

Eppinger, Russell & Co. v. Canepa

Fla.

20 Fla. 262 (Fla. 1883) · 1883-06-15

Mr. Justice Wkstcott

delivered the opinion of the court.

The trial here was by referee.

This is a creditor's bill, charging the respondent as executor under the will of Wm. R. Streiber, deceased, with the reception of assets, consisting of real estate, on which there are two dwelling houses, some three hundred dollars of personal property, about \$1,400 in money, and another item of money to the amount of about \$2,000, the proceeds of two life insurance policies upon the life of deceased, payable to the deceased by name.

The bill charges that the creditors duly presented demands to the executor, to th\$ amount of several thousand dollars, which he refused or neglected to pay ; that he was wmsting the assets ; had neglected to make any settlements in the Probate office, or reports showing the cash assets received, and prayed a discovery as to the.amount of estate received, and for an account and decree. Plaintiffs also allege that the estate is insolvent.

Defendant answers, admitting his appointment and qualifications as to executor; that he took possession of the assets and effects of the estate, with the exception of papers which plaintiff, John K. Russell, had taken from the possession of Mrs. Barker, the person in whose custody and control they had been kept by Streiber; that among the papers wdiiich he, as executor, received,'there -were no letters of Eppinger, Russell & Co., or of the plaintiffs; that he found only some receipts for some small bills from the first of the year 1873 to the middle of the year 1874. He denies that the testator was indebted as alleged in the bill and sets up facts which he claims show that the account is not as stated. He denies also that the estate is insolvent and admits the reception of certain moneys and effects for *277 which he is accountable. It is, not deemed necessary here to insert at length each of the allegations of the answer, as principal matters here involved arise upon exceptions to the findings of the referee, and the facts as they appear from the pleadings and evidence will be stated so far as deemed necessary in' the consideration of the matters of exception which are brought to our attention by the appeals.

After demurrer sustained to the bill it was amended and there was replication.

After interlocutory decree of reference, report' of a master and hearing by the referee, there was a decree by the referee against the defendant. This decree was based upon the report of the master, to which exceptions had been been filed, and the referee's action in allowing and overruling these exceptions occasioned the appeals in this case. Both plaintiffs and defendant appeal.

We examine first the grounds of appeal set up by the plaintiffs in their petition of appeal.

It is insisted, first, that the proceeds of two policies of insurance upon the life of the testator, Wm. R. Streiber, were assets of his estate, subject to the claims of plaintiffs, and that the finding of the referee to the contrary was error.

As to the matter of money realized by Streiber from these policies:

The plaintiffs in their bill allege simply¹, that the executor had collected considerable amounts of money due on policies of insurance on the life of the testator, Streiber, issued to the testator by the Continental Life Insurance Company of New York.

Defendant, in his answer, replies that the sums of money payable on the policies of insurance did not constitute assets of the estate ; avers that during the lifetime of Streiber and before his last illness, he assigned and transferred *278 said policies to Plattie Barker and John Barker, .minor children of Richard F. Barker and Mary Barker ; that they had been collected by their guardian and were held by him for their use and benefit.

The next reference to this matter in the record is the testimony of the executor. He says that he received the sum of \$1,960 56-100 on the policies of insurance from George Schnabel, the agent of the company in Jacksonville. The agent, Schnabel, testifies that on the 14th of May, A. D. 1870, he issued two policies of insurance upon the life of Streiber, each for the sum of one thousand dollars, and that the policies were "made payable to himself," Streiber; that after the death of Streiber they were paid to F. Canepa, as executor and guardian.

Mary Barker testifies that she was acquainted with Streiber from the time he came to the firm of Eppinger, Russell & Co., and for about six years before his death ; that she took care of him during his last illness ; that he placed his will in a box and told her to take care of it. The testimony of Richard F. Barker, the husband of this witness, shows that he also was on intimate terms with Streiber and that in the summer or early fall of 1874 he went to New York with him.

The executor being recalled, says that he saw the insurance policies left by Streiber ; that when they were paid he gave them to Mr. Schnabel, the agent of the company, and has not seen them since. This witness says that " on the body of the policy was Mr. Streiber's name, I think, and on the face it was written in Mr. Streiber's hand-writing to pay the money, \$1,000 each, to the Barker children." Upon cross-examination he says that " when Streiber died these policies were among his papers, at his house; that he did not recollect the date of the writing of Mr. Streiber on the face of the policies."

