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No. \_\_\_\_\_

# Supreme Court of Illinois

Doyle et al

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vs.

Murphy

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ILLINOIS SUPREME COURT.

THIRD DIVISION.

APRIL TERM, 1859.

MARY DOYLE, AMBROSE CHARLES  
DOYLE, HENRY DOYLE, FREDERICK  
DOYLE, MARGARET HELEN DOYLE,  
and THOMAS LEWIS, Administrator of the  
Estate of MAURICE DOYLE, deceased,  
*Plaintiffs in Error,*

vs.

PATRICK MURPHY and HONORA TERESA  
MURPHY,  
*Defendants in Error.*

PLAINTIFFS' BRIEF.

The bill of complaint in this case was filed in the Will County Circuit Court, Sept. 28, 1853.

The bill alleges, that some time during the latter part of the year 1834, Maurice Doyle, who was then living in Ireland, fraudulently disposed of certain bank debentures, of the value of £1,000, which were the property of Catherine Byrne, and that he converted the proceeds thereof to his own use; and that during the same year he fraudulently converted to his own use money of the said Catherine, amounting to about £640. That he absconded and left Ireland, taking with him this money, and the proceeds of the bank debentures. That in 1851 the complainants, upon their arrival in America, learned that he had for a number of years been residing in Springfield, Illinois, carrying on a mercantile business there. That in June, 1851, he died, leaving a large amount of property in Sangamon county, and elsewhere. That defendant, Lewis, public administrator of that county, was appointed by the County Court, administrator of his estate, and took upon himself the administration thereof, and that he has a large amount of assets in his hands, or under his control, belonging to the estate.

The suit is against the administrator and the heirs of Maurice Doyle, and is brought by Honora Teresa Murphy, the daughter of Catherine Byrne, and Patrick Murphy, her husband, they alleging that Catherine died testate in Ireland, in 1849, and by her last will and testament made Honora Teresa executrix thereof, and sole legatee of all the property, real and personal, and of every other description, of which Catherine died seized or possessed—subject to the payment of her debts, and the payment of \$50 to Patrick Byrne, her son. And it is alleged that this will was proved and duly admitted to record, in the proper prerogative court, in Ireland; and the prayer of the bill is, that Lewis, as administrator of said estate, pay to the complainants the full amount of the value and proceeds of said bank debentures and moneys received by said Doyle, with interest, to the time of such decree; and if the

assets are insufficient, then, that he pay to complainants such sum of money, or other thing, as may be in his hands, or possession, or under his control, as administrator of said estate.

The decree finally entered in the case is, that complainants have judgment against Lewis, as administrator, for the sum of \$17,282.48, together with costs of suit, and that the same be paid in due course of administration.

There is no allegation in the bill that any portion of the money appropriated by Maurice Doyle, in 1834, was ever employed by him in his business at Springfield, or that he ever traded with it to any extent, or that any portion of it had gone into, or was represented to any extent, by the assets belonging to his estate, and held by Lewis as administrator, at the time of the filing of this bill; and there is no allegation that this claim is to any extent a lien upon these assets, or that any specific portion of them is amenable therefor.

The suit is instituted simply for the purpose of recovering a debt, alleged to be due from the estate of Maurice Doyle, deceased, to the estate of Catherine Byrne, deceased.

I. It does not appear that this claim was ever filed in the County Court of Sangamon county, or allowed by that court; or that it had ever been reduced to judgment in any court of law. The Circuit Court of Will county had no jurisdiction of the case, unless the bill can be treated as a bill for a discovery, as well as relief; and the bill should have been dismissed.

1st. It is only when a discovery of assets is sought, that a court of equity will entertain jurisdiction of a suit of this character, and having obtained jurisdiction for the purpose of compelling a discovery and account of assets, the court will proceed to a final decree without sending the creditor back to a court of law for a recovery of the debt.

Story Equity Juris., sec. 546.  
*Greenway v. Thomas*, 14 Ill. 271.  
*McKay v. Green*, 3 John Ch. R. 59.  
*Thompson v. Brown*, 4 John Ch. R. 632-9.  
 2 Atkys, 363; 3 Atkys, 263.  
 1 Sch. and Lef. 262.

*But* ~~and~~ if the discovery is totally denied by the answer, the bill must be dismissed, and the relief denied, though the title to relief may be made out by other evidence.

*Martin v. Dryden*, 1 Gil. 210.  
 Story Eq. Juris., sec. 641.

2nd. This bill cannot be treated as a bill for a discovery.

