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Appellant : Henshaw

Respondent : Miller

Judgement :

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Henshaw v. Miller

58 U.S. (17 How.) 212

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE

CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

SYLLABUS

Where an action on the case was brought in Virginia against a person to recover damages for fraudulently recommending a third party as worthy of credit, whereby loss was incurred, and after issue joined upon the plea of not guilty, the defendant died, the action did not survive against the executor, but abated.

The Virginia laws and cases examined.

Henshaw was a citizen of Massachusetts, and brought an action on the case against Charles E. Miller, in his lifetime, for fraudulently recommending one Robinson as worthy of credit, in consequence of which the plaintiff had incurred considerable loss. After issue joined upon the plea of not guilty, Miller died, and on motion of the plaintiff, a *scire facias* was issued for the purpose of reviving the suit against John R. Miller, his executor.

Upon the return of the *scire facias,* the executor moved to quash it, when the judges were divided in opinion whether the

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action survived the executor or abated, and the question was certified to this Court.

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MR. JUSTICE DANIEL delivered the opinion of the Court.

The facts of this case and the question of law arising thereon upon which the judges were divided are shown in the following statement:

John Henshaw, the plaintiff in the circuit court, instituted in that court an action on the case against Charles E. Miller to recover of him damages for fraudulently recommending to the plaintiff, by letter, one Porter Robinson as a person worthy of confidence, and thereby inducing the plaintiff to make sale on credit to the said Robinson of a considerable amount of merchandise when the defendant knew that Robinson was unworthy of credit, and intended fraudulently to deceive the plaintiff,

who in fact had been deceived by the recommendation given by the defendant to Robinson and upon the faith thereof had made sales to him, the whole amount whereof had been lost. In this case, after issue joined upon the plea of not guilty and after several attempts at a trial of the cause, rendered fruitless by disagreement amongst the jury, the defendant departed this life, and on the motion of the plaintiff a writ of *scire facias* was awarded him to revive the suit against John R. Miller, the executor of the original defendant.

Upon the return of the *scire facias* executed, the executor moved the court to quash the process. This motion was continued until the May term of the court, 1853, when, upon the argument of the motion to quash the *scire facias,* the question occurred whether the action survived against the executor of the original defendant or abated by the death of the latter, and opinions of the judges being opposed on this question, at the request of the counsel for the defendant, it was ordered that the division be certified to the Supreme Court as its next session.

In considering the question presented by the certificate of division in the circuit court, we must adopt for our guidance the following principle -- namely that this question is to be determined by the rule of the common law with respect to the revival of suits except so far as that rule has been modified, either by restriction of enlargement, by the statutory provisions of the Virginia laws.

To the principle just mentioned we are bound to adhere, for the following causes:

By an ordinance of the Virginia convention, passed on the 3d of July, 1776, it was declared:

"That the common law of England, all statutes or acts of Parliament made in aid of the common law prior to the fourth year of the reign of James I, and which are of a general nature and not local to that Kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be in full force until the same shall be

altered by the legislative power of his colony."

At a subsequent period, namely on the 27th of December, 1792, the Legislature of Virginia, by an act of that date, after reciting the ordinance above mentioned, declared and enacted as follows, namely:

"Sec. 2. That whereas the good people of this commonwealth may be ensnared by an ignorance of acts of Parliament which have never been published in any collection of the laws, and it hath been thought advisable by the general assembly during their present session specially to enact

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such of the said statutes as to them appear worthy of adoption, and do not already make a part of the public code of the laws of Virginia."

"Sec. 3. Be it therefore enacted by the General Assembly of Virginia that so much of the above-recited ordinance as relates to any statute or act of Parliament shall be and the same is hereby repealed, and that no such statute or act of Parliament shall have any force or authority within this commonwealth."

These provisions are followed by savings with respect to rights arising under any of the above-mentioned statutes, and as to any crimes committed against them before this repeal, and also of the benefit of all writs, remedial or judicial, which might have been legally obtained or sued out of any court, or the clerk's office of any court, of the commonwealth, prior to the commencement of the statute.

These two enactments have been continued in force, and will be found to be reenacted in the revisal of 1819, vol. 1, chapters 38 and 40.