*279 George Schnabel, the agent, being recalled, says that the policies were paid in May, 1876. The payment was in drafts in favor of Mr. Canepa, but whether they were drawn to him as guardian or executor he does not recollect. This witness being, asked by the defendant's counsel whether there were any endorsements on the policies, and if so, what they were ? states that the policies were endorsed in the hand-writing of Streiber, to the children of Mrs. Barker; that he does not remember on what part of the policies the endorsements were made, but probably on the back; that both policies bore the same endorsement; that it was in ink ; that the children were mentioned by name, and that he does not remember whether they were signed by Streiber or not. He states that an effort has been made to obtain the policies, but it failed ; that he does not remember the date of the endorsements or that there was any other thing written upon them by Streiber except as stated. He states that the drafts paying the policies were " by his best recollection to Mr. Canepa, as executor."

Mary Barker, the mother of the children, being recalled, testified that Mr. Streiber lived in the same house with us, when we lived at the mill (the mill was the place of business of a lumber firm, for which Streiber was a bookkeeper); that he lived with the family for about three years ; that he used to come to her house every day before, for about six years after he came to take his meals with us and after he left the mill.

Upon being asked whether about the year 1870, she heard Streiber say anything in regard to getting his life insured, she says she does not know the year but he did speak about the policies and we laughed at him and asked who he was going to take them out for, as he had no family ; that he said he was going to get one for Hattie, meaning Hattie Barker, and one for John, meaning John Barker. He also said that he would get them out *280 for their education, and some time after that, we having no more talk about it, he brought the policies home one evening, and said he had got them, and sat right down and put Hattie's name on one policy and Johnny's on the other; that ■ she don't know what the writing was, but saw the names of Hattie and John. This was done in my presence two or three years before his death ; that when he made his will he took these policies from his box and showed them to Judge Emmons who was the person who wrote the will. He then put the policies and the deeds back in the box and handed the box to me, and told me to take charge of them ; he had known my son Johnny since he was a baby; he would carry him to town with him ; he did not know Hattie so well; he took Johnny with him to New York, and the last time he was in New York he brought the two children from New York, where they were. It is not deemed necessary to insert more of the testimony of this witness. It shows that the kindest relations existed between the parties, and that Mrs. Barker nursed Mr. Streiber for ten weeks during his last illness; Streiber died testate and by his will bequeathed these policies to the children. The executor here was also the guardian of the children. H(j swears that he turned over all the money realized from the policies under an order from the Probate Court of Du-val county, to the guardians of the children, and there is in the record a copy of the proceedings of the Probate Court showing that fact.

The testimony establishes as matter of fact that each of these policies was taken out in the name of the testator himself; that in pursuance of an intention to apply the proceeds of the policies to the two children, Hattie and John Barker, he placed upon either the back or face of one policy a direction in writing, to pay the money to one of the children ; and that he made a like direction to pay the *281 money upon the other policy to the other child. At the date of the policy, A. D. 1870, it is not pretended that the party was insolvent, or that the debts set up in the bill and proofs existed, and it is established that he was attached to the children, and that the most friendly relations existed between the insured and the father, the mother and these children.

The proof shows that the testator left no wife or children surviving him. There is no proof of the existence of any heir at law, and there is a testamentary disposition of the policies to the children corresponding with the directions made in each policy itself.

The question here is, are the proceeds of these policies assets of the estate subject to the claims of creditors.

It was insisted in the argument that there was here no gift or assignment of the policies to these children. This question we deem it unnecessary to decide, as a technical assignment or gift of a life policy is not required under the statute to protect the proceeds from the claims of creditors if the fact be that it is not declared in the policy that the insurance was effected for the benefit of a creditor or creditors, and there is in substance in the hand writing of the assured a declaration in the policy of the person to whose use and benefit the policy is declared to be.