*First.* A bill of discovery is one which seeks to compel the defendant to discover and set forth upon oath, the facts and circumstances within his knowledge, information or belief, material to the plaintiff's case.

1 Adams Eq., p. 1.  
 2 Story Eq. Juris., secs. 689, 1483, 1484.  
 Story Eq. Pleading, secs. 311-13.

*Second.* It is only when the defendant is called upon to discover upon his oath a fact material to the plaintiff's case, that the bill can be called a bill of discovery, and it is held that infants cannot be made parties for the sake of a discovery merely, for the reason that they never answer on their own oaths.

*Leggett v. Sellon*, 3 Paige Ch. R. 84.

The complainants in their bill have expressly waived the oath of each and all of the defendants to the answer.

The statute only authorizes the waiving of the necessity of the answer being under oath, in cases *other than for a discovery*, (Chancery Prac., sec. 21,) and the complainants having waived the oaths of all the defendants in this case, they cannot treat the bill as one for a discovery.

3rd. The bill should have expressly alleged that the plaintiffs have no other witnesses <sup>or</sup> evidence to establish the facts of which a discovery is sought.

When a bill is for a discovery only, it is not necessary to allege that the plaintiff has no other witnesses <sup>or</sup> evidence to establish at law the facts of which a discovery is sought, for he is entitled to the discovery if it be merely cumulative evidence of material facts; but when (as in this case) the bill not only asks for a discovery, but for relief also, the allegation is necessary; otherwise, it would be merely an attempt to withdraw the whole jurisdiction from the proper court of law and give it to a court of equity.

Story Eq. Plead., sec. 324 a.

*Marsh v. Davidson* 9 Paige, 580.

*Russell v. Clark's Executors*, 7 Cranch, 89.

*Seymour v. Seymour*, 4 John Ch. R. 411.

No allegation of this kind is contained in this bill, and the defendant Lewis, in his answer as to the amount of assets in his hands, merely refers to the records of the County Court of Sangamon county, (a copy of which is annexed to his answer,) showing the balance of assets in his hands, and he does not state any other facts than those apparent upon the records of that court. These records were always open to the inspection of complainants, and it is not pretended that the inventory of the property filed by Lewis in that court, does not contain a true statement of all the assets belonging to the estate; or that the several statements of his account as such administrator, and which were spread upon the records of that court, did not contain a true statement of the balance in his hands, at the time when such accounts were rendered.

The complainants did not therefore seek a discovery of assets; they had abundant evidence of the amount in the hands of Lewis at the time the bill was filed.

II. The bill of complaint avers that Catherine Byrne died in Ireland, in 1849, leaving a will duly executed, as her last will and testament, which was duly proved and admitted to record, in the proper prerogative court, in that country, and that by this will Honora Teresa was made sole executrix thereof; and according to the allegations in the bill, the debt which is sought to be recovered was in the lifetime of the respective parties, due from Maurice Doyle to Catherine Byrne. At the time of the death of Catherine it vested in Honora Teresa *as executrix*. She should therefore have sued in her representative capacity, and expressly named herself as such.

An executor or administrator represents the person of the testator or intestate in respect to his personal estate; the whole of which, generally speaking, vests in the executor immediately on the testator's death, in the administrator on the grant of letters of administration, and such grant hath relation to the time of the intestate's decease.

Toller on Executors, 133.

*Griffith v. Frazier*, 8 Cranch, 24.

*Valentine v. Jackson*, 9 Wend. 302.

*Babcock v. Booth*, 2 Hill, 181.

As representative he may maintain an action on simple contracts in writing or not in writing, either express or implied, made with the deceased, whether the same become due and payable before or after the death, but he must sue in his representative capacity, and name himself as such.

1 H. Black. 528.

*Portman v. Cone*, 2 Lord Raymond.

3 Pike's (Arkansas) Rep. 271.

2 Pike's (Arkansas) Rep. 485.

To give her the character of executrix in the suit, the bill should contain an express averment that the debt *accrued to her as executrix*, otherwise she will be considered as suing in her own private individual character.

1 Arkansas Rep. 241, 365.

*Henshall v. Roberts*, 5 East, 15.

Not only is there no such allegation, but the complainants by their bill expressly claim this sum *in the right of Honora Teresa as legatee* of Catherine Byrne, by virtue of her last will and testament.

Even if she had sued as executrix, letters testamentary should have issued to her at common law, before declaring.

*Wakefield v. Wakefield*, 1 Salk. 299.

*Rex v. Netherseal*, 4 Term, 258.

*Thompson v. Reynolds*, 3 Carrington & Payne, 125.

