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PATRICK H. PHILBIN vs. HERBERT J. THURN, USE OF VERNON COOK.

[NO NUMBER IN ORIGINAL]

COURT OF APPEALS OF MARYLAND

103 Md. 342; 63 A. 571; 1906 Md. LEXIS 124

March 27, 1906, Decided

PRIOR HISTORY: [*1]** Appeal from Baltimore City Court (DOBLER, J.)

DISPOSITION: Judgment affirmed with costs above and below.

LexisNexis(R) Headnotes

HEADNOTES: *Bond From Testamentary Trustee not Required by Code, Art. 16, sec. 221 — Grantors in a Deed Erroneously Designated as Executors Instead of Trustees — Evidence — Attachment — Trial of Short Note Case.*

Trustees appointed by will with power to sell property are not within the provisions of Code, Art. 16, sec. 221, which provides that every trustee to whom any estate shall be conveyed to be sold shall file with the Clerk of the Court in which the deed or instrument creating the trust may be recorded a bond for the faithful performance of the trust, and that no sale made by such trustee without such bond shall be valid.

Real estate was devised to three trustees with unqualified power of sale. The same persons were appointed executors of the will without a power of sale. They executed a conveyance of certain land so devised as executors of the last will of the testator and signed the same as executors. *Held*, that the erroneous designation of the capacity in which the grantors executed the deed does not render it invalid but the deed conveys the title which the grantors had power to convey as trustees.

When at the request of a debtor a third person obligates himself to see that the debt is paid, then in an action by the creditor against the debtor evidence is admissible to show the circumstances under which such third person was induced to become responsible, and that his subsequent payment of the debt was not an extinguishment of the same, and that the suit is prosecuted in the name of the creditor for the use of the person so making payment.

If the defendant in an attachment against him as a non–resident or absconding debtor appears, the proper course is to try the short note case against him first, before the attachment case against the garnishee or the property attached.

After the defendant in a non–resident attachment case has appeared and a verdict has been rendered for the plaintiff in the short note case, the entry of a judgment *in personam* on the verdict will not be arrested on account of the existence of any grounds for quashing the attachment.

COUNSEL: Charles S. Hayden and Charles W. Wisner, Jr., for the appellant.

Samuel J. Harman and **Joseph N. Ulman,** for the appellee.

JUDGES: The cause was argued before MCSHERRY, C. J., BRISCOE, PAGE, BOYD, SCHMUCKER, JONES and BURKE, JJ.

OPINIONBY: MCSHERRY

OPINION:

[571] [*343]** MCSHERRY, C. J., delivered the opinion of the Court.

An attachment on original process was issued out of the Superior Court of Baltimore City at the suit of the appellee, Thurn, against the appellant, Philbin, as an absconding debtor, and later on the short note was amended by an entry of the case to the use of Mr. Vernon Cook. Both the attachment and the short note case were thereafter on motion and affidavit of Philbin, who had previously appeared and pleaded, removed to the Baltimore City Court where the short note case was tried before a jury. The trial resulted in a verdict for the plaintiff. A motion in arrest of judgment was then filed. It was overruled and judgment was entered on the verdict and from that judgment this appeal was taken. During the progress of the trial eleven

exceptions were reserved. The first **[***2]** and eleventh relate to rulings on the prayers, the remaining nine involve questions pertaining to the admissibility of evidence.

The suit is founded on a covenant to pay rent. Under a lease executed by Neal O'Donnell and Hugh O'Donnell, of the first part, and the appellant Philbin, of the second part, the latter covenanted to pay to the former in equal semi-annual installments a yearly rent of six hundred dollars for certain **[**572]** premises situated in Baltimore City. In July, 1903, Thurn acquired the title of the lessors, and the rent which fell due in September of that year and in March, 1904, not having been paid, an attachment was issued against Philbin as an absconding debtor. Under circumstances which will be mentioned in a moment the cause of action was assigned to Mr. Cook, and the short note case was proceeded with in the name of Thurn for the use of Cook. To avoid the prolixity and repetition that would unavoidably result from a separate discussion of each of the questions raised by the nine bills of exception **[*344]** which relate to the admissibility of evidence, a statement of all the material facts contained in the record—both those which are not challenged **[***3]** as well as those which are objected to—will be now made, and then the relevancy of the evidence and the propriety of the rulings on the prayers will be considered.

Hugh O'Donnell and his brother Neal O'Donnell, both of whom were residents of the city of New York, owned a property known as the "Mansion House" and situated on Gay street in the city of Baltimore. In February, 1898, they leased the premises to the appellant Philbin for the term of ninety-nine years, reserving a yearly rent of six hundred dollars. Hugh O'Donnell made his will and devised all of his real estate to his brother Neal.