The statutes, therefore, of 4 Edw. III, ch. 7, or of 3 and 4 Will. IV, or any other English statute as such cannot govern this case nor in anywise influence its decision except so far as by parity the courts of Virginia may have applied the interpretation of those statutes by the English courts to similar provisions, if such there be, in the laws of Virginia.

The maxim of the common law is *"actio personalis moritur cum persona,"* and as this maxim is recognized both in England and in Virginia, the interpretation of it in the former country becomes pertinent to its exposition or application here. In England it has been expounded to exclude all torts when the action is in form *ex delicto* for the recovery of damages and the plea not guilty. That in case of injury to the person, whether by assault, battery, false imprisonment, slander, or otherwise, if either party who received or committed the injury die, no action can be supported either by or against the executors or other personal representatives. 1 Saund. 217, n. 1; 2 M. & Sel. 408. And so express and strict have been the applications of this maxim of the common law by the English judges as to have established the rule that for the breach of a promise to marry, although the action is in form *ex contractu,* yet the cause of action being in its nature personal, the executor of the party to whom the promise was made cannot sue.

And again that for the breach of the implied promise of an attorney to investigate the title to a freehold estate the executor of the purchaser cannot sue without stating that the testator had sustained some actual damage. *Vide* 4 Moore 532; 2 B. & B. 102, and 2 M. & Sel., before mentioned. This has been ruled even under the alleged relaxation of the common law

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maxim in virtue of the statutes of 4 Edw. III. cap. 7, and 3 and 4 Will. IV. cap. 42. By the English courts it has been also ruled that although the statutes which have conferred upon executors the right to maintain actions in certain cases arising *ex delicto* do not limit that right to instances of a literal asportation of the goods or assets, yet they confer the right of action upon the executor in instances solely of actual injury to personal property whereby that property has been rendered less beneficial to the executor. 2 M. & Sel. 416.

Let us see how far the common law maxim has been modified in Virginia either by express statutory language or by judicial construction.

By the 38th section of chapter 128, vol. 1 of the Revised Code of 1819, it is provided

"That where any personal action or suit in equity is now or shall be depending in any court of this commonwealth and either of the parties shall die before verdict rendered or final decree be had, such action or suit shall not abate, if the same were originally maintainable by or against an executor or administrator, but the plaintiff; or if he be dead, his executor or administrator, or the sheriff, sergeant, or other curator of the decedent's estate, shall have a *scire facias* against the defendant; or if he be dead, against his executor, administrator, sheriff, sergeant, or other curator of his estate, to show cause generally, why such action or suit shall not be proceeded in to a final judgment or decree."

This section of the statute provides merely against the abatement of actions at law or suits in equity by the death of parties, as a matter of course, but it gives no further description of actions or suits than by reference to such designation of them and their capacity for revival as may be deducible either from the common law or by some statutory regulation.

By the 64th section of chapter 104, vol. 1, 390, of the same code, it is declared:

"That actions of trespass may be maintained by or against executors or administrators for any goods taken or carried away in the lifetime of the testator or intestate, and that the damages recovered shall be in the one case for the benefit of the estate, and in the other out of the assets."

This provision of the Virginia statute, insofar as it authorizes an action against the personal representative as well as in his favor, is unquestionably an extension of the statute of Edward III which confers the right of action upon the executor or administrator, but does not authorize an action against him. But although the former statute is certainly an extension of the latter with respect to the parties for or against whom the right of action is given, it has been doubted, and upon very high authority upon the point, whether with respect to the class of

subjects to which the right of action is authorized, the statute of Virginia does not operate a material restriction upon the provision of the English statute. The statute of Edward III is thus entitled "Executors shall have an action of trespass for a wrong done to the testator," and reciting

"that in times past, executors have not had actions for a trespass done to their testators, as of goods and chattels carried away in their life, and so such trespasses have hitherto remained unpunished."

It is enacted that

"The executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they whose executors they be should have had if they were in life."