Streiber here took out the policy payable to himself. The amount was to be paid upon his death. He had a right to direct to whom it should be paid. Insurance policies other than those payable before death, are ordinarily taken out for the benefit of some, third person or class of persons, and not as a mere investment for the benefit of creditors. It was in view of this supposed intention that our statute was enacted. Under

So far as the matter of insolvency is concerned we do not think, under our statute, that it would make any difference if the premiums to be paid were reasonable in amount, looking to the condition in life of the assured and other circumstances, and there was no proof from which it could be presumed that the actual purpose had in view at the time of perfecting the contract of insurance was to divert the money from the payment of anticipated debts and in fraud of his creditors. In other words, we mean to say that upon the death of the insured, whether he be solvent or insolvent, the purpose of the statute is to protect the amount of a policy of insurance reasonable in its character from the claims of creditors, and to secure the amount realized therefrom to the beneficiary declared therein.

To hold that the proceeds of these policies were subject to the claims of creditors here would be in effect to say that the declaration here in the policies amounted to nothing.

In this connection appellants insist that the defence set up by the defendant in his answer was an assignment of these policies, and that under such an answer he cannot make this testimony available to show any other defence. We cannot see that these pleadings are as stated.

Page 4 of 8

amount, and when received, and what disposition has been made of it?" Defendant in his answer denies that the sums of money payable on these policies of insurance constitute assets of the estate, and avers that during the lifetime of said Streiber, and before his last illness, he assigned and transferred said policies in said complainants' bill mentioned to Liattie Barker and John Barker, and the same has been collected by their guardian and is held by him for their use and benefit." It thus appears that the responses of the answer were as broad as the allegations of the bill and the interrogatory covering the general subject. The true issue here was assets or no assets. Plaintiffs filed no exceptions to the answer, but filed their replication thereto, thus admitting its sufficiency. The simple denial that these moneys were assets and a statement setting up their payment to the guardian of these children as their property met the case. The rule in such cases is that "where the facts were put in issue and proved a defence will be allowed, although it is not distinctly raised on the pleadings." A simple allegation that certain moneys are assets is certainly answered by a denial that they are assets, and affirming that they were the property of other persons named. The allegation that the policy was payable to the insured is, under these pleadings, admitted by the defendant. The question of assets was the issue, and we do not think the defendant here, in view of the pleading of the plaintiffs, should fail simply because the mode and method in which the fact of no assets was to be proved was not elaborately set forth or an assignment was alleged, when the facts failed to show a delivery of the chose in action, but did show a declaration in writing which is something less than an assignment or gift to take effect in present.

***285** The second ground of plaintiffs' appeal is "because the said referee found and decreed that the estate of said Streiber was entitled to a credit of eighteen hundred dollars for salary earned and due said Streiber for services rendered Eppinger, Russell & Co. for the year ending April 1st, 1874."

It appears that Streiber, prior to April, 1873, was receiving a salary of \$1,800, as bookkeeper, from Eppinger, Russell & Co., plaintiffs, and the referee allowed that sum as salary for the year 1874. There is no doubt of the performance of the service, nor is it claimed that the allowance is excessive, but it is insisted that during that time Streiber was a member of the firm of Eppinger, Russell & Co., with an interest of one-sixth in the profits during the year 1873; that the firm sustained heavy losses for that year, and that Streiber was for that reason not entitled to the salary. The plaintiffs admit that he was entitled to a salary after that year. The question, therefore, upon which this matter depends is, was Streiber a member of the firm of Eppinger, Russell & Co. for that year. Russell, one of the plaintiffs, swears that such a relation existed. As a matter of course no relation of partnership could have existed between these parties except as the result of a "transaction or communication" between them, and therefore neither he nor any of the plaintiffs are competent, under the statute (Chap. 1983, Laws) to prove a partnership relation between themselves and Streiber in a suit by the magainst his executor. There is no evidence in the books of the firm showing any such fact.

It can serve no good purpose to encumber this opinion with a statement of the testimony of the witnesses examined by the parties upon this subject. I have read it over and analyzed it carefully and thoroughly, and cannot say or demonstrate that the finding of the referee is wrong. ***286** The testimony of Moody., who was a member of the firm up to 1873, and who employed Streiber originally, is that he conversed with the partners, as well as with Streiber, on the subject. He swears definitely as to the time, and from his testimony, which we cannot say is overthrown, although it is not consistent with that of plaintiffs' witnesses, it is clear that while the subject was discussed, yet there never was a consummated agreement for a copartnership. We know of no rule of law which authorizes us in this conflict to direct the master to believe plaintiffs' witnesses rather than defendant's.