And she <sup>c</sup>ould not maintain her suit by virtue of foreign letters, but letters should have been issued in this State.

Story's Conflict of Laws, sec. 513, p. 422, and cases cited in note.

Although the legal title to the personalty vests in the executor at the instant of the death of the testator, yet our statute limits the power of the executor over the testator's estate before probate of the will, and obtaining letters testamentary, to the burial of the deceased, the payment of necessary funeral charges, and the taking charge of the estate.

Held, under a similar statute in New York, that <sup>and</sup> executor was not authorized to bring suit before taking out letters.

*Thomas v. Cameron*, 16 Wend. 580.

Sec. 24, Statute of Wills.

### III. The suit cannot be maintained by Honora Teresa as legatee.

1st. Even when the action is brought to recover a specific legacy, the title to it can only be asserted through the legal representative of the testator, according to the laws regulating the settlement of the estate of deceased persons. The legatee cannot even take possession of a legacy without the assent of the executor, and the union of the two characters of executor and legatee in one and the same person, makes no difference.

Toller on Executors, 307, 344-5-6.

2 Texas, 400.

And under our statute the executor is not authorized to give such consent before the will is probated and letters testamentary are issued.

*See 24. Stat. Wills B.S.*

2nd. The legatee has no right to institute a suit against the debtors to his testator's estate, for the purpose of compelling them to pay their debts in satisfaction of his legacy, for there is no priority between the legatee and the debtors. They are answerable only to the personal representatives of the testator.

Story's Eq. Juris. sec. 262.

Mitf. Eq. Pl. 160.

3rd. Even when the legatee sues the executor, to compel a satisfaction of the legacy, he cannot make a debtor to the estate a party, without showing collusion between the executor and such debtor, or that the executor is insolvent.

Story's Eq. Juris., sec. 514.

*Alasgie v. Johnson*, 4 Vesey, 217.

*Beckley v. Dorrington*, 6 Vesey, 749.

*Doran v. Simpson*, 4 Vesey, 651.

*Burroughs v. Elston*, 11 Vesey, 29.

*Newland v. Champion*, 1 Vesey, 104.

*Long v. Majestrie*, 1 John. Ch. 305.

If the case of the plaintiff as stated in his bill will not entitle him to a decree, the objection is equally fatal whether insisted on by way of demurrer, or at the hearing.

Story Eq. Pl. § 453.

IV. The Court erred in directing the testimony of Honora Teresa to be taken, and in rendering a decree upon that testimony alone.

The only testimony given in the case was the deposition of Honora Teresa Murphy, one of the complainants, which was made before the Master on the 24th of March, 1854. This deposition is set forth in the Record, at page 19; the Master's report is also set forth at page 25,—shows that the only proofs before him were the statements of Honora Teresa, and upon those statements he founded his report. On motion of complainant's solicitors an order of reference to the Master was taken on the 24th of March, to take the deposition of Honora Teresa touching the truth of the allegations contained in the bill. At that time the bill had not been taken as confessed, so as to bring this order within the 19th section of the Chancery Act, for Lewis had filed his answer in which he states he had no knowledge of the truth of these allegations, and requiring proof.

The decree, therefore, which was rendered in favor of the claimants, founded on the deposition of one of them, is in direct violation of § 119 of the Statute of Wills, which provides that "no person making a claim against the estate of any testator or intestate shall be permitted to prove the same by his or her own oath, except in cases specified in sec. 95 hereof;" and by sec. 95 it is provided "*that when no objection is made to the claim, the person making it shall be permitted to swear that such claim is just and unpaid, and that the same is correct after allowing all just credits.*"

But it may be said that Lewis consented to the order that her deposition be taken. He had no right to give such consent, and his consent could not bind the heirs of Maurice Doyle, the parties really in interest.

V. It does not appear from the bill, or from any of the proceedings, that the claim for which this suit is brought was ever filed in the County Court of Sangamon County, or that any demand was ever made upon the administrator for it, before bringing the suit; yet the decree is not only in favor of the complainants for the full amount of their claim, but for their costs also. In this particular the decree is in direct violation of the statutory provisions on this subject, contained in the 93rd and 101st sections of the Statute of Wills, which are:

"That estates shall be answerable for costs on claims filed at or before the term fixed upon, and of which notice is given by the executor or administrator for the settlement and adjustment of claims, but not after."

And also that "no person suing after one year from the issuing of letters testamentary, or of administration, shall recover costs unless a demand be proved before the commencement of such suit."

