value of it, and how the same have been disposed of, particularly whether any of the legacies have been paid out of the personal executor, and that he report also the value of the personal assets still in the hands of the executor, and that he report any special matter that he may deem pertinent or either party may require.

In December, 1841, the complainant, under the above order, filed his amended bill, making West a party.

In April, 1842, West demurred to the bill because the other legatees of Mandeville were not made defendants and because the complainant had not, by his bill, shown a case in which he was entitled to relief.

In May, 1842, the commissioner made a report under the above reference stating that Gardner, as executor, had then in his hands assets amounting to $1,036.70.

In June, 1842, the demurrer was argued, and the court being of opinion that the general assets of the estate of the said Joseph Mandeville, deceased, in the hands of his executor, William C. Gardner, one of the said defendants, are not chargeable with any debt contracted by the defendant Cawood in the name of the firm of Daniel Cawood and Co. after the death of the former partner of the firm, the said Joseph Mandeville, and being of opinion that the defendant's said demurrer is well taken and fully sustained in argument, and that the complainant's bill contains no matter, allegation, or

charge laying any foundation for equitable relief in the premises, dismissed the bill with costs.

The complainant, Burwell, appealed from this decree.

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MR. JUSTICE STORY delivered the opinion of the Court.

On 9 July, 1836, Joseph Mandeville, deceased, by certain articles then executed, entered into partnership with Daniel Cawood, one of the defendants, for the term of three years from 1 September, 1835, under the firm of Daniel Cawood & Company. On 3 June, 1837, Mandeville made his last will, by which in the introductory clause he said:

"I do hereby direct the disposal which I desire of my earthly remains after my decease, and of such real and personal property as I may possess when called hence to a future state."

He then proceeded to make sundry bequests of his real and personal estate to different persons; and then added:

"If my personal property should not cover the entire amount of legacies I have or may give, my executors will dispose of so much of my real estate as will fully pay the same."

He immediately added:

"John West, one of the defendants, formerly of Alexandria, now of Mobile, I hereby make my residuary legatee, recommending him to consult with and follow the advice of my executors in all concerning what I leave to him."

The testator, on 11 July, 1837, made the following codicil to his will:

"It is my will that my interest in the co-partnership subsisting between Daniel Cawood and myself, under the firm of Daniel Cawood & Company, shall be continued thereon until the expiration of the term limited by the articles between us, the business to be continued by the said Daniel Cawood, and the profit or loss to be distributed in the manner the said articles provide."

The testator appointed Robert J. Taylor and William C. Gardner (one of the defendants) executors of his will, and died in July, 1837. His will and codicil were duly proved after his death, and Taylor having renounced the executorship, Gardner took upon himself the administration of the estate under letters testamentary granted to him by the Orphans' Court of Alexandria County.

Cawood, after the testator's death, carried on the co-partnership in the name of the firm, and failed in business before the regular expiration thereof, according to the articles.

The present bill was originally brought against Cawood and Gardner, as executors of Mandeville, by the plaintiff, Burwell, alleging himself to be a creditor of the firm upon debts contracted with him by Cawood, on behalf of the firm, after Mandeville's death, *viz.,* on a promissory note, dated 28 July, 1838, for $800, and on an acceptance of a bill of exchange drawn by Burwell on the same day for $1,000, in favor of one William H. Mount, both of which remained unpaid. The bill charged the failure of Cawood in trade, and his inability to pay the debts due from the firm. It also charged that Gardner, the executor, had assets sufficient to satisfy all the debts of the testator, and all the debts of Cawood & Company, and it sought payment of the debt due to the plaintiff out of those assets.

The defendant, Gardner, put in an answer denying that he had such accurate information as to enable him to say whether the partnership funds in the hands of Cawood were sufficient to pay the debts of the firm or not, and not admitting that the assets of the testator in his hands were liable to the payment of the debts of the firm, and requiring proof of such liability, and alleging that he had not assets of the testator in his hands sufficient to satisfy the plaintiff's claims, after satisfying two specified judgments.

The defendant, Cawood, not having made any answer at this stage of the cause, the bill was thereupon taken against him *pro confesso* -- subsequently he put in an answer, and thereupon it was, by consent of the plaintiff and Cawood and

Gardner the executor, referred to a master to take an account of the assets of the testator, of the debts due to him, of the value of his real estate, and to settle the accounts and transactions of the firm of Cawood & Company until its termination, and of the individual partners with the firm, to take an account of the assets of the firm, and the outstanding debts of the firm, and the debts due thereto &c.;, and also to ascertain whether the debt due to the plaintiff arose in the partnership transactions and is now due.

