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New Jersey Court of Errors and Appeals.

GRACE LIVINGSTON