

West Vs. Smith

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Appeal No. : 49 U.S. 402

Appellant : West

Respondent : Smith

Judgement :

West v. Smith - 49 U.S. 402 (1850)

U.S. Supreme Court West v. Smith, 49 U.S. 8 How. 402 402 (1850)

West v. Smith

49 U.S. (8 How.) 402

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT

OF COLUMBIA AND COUNTY OF ALEXANDRIA, SITTING AS A COURT OF EQUITY

SYLLABUS

Where a bill was filed in the Circuit Court of the United States for the County of Alexandria by a legatee against the executor and residuary devisee, praying for the sale of the real estate in order to pay legacies, the personal estate being exhausted, it was not necessary to make a special devisee of land in Virginia, who resided in Virginia, a party defendant.

The orphans' court had power to allow a commission to the executor for paying over a specific legacy and a right to extend this commission to ten percent

Under the laws of Virginia, the executor had a right to refrain from pleading the statute of limitations when sued, and to pay a judgment thus obtained against him. The judgment, at all events, must stand good until reversed.

Where the executor paid legacies to persons who had occupied property which, it was alleged, belonged to the deceased, and the occupiers claimed to hold it in consequence of an uninterrupted possession of twenty years, the justice of their claim could not be tried in a collateral manner by objecting to this item of the executor's account on the ground that he should have set up the claim for rent in setoff to the legacy.

This was a bill filed in the circuit court by Ellen Smith, then Ellen Mandeville, one of the legatees of Joseph Mandeville, deceased, whose will was before this Court for construction at January term, 1844. The case is reported in [43 U. S. 2](#) How. 560. It will be seen by reference to that case that John West became a party to the proceedings upon the ground of being the residuary legatee, and, as the Court then held, residuary devisee also.

Ellen Mandeville, who intermarried with Joseph Smith pending the suit, was a legatee under that will for \$3,000. One of the clauses of the will was this:

"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."

Mandeville, the testator, died in July, 1837.

In May, 1839, Ellen Mandeville filed her bill in the circuit court (to which suit her husband, Smith, afterwards became a party), charging the making and publication of the will, the bequest to herself and others of certain legacies, which in default of personal assets were chargeable upon the real estate, the death of the testator, and the deficiency of personal assets,

Page 49 U. S. 403

and praying a sale of lands for the satisfaction of her legacy. To this bill all the other pecuniary legatees, the residuary devisee, West, and the executor of Mandeville were made defendants.

It is not necessary to trace the progress of the suit through its successive stages. It was at last referred to a master in chancery, who reported sundry matters of account, to some of which exceptions were taken by the defendant, West. The court, however, overruled these exceptions and proceeded to decree a sale of so much of the real estate as might be necessary to pay the legacies. From this decree West appealed, and the case now came before this Court upon the exceptions to the master's report. Only four of these exceptions were insisted on in the argument, *viz.*, the second, third, seventh, and eighth.

They were as follows. The first exception is inserted for the purpose of explaining the second.

"1. For that said commissioner has improperly allowed William C. Gardner, deceased, a credit in his account as executor of Joseph Mandeville, deceased, the sum of eight hundred and forty-two dollars and ninety cents, as having been paid to Sarah A. Hill 'a specific legacy of slaves, furniture &c., as appraised,' which said property was properly subject, at the time of its delivery to the said legatee, Sarah A. Hill to the payment of the debt of Joseph Mandeville, deceased."

"2. For that the said commissioner has improperly allowed the said William C. Gardner, deceased, as a credit in his said executorial account on the estate of Joseph Mandeville, deceased, the sum of eighty-four dollars and twenty-nine cents as a commission on the said \$842.90, mentioned in the first foregoing

exception, which said sum was not so due to said Gardner."

"3. For that the said commissioner has improperly allowed the said Gardner, as a credit in his said executorial account, the sum of three hundred and sixteen dollars and thirty-seven cents and a further credit in said account of nine hundred and twenty dollars and twenty-six cents (920.26) as having been paid by said Gardner on account of a judgment in favor of Samuel Bartle against said Gardner, as executor of Joseph Mandeville, deceased, the items or most of them forming the account of said Bartle against said Mandeville's estate, on which said judgment is predicated, being unsustained by legal proof, and barred by the statute of limitations."

"7. For that the said commissioner has improperly reported the sum of fifteen hundred dollars, with the several sums of two hundred and twenty-five dollars and four hundred and fifty dollars interest thereon, after allowing a credit of one hundred

Page 49 U. S. 404

and fifty dollars, as a legacy due to Mary Mandeville, under the will of Joseph Mandeville, deceased; the said legacy being subject to a further credit of two hundred and twenty-five dollars, for the use and occupation of a portion of the real estate of Joseph Mandeville deceased."