Cawood, by his answer, admitted generally the facts stated in the bill, but he also alleged that he neither admitted nor denied the insolvency of the firm, averring that he had satisfied claims against the firm since it terminated to the amount of about $14,000 from the firm funds, and was engaged in the collection of the outstanding debts due thereto, and that the firm still owed debts to the amount of about $7,000.

The master made his report in May, 1841, the details of which it

is not necessary to mention. In November, of the same year, it was referred to another commissioner to take an account of the assets of Mandeville in the hands of his executor, who afterwards made a report accordingly. At this stage of the proceedings, John West (the residuary legatee, so called in the will) claiming to be interested in the subject matter, the bill was amended by making West a party, and he filed a demurrer to the bill. The demurrer was afterwards set down for argument, and the court being of opinion that the assets of Mandeville in the hands of his executor (Gardner) were not chargeable with any debt contracted by Cawood in the name of the firm, after the death of Mandeville, sustained the demurrer, and dismissed the bill with costs. From this decree of dismissal the present appeal has been taken to this Court.

The argument has spread itself over several topics, which are not in our judgment now properly before us, whatever may have been their relevancy in the court below. The real question, arising before us upon the record, is whether the general assets of the testator, Mandeville, in the hands of his executor, are liable for the

payment of the debt due to the plaintiff, which was contracted after Mandeville's death. If they are not, the bill was properly dismissed, whatever might be the remedy of the plaintiff against Cawood, if the suit had been brought against him alone, for equitable relief, upon which we give no opinion. In general the surviving partner is liable at law only, and no decree can be made against him, although he may be a proper party to the suit in equity, as being interested to contest the plaintiff's demand, unless some other equity intervenes, and so it was held in *Wilkinson v. Henderson,* 1 Myl. & K. 582, 589.

The bill, as framed, states the insolvency of Cawood and seeks no separate relief against him, and therefore, if it is maintainable at all, it is so solely upon the ground of the liability of the general assets of Mandeville to pay the plaintiff jointly with the partnership funds in the hands of Cawood. In respect to another suggestion, that West was not a necessary party to the bill, in his character of residuary legatee of the personalty, that may be admitted; at the same time it is as clear that as he had an interest in that residue, if Mandeville's general assets were liable for the plaintiff's debt, and therefore the plaintiff might at his option join him in the suit, and if West did not object, no other person would avail himself of the objection of his misjoinder.

Then, as to the liability of the general assets of Mandeville in the hands of his executor for the payment of the plaintiff's debt, we are

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of opinion that they are not so liable, and shall now proceed to state the reasons for this opinion.

By the general rule of law, every partnership is dissolved by the death of one of the partners. It is true that it is competent for the partners to provide by agreement for the continuance of the partnership after such death, but then it takes place in virtue of such agreement only, as the act of the parties, and not by mere operation of law. A partner too may by his will provide that the partnership shall continue notwithstanding his death, and if it is consented to by the surviving partner, it

becomes obligatory, just as it would if the testator, being a sole trader, had provided for the continuance of his trade by his executor after his death. But then in each case the agreement or authority must be clearly made out, and third persons having notice of the death are bound to inquire how far the agreement or authority to continue it extends, and what funds it binds, and if they trust the surviving party beyond the reach of such agreement, or authority, or fund, it is their own fault, and they have no right to complain that the law does not afford them any satisfactory redress.

A testator, too, directing the continuance of a partnership, may, if he so choose, bind his general assets for all the debts of the partnership contracted after his death. But he may also limit his responsibility either to the funds already embarked in the trade or to any specific amount to be invested therein for that purpose, and then the creditors can resort to that fund or amount only, and not to the general assets of the testators' estate, although the partner or executor, or other person carrying on the trade may be personally responsible for all the debts contracted. This is clearly established by the case *Ex Parte Garland,* 10 Ves. 110, where the subject was very fully discussed by Lord Eldon, and *Ex Parte Richardson,* 3 Madd.Ch. 138, 157, where the like doctrine was affirmed by Sir John Leach (then Vice-Chancellor), and by the same learned judge, when Master of the Rolls, in *Thompson v. Andrews,* 1 Myl. & K. 116. The case of *Hankey v. Hammock,* before Lord Kenyon when Master of the Rolls, reported in Cooke's Bankrupt Law 67, 5th ed., and more fully in a note to 3 Madd.Ch. 148; so far as may be thought to decide that the testator's assets are generally liable under all circumstances, where the trade is directed to be carried on after his death, has been completely overturned by other later cases, and expressly overruled by Lord Eldon in 10 Ves. 110, 121, 122, where he stated that it stood

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alone, and he felt compelled to decide against its authority. The case of *Pitkin v. Pitkin,* 7 Conn. 307, is fully in point to the same effect, and indeed, as we shall presently see, runs *quatuor pedibus* with the present.