VI. One of the defendants below, Mary Doyle, is the widow of Maurice Doyle, deceased, and by our statute it is made the duty of the executor to set apart to her a proportion of the personal estate, which she may have and retain as her sole and separate property, to be in no way subject or liable to the payment of the debts of the deceased; and yet by this decree she is forever barred and foreclosed from having or receiving *any portion* of the *personal estate* of the deceased, until the amount of the decree and costs of suit are fully paid and satisfied. In this particular also the decree is clearly erroneous.

VII. The Court erred in overruling the motion made by the defendants Doyle, to set aside their default taken in the cause, and to vacate the decree entered against them.

The suit was commenced by publication against the defendants Doyle, as they all reside in Ireland, on the 28th of September, 1853, and by the notice they were required to appear and defend the suit at the next ensuing December term of the Court. It appears from the affidavit of Frederick Mooney, the agent of the Doyles, and Thomas Hoyne, set forth in pages 28, 29, 30 and 31 of record, and which were filed among the papers in the cause in May, 1854, and on which a motion to set aside the default was then and there filed in the cause, that Mr. Mooney, in October, 1853, retained and employed Hoyne and Miller of Chicago to defend the suit on behalf of the Doyles; that at the suggestion of Mr. Hoyne he spoke to Mr. McRoberts of the firm of Norton and McRoberts, for the purpose of retaining him to act with Hoyne and Miller, for the reason that he resided in Joliet, and could watch the progress of the suit there; that Mr. McRoberts said that he had already been spoken to by the administrator, Mr. Lewis, about defending the suit; and that he consented to act for the Doyles also in connection with Hoyne and Miller, and to advise Mooney from time to time of the progress of the suit. That Mr. Hoyne informed Mr. Lewis at Springfield in December of that year that he had been employed to defend the suit, and that Lewis seemed anxious to have the suit properly defended, stating that he regarded the claim as unjust and unfounded; that he had employed McRoberts to defend the suit, and had paid him a retainer of \$240. That Hoyne and Miller procured a copy of the bill of complaint, had a correspondence with Mr. McRoberts with regard to the merits of the suit, and received several letters from him, in one of which he advised them that he had filed a demurrer to the bill on behalf of the defendants, and that when it should become necessary for any thing to be done in the suit he would advise them of it in time to come to <sup>Joliet</sup> Chicago. That relying entirely upon this promise of McRoberts (Mr. Norton was then absent in Washington) to advise them of the time when the demurrer would be called up, or when it might be necessary to put in an answer for the Doyles, and supposing that McRoberts was acting with them in good faith in defending the suit, they did not attend the March term of the court at Joliet, but waited for advices from that place. That they received no further communication from McRoberts, and that neither Hoyne and Miller nor Mooney were advised, or received any notice whatever, that the demurrer had been withdrawn, or any thing further done in the case, until after the adjournment of the March term of the court, when to their great surprise they accidentally learned in Chicago that a decree had been entered in the case in favor of the complainants.

It is further stated by Mooney in his affidavit, that he is familiar with all the principal facts in the case, and is personally acquainted with all the rights and interests of the defendants in the cause, and that they have a good and substantial defense to the bill of complaint, on the merits. And that the principal allegations therein made are untrue in substance and in fact, and can be disproved by the defendants upon a rehearing of the cause.

The record shows that on the 4th of January, 1854, a demurrer was filed in behalf of all the defendants, signed Hoyne & Miller and Norton & McRoberts, solicitors.

March 13.—Notice that application would be made on the 24th of March for an order to take the deposition of Honora Teresa Murphy, one of the complainants, and admission of service same day by McRoberts, as solicitor for Lewis.

Same day.—Motion by McRoberts on behalf of all the defendants for leave to withdraw the demurrer, and leave granted.

Same day.—Order granting leave vacated.

March 20.—Motion by Norton & McRoberts, on behalf of all the defendants, for leave to withdraw the demurrer renewed, and leave granted.

March 23.—Replication to answer filed.

Same day.—Proof of publication filed, *nunc pro tunc*, and ordered that defendants, except Lewis, plead by one o'clock that day.

Same day.—The Doyles defaulted for want of a plea, and bill taken as confessed as against them.

March 24.—Ordered that master take deposition of Honora Teresa Murphy, and report with all convenient speed, Lewis, by Norton & McRoberts, his solicitors, consenting.

March 25.—Deposition of Mrs. Murphy filed; also, master's report.

Same day.—Decree made.