"8. For that the said commissioner has improperly reported the sum of fifteen hundred dollars, with seven hundred and thirty-five dollars, the interest due thereon, as a legacy to Julia Mandeville, under the will of Joseph Mandeville, deceased, when the same should have been credited with the sum of two hundred and twenty-five dollars for the use and occupation of a portion of the real estate of Joseph Mandeville, deceased. "

Page 49 U. S. 409

MR. JUSTICE WOODBURY delivered the opinion of the Court.

The original proceeding in this case was a bill in chancery instituted in September, 1839, in the Circuit Court for the District of Columbia, sitting for the County of Alexandria. The object was to recover a legacy of \$3,000, bequeathed by Joseph Mandeville, in 1837, to Ellen Mandeville, now the wife of Smith.

William C. Gardner, the executor, took upon himself the execution of the will, and was made one of the original defendants, with West and several other legatees. West, being residuary legatee, took a leading part in conducting the defense in the circuit court and made the appeal to this Court. Various answers were put in by the respective respondents, several depositions filed, and some documentary evidence. From these it appears that proceedings had for some time been instituted in the Orphans' Court for the County of Alexandria for the purpose of settling the estate of Joseph Mandeville. Most of the debts had been adjusted and some of the legacies, and the personal estate being exhausted, permission had been asked to sell and apply a part of the real estate situated in said County of Alexandria to pay the residue.

To this application as well as to some of the previous proceedings

Page 49 U. S. 410

and decrees in the orphans' court sundry objections had been interposed. But the exceptions made by West to the last report of the commissioner in the circuit court in May, 1846, disclose all the matter finally relied on in opposition in that court by the respondent. Those exceptions having been there overruled, this appeal was taken.

Before going into the consideration of those exceptions in detail, and the correctness of the decision which was pronounced upon them, it may be well to dispose of a preliminary question raised here, that James Mandeville of Virginia, a legatee of 10,000 acres of land there situated, ought to be made a party defendant, with those already before the court.

We feel obliged to overrule this objection.

It is not clear that it could be made here after an appeal, though if proper, the case might perhaps be sent back and an amendment made there -- as new parties can be admitted there as late as the final hearing. *Mitford*, Pl., 144, 145; *Owing's Case*, 1 Bland Ch. 292; *Clark v. Long*, 4 Rand. 451.

At the same time it is true as to exceptions to a master's report that none can generally be made in the appellate court which were not taken below. [*Brockett v. Same*](#), 3 How. 691. The objection here, however, must in any view be overruled because the Orphans' as well as the Circuit Court for the County of Alexandria proceeded, and ought to have proceeded, against parties and property situated within their limits, and not against either situated like James Mandeville and his land in Virginia, and without their jurisdiction. *Hallett v. Hallett*, 2 Paige 15; *Townsend v. Auger*, 3 Conn. 354. Though he held his land under the same will, yet it is admitted that he and his land were both in another state. Another excuse for not joining him is that property enough existed within the County of Alexandria to discharge the claims of the original plaintiffs, without a resort to James Mandeville or the land devised to him. [*Russell v. Clarke's Executors*](#), 7 Cranch 72.

Especially must West and all the property devised to him be first made liable, as he is only a residuary legatee, or, in other words, is entitled only to what is left after all others are satisfied. And finally it was not necessary to make James Mandeville a party to this bill when neither he nor his land could be affected by a decree made against other persons and other lands, and in a case instituted in another jurisdiction and in which no service had been made on him. *West v. Randall*, 2 Mason 181; *Joy v. Wirtz*, 1 Wash.C.C. 517; [*Elmendorf v. Taylor*](#), 10 Wheat. 152; *Wheelan v. Wheelan*, 3 Cow. 538.

Page 49 U. S. 411

To proceed next to the consideration of the exceptions made below, it is to be remembered that the first one was waived at the hearing, and need not therefore be repeated. The second exception is that the executor, Gardner, was improperly

allowed a commission of \$84.29 on a specific legacy of slaves, furniture &c.;, made and paid to Sarah A. Hill.

This commission was at the rate of ten percent, and though that rate seems high, yet if the orphans' court had authority to make any allowance in such a case, its decision within its authority and jurisdiction must be considered binding. [26 U. S. 1](#) Pet. 566; *Thomas v. Fred. City School*, 9 Gill & J. 115.

On general principles it would seem just and proper for all such courts to make some compensation to executors for such services as paying over legacies, no less than for paying debts. In the case of specific legacies, the trouble and risk are as great, if not greater, than in moneyed legacies, and it would be difficult to find elementary principles to justify commissions in one case and withhold them in the other.

If this point is to be governed by these principles, as it must be, provided the laws of Virginia at that time controlled the matter in the County of Alexandria, then the exception must fail under those principles, and under a practice, well settled there, authorizing in such cases a *quantum meruit*. Under that, as much as ten percent on moneys received and paid out has in several instances been sanctioned. *McCall v. Peachy*, 3 Munf. 301; and *Hutchinson v. Kellam*, *id.* 202.

But if it is to be governed by the laws of Maryland, as is contended by the plaintiffs, a like result will follow by means of express statutory provisions and decisions in that state.