The third and last exception, the overruling of which by the referee the plaintiffs make a ground of their appeal here, is the allowance to the executor of the sums paid to Mr. McDonald and James M. Raker for professional services rendered as attorneys at law to the executor. The ground upon which these charges is objected to is that (where the administrator acts in such disregard of his duty as is disclosed by this record he should not have credit for counsel fees. This may be good ground for the administration of some penalty in the way of not allowing compensation to the administrator, but we cannot see why one account for moneys expended rather than another should be disallowed on that account. The amount of the charge of the attorney is certainly no standard by which the loss occasioned by neglect to follow the advice given or failure to discharge any of his duties as executor is to be measured. I do not understand that it is denied that the service was performed or that the compensation is reasonable and proper in amount. It should be allowed. *McHardy vs. McHardy*, 7 Fla., 317; 3 *Williams on Executors*, 6 Am. Ed., 1971, note K.

What has been said disposes of the matters involved in the appeal of plaintiffs, so far as insisted upon here. The *287 remaining matters to be disposed of are the exceptions of the defendant to the findings of the referee, which the referee overruled, and which are set up as grounds of appeal upon the appeal of the defendant.

The first ground of exception is that the master has charged the defendant with the rent of the real estate for the entire time since the death of testator. There is no objection made to the sum charged as rent, if he is chargeable at all. The rents of this property are a fund to which the creditors have a right to look for the payment of their debt. *Gilchrist vs. Filyau and wife*, 2 Fla., 97; *Sanchez vs. Hart*, 17 Fla., 507. And if the administrator neglects to discharge his duty in this respect, unquestionably, to the extent that they are necessary to meet their claims, he should be charged at the suit of the creditors. There is no pretence here that the personal property is adequate to pay the debts.

There were two houses belonging to the estate, one large the other small. The executor says he endeavored to rent the large house the first and second years after the death of the testator. Upon cross-examination he names two persons to whom he spoke on the subject. He never advertised the house for rent. He admits that the Barker family claimed the property under the will, and that with his consent- they entered into possession shortly after the death of Streiber, and that he never even demanded any rent from them. The small house he rented for a portion of the time at eight dollars per month. The furniture in the large house, which was the residence of the testator, he permitted to remain, subject to the use of the Barker family. The Barker family after moving out of their house, rented it at the rate of ten dollars per month for a sufficient length of time to realize almost two hundred dollars, and it was "never empty" for a year at a time. This house thus rented *288 was no better than, if it was as good as, the large house belonging to the estate. The charge made was five dollars per month for the large house, and to this the executor excepts. We must sustain the action of the referee here. That the small and inferior house in the yard was rented at eight dollars per month, and that the Barker house was rented at ten dollars per month, and was at no time unoccupied for a year, are facts which are not explained or answered by the simple statement of the executor, that he endeavored to rent the house. The only difference -here to which the failure to rent the one house while the others were rented can be reasonably attributed, is the fact that the executor permitted the family to occupy it without rent, and the reasonable explanation of the conduct of the executor here, looking to this entire record is, that he did not feel that he was responsible for the rent or should collect rent from the family, as the property, under the will, went to the family. This is no legal excuse. The claim of the family was subordinate to the creditor. He has clearly failed to act with reference to this fact, and failed to exercise the diligence required in the matter of the collection of these rents. *Perry on Trusts*, 527.

The charge is proper, but as it is for money not received, it should bear only simple interest.

The second exception is to the charge by the master of interest upon the sums in the hands of the executor with annual rests from the time of reception. This is a mistake. The master charged interest upon the yearly balances as the rule in this State requires. He did not charge interest upon the sums as received. The fact that the executor permitted the funds to remain in the bank uninvested makes no difference. Where the executor retains the money, and it does not appear affirmatively that "no good security could be found on which to put out the said money at interest," *289 and he fails to pay it into court, pending the litigation, he is chargeable with interest. *Shepard's Heirs vs. Shepard's Administrator*, 19 Fla., 341; *Perry on Trusts*, 3 Ed., Sec. 468, and cases cited to note 4. It enters into his yearly balances and the interest upon the balance found at the beginning of a year is to be carried into the balance struck at its close, computing interest for the next year upon the whole, no interest being computed upon the sums, when received. *Sanderson vs. Sanderson's Administrators*, 17 Fla., 862; *Moore and Montford vs. Felkel*, 7 Fla., pp. 54, 60.

