Record No. 2176.

- In the -

Supreme Court of Appeals of Virginia

At Richmond

J. R. K. COWAN'S ADMINISTRATRIX, MARGARET K. COWAN

vs.

W. R. J. ZIMMERMAN, HOLMAN WILLIS, Receiver, and HOLMAN WILLIS and JULIUS GOODMAN, Commissioners, and W. H. COLHOUN and JULIUS GOODMAN, Attorneys, etc.

C. A. BROWN

vs.

W. R. J. ZIMMERMAN, et als.

FROM THE LAW AND CHANCERY COURT FOR THE CITY OF ROANOKE, VIRGINIA.

"The Briefs shall be printed in type not less in size than small pica, and shall be nine inches in length and six inches in width so as to conform in dimensions to the printed records along with which they are to be bound, in accordance with the Act of Assembly approved March 16th, 1903; and the Clerks of this Court are directed not to receive or file a Brief not conforming in all respects to the aforementioned requirements."

The foregoing is printed in small pica type for the information of counsel.

M. B. WATTS, Clerk.

John A. Cook, Printer, Wytheville, Va.

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PETITION

To the Honorable Justices of the Supreme Court of Appeals of Virginia:

Your petitioner, Margaret K. Cowan, Administratrix of J. R. K. Cowan, deceased, would respectfully file this petition against the above named defendants and say:

That said Administratrix is aggrieved by decrees entered in the above styled causes in The Law and Chancery Court for the City of Roanoke, Virginia, which were rendered on the

22nd and 23rd days of March, 1939, in the following particulars:

The above styled two causes were heard together. The cause of Cowan v. Zimmerman, late pending in the Circuit Court of Montgomery County, Virginia, having been subsequently removed to The Law and Chancery Court for the City of Roanoke, Virginia, was then heard with the cause of C. A. Brown, v. W. R. J. Zimmerman, et als.

Statement of the Case in the Cause of Cowan V. Zimmerman:

On the 15th day of February, 1924, J. R. K. Cowan and wife executed a lease to W. R. J. Zimmerman by which they leased the coal on a certain tract of land lying and being
2* in Montgomery County, *Virginia, a copy of said lease being filed with the bill in this cause. The said Zimmerman did not comply with the terms of said lease and did not pay the sums of money required to be paid under the terms thereof, and on the 16th day of January, 1936, J. R. K. Cowan brought a chancery suit in the Circuit Court of Montgomery County, Virginia, against W. R. J. Zimmerman, in which Cowan complained because Zimmerman had not paid any of the moneys that Zimmerman was required to pay under the lease contract. The writ in this case was returnable to rules to be held in the Clerk's Office of Montgomery County on the first Monday in April, 1936. The summons was executed in Richmond, Virginia, by the Sergeant of said City on the 24th day of January, 1936, and was duly returned to the Clerk's Office of said Circuit Court of Montgomery County. The rules thereon were properly taken, and, thereupon, W. R. J. Zimmerman, on the 8th day of April, 1936, filed in the Clerk's Office of the Circuit Court of Montgomery County, Virginia, a plea in abatement.

Said plea had a double aspect. The first ground asserted in said plea was that Zimmerman did not reside in Montgomery County but resided in the City of Richmond, Virginia, and that the process was improperly served on him in the City of Richmond. The second ground in said plea was to the effect that a suit for receivership had been brought in The Law and Chancery Court for the City of Roanoke, Virginia, and therefore the suit in Montgomery County could not be main-

tained. The suit in Montgomery County, as shown by the record, was brought prior to the date of the suit in Roanoke, and process served before the suit in Roanoke was brought.

J. R. K. Cowan died in the meantime and the suit was revived in the name of Margaret K. Cowan, his Administratrix. The plea in abatement was held good. In this we think the Court erred. It will be observed that this is not a simple suit at law asking for a judgment against Zimmerman, but is a suit in equity, not only asking for a judgment against Zimmerman but setting forth the facts that Zimmerman had not
3* complied with the lease and had not paid the moneys *required to be paid by said lease, and asked for the relief that the property leased and other property owned by said Zimmerman be taken in possession by a receiver and the lease operated by a receiver, and the property to be sold to pay the sums due according to said lease, and further asked for *general relief* so that not only could the debt due be recovered but that the Court would grant such further and general relief as to equity might seem meet.

In the Montgomery County case not only is the sums of money due under said lease brought into question but the property itself is brought into question, and the Court is asked to take charge of the property covered by said lease itself and aid said Cowan in regard thereto. Take it temporarily away from Zimmerman and put it in the hands of a receiver, and if necessary, to sell and dispose of said property. If the suit be to recover the land conveyed by the lease or subject it to the debt set forth in the lease, Section 6049 of the Code provides that the suit may be brought in the County in which the land sought to be subjected is located. The case of Hull v. Fields 76 Va. 594, is directly in point. In that case the Court said:

> "We are met at the threshold of this case with the objection that neither of the defendants were residing in the county of Smyth when the suit was brought, and that the process was not served on them in that county, and that the court below erred in overruling the motion to strike the cause from the docket. The suit was brought to rescind a contract which was made in the county of Smyth, between the plaintiff and defendants, and to annul the deed of conveyance which was made by the plaintiff to the defendants, of real estate situate in

said county of Smyth, and to recover the same. We are of opinion that under the Code of 1873, ch. 165, the suit was properly brought in said county, and that the circuit court did not err in overruling the defendants' said motion."