He then died leaving Neal surviving him. Neal also made a will by which he gave and devised his property to certain trustees to sell the real estate at public auction or private sale, and on such terms as to them might seem just for the uses and purposes named in the will. The executors who were appointed by that will were the same individuals who were constituted trustees thereunder. After he had made his will Neal O'Donnell died. Both wills were duly admitted to probate in the Surrogate Court for the county of New York, and letters testamentary were granted to the executors named therein. **[***4]** Duly authenticated copies of the wills were recorded in the office of the Register of Wills of Baltimore City. A deed was executed in July, 1903, by William F. Clare, Andrew J. Toland and Patrick M. Carolan, conveying to the appellee Thurn the Mansion House property. Under this deed Thurn claims the rent reserved in the lease already alluded to. The deed purports to be made by the grantors *as executors* of the last will of Neal O'Donnell. Under the will of Neal O'Donnell the executors were not clothed with a power of sale, but the trustees, who were the same persons, were fully authorized to sell the real estate owned by the testator. A confirmatory deed signed by the same grantors in their capacity as trustees was subsequently executed. Whether those **[*345]** deeds or either of them vested a title in Thurn is the main question in the case. In August, 1903, Philbin filed a bill in the Circuit Court of Baltimore City against the trustees named in the will of Neal O'Donnell and against Thurn alleging that he, Philbin, was a creditor of Hugh and Neal O'Donnell, and that the decedents owed him a large sum of money for his services in managing the Mansion House. He asserted that he **[***5]** was the owner of the leasehold interest, and he prayed for a sale of the property so that his claim might be satisfied out of the proceeds. The trustees answered the bill and disputed Philbin's ownership of the leasehold interest and denied the validity of his claim for compensation. Philbin insured the improvements against loss by fire and after the buildings were destroyed in the great disaster of February 7th, 1904, he collected the sum of ten thousand dollars, the amount of the policy which he held. A cross-bill was filed by the trustees setting up a claim to the proceeds of the insurance policy, and an injunction was granted restraining Philbin from withdrawing the insurance money from bank and restraining the bank in which it was deposited from paying it out. Finally the counsel of the various parties met to adjust the litigation by compromise. Mr. Vernon Cook represented Philbin, Mr. Harman was counsel for Thurn and Mr. Whelan for the trustees. It was agreed that Philbin should abandon his claim for compensation, that the trustees should relinquish their claim to the insurance money and their attack on the validity of the lease, and that Philbin should pay Thurn the two installments **[***6]** of rent then due and also the costs of the equity case. Philbin offered his check for the six hundred dollars due Thurn for rent, but Mr. Harman refused to accept it. The check was then destroyed and Mr. Cook stood responsible to Mr. Harman for the six hundred dollars due by Philbin and took Philbin's check for that sum. Philbin fully understood that Mr. Harman would not trust him, and he knew that Mr. Cook had made himself responsible for the rent upon the faith of Philbin's check to Cook. An agreement was then signed to dismiss the bill and the cross-bill, and as it was late in the **[*346]** afternoon Mr. Cook did not have an opportunity to get Philbin's check certified or cashed. An order was procured from the Court dissolving the injunction that same evening. The next morning when Mr. Cook presented Philbin's check to the Canton Bank he found that Philbin had stopped payment of the check, and had withdrawn all the money he had on deposit and had left the city. Mr. Harman then sued out for Thurn an attachment against Philbin as an absconding debtor and later on Mr. Cook paid to Mr. Harman the six hun-

dred dollars for which he had stood responsible, and the attachment and short **[***7]** note case were thereupon entered to Mr. Cook's use. The short note case is now before us.

Out of the aforegoing facts the several questions presented by the eleven bills of exception have arisen. They all however involve but two inquiries in addition to a third which the motion in arrest of judgment brings up. Without particularizing it may suffice to say that the two inquiries which embody all the objections contained in the eleven exceptions are **[**573]** these, first was there error in admitting in evidence the deed and the confirmatory deed to Thurn; secondly, was the trial Court wrong in permitting the records of the equity case and the oral testimony of Mr. Cook to be considered by the jury?

