No. 14305

Supreme Court of Illinois

Moline Water Power Co.

vs.

Webster

71641 7

STATE OF ILLINOIS,

SUPREME COURT,

Third Grand Division.

No. 245

14305

Nature
Water Power
vs
Water

1882

Copy of Affidavit
filed with the Clerk

State of Illinois } ss Of the April Term A.D. 1862 of the
Third Division } Supreme Court of said State
at Ottawa.

The Moline Water Power and
Manufacturing Company Appellant

vs.

Alfred Webster Administrator de
bonis non of the Estate of D.
Benton Pitts. Appelle.

To the Hon. the Supreme
Court of the State of Illinois
The Petition of the Appellee for a re-hearing
in the above entitled cause
Upon an examination of the Opinion filed in
the above cause it appears that the decree ren-
dered by the Court below is reversed for want
of sufficient accuracy in its drafting
It is true the Court say that on an applica-
tion by the administrator to sell real-estate
to pay the debts of the Intestate the heir may
appear and contest the validity of the claims.
Of course that is the law - but as no ques-
of that kind arrises in this case it can have
no influence on its decision -
The appellant does not pretend but that he
had an opportunity to contest the claims.
The Court then speak of the rule which
must govern in the presenting and allowing

of claims against an Estate that arise from the Insolvency of Partnerships — And say that "till the Partnership assets have been exhausted "no equitable claim even arises against an Estate." That — as a proposition of Law is not questioned — But no question of the kind arises in this case. The claims against the Estate of the Intestate were presented to the County Court and by said Court duly allowed. It is not pretended by the appellant, and (if so pretended) the Record does not shew but that the County Court heard all the evidence that was necessary or proper to be heard, including testimony shewing that the firm of which the deceased was a member was insolvent and that the assets of said firm were entirely exhausted, and that upon a full consideration of all such testimony the claims were allowed against the Estate. The Law will presume that the County Court did its duty, and heard all the testimony that the Law requires — This presumption is not rebutted nor is any attempt made to rebut it in this case — If therefore there is any force in that presumption of the Law it effectually disposes of all question as to the proper allowance of the partnership claims in the County Court. On the trial of the

case in the Circuit Court when the heir appears to contest the validity of the claim the judgements of the County Court are prima facie evidence of the validity and justness of the claims.

In the case of Stone et.al vs. Wood 16 Ills. 177 this Court have said that the judgement against the administrator is prima facie evidence of the existence of the debt against the Estate, as against an heir. The Record in this case does not show that the appellant offered any testimony to impeach the validity of any of the claims against the Estate — The Decree then was not reversed because of any error in the allowance of the claims, or any refusal to allow the Appellant to contest them —

The only point then, upon which the decree was reversed was because of some alleged errors in its drafting as we have already stated — If the decree is not properly drafted why cannot this Court enter a proper one in the case when by the opinion it appears that no objection is taken to the sufficiency of the evidence and it is all now before this Court.

The objections to the decree, as made by the Court are two in number ——

First

The First is contained in that sentence "Debts
"against the firm of which the intestate was a
"member after the partnership assets have
"been exhausted in the payment of the
"firm debts become an Equitable claim a-
"gainst the Estate — all of which must
"be first paid before any payment can
"be allowed upon the firm debts. and
"this should be provided for in the
"order of the probate court in allowing
"the claims against the Estate — or
"by the order of the Circuit Court or-
"dering the sale; Real Estate for
"the payment of claims against the
"Estate." What is meant by this sentence is
hard to ascertain. But it is probable that from
this and two or three succeeding sentences the
Court intend that the private debts of the Es-
tate shall be first paid before anything shall
be applied on the firm debts. and that the
Decree shall so specify. If such be the true
meaning of the language use by the Court. it
is simply applying a well known rule of
Equity to the settlement of Equitable Claims
in the probate court. to-wit- "Partnership
assets must be exhausted before resort can
be had to private property for the pay-
ment of Partnership debts"

