142-493

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IN THE

Supreme Court of Appeals of Virginia At Wytheville.

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JUNE TERM, 1925.

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RACHEL POWERS BLEVINS, Appellant

VS.

W. R. D. MONCURE, Exr. et al., Appellee.

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BRIEF OF COUNSEL FOR APPELLEE

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STATEMENT OF FACTS

J. M. Lovelace of Smyth County departed this life June 5th, 1922, having made his last will and testament, dated March 1st 1921. He left surviving him as his sole heir at law and devisee, a great-granddaughter, Vir-

ginia Minnick. He devised to her his home place and farm containing 150 acres, and likewise bequeathed to her all of his household and kitchen furniture. He appointed one H. L. Bonham guardian of his great-granddaughter and gave him plenary authority in handling the farm during his term as guardian. He also clothed him with the authority to direct the sale of the household furniture, etc., should he in his discretion think it best. In Clause One of his will he directed his Executor to sell two certain mountain tracts of land and a house and lot in the Town of Abingdon and out of the proceeds of the sale and funds in the hands of Executor collected from other sources he directed that all of his just and provable debts be paid. He further, in Clause Four of his will, bequeath to Rachel Powers, the appellant, One Thousand Dollars to be paid out of the funds derived from the sale of his property described in Clause One of his will.

After the will had been regularly probated in the Clerk's Office of the Circuit Court of Smyth County and W. R. D. Moncure, who was appointed Executor in said will, had duly qualified, and all of the creditors had filed their claims against the estate of J. M. Lovelace with the Executor, the Executor proceeded to perform under the will. He reduced all of the collectible debts owing the estate to cash, sold the real estate directed to be sold in Clause One of the will. The funds coming into his hands were insufficient to pay all of the provable debts against the state and the Executor could not pay the legacy to Rachel Powers.

Rachel Powers, the appellant, filed her claim with the Executor for $107.00 for services rendered, and said claim was allowed and paid. No other claim was ever filed with the Executor by the said Rachel Powers, than her claim for $107.00.

Appellant then proceeded to bring a suit in chancery in the Circuit Court of Smyth County in which she made the said W. R. D. Moncure, Executor, the said H. L. Bonham, Guardian, and George F. Cook, Guardian ad Litem, defendants. She alleged that the bequest of $1000.00 was a demonstrative legacy and should be paid out of the proceeds of the sale of the property willed to Virginia Minnick. In Clause Nine of appellant's bill of complaint filed in this suit, she alleges "that really this legacy to her was in payment of a debt for services that she rendered to the said testator, etc." See page 15 of printed record. All of the depositions taken by appellant in this suit were taken for the purpose to prove that the legacy was made in the performance of a verbal contract by testator, and the prayer of the bill asks the Court to give this legacy the same priority with the other provable debts of the estate as mentioned in Clause One of said will. See page 16 of printed record. A final decree was entered in this suit on January 24, 1924, denying the relief prayed for, and affirmatively asserted that the provision of One Thousand Dollars provided for Rachel P. Blevins, nee Powers, was a legacy subjected to the indebtedness of the said J. M. Lovelace. The Court pronounced it a legacy and not an acknowledgment of a debt founded on a verbal contract as alleged in Clause Nine of said bill.

Appellant, after being defeated in her suit in chancery, then brings an action at law against the same parties and files her declaration at the first September Rules, 1924. In said declaration, she again asserts her claim to the $1,000.00 legacy bequeathed to her in said will, and bases her said claim upon a verbal contract to the effect that the late J. M. Lovelace faithfully agreed that in consideration for her remaining and caring for him and his home until his death, he would bequeath to

her the sum of One Thousand Dollars. The defendants, W. R. D. Moncure, Executor, et als., filed two special pleas, namely, condition performed and Res Adjudicata. See page 11 of printed record. The Court passed upon the plea of Res Adjudicata by sustaining the plea and striking the case from the docket.

THE QUESTIONS INVOLVED

First: Was it error for the issue raised by the plea of Res Adjudicata to the declaration in the action at law to be passed upon by the Court without the intervention of a Jury.

Second: Was the cause of action set out in the declaration in the action at law adjudicated on its merits in the chancery suit.

Propositions and authorities relied upon for appellee.

(1) A plea of Res Adjudicata must be tried by the Court by inspection of the records; it is error to submit it to the Jury.

Davis vs. Trump 43 W. Va., 191; 27 S. E., 397.
Brown vs. Cook, 77 W. Va., 356; 87 S. E., 454.
15 R. C. L., page 1053, Sec. 533.

(2) When the second suit is between the same parties as the first, and on the same cause of action, the judgment or final decree in the former is conclusive in the latter, not only as to every question which was decided, but also as to every other matter which the parties might have litigated and had determined within the issues as they were made, or as incident to or essentially connected with the subject matter of the litigation whether the same, as a matter of fact, were or were not

considered.