In the interpretation of this statute, the courts in England have ruled that the right conferred on the executor to maintain trespass for a wrong done to the testator must, with reference to the language of the times when the statute was passed, signify any wrong, and that the instance put -- namely "as of the goods and chattels of the same testators carried away in their life" -- was put in the statute only as an instance or illustration, and by way of limiting the right to injuries to personal property, and not as restrictive to the single or particular form of injury, and that the statute must be construed to extend to every description of injury to personal property by which it has been rendered less beneficial to the executor, so that the executor may support trespass or trover, case for a false return to final process, and case or debt for an escape. Ld.Raym. 973.

The provision of the statute of Virginia by which the right of action by or against the personal representative as to torts is conferred is introduced by no preamble or declaration by which any object or purpose beyond its literal terms may be implied. It is a simple section of the statute concerning wills, intestacy, and distribution, and clearly defines the single instance in which trespass may be maintained by the personal representative; the instance of "goods taken or carried away in the lifetime of the testator or intestate;" no other species of trespass or wrong is

enumerated or alluded to. *Vide* 1 Rev.Co. of 1819, § 64, 390.

In reference to this section and in comparing it with the statute 4 Edw. III, it has been remarked by Green, Justice, in the Supreme Court of Virginia, that in the construction of the latter statute,

"it has been decided that the word 'trespass,' as it was then understood, embraced all cases of tort; that the word 'wrong' in the title is general, and that the words 'as of the goods' &c.; were inserted only by way of example, so as to confine the remedy to case in which the wrong affected the goods and chattels. But our statute, without any such title or general words as are found in the title and in the enacting clause of

the English statute, gives the action of trespass for goods taken and carried away and provides for that case only substantively, and not by way of example. *Vide Thweatt's Administrator v. Jones' Administrator,* 1 Randolph 331."

But this 64th section would seem to have received a more explicit and definitive interpretation by the decision of the Supreme Court of Virginia in the case of *Harris v. Crenshaw,* reported in the 3d of Randolph 14. That was an action of trespass *quare clausum fregit* in which there was a verdict and judgment in favor of the defendant, who died and whose representative was made a party by consent. The case was carried by appeal, as is the practice in Virginia at law as well as in equity, to the Supreme Court by the plaintiff upon exceptions taken to instructions from the judge at *nisi prius.* In delivering the opinion of the court, Tucker, President, said:

"This is nothing more than an ordinary action of trespass *quare clausum fregit.* The allegation that the trees were cut and carried away is always inserted in the declaration when it is intended to be proved. It did not convert the action into an action of trespass *de bonis asportatis* and take it out of the rule *actio personalis* &c.; If the defendant had died before verdict, the writ would have abated and the plaintiff would have been deprived of damages if he had sustained any. But there

being a verdict and judgment against him by which he may be hereafter affected in some other controversy respecting the premises, he has a right to reverse that judgment if he can, and was entitled to a *scire facias* against the personal representative of the appellee."

Then, in commenting upon the exceptions to the instructions from the judge at *nisi prius,* the court proceeds thus:

"The second instruction of the judge was therefore erroneous, and the judgment is to be reversed and the verdict set aside, and as by the death of the appellee, the appeal abated here, and there can be no prosecution of the suit in the court below, it coming within the rule before stated -- that is to say the rule of the common law, *actio personalis* &c.;, it is to be abated here, and the proceedings certified to the court below."

By this decision of the Supreme Court of Virginia the following positions must be taken as having been affirmed:

1. That by the rule of the common law, the right of action founded upon torts of any and every description terminated with the life of either participant in such tort. That this maxim or rule of the common law governed all causes of action arising *ex delicto* in Virginia, except so far as it may have been modified by statute.

2. That the provision of the statute of Virginia authorizing actions for or against executors and administrators for torts

done or suffered by those whom they represent limits those actions to instances which are essentially, or rather directly, cases of trespass *de bonis asportatis,* and cannot be made to embrace ordinary cases of trespass *quare clausum fregit* or cases of tort generally by attempting to connect with them as an incident the asportation of goods and chattels; much less can it be made to cover an indirect or consequential injury to the welfare or prosperity of a testator or intestate resulting from a fraud practiced upon him.

