IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

PARKSLEY NATIONAL BANK, et als.,
Appellants

vs.

J. W. CHANDLER'S ADMINISTRATORS, et als.,
Appellees

BRIEF FOR NORTHAMPTON LUMBER COMPANY, A CORPORATION, C. M. JOHNSON AND LOTTIE F. MISTER

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and
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Attorneys
for Northampton Lumber Company,
C. M. Johnson and Lottie F. Mister.

THE EASTERN SHORE PUBLISHING CO., INC., ONANCOCK, VIRGINIA

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BRIEF FOR NORTHAMPTON LUMBER CO., A CORPORATION, C. M. JOHNSON, AND LOTTIE F. MISTER

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

Your respondents, the Northampton Lumber Company, a corporation, C. M. Johnson and Lottie F. Mister, respectfully beg leave to file the following brief in support of the decrees entered by the Circuit Court of Northampton County, Virginia, in the above cause on January 30, 1937, and May 19, 1937, respectively, as a reply brief to the petition filed in this Court by the Appellants. The facts alleged

in petition of appellants are substantially correct, except as hereinafter pointed out.

A. That as to the decree of January 30, 1937 it believes that the decree was clearly right and that no error was committed by the trial court, but that the defense against the claims which were disallowed was made by counsel for the administrators of the estate, and it presumes that said counsel will file proper reply to the petition with regard thereto. Consequently no reply thereto is hereby made.

B. That as to the decree of May 19, 1937 and the assignments of error with regard thereto, it submits as follows:

(1) The petitioners assert first that the decree was prematurely entered, and that no sale of any real estate by said decree set out should have been ordered until an appeal from the decree of January 30, 1937 by petitioners had been denied or, if allowed, until the questions raised should have been determined by this honorable court.

These respondents admit that as a general principle of law in every case of a creditor's bill before the entry of a decree of sale there should be a reference to a commissioner in chancery to determine the indebtedness and the character, nature, amount and priority of same. In this case there was a conformity in every respect to the established and undisputed rules of law and procedure. The record discloses that on May 8, 1936 the cause was referred to W. A. Dickinson, a special commissioner in chancery, for the purpose of ascertaining the indebtedness of the estate and determining the nature, amounts and priorities of such indebtedness and

taking an account of the personal estate of the decedent and the transactions of the administrators. The said commissioner in chancery thereafter properly executed the decree by having several hearings and taking many depositions and receiving proofs of claims. He likewise received the report of the administrators and took an accounting of their transactions. He filed his report with all his evidence and exhibits on January 1, 1937, upon which report and the exceptions thereto the court ruled by its decree of January 30, 1937, which is one of the decrees of which petitioners are aggrieved. Thus it is submitted that proper reference was had and accounts taken in this case before the entry of any decree of sale.

Counsel for petitioners cites the case of Simmons v. Lyles, 27 Gratt. 922, as authority for his position in the petition. This case is not at all in point. The principle of law invoked in the cited case is not questioned, but in that case it appears that no account of the indebtedness of the estate stating the debts and order of priority was taken before decree for sale, but such accounting and reference was ordered in the same decree providing for the sale. The court said that there was no impropriety in taking an account of the personal property, but it did not say that this was even necessary much less that a complete administration of the personal estate was necessary before resorting to the real estate of a decedent.

Certainly petitioners do not contend that a creditor of a decedent is precluded from resorting to his real estate for payment of a debt due him until after complete exhaustion of the personal estate. Even in the case of a creditor's bill

against a living debtor, no such order of exhaustion is required, but either real or personal property, or both, may be resorted to at the same time or as the creditor sees fit. *Rush v. Dickinson County Bank 128 Va. 114.* Surely in the case of a decedent where every debt, immediately upon his death, becomes a lien upon his property and the chief obligation of the administrators or executors is to first pay the decedent's debt, the requirement cannot and will not be more stringent as to the recourse of a creditor.

The necessity of prompt sale of real estate of a decedent's estate becomes more obvious when it is apparent that the estate as a whole is of very doubtful solvency. The record in this case shows that the indebtedness of the estate of J. W. Chandler which has been allowed and approved by the court is $190,510.62 in principal amount, with considerable accrued interest. The value of the real estate of the decedent as reported by the commissioner in chancery in this case is $130,325.00; and the personal estate was originally appraised at $161,102.68. Since there are no liens against the real estate paramount to the widow's dower she is endowed in all of his real estate. She has consented to have the real estate sold free from her dower and have the commuted value paid her in cash. At her present age her dower interest is approximately 22% of the value of the property, so it is evident that the real estate will be reduced by that amount as a means of satisfaction of the debts of the estate. It is quite evident to anyone that the real estate will not bring the reported value. Thus far the special commissioners appointed in this case have sold twenty-one parcels of real estate of the reported value of $23,425.00 for the sum of $16,526.00, and these sales have been duly

confirmed by the court without objection from anyone. It is thus apparent that the property thus far sold realized only about 70% of its reported value, and it is reasonable to expect that the same percentage will prevail as to the residue unsold. On November 4, 1936 the administrators in their accounting before the commissioner in chancery in this cause disclosed that since their qualification they had only collected the sum of $34,201.90 of the appraised estate in personalty of $161,102.68, and on that date had in hand only the sum of $3,641.20. Of the amount thus collected and expended a large part had been paid on taxes, costs, preferred claims and secured claims which are not reflected in the $190,510.62 indebtedness proved and allowed against the estate. Practically all of the personal estate of any value is held by creditors as collateral, and there remains the probability of practically nothing becoming available to the unsecured general creditors from the personal estate. It seems evident to your replicant that the estate is insolvent on the basis of presently allowed claims.