15 R. C. L., page 962, Sections 438 and 439.
Gallagher et al. vs. City of Moundsville, 34 W. Va., 730; 12 S. E., 859.
Dillard vs. Dillard et als., 97 Va. 434.
Brunner vs. Cook et al., 134 Va., 271.
Ivey vs. Lewis, 133 Va., 145.

(3) A judgment upon the merits bars a subsequent suit upon the same cause, though brought in a different form of action.

15 R. C. L., page 965, Sec. 439.
Dillard vs. Dillard, et al., 97 Va., 434.

ARGUMENT

The questions involved in this case are narrow and will not be found difficult of solution.

I.

The first assignment of error is to the effect that the plea of Res Adjudicata to the declaration in the action at law could not be passed upon by the Court without the intervention of a Jury. It would have been error to have submitted the plea of Res Adjudicata to be tried by a Jury as only the records in the two cases are relied upon and the determination of the point whether the plea of Res Adjudicata was a good plea in this case is solely a matter of law to be determined from the record. See cases cited (1) under the head of Propositions and Authorities relied upon by appellee.

II.

In considering the second assignment of error on an examination of the pleadings of the suit in chancery and the action at law exactly the same cause of action is asserted and the same subject matter is involved, namely, the legacy of One Thousand Dollars bequeathed to appellant. In the first suit appellant elected to regard the bequest as a demonstrative legacy founded on a promise by the testator during his life time to make such a legacy and that the promise was made on the consideration that appellant was to remain as the housekeeper of the testator until his death. See Clause Nine of the bill of complaint of appellant in the chancery suit, printed record page 9. The prayer of the bill asks that this legacy be paid out of the funds of the said testator's estate along with the other provable debts of the estate. See page 16 of printed record.

All of the depositions taken in behalf of appellant in the suit in chancery undertook to prove that the legacy was founded on a verbal contract, namely, a promise to make appellant the beneficiary of a legacy of One Thousand Dollars.

In the action at law, in which both the parties plaintiff and defendant are the same as the parties plaintiff and defendant in the suit in chancery, the declaration sets up exactly the same facts, quoting from the declaration (see page 9 of printed record):

> "And the further consideration to bequeath to plaintiff the sum of One Thousand Dollars, the said plaintiff did remain with the said J. M. Lovelace, now deceased, etc."

An examination of the depositions of the appellant

in the chancery suit plainly shows that the evidence produced to sustain the allegations of said chancery suit would be exactly the same evidence to sustain the declaration of the action at law. The Court, in the suit in chancery, decided the case on its merits and the wording of the decree shows that the Court considered all of the allegations and issues raised in the suit.—See final decree entered in suit in chancery, page 43 of printed record.

The action at law between the same parties was upon the same claim and demand. The only difference is that the appellant abandoned the position of a demonstrative legacy, which she elected to take in bringing her suit in equity, and in her action at law that her claim is based upon a verbal contract, namely, a promise on the part of the testator that he would bequeath her One Thousand Dollars. In her bill of complaint in the first action she alleges that testator fulfilled his promise and bequeathed her One Thousand Dollars and filed the will as an exhibit to her bill and in her second action she alleges

> "That J. M. Lovelace, the testator, contriving and wrongfully intending to injure her, did not nor did perform the said promise and undertaking * * * * * * * * and wholly neglected to fulfill his promise to bequeath to her the One Thousand Dollars but on the other hand bequeathed nothing to her.
>
> See page 9 of printed record.

It is therefore apparent that the cause of action and the parties to the two actions are identical and the only difference is one is a suit in chancery and the other an action at law, one sets up a demonstrative legacy founded on a promise to make said legacy and the other abandoning and denying any legacy at all and founded on a

promise to make a bequest of One Thousand Dollars. The test of indentity of the second suit with the first suit is whether the same evidence would sustain both. If the same evidence would sustain both, the two actions are considered the same, and the judgment in the former is a bar to the subsequent action, although the two actions are different in form. Therefore, with this test in mind no other conclusion can be reached than that appellant has blown hot and cold and that the only difference between her two actions is that one was in equity and the other at law.

The appellant relies upon the fact that no special contract was mentioned in the bill nor referred to and was not before the Court in any way and was not passed upon and could not have been passed upon by the Court. Her declaration further alleges that she is relying on a specific contract to bequeath for a valuable consideration An examination of the bill in the chancery suit plainly shows that appellant sets up the promise, alleges a specific contract to bequeath for a valuable consideration and further states that the testator fully performed his promise and filed as an exhibit testator's will to show that he had performed and then prays the Court to declare the legacy a demonstrative legacy and give it the same priority with the other provable debts against the estate.

I submit that there is no reversible error against the plaintiff in this case, and that the judgment of the lower Court should be affirmed.

Respectfully submitted,

GEORGE F. COOK,
Attorney.