And this leads us to remark that nothing but the most clear and unambiguous language, demonstrating in the most positive manner that the testator intends to make his general assets liable for all debts contracted in the continued trade after his death, and not merely to limit it to the funds embarked in that trade, would justify the court in arriving at such a conclusion from the manifest inconvenience thereof, and the utter impossibility of paying off the legacies bequeathed by the testator's will or distributing the residue of his estate without in effect saying at the same time that the payments may all be recalled if the trade should become unsuccessful or ruinous. Such a result would ordinarily be at war with the testator's intention in bequeathing such legacies and residue, and would or might postpone the settlement of the estate for a half-century, or until long after the trade or continued partnership should terminate. *Lord Eldon,* in 10 Ves. 110, 121-122, put the inconvenience in a strong light by suggesting several cases where the doctrine would create the most manifest embarrassments, if not utter injustice, and he said that the convenience of mankind required him to hold that the creditors of the trade, as such, have not a claim against the distributed assets in the hands of third persons, under the directions in the same will, which has authorized the trade to be carried on for the benefit of other persons. This also was manifestly the opinion of Sir John Leach in the cases 3 Madd.Ch., 128; 1 Myl. & K. 116, and was expressly held in the case in 7 Conn. 307.

Keeping these principles in view, let us now proceed to the examination of the will and codicil in the present case. There can, we think, be no doubt that the testator intended by his will to dispose of the whole of his estate, real and personal. The introductory words to his will already cited show such an intention in a clear and explicit manner. The testator there says:

"I do hereby direct the disposal which I desire of my earthly remains after my decease and of such real and personal estate as I may possess, when called hence to a future state."

He therefore looks to the disposal of all the estate he shall die possessed of. It is said that, admitting such to be his intention, the testator has not carried it into effect, because the residuary clause declares John West his "residuary legatee"

only, and

not his residuary devisee also, and that we are to interpret the words of the will according to their legal import as confined altogether to the residue of the personal estate. This is, in our judgment, a very narrow and technical interpretation of the words of the will. The language used by the testator shows him to have been an unskillful man, and not versed in legal phraseology. The cardinal rule in the interpretation of wills is that the language is to be interpreted in subordination to the intention of the testator, and is not to control that intention when it is clear and determinate. Thus, for example, the word "legacy" may be construed to apply to real estate where the context of the will shows such to be the intention of the testator. Thus, in *Hope v. Taylor,* 1 Burr. 269, the word "legacy" was held to include lands, from the intention of the testator deduced from the context. The same doctrine was fully recognized in *Hardacre v. Nash,* 5 T.R. 716. So, in *Doe dem. Tofield v. Tofield,* 11 East 246, a bequest of "all my personal estates" was construed upon the like intention to include real estate.

But a case more directly in point to the present, and differing from it in no essential circumstances, is *Pitman v. Stevens,* 15 East 505. There, the testator, in the introductory clause of his will, said:

"I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts is paid. I hereby appoint Capt. Robert Preston my residuary legatee and executor."

The testator then proceeded to give certain pecuniary legacies, and finally recommended his legatee and executor to be kind and friendly to his brother-in-law J. C. &c.;, and begs him to do something handsome for him at his death &c.; The question was whether Preston was entitled to the real estate of the testator under the will, and the court held that he was, and that the words "residuary legatee and executor," coupled with the introductory clause and the recommendation clearly established it. Upon that occasion, Lord Ellenborough,

after referring to the words of the introductory clause, said:

"Then he appoints Capt. P. his residuary legatee and executor -- residuary legatee and executor of what? of all that he should die possessed of, real and personal, of what nature and kind soever; that is, of all he should not otherwise dispose of. The word 'legatee,' according to the cases, particularly *Hardacre v. Nash,* may be applied to real estate if the context requires it, as was said by Lord Kenyon upon the word 'legacy.' Then, in the subsequent parts of the will, he contemplates that his residuary legatee and executor will have the disposition

of his whole funds, but after some legacies and annuities, he recommends him to be kind and friendly to his brother-in-law &c.;"

In the present case, it is plain that the testator contemplated some positive benefit to West when he designated him as his residuary legatee, and yet at the same time he contemplated that his personal property might not be sufficient to cover the amount of legacies given by his will, and in that event he directs his executors to dispose of so much of his real estate as will fully pay his legacies, so that if we restrain the words "residuary legatee" to the mere personalty, we shall defeat the very intention of the testator, apparent upon the face of the will, to give some beneficial interest to West in an event which he yet contemplated as not improbable. On the other hand, if we give an enlarged and liberal meaning to the residuary clause as extending to the real estate, it will at once satisfy the introductory clause, and upon a deficiency of the personal assets will still leave an ample amount to the beneficiary, who appears to have been an object of the testator's bounty. But if this interpretation should be (as we think it is not) questionable, one thing is certain, and that is that the testator did not contemplate that his personal assets would not be more than sufficient to pay all his debts, for he does not charge his real estate with his debts, but only with his legacies, in case of any deficiency of personal asset, and the residuary clause, if it were limited to the mere residue of his personal assets, would also show that the testator did not provide for any debts which should arise from any subsequent

transactions after his death.