But supposing this to be the intended meaning of the Court there can be no reason for such a provision in the Decree ordering the sale of Real Estate. Upon this subject I wish to refer the Court to Section 110 at page 1211 of L. B. Crookes Ed. of the Statutes which is in these words. "When any Real-
"Estate shall at any time be ordered to be sold.
"the money arrising from such sale shall be
"received by the executor or administrator apply-
"ing for such order, and shall be considered as as-
"sets in his hands for the payment of debts, and
"shall be applied in the same manner as assets
"arrising from the sale of personal property"
The Statute of Wills by other sections provides for the distribution of the assets arrising from the sale of personal property. If at any time the administrator was in doubt as to the manner in which he should apply the proceed of such sale, he could ask the instruction of the County Court which has charge of the settlement of Estates. Why then was it necessary in this case more than in any other, and why is it necessary in any case that the Decree ordering the sale of the Real Estate should provide for the application of the proceeds. The Statute is explicit on that subject and the Law outside of the Statute equally well settled, and the presumption is that the Administrator will act in conformity with

the requirements of the Law. There can be no impropriety in reversing a judgement because it does not direct the Administrator to do that which the Law clearly requires him to do. The decree in this cause requires the Administrator to make the sale, and report his doings to the Court. Upon the filing of this Report cannot the Court direct expressly as well how the proceeds shall be applied as in the decree of sale? if any such directions are necessary — The application in this case is for an order to sell real estate — The Court make no question of the sufficiency of the bond for that purpose — The application therefore should be sustained, and it is going outside of the record to require the decree to provide for the application of the proceeds of the sale — As well might the Court require that the decree should provide that the Debts of the 1st class under the Statute of Wills should be first paid out of the proceeds of the sale — Those of the ~~1st~~ 2nd class to be next paid, and so on — as to require ~~the~~ the decree to provide that private debts be first paid, and partnership debts afterwards — It has been already said the Law will presume that the Administrator will apply the proceeds according to Law without the decree providing

specially the manner.— But admit the decree to be imperfect in this respect. does not justice require that this Court should so amend it &c to make it conform to their views.— The cause must be tried by the Court without a jury if remanded. The evidence is all before this Court— What the necessity therefore of putting the parties, and the Estate (already insolvent) to the expense of getting all this evidence again into Court—

Second The Second objection to the decree is that it does not provide whether the sale be for cash or upon a credit— The Court say "We will not say that it is indispensable that "the order of the Circuit or County Court in "ordering the sale of real estate shall specify "the precise amount for which the Lands should "be sold—or that it should specify what par- "ticular tracts should be sold— but the Statute "does positively require that the order should "specify whether it should be sold for cash or "on a credit"— In this case the order does specify that sufficient property be sold to realize money enough to pay the indebtedness as mention- ed in the Petition, & the expenses of adminis- tration, and the cost of this suit. It would be impossible to ascertain the exact expences of administration or the costs of this suit until the

suit is finally determined — The order also determines what property shall be sold and which first sold — but does not specify whether it be sold for cash or on a credit —
This the court say the Statute positively requires — The only provision of the statutes on this subject is the last clause of Section 106 at page 1210 of S.B. Brooks Ed. which reads as follows "And provided further "that it shall be lawful for such executor "or administrator to sell the same on a "credit of not less than 12 , nor more than "twelve month by taking bond with good "security for the payment of the purchase "money, and by taking a mortgage on "said land." The question then is does the Statute "Positively require that the order "should specify whether it should be sold for "cash or on a credit" It would at least appear to be a forced construction of the statute. It would appear that the intention of the Statute was to vest the executor or administrator, who is best acquainted with the wants and necessities of the estate with a discretion in the matter — with the knowledge and power of exercising his own judgment in the case — "It shall be lawful &c" says the Statute — what language could have been more definite and explicit if it does not the

intention of the Statute? — While if it were the intention that the Court should exercise this dis-cretion would not the Statute have read "It "shall be lawful for the Court to order the "sale to be upon a credit &c"

Certainly if this be the correct view of the Statute it is not necessary that the Court determine on what terms the sale shall be made — It is no doubt necessary that the notice of the sale should state the terms thereof, but if the above view of the Statute is correct there can be no necessity for the Decree determining the matter and it would be error for the Court to attempt to controll the action of the Administrator

But admitting that the Decree should de-termine the matter, and is silent on the subject would not the conclusion of Law ~~on the subject~~ be that the sale be for cash as there is no provision allowing the Administrator to sell on credit.