The first inquiry turns entirely on the interpretation of *sec. 221 of Art. 16 of the Code of 1904.* That section reads as follows, "Every trustee to whom any estate, real, personal or mixed shall be limited or conveyed for the benefit of creditors, or to be sold for the benefit of creditors or to be sold for any other purpose except upon a contingency, shall file with the Clerk of the Court in which the deed or instruments creating the trusts may be recorded, a bond in such penalty **[***8]** as the clerk may prescribe, being as nearly as can be ascertained double the amount of the whole trust estate, and with sureties to be approved by the clerk, conditioned for the faithful performance of the trust reposed in such trustee, which bond shall be retained and recorded in the office of said clerk, and no title shall pass to any trustee as aforesaid until such bond shall be filed and approved as aforesaid, and no sale made by any **[*347]** such trustee without such bond shall be valid or pass any title to such property or estate. If the trust estate consists of real property or of real and personal property, situated partly in the county or city in which the grantor resides and partly in one or more other counties, it shall be sufficient that a bond has been accepted and filed in the county of the grantor's residence; if the trust estate consists entirely of real estate in a county or counties other than of the residence of the grantor, it shall be sufficient that a bond has been accepted and filed in the county in which the deed has been first recorded."

If the above quoted section applies to trustees appointed by wills and is not wholly confined to trustees appointed by **[***9]** deeds, then, inasmuch as the trustees named in the will of Neal O'Donnell did not give bond in Maryland, no title passed to them and they could convey none to Thurn. Hence the question is, Does the section apply to trustees appointed by wills? We are of the opinion that it does not, and the reasons in support of that conclusion are quite obvious. In the first place, the word "will" does not occur in the section, and it cannot be presumed that the Legislature intended the provisions of that enactment to apply to trustees appointed by wills when not a single reference is made in the section to such trustees in any way whatever. The omission of the word becomes more significant when it is remembered that in sec. 219 of the same Article the General Assembly did employ the word "will," since it wished to include under that section a trustee appointed by will, as it is there enacted: "In all cases where a trustee has been appointed by *will* or *deed* to execute any trusts," certain proceedings may be had to require a bond to be given. The explicit inclusion of a testamentary trustee under *sec. 219* clearly indicates that he was omitted from *sec. 221,* because he was not intended **[***10]** to be embraced within the terms thereof. But it is said the word "instruments" following the word "deed" is comprehensive enough to include a will. The context, however, furnishes a complete answer to that contention. The trustee who must give bond under *sec. 221,* is required to file it with the "*Clerk of the Court* in which the **[*348]** deeds or instruments creating the trusts may be recorded." Now, no wills are recorded by the Clerk of any Court. They are recorded in the office of the Register of Wills who is an officer wholly distinct from the Clerk of a Court. The "instruments," therefore, to which the section refers are only such instruments as may be recorded by the *clerk* of a Court, and as wills are not instruments recorded by the Clerk of a Court they are not within the purview of the section. In the next place, the bond which trustees who do come within the scope of *sec. 221* are required to give, must be retained and recorded in the office of the *clerk* where the "deed or instrument creating the trusts may be recorded." The bond must be, as nearly as can be ascertained, double the amount of the whole trust estate, and the sureties must be approved by the **[***11]** clerk. Nowhere in these provisions is the Register of Wills mentioned or described. When we turn to *sec. 224* of the same Article it is apparent that "Clerk of the Court" does not include Register of Wills, and therefore that the word "instruments" does not include wills. Under that section only the Circuit Courts for the counties, the Circuit Court and Circuit Court No. 2 and the Superior Court of Baltimore City are empowered to reduce the penalty of the trustee's bond given under *sec. 221* below an amount double that of the whole trust estate, and as those Courts have nothing to do with bonds filed in the Orphans' Court or recorded by the Register of Wills, it necessarily follows that the bond which *sec. 221* declares must be given before a title can vest in a trustee, is a bond to secure the faithful discharge of some trust created by a deed or instrument recorded by the Clerk of a Court and not by a Register of Wills. In addition to this the statute uses throughout the term *grantor* and not the term *testator.* The trusts, therefore, to which it refers are such only as a *grantor* may create, and are not such as a *testator* may establish by his will.

To make **[***12]** the section embrace a trustee appointed by a will the term "*Testator*" must be supplied. As *scc. 221* has no application to trustees appointed by wills, it was not necessary that the trustees **[*349]** named in the will of Neal O'Donnell should give bond, and their failure to do so did not prevent the title to the Mansion House from vesting in them under the will of O'Donnell. If the deed which they executed was sufficient in **[**574]** form to convey to Thurn the title which vested in them, then Thurn was entitled to the rent reserved by the lease. And this brings us to a consideration of the sufficiency of the deed under which Thurn claims.