The present Section of the Code, 6049, is similar in all respects to the Code of 1873 heretofore referred to. In fact there cannot be any doubt but that the suit was properly brought in Montgomery County to recover the land mentioned in said lease or subject it to the debt due under said lease, and therefore the writ was properly served on the defendant Zimmerman in the City of Richmond, both to recover the debt
4* and to subject said property, in any way to take *the property from the said Zimmerman and to subject it to said lease. This being true the Court erred in sustaining the plea in abatement and dismissing this suit. Zimmerman has not answered the bill in this case, and if he does not choose to answer it, the bill should be taken as confessed, and a recovery had by the plaintiff in the Montgomery County suit, certainly at least for the minimum amount of royalty provided in said lease which is $1900.00 for the first year and $2400.00 for each year thereafterwards, and that is what we ask as to recovery in the Montgomery County suit.

Now then, the next question is what should be done as to the Brown suit. The Montgomery County suit was first pending and was standing on the plea in abatement. The Brown suit was referred to Commissioner Moomaw, who among other things, was directed to report as to the assets of Zimmerman, and he was directed to give notice by publication. He gave notice by publication of the time and p'ace to take the account. He says that the Receiver, Willis, said that he notified Cowan as to the time and place of the taking of the account, but Cowan is dead. Commissioner Moomaw made no report as to the Cowan debt that was subject to exception or anything else. He merely reported the fact of the pendency of the Montgomery County suit and said that would have to be disposed of in the Montgomery County suit. There is nothing in that report that was subject to confirmation. The only thing that that report says is that the suit is pending in Montgomery County and that this question would have to be disposed of in the Montgomery County suit. The Law and Chancery Court for the City of Roanoke did not dispose of the Montgomery

County suit and made no reference in its decree as to the Montgomery County suit. It left the Montgomery County suit just where Moomaw left it. There was nothing in Moomaw's report to confirm as to the Cowan v. Zimmerman suit, and the Court did not confirm it but left the Montgomery County suit where it stood at the time of the filing of Commissioner Moomaw's report.

We realized that the best thing that could then be done was to have the Circuit Court of Montgomtry County
5* send the Cowan V. *Zimmerman case to The Law and Chancery Court for the City of Roanoke so that it could be heard in connection with the Brown v. Zimmerman case pending in the last named Court, which was done, and the two cases were heard together. As previously stated, the Cowan case was dismissed on the plea in abatement. If that dismissal is wrong then the Cowan case should be heard on its merits. And if the case were heard on its merits, then a judgment would be rendered against Zimmerman, and then the question would arise as to whether any part of their judgment was payable out of assets under the control of the Court in the Brown case.

Should Cowan's Claim Participate?

Assuming then that the Court erred in dismissing the Montgomery County case on the plea in abatement filed, and that Cowan should have the right to a judgment on his claim in the Montgomery County suit, then, as above stated, the question is: SHOULD COWAN BE PERMITTED TO PARTICIPATE IN THE FUNDS UNDER CONTROL OF THE COURT?

The theory on which we base our right to participate *pro tanto* is that the relief which we are seeking does not prejudice the rights of any party of this cause, and, further, that the decree of October 28-29, 1937, was not a final decree.

On June 2, 1938, Judge J. L. Almond, Jr., sitting for Judge Berkeley at the time, entered an order filing the petition of Cowan and directed Commissioners Holman Willis and Julius Goodman to retain in their hands the funds until the further order of the Court, and until such time as the petition of Cowan could be determined on its merits. A copy of

this order was delivered to the gentlemen, and it is a fact that the funds were still in control of the Court on the date of the decree of March 22, 1939.

In other words, the restraining order fulfilled its purpose of keeping the funds intact, and if there has been a distribution, it has been subsequent to March 22, 1939, and with full information before them that we were denying their right
6* to distribute the fund. *And the decree itself gave us thirty days within which to apply for this appeal.

It will be noted that a decree was entered March 23, 1939, confirming a distribution of the fund, but this decree should not have been entered in view of the fact that we were then litigating over the funds under the control of the Court, which funds are still in the hands of Mr. Julius Goodman and W. H. Colhoun, and these gentlemen will not contend that the fund has been paid out to the various creditors. And bear in mind that both of these gentlemen, Mr. W. H. Colhoun and Mr. Julius Goodman were parties to the proceeding with reference to this fund as shown by the decree of March 22, 1939.