It was made apparent to the court below, that the Doyles intended to defend this suit; that they had in season employed counsel, and had done all it was possible for them to do to make such defense. That they had taken the precaution to employ a solicitor at Joliet, in order that he might take care of the suit there, and advise their agent, and also their solicitors at Chicago, from time to time of its progress; that the administrator, who had employed the same solicitor at Joliet, gave them to understand that he should vigorously defend the estate against what he considered a grossly unjust and unfounded claim. That in January, this solicitor advised the solicitors in Chicago that he had filed a demurrer to the bill in behalf of all the defendants; and, that if their presence should be required in Joliet, he would advise them of it in time for them to go down.

A demurrer was a most proper defense to make in the first instance, and should the demurrer be overruled, a simple denial of the allegations contained in the bill is all that the answer could contain. The solicitors in Chicago had a right to expect that they would be informed of the time when the demurrer would probably be taken up, in order that if necessary they might attend at the argument, or should it be overruled, that an answer would be filed by McRoberts on behalf of all the defendants, as he had already filed the demurrer in behalf of all; or at least, that he would advise them of the overruling of the demurrer, in order that they might file an answer in time for the parties they represented. They showed their confidence in Mr. McRoberts in suggesting him in the first place, and before they were advised that Lewis had employed him, as a person whom they desired to have associated with them in the case. They had a right to expect that he would at least act in good faith towards them, and it would have been dishonorable in them to suppose that he would under any circumstances be induced to betray them. With Lewis they had had no previous acquaintance, but they could not have imagined that a person in his position, as public administrator, and having no personal interest in the controversy, would so far violate the sacred trust he held, as to facilitate the recovery, against the estate of a deceased friend and neighbor, of what he regarded a grossly unjust and unfounded claim.

It would be a clear impeachment of everything like integrity in the legal profession, or honesty in human nature, to require of them that they should have anticipated conduct of this kind. (We speak of it in as mild terms as it is possible for us to employ.)

The Record shows that the claimants were without the least item of legal or competent evidence to establish the large claim they had made against this estate, when they found that any resistance was offered to it. That as early at least as the 13th of March (to say nothing of any previous collusion) an agreement had been concluded between them and Lewis the administrator, that the heirs, the parties really in interest, should be defaulted, and that judgment should pass against the estate for the full amount of the claim; for, on that day, notice was served upon McRoberts of the intended application to take the testimony of one of the complainants and he admitted service of this notice as solicitor, *not for all of the defendants, but for Lewis*

only; and on the same day, as solicitor for *all of the defendants*, he entered a motion for leave to withdraw the demurrer which had been filed. Why move for leave to withdraw the demurrer unless they apprehended that if it had been submitted even without argument, Judge Henderson, who was then Judge, would either have sustained the demurrer or held it under advisement, and thereby defeat the object they had in view?

This motion for leave to withdraw the demurrer was renewed by McRoberts in behalf of all of the defendants on the 20th of March, and leave was granted. He afterwards appeared for Lewis alone, and then followed in rapid succession the answer of Lewis, the replication to his answer, the filing of proof of publication of notice, the default of the Doyles, the application to take the testimony of Honora Teresa Murphy, her deposition, the Master's report, the order confirming the Master's report, and the final decree,—these various step filling some fifteen pages of the Record, and all showing that they were taken in pursuance of a previous agreement.

A motion was made to set aside the default of the Doyles at the next succeeding term of the court, and the Court (Judge Randall presiding) should have granted it; for it was made apparent to him that the act of withdrawing the demurrer was a fraud upon them, and that their default was improperly taken, and should have been set aside.

*Millspaugh v. McBride*, 7 Paige Chan. Rep. 512.

*Tripp v. Vincent*, 8 Paige Chan. Rep. 175.

*Beckman v. Peck*, 3 John. Ch. Rep. 415.

*Kemp v. Squire*, 1 Vesey, 207.

*Robson v. Cranwell*, 1 Dickens, 61.

The Court should have granted the prayer of the petition in behalf of the Doyles to set aside their default, and grant a rehearing under the statute. After leave was given to withdraw the demurrer, they were treated as *never having appeared in the case*; and to give the court jurisdiction as to them, proof of notice of publication was filed in the case.

When the demurrer was withdrawn without their knowledge or consent, and for the purpose of enabling the complainants to take their default, the mere filing of the demurrer should not be allowed to operate to their prejudice. It was, to say the least, inequitable to hold them bound by an appearance of the fruit of which they were deprived of by the improper, not to say fraudulent, conduct of the party urging it as a ground for the court's jurisdiction.

HOYNE, MILLER & LEWIS,

*Of Counsel.*

MICHAEL ANDREW RORKE,  
*Solicitor.*

118

Doyle et al vs Murphy

Plaintiffs Bonds

Filed April 30. 1859

Leland  
Clerk

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