The third exception is because the master has not allowed the executor any compensation for his services.

We cannot see how the executor here can expect to be paid anything when he has so signally failed to discharge his duty. The moneys of the estate which he collected he allows to remain idle, while admitted claims against the estate are bearing interest. He files no annual returns in the county court as required by law. The personal property, which is of perishable nature, he fails to dispose of. The real estate is so managed as to yield but little income. It is not even kept in as good repair and condition as when it came into his possession. The compensation of an executor in this State is regulated by statute. When he renders annual returns as required by law he is entitled to a commission on accounts collected and disbursed, and approved and allowed. He is also entitled to a fair and just compensation for his services. *Shepard's Heirs vs. Shepard's Administrators*, 19 Fla., pp. 331, 332. Here the executor has failed to make annual returns, and we do not think his general administration of the effects of the estate is of such character as to entitle him to compensation.

Defendant's fourth, fifth, sixth, seventh and eighth exceptions all refer to the *Eppinger, Russell & Co.* account. *290 This account has been the subject of examination by reference to the books of the firm by both the master and the referee. The referee states in his report that he has "carefully examined this account as proven, and the books from which it was taken, and it is found to be exactly in accordance with the same account in *Streiber's* own handwriting, in the books of *Eppinger, Russell & Co.*" There is nothing here showing this finding to be incorrect.

The last and ninth exception is to the allowance of the accounts of *Doctors Sahel and Ivenvorthy*. These accounts as the referee finds were admitted before the master without opposition. He states that they were not objected to.

The findings of the referee in this case are therefore sustained. None of the causes specially set forth by the parties to the two appeals herein as grounds for reversal of the decree are well taken. No objection for want of parties is urged by either plaintiffs or defendant.

There is, however, manifest error in the decree herein rendered. It should not have been against the executor for the amount of the valuation of the property in his hands. The decree here should be for sale of all the effects of the estate, both real and personal, except for the moneys admitted to be on hand. This should be decreed to be brought into court, and the proceeds of the sale, as well as the moneys, should lie

directed to be applied to the payment of the debts according to their admitted priorities. To the extent that there are sums found due from the executor for rents which he did not collect, and for the interest on the moneys in his hands, or other sums from which he did not realize anything, but should have realized something, to that extent should the decree direct an execution to issue, to be levied of the goods and chattels of the executor, in the event such amounts are necessary to satisfy the creditors. The land, the goods and chattels, and the moneys *291 on hand admitted to be the property of the estate, are to be treated as assets in the hands of the executor, and applied to the claims of creditors.

There has been here no conversion or misapplication of the property proved. The .Barker's are in possession as they admit simply as agents of the executor to take care of the property, and the funds the executor admits are assets and have not been converted. The prayer of the bill here is not for a personal decree as for a devastavit, but for a sale, and application of the property, real and personal, to the claims of creditors. This is the ordinary case of a bill by creditors seeking sale of assets and application of proceeds to the payment of their debts. Story's Eq. Jur., §546 et seq., to 570; Thompson et al., vs. Brown, Fay et al., 4 John. Chy., 619.

in framing the decree it should embody in itself the amounts due. It should not be simply for a sum to be ascertained by reference to a master's report. It should set out the amount in dollars and cents, as in the case of a judgment, at law. The case cited from 4th Johnson's Chy. contains a form of decree, which, so far as applicable under our statutes, may be properly followed. Indeed, this case gives quite fully the practice in a creditor's bill to administer assets.

Insolvency is not a necessary element to give equitable jurisdiction in such cases, and therefore the discussion of the question, whether the estate is insolvent, is unnecessary.

The decree is reversed and the case will be demanded with directions to reform the decree in the respects indicated in this opinion, and for further proceedings in execution of the decree. Plaintiffs and defendant will each pay one half of the costs.