The deed of July, 1903, was made by William F. Clare, Andrew J. Toland and Patrick M. Carolan "as executors of the last will and testament of Neal O'Donnell," and was signed and sealed by the grantors, under each of whose names there appear the words "Exr., &c., of Neal O'Donnell, dec'd." The grantors were trustees as well as executors. In their capacity of executors they had no power of sale, in their capacity of trustees they had an unqualified power to sell the decedent's real estate. In exercising a power which they undoubtedly possessed **[***13]** as trustees they inadvertently described themselves as executors; and the question is, Does this erroneous designation of the capacity to which the power belonged defeat the act done, when the act done was clearly within the scope of their authority as trustees? Former decisions of this Court answer that inquiry in the negative. In *Flickinger v. Hull, 5 Gill 60,* the general principle applicable to such a situation is thus stated: "Where a person in one character is debtor and the same person in another character is creditor, the law regards the debt as paid by the debtor capacity to the creditor. This is on the same principle which governs in the case where a man has several capacities, and is found in possession of property, the law will attach the possession to the capacity in which, of right, it ought to be held; so also, where having various capacities, he executes an authority delegated to him in one of those capacities, the law will attribute the act to the proper authority, although the person does not not profess to exercise it, in virtue of that particular power." In the later case of *State, use of Gable et al. v. Cheston & Carey, 51 Md. 352,* **[***14]** the general **[*350]** principle just quoted was applied to a condition closely resembling, in this feature, the case at bar. It there appeared that John Gable by his will devised all the residuum of his estate to three trustees and the survivor of them in trust for the purposes therein stated, and appointed the *same parties* his executors. The executors purchased certain leasehold and fee–simple property and took the conveyances therefor to themselves as *executors* and they subsequently, in the *same* capacity, sold and conveyed the same property to a purchaser. As executors they had no authority to make such a purchase or such a conveyance; as trustees they had the power. In dealing with that state of facts this Court said: "It may not be necessary to decide the point in this case, but we find no difficulty in rerard to the *title* to the real estate thus taken and transferred by the executors. The same parties were authorized to purchase and sell as *trustees,* and the fact that they took and executed conveyance as *executors* would seem to make a case covered by what is said in *Flickinger* v. *Hull.*" The deed of July, 1903, was effective to convey a title to **[***15]** Thurn and there was no error committed in admitting it in evidence.

We now come to the second inquiry, viz.: was the ruling which admitted in evidence the equity record and the oral testimony of Mr. Cook right? As the suit was being prosecuted in the name of Thurn for the use of Mr. Cook it was necessary to show, not only how Mr. Cook acquired an interest in the controversy, but further that the payment made by him to Thurn of the six hundred dollars due by Philbin was not designed to be an extinguishment or satisfaction of the latter's debt. The facts disclosed by the equity record and the facts deposed to by Mr. Cook were all admissible for the purposes indicated. The second, third, fourth, sixth, seventh, eighth, ninth and tenth exceptions present the question as to the admissibility of this evidence. No error was committed by any ruling therein objected to. The fifth exception brings up nothing material. The first and eleventh exceptions relate to the prayers. The Court's action on the prayers was eminently proper.

[*351] The motion in arrest of judgment remains to be considered. It asked that the judgment in the short note case might be arrested to await the determination **[***16]** of a motion to quash the attachment. The motion in arrest was properly overruled. The proceeding by attachment, except when used as an execution on a judgment, is designed to accomplish the two–fold purpose of compelling the appearance of the defendant to answer the plaintiff's demand, and also of giving the plaintiff a security for the payment of his claim. This security is obtained at the beginning of the action by the seizure of the defendant's property, and when once properly and validly acquired, it is retained to await the result of the action, unless, in the meantime, the defendant appears to the suit and displaces the specific lien acquired under the attachment by substituting in lieu of such lien, the security of a bond with sureties approved by the Court. *Poe's Prac.,* sec. 502. If the defendant appears, as Philbin did, the proper course is to try the short note case first. *Barr v. Perry, 3 Gill 313; Lambden v. Bowie, 2 Md. 334; Randle v. Mellen, 67 Md. 181.* A judgment obtained after appearance in the short note case in a judgment *in personam,* and nothing that may be urged as a ground for quashing the attachment **[***17]** can be availed of to arrest the entry of a

judgment *in personam.* The validity of that judgment in no way depends on the regularity of the attachment. The appearance of the defendant accomplishes one of the objects of the attachment, and after the plaintiff has secured a verdict in the short note case no motion to quash the attachment can intervene to arrest the entry of a judgment *in personam.*

Judgment affirmed with costs above and below.