Argument as to Final Decree:

It will be noted that the decree of his Honor, Judge Berkley, denying Cowan the right to participate in the distribution was on the ground that "the Court being of the opinion that the decree entered herein on October 28, 1937 .....directing the distribution of the funds to arise from the real estate decreed to be sold herein, was a final decree which this Court is without power to disturb.". We contend that the decree of October 28-29, 1937, was *not a final decree.* Our reasons are:

That this is a decree for the sale of lands, which is *never* a final decree. Good authority for this proposition of law is found in 6 Michie's Digest, page 165, under the topic of Judgments and Decrees:

> "Decrees Ordering or Confirming Sale of Land.—A decree directing the sale of land to satisfy charges on it is not a final decree. Spoor v. Tilson, 97 Va. 279, 33 S. E. 609. See also Downing v. Huston, etc., Co., 149 Va. 1. 141 S. E. 134.
>
> And a decree for a sale under a mortgage, or otherwise, is interlocutory because the sale is not consum-

mated until approved by the Court. Repass v. Moore, 96 Va. 147, 150, 30 S. E. 458; Downing v. Huston, etc., Co., 149 Va. 1, 141 S. E. 134. See also Goodwin v. Miller, 2 Munf. 42; Allen v. Belches, 2 Hen. & M. 595; Fairfax v. Muse, 2 Hen. & M. 557.

7* Division of Property or Sale in Partition *Suit.—In a large number of cases it has been held that the judgment in a suit for partition, directing a division of the property or a sale thereof, is not a final decree, but merely an interlocutory order. Dangerfield v. Caldwell (W. Va.), 151 Fed. 554, 556."

It is true that the decree mentioned provides that the proceeds of such sale, after paying the cost of such sale, shall be paid to W. H.Colhoun and Julius Goodman up to $2000.00 to be applied upon such labor claims as hereinbefore set forth, but at that time the real estate had not been sold and it was in a latter part of the decree that the decree for sale was made and the decree was not a final decree because at any time before the sale was made and confirmed the Court had the power to change and modify the decree in any respect it deemed proper so that we readily see that the decree was not a final decree as stated in the decree of March 22, 1939, and if it were not a final decree, the Court had the power and should have heard the Cowan case on its merits, which the Court declined to do for the reason it mentioned.

Another thing, the report of Commissioner Moomaw is not a final report as to the Cowan matter for reasons heretofore stated.

In Volume 6 of Michie's Digest, on page 165, the text writer stated as follows:

"A decree confirming the report of commissioner is not final. Fowler v. Lewis, 36 W. Va. 112, 14 S. E. 447. It does not give that complete relief which makes further action of the court in the case unnecessary. Downing v. Huston, etc., Co., 149 Va. 1, 141 S. E. 134; Smith v. Blackwell, 31 Gratt. 291. See also Wright v. Strother, 76 Va. 857."

Even if the report of Commissioner Moomaw had been confirmed as to the Cowan claim, it would not have been a final decree. The Court could have reconsidered the matter.

Effect of Prayer for General Relief:

It may be urged that the prayer for general relief was not broad enough for the Court under this prayer to cancel the lease between Cowan and Zimmerman, but a review of
8* the authorities disclose *that under the prayer for general relief that any case made by the pleadings may be granted. See Michie's Digest, Vol. 4, page 155:

> "Effect of Prayer for General Relief.—In General,—When the bill contains allegations to support a decree and a prayer for general relief, a decree may be predicated thereon, although not specifically prayed for."
> (Citing a large number of Va. & W. Va. cases.'

Conclusion:

Our contention is that the plea in abatement was bad and should have been stricken out, and that petitioner, Margaret K. Cowan, Administratrix of J. R. K. Cowan, deceased, should have been permitted to recover judgment for the amount due under the lease contract, and to thereupon participate in the funds under control of the Court.

IN CONSIDERATION WHEREOF, your petitioner prays that she may be awarded an appeal and supersedeas to the decrees entered by the Court of Law and Chancery for the City of Roanoke on March 22-23, 1939, and that said decrees may be reviewed and reversed by this Honorable Court, and that judgment may be entered by it for your petitioner.

Petitioner requests that her counsel may be permitted an opportunity of stating orally their reasons why the petition shall be granted. In the event an appeal is awarded, petitioner adopts this petition as her opening brief in her behalf.

A copy of this petition was mailed to W. H. Colhoun, Julius Goodman and Holman Willis on April 14, 1939.

Your petitioner will ever pray, etc.

Respectfully,

J. R. K. COWAN'S ADMINISTRATRIX,
MARGARET K. COWAN,
By Counsel.

W. J. HENSON,
T. S. WORD,
TED DALTON,
Counsel.

9* We, W. J. Henson and Ted Dalton of the City of Radford, Virginia, attorneys practicing in the Supreme Court of Appeals of Virginia, do certify that in our opinion the decree complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals of Virginia.

Given under our hand this 14th day of April, 1939.

W. J. HENSON,
TED DALTON.

Received April 19, 1939.

M. B. WATTS, Clerk.

June 9, 1939. Appeal and supersedeas awarded by the Court.

M. B. W.