They contend this because in February, 1801, Congress established in Washington and Alexandria Counties an orphans' court for each county, and provided that they

"shall have all the powers, perform all the duties, and receive the like fees, as are exercised, performed, and received by the register of wills and judges of the orphans' court within the State of Maryland,"

&c.; 2 Stat. 107, 12; [Yeaton v. Lynn](#), 5 Pet. 230.

It is argued, that this provision extended to the power and duty of the orphans' court in Virginia to allow commissions as large as here, and for specific as well as moneyed legacies, and not to the mere organic structure and jurisdiction of the orphans' court, leaving all else in Alexandria County to be governed by the laws of Virginia, and in Washington County by the laws of Maryland.

If this view be correct, which is supposed to be the one

Page 49 U. S. 412

usually acted on in this district, it was provided in Maryland by statute in 1798, ch. 101, that a commission may be allowed "not under five percent, nor exceeding ten percent on the amount of the inventory." [Nichols v. Hodges](#), 1 Pet. 565; 5 Gill & J. 64.

The third exception is that a judgment was allowed by the executor to be recovered by one Bartle against the estate of the deceased Mandeville, which "was unsustainable by legal proof, and barred by the statute of limitations."

But this judgment was recovered after due notice and hearing. No fraud or collusion is set up or proved between the parties to it for the purpose of charging the estate. And the chief if not only exception to its fairness or validity is that Gardner, the executor, did not plead the statute of limitations to a part of the claim on account when he might have done it under the apparent time when the cause of action accrued on that item. But in Virginia, and especially if the court, by not striking out the item, sanction a waiver of the statute, as is inferred to have been done here, the executor seems fully justified in not pleading it. 2 Lomax on Exec. 419; *Bishop v. Harrison*, 2 Leigh 532; 1 Robinson's Pr. 112; 1 Rev.Stat. 492. So in England, formerly, the executor was held excused in his discretion from interposing as a defense the statute of limitations. *Norton v. Frecker*, 1 Atk. 526. But in a recent case, doubt is cast over this in England in 9 Dowl. & Ry. 43.

The Virginia law, however, must control here, and conduces to justice when the court or the executor is satisfied no payment has been made or that there had been a re-promise by the deceased. *Holladay's Ex'rs v. Littlepage*, 2 Munf. 316; 4

Hen. & M. 266.

At all events, on elementary principles, the judgment thus obtained must stand as binding till duly reversed, and be till then for most purposes presumed correct. [Voorhees v. Bank of United States](#), 10 Pet. 449, [35 U. S. 472](#) ; [43 U. S. 2](#) How. 319; [Lupton v. Janney](#), 13 Pet. 381.

Under the sixth and seventh exceptions, the respondent insists that Mary and Julia Mandeville, legatees of the deceased, ought to have been charged rent for a piece of land which they occupied, and that the amount thereof ought to have been deducted from these legacies.

It is true that this land once belonged to the deceased, but Mary and Julia insist that they have been in the exclusive occupation of it for more than twenty years. They had always since their entry claimed it as their own, and this land was not

Page 49 U. S. 413

by name devised by the deceased to anyone as if still his property. The legatees insisted that at first, being relations of J. Mandeville, and the premises contiguous to their house, they were given to them for a garden, and that their possession had ever since been adverse to all the world. Nor was there any contract shown to pay rent by them to him, nor any proof that rent had ever been demanded by him while living. Without, then, settling here the disputed title to this property, it is sufficient to say that under these peculiar circumstances, such a use and occupation of these premises would not warrant the recovery of rent from them in an action of assumpsit at law. 1 Chit.Pl. 107; *Birch v. Wright*, 1 T.R. 387; *Smith v. Stewart*, 6 Johns. 46. Such an action must rest on a contract express or implied. [Lloyd v. Hough](#), 1 How. 159, and cases there cited. And if no implied promise could be raised to recover rent, when the occupation is adverse, and no express one is pretended to exist, the executor could not legally set off this claim against their legacies.

The rights to the land or to any rent thereon must be settled by a direct action at law, and not in this collateral manner, and if the legatees do not succeed there,

they can be made to pay in trespass for mesne profits what they are not liable for as rent *ex contractu* when holding adversely.

A concluding objection to the proceedings below, subsequent to overruling the written exceptions to the report, is that the court proceeded to a final decree whilst the claims of two of the creditors and two of the legatees were held under consideration.

But either those claims is independent and not necessary to be decided before a final decision on the rest -- or they are so connected that a decision on them was proper at the same time, and then this appeal itself would be premature and would have to be dismissed. [45 U. S. 4](#) How. 524; [Perkins v. Fourniquet](#), 6 How. 206. This, it is understood, is not moved nor desired by either party.

Such independent claims, however, may properly be suspended under the circumstances existing here, according to *Royal's Administrators v. Johnson*, 1 Rand. 421.

The judgment below must therefore be

Affirmed.

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

Page 49 U. S. 414

now here ordered, adjudged, 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.