If this be so, then we are to look to the codicil to see whether any different intention is there disclosed in clear and unambiguous terms. In the first place, the language of the codicil is just such as the testator might properly have used if he intended no more than to pledge his funds already embarked in the partnership for the payment of the partnership debts. The codicil says "It is my will that my *interest' in the co-partnership &c.;, shall be continued therein until the expiration of the term limited by the articles." Now his interest in the firm then was his share of the capital stock and profits after the payment of all debts and liabilities due by the firm. It is this interest, and not any new capital which he authorizes to be embarked in the firm. He does not propose to add anything to his existing interest, but simply to continue it as it then was. How, then, can this Court say that he meant to embark all his personal assets in the hands of his executor as a pledge for the future debts*

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or future responsibilities or future capital of the firm? That would be to enlarge the meaning of the words used beyond their ordinary and reasonable signification. And besides, it is plain that the testator did not mean to have the payment of his legacies indefinitely postponed until the expiration of the articles and the ascertainment and final adjustment of the concerns of the firm, which might perhaps extend to ten or twenty years. So that to give such an enlarged interpretation to the terms of the codicil (as is contended for), for the codicil must be construed as if it were incorporated into the will, would be to subject the legatees to all the fluctuations and uncertainties growing out of the future trade, and might deprive the residuary legatee of every dollar intended for his benefit.

There is another consideration of the matter which deserves notice. Would the real estate of the testator, upon a deficiency of his personal assets, be liable for the debts of the firm contracted after his death, by mere operation of law, as it would be for such debts as were contracted in his lifetime? If it would, then it is apparent that all the legatees and devisees might in the event of the irretrievable and

ruinous insolvency of the firm be deprived of all their legacies and devises, although the legacies were charged upon the real estate. If it would not, then it is equally apparent that the testator did not contemplate any liability of his general assets, real and personal, for the payment of any debts excepting those which were subsisting at the time of his death.

There is yet another consideration not unimportant to be brought under review. It is that the whole business of the firm is to be conducted by Cawood alone, and that neither the executor nor the legatees are authorized to interfere with or to scrutinize his transactions. Such an unlimited power over his whole assets by a person wholly unconnected with the administration of his estate could scarcely be presumed to be within the intention of any prudent testator. If to all these we add the manifest inconveniences of such an interpretation of the codicil, thus suspending for an indefinite time the settlement of the estate and the payment of the legacies, it is not too much to say that no court of justice ought upon principle to favor, much less to adopt it.

And certainly there is no authority to support it -- at least none except *Hankey v. Hammock,* which cannot now, for the reasons already stated, be deemed any authority whatsoever. On the other hand, the case *Ex Parte Garland,* 10 Ves. 110, and *Ex Parte Richardson,* 3 Madd.Ch. 138, although distinguishable from the present in

some of their circumstances, were reasoned out and supported upon the broad and general principle that the assets of the testator were in no case bound for the debts contracted after his death by the persons whom he had authorized to continue his trade, but the rights of such new creditors were exclusively confined to the funds embarked in the trade and to the personal responsibility of the party who continued it, whether as trustee, or as executor, or as partner -- unless, indeed, the testator has otherwise positively and expressly bound his general assets.

The case of *Pitkin v. Pitkin,* 7 Conn. 307, is however (as has been already suggested) directly in point. There, the testator, by his will directed

"that all his interest and concern in the hat manufacturing business &c.;, as then conducted under said firm should be considered to operate in the same connection for the term of four years after his decease &c.;"

The court there held, after referring to the cases in 10 Ves. 110 and 3 Madd.Ch. 138, that the general assets of a testator were not liable to the claims of any creditors of the firm who became such after the testator's death, and that such creditors had no lien on the estate in the hands of the devisees under the will, although they might eventually participate in the profits of the trade. There was another point decided in that case, upon which we wish to be understood as expressing no opinion.

Upon the whole, our opinion is that the decree of the circuit court dismissing the bill ought to be

Affirmed with costs.

ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia holden in and for the County of Alexandria and was argued by counsel. On consideration whereof it is now here ordered and decreed by this Court that the decree of the said circuit court in this cause be and the same is hereby affirmed with costs.

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