In the sale of personal property the Ad-ministrator is required to sell upon a credit of not less than six nor more than twelve months. but may make it a condition of the sale that purchases under the sum of five dollars shall be paid in hand

See Sec. 96. page 1208 of S. Blecker Ed. of the Stat-

utes. In that case there is no question but that the Administrator may exercise his own judgment; and an order of Court fixing whether the credit shall be six, ten or twelve months is necessary — Why then is it any more necessary that in the sale of real estate the Court should determine whether the credit be six, ten or twelve months or no credit at all — but be cash?

If it is necessary that the Court should determine whether the sale be for cash or on a credit there is the same reason that it should fix the exact length of the credit, whether for six, eight, ten or twelve months — It would certainly appear that the whole matter is discretionary with the administrator, and not the proper subject of a decree by the court —

But ~~—~~ admitting that the decree is not correct, how can it best be made right? —

It has already been said the cause must be tried by the Court without a jury —

The evidence is all before this Court and there is no objection to its sufficiency —

This Court has the power and is certainly as competent to reform the decree as the Circuit Court can be. The Estate is insolvent at best. It will save the expense and trouble of a new trial, and the interaction in the

Court below of the same evidence again, that is now before this Court — Justice therefore would seem to demand that the decree be ~~reversed~~ here by which course an injury is sustained by either party interested, and much unnecessary trouble and expense is saved to the estate and its creditors — This Court and the Law will not require the performance of an unnecessary, expensive and useless act ~~to be performed~~

A. Webster
Pro se

Opinion of the Court

Caton C. J. — This was a proceeding by an Administrator to sell real estate, left by the intestate for the payment of debts.
It is not a Chancery proceeding, as was insisted upon the argument. We have repeatedly decided that the allowance of claims against an estate by the probate court is not conclusive against the heir in this proceeding; and that he is allowed to contest the validity of such claims — To that rule we adhere —

We have also decided that Equitable claims against an estate may be allowed by the probate court, and it would seem to follow that real estate may be sold for their payment.

Debts against the firm of which the intestate was a member after the partnership assests have been exhausted in the payment of the firm debts become an Equitable claim against the Estate — all of which must be first paid before any payment can be allowed upon the firm debts — and this should be provided for in the order of the probate court, in allowing the claims against the estate — or by the order of the Circuit Court, ordering the sale of real estate for the payment of claims against the Estate We wish to be distinctly understood that no claim should be allowed against the estate for a partnership debt till it is shown that all the

partnership assets have been exhausted.
Till this is done no Equitable claim even arrises a=
gainst the Estate — This will be sufficient to inform the
Circuit by what principles, in the judgement of
this court, it should be governed as to the allowance
of these partnership claims when the cause is re=
manded — as it will be.
We will not say that it is indispensable that the order
of the Circuit or County Court in ordering the sale
of real estate should specify the precise amount for
which the lands should be sold — or that it should
specify what particular tract should be sold, or
which should be first sold — but the statute does
positively require that the order should specify
whether it should be sold for cash or on a credit.
This was not done in this case —
The order of the Circuit Court is reversed, and the
cause remanded for further proceedings consistently
with the principles here laid down —

The Marine Water Palace

vs

Alfred Webster

Admr of D B Pitts

Petition for rehearing

State of Illinois } Of the April Term A.D. 1862 of
Third Division } the Supreme Court of said State
at Ottawa

The Moline Water Power &
Manufacturing Company Appellants
vs
Alfred Webster Administrator
de bonis non of the Estate of
E Benton Pitts deceased - Appellee

To the above named Appellee
or E J Wells its atty of Record

You will please take
notice that on the first day of
the above named Term of the aforesaid
Court (or as soon thereafter as the Court
will hear it) I shall Petition the
said Court for a re-hearing in
the above cause

A. Webster Administrator
By King Reed & Webster
his attys

I E J Wells atty of Record for the
Appellant in the above entitled cause
do hereby acknowledge that I was served
with a copy of the foregoing notice
this 12th day of April A.D. 1862

E. J. Wells

Nucleus Oil Works Co
vs 245
A. Wabster et al

Notice of Petition for
re-hearing

Petition for Rehearing

Filed Apl. 23. 1862
L. Leland
Clk.

Rehearing Denied