Your respondents would represent that seven lots at Oyster were ordered sold by decree of March 17, 1937 and May 10, 1937 without objection from any party, and the sales thereof have been confirmed.

The administrators, widow, and infant heir have raised no objection to the sale of the said property. Ten parcels of land were advertised for sale on July 3, 1937 by the special commissioners, and upon the request of counsel for the administrators, widow and infant heir five more parcels were advertised and sold on the same day and the said sales have been confirmed with the approval of said counsel. It is

therefore apparent that the parties with the most right to object to a sale of realty before exhaustion of personal estate, if such could be rightfully raised, have acquiesced in the sale of the said real estate.

It is obvious that the law never contemplated more than a reference and accounting in the trial court before order of sale, and there is no case to be found supporting such a view. To require that no recourse be had against the real estate of a decedent and that no sale be decreed until every question raised in the trial court and determined by it could be adjudicated in a court of appeals would work incalculable hardship and loss upon creditors. Land may depreciate in value, probably is in this locality; rents and profits may be negligible and insufficient to care for even taxes and insurance; buildings are depreciating; interest is accruing on the claims against the estate; two and a half years have already elapsed without the payment of one cent on the unsecured or unpreferred claims; at best with real estate sold on deferred purchase money terms which is the only logical method of sale in this locality it will be long before the estate is settled, be the court as diligent and expeditious as possible to hurry up settlement; these things dictate and require that the land of this estate be sold as promptly as possible so that the least possible loss may be entailed upon the creditors of the estate. Should an appeal be granted the petitioners from the decree ascertaining the indebtedness entered on January 30, 1937, the court would protect the interest of the persons whose claims were in question by reserving from distribution a pro rata amount to care for them in event their contention should be sustained.

It is therefore submitted that the real estate should be sold and as quickly as possible, and that there is no merit in the first assignment of error referred to.

(2) As to the appointment of commissioners for the purpose of sale.

Respondents submit that as to this assignment of error the trial court is vested with a very wide discretion as to whom it may select and appoint as special commissioners to make sale under a creditor's suit. Such commissioner is merely an agent of the court and is obligated to carry out faithfully and impartially the decree of the court. Unless the persons appointed are grossly personally unfit the courts will not, and should not, interfere with the exercise of the court's discretion in their appointment. That this discretion is possessed by the court has been free from question; its abuse only has been called into review. In the case of Teel et als. v. Yancey et als., 23 Gratt. 691, Judge Christian laid the principle down in the following language:

> "A commissioner is but the agent of the court. A sale by a commissioner is a sale by the court; his acts are subject to the control and superintendence of the court, and are liable to exception by any person interested; and indeed there is no sale without the approval of the court."

And again the freedom of the court in naming the special commissioners is well and forcefully set forth in the case of Goddin v. Vaughan's Ex'x et als., 14 Gratt. 102, by Judge Lee in language that has never been questioned as follows:

> "It is the constant practice of the courts to name the counsel prosecuting a claim to a decree for the sale of property as the commissioner, and I am not aware that the legality of such an appointment has been heretofore questioned. If there be no objection personally, to the counsel so named (and any personal objection in this case is wholly disclaimed), I cannot see any impropriety in such an appointment and especially as the whole matter is under the control of the court whose duty it is to see that its commissioner has acted with perfect fairness and impartiality, and to correct and, if necessary, punish any deviation from the line of duty. Nor do I see any necessity or particular propriety in associating with him the counsel of the other party. If the former is liable to be biased in favor of his clients, the latter is not less so in favor of his, and from this diversity of interests divided counsels might ensue not at all favorable to the prompt and harmonious execution of the decree of the court. At any rate it is a matter within the sound discretion of the court."

And also in Teel v. Yancey, supra, Judge Christian further says:

> "Under the English practice in chancery proceedings, the conduct of the sales is usually given to the plaintiff, or other party having charge of the general proceedings (See 2 Dan. Ch. Pr. 1267). Nor is there anything in the rules, of chancery practice in our courts, which forbids such appointment. The commissioner is the officer of the court, and acts under its supervision. His errors, when brought to the notice of the court, or when

> appearing on the face of the proceedings, will be corrected."

And to like effect is Barton's Chancery Practice, 3rd Edition 881:

> "Independent of statutory provisions on the subject, it is the general right of a court decreeing a sale, to appoint some one as its agent to make it, and the selection of the person is a matter for the proper discretion of the court where there is any dispute about it."
> Also see Section 6266, Code of Virginia.