There is one case from the Supreme Court of Virginia cited by plaintiff and relied on to sustain the right of action in the executor. It is the case of *Lee v. Cooke's Executor,* reported in Gilmer 331. This was an action for mesne profits of land which had been recovered in ejectment. After issue made up in the cause, the defendant died. At a subsequent term of the court, the executors appeared by attorney and the cause was continued. At the term next ensuing, the cause was directed to be struck off the docket, the court thinking that the action abated by the death of the defendant.

This decision was reversed by the Supreme Court, the latter tribunal being of the opinion that the case was within the equity of the 64th section of the Virginia statute, cap. 104, 1 Rev.Co. 390, and that the action, so far at least as regarded the mesne profits, did not die with the testator. The case is very succinctly given in the report and is accompanied with no argument showing explicitly the grounds on which it was contested. It may have been regarded by the Supreme Court as resting upon an implied obligation or assumption to pay or account for profits ascertained by the judgment in ejectment to belong to the plaintiff, and therefore as partaking essentially of the character of a contract. Or if in any sense the right of action could be understood as arising from the asportation by the defendant, it must be by such an acceptation of the phrase as will apply it to the mesne profits specifically as being personal property belonging to the plaintiff, and actually injured by the testator of the defendant in his lifetime. If more than this is sought to be deduced from the case of *Lee v. Cooke's Executor,* the attempt would bring the case in conflict with that of *Harris v. Crenshaw,* and with the opinion of Green, Justice, in the case of *Thweatt's Administrator v. Jones' Administrator,* both more recent in point of time as well as more explicit in their interpretation alike of the English statute and that of Virginia.

In cases analogous to the one before us, or which rather must be viewed as identical in their essential features, the principles hereinbefore deduced from the laws and decisions of Virginia have been directly affirmed. Thus, in the case of *Coker v.*

Crozier, in the 5th vol. of Alabama Rep. 369, it was ruled, that in an action on the case for a fraud committed in the exchange of horses, upon the death of the defendant the suit could not be revived against his personal representative, the rule of the common law forbidding such revival, and there being no statute of the state to authorize it.

The case of *Read v. Hatch,* from the 19th vol. of Pickering's Rep. 47, bears a still stronger resemblance to the case before us than does that just cited from the Supreme Court of Alabama. So exact, indeed, is this resemblance, that it might with justice be said, of the case of *Read v. Hatch,* in comparison with this under our consideration, *mutato nomine historia narratur de te.* The former was an action for fraudulently recommending a trader as in good credit, by means whereof the plaintiff was induced to sell him goods on credit, and thereby sustained damage. This action was founded on the 7th section of the 93d chapter of the Revised statutes of Massachusetts, which provides that actions of trespass and trespass on the case for damage done to real or personal estate shall survive. Pending the suit the defendant died, and the plaintiff moved to cite in his administrator. Shaw, Chief Justice, said, in pronouncing the judgment of the court:

"The question whether the plaintiffs can cite in an administrator, and proceed with their action, depends on Revised Stats. ch. 93, § 7. It is contended that a false representation, by which one is induced to part with his property by a sale on credit to an insolvent person, by means of which he is in danger of losing it, is a damage done to him in respect to his personal property. But we are of opinion that this would be a forced construction. If this were the true construction, then every injury by which one should be subjected to pecuniary loss would, directly or indirectly, be a damage to his personal property. But we are of opinion that it must have a more limited construction, and be confined to damage done to some specific personal estate of which one may be the owner. A mere fraud or cheat by which one sustains a pecuniary loss, cannot be regarded as a damage to personal estate. The action is abated at common law, and, not surviving by force of the statute, must be deemed to stand abated."

Upon full consideration of the statutes of Virginia, and of the interpretation placed by the courts of that state upon those statutes, and of every analogy which can be applied from similar provisions elsewhere, we are of the opinion, that in the circuit court this action did not survive the death of the defendant, but abated upon the occurrence of that event, and we order it to be certified accordingly to the circuit court, in reply to the certificate of division.

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ORDER

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Virginia, and on the point or question on which the judges of the said circuit court were opposed in opinion, and which was certified to this Court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof it is the opinion of this Court that this action did not survive against the executor of the defendant, and that it did abate by the defendant's death. Whereupon, it is now here ordered and adjudged by this Court that it be so certified to the said circuit court.