The petitioners are aggrieved by the refusal or failure of the court to appoint their counsel as one of the special commissioners to make sale of the real estate in this case. It has been heretofore asserted that the court was vested with a discretion which it properly exercised; but aside from this it would have been an improper exercise of the court's discretion to have appointed the said counsel for the reason that he has a very substantial interest in a claim asserted in this cause. It appears from the record in this case that one of the claims asserted against the estate of J. W. Chandler was for $40,178.02 upon three notes made by J. W. Chandler, *G. Walter Mapp*, counsel for petitioners, and others; one for $20,840.00 dated Nov. 1, 1933, one for $11,061.00 dated Dec. 30, 1933 and one for $8,277.02 dated Dec. 30, 1933. Since Mr. Mapp is one of the joint makers of these notes his interest is very vitally and substantially affected by virtue of the law of contribution by the amount realized thereon from the Chandler estate. Lest the same be not incorporated in the record in this case the following

excerpt from the decree of the Circuit Court of Northampton County entered on January 30, 1937, is quoted:

> "It doth sustain Exception No. 37 of J. Brooks Mapp, administrator, et als. to the report of said special commissioner of a claim in favor of Parksley National Bank in the sum of $40,178.02, represented by three notes of J. W. Chandler, G. Walter Mapp, A. J. Rew and C. B. Ross, said notes being in the principal amounts of
>
> $20,840.00
> 11,061.00
> 8,277.02
>
> "It appears to the court from the evidence of S. C. White that he is jointly and severally liable along with the four obligors on said note.
>
> "The court doth adjudge, order and decree, however that said claim be and the same hereby is approved against the estate of J. W. Chandler in favor of S. C. White, without prejudice as to the right of said estate to seek contribution from the other three obligors and S. C. White on the notes representing said indebtedness, of any amount or amounts that may be due by said three obligors and S. C. White."

The courts seem to deny to such a party in interest the right to be a special commissioner for the sale of property sought to be subjected to the satisfaction of such a claim. Barton's Chancery Practice, 3rd Edition, p. 882 states the law as follows:

> "It is undoubtedly better, and the usual practice,

> not to appoint as commissioner one who has a personal interest in the suit."

And to the same effect is the holding of the court in the case of Etter v. Scott, 90 Va. 762:

> "It was error in the cause of Painter against Scott to appoint F. S. Blair, who was assignee and owner of one-half of the debt claimed in the bill, the commissioner to sell. His interest made him incompetent to act as a commissioner of sale."

So your respondents contend that in declining to appoint counsel for petitioners one of the special commissioners the court exercised properly the discretion vested in him.

Counsel for petitioners has gone to length in his petition to state the claims represented by him, etc. While respondents feel that such has no bearing upon the case, yet for the enlightenment of the court would like to also cumber the record with the fact, that while petitioners' counsel represented approved claims in the amount of $75,381.61 (figures of petition accepted as to same without verification), counsel for respondents represent approved claims in the amount of $59,351.17; Mears & Mears represent approved claims in the amount of $11,820.85; S. K. Powell represents approved claim of $136.62; R. T. Gladstone, Jr., represents approved claim of $606.10; Nottingham and Nottingham represent approved claim of $404.67; and approved claims of $42,809.60 are represented by no attorney of record. It should be noted that among the approved claims represented by counsel for petitioners is the claim approved to S. C. White for $40,178.02 in which he

is vitally interested, and that practically all claims represented by petitioners' counsel are largely secured by pledged collateral, while practically all of claims represented by respondents' counsel are unsecured general claims. Respondents, therefore, deny that petitioners' counsel represents over 50% of the approved claims, but on the contrary asserts that he represents less than 40% of all approved claims.

It would seem to be unnecessary to reply to the suggestion that counsel for the widow and the infant son should be appointed one of the special commissioners. No complaint is being raised by him or them in the form of appeal to the action of the court in not naming him as one of them, and it ill behooves counsel for petitioners to set up a straw man to be knocked down by counsel for respondents. Suffice it to be said that it is practically evident that nothing will ever come to the infant heir at law from the estate, and the widow's dower will be duly ascertained and paid her without costs or charges to her so that neither really has such an interest in the sale of the property as would entitle them to representation among the commissioners if interest played any part in the court's selection.

It should further be stated that the court in this case followed the custom in the appointment of special commissioners to which he has uniformly conformed since he has been upon the bench seven years, and the custom that was followed and adhered to by the late venerable Judge Blackstone on this circuit.

It is therefore submitted that the court's action in the

appointment of the special commissioners was imminently right.

From the above asserted facts and law your respondents submit that the decrees entered by the Circuit Court of Northampton County, Virginia, should be affirmed.

Respectfully submitted,

NORTHAMPTON LUMBER COMPANY,
a corporation.
C. M. JOHNSON,
LOTTIE F. MISTER.

By—

DUNTON J. FATHERLY,
and
CHARLES M. LANKFORD, JR.,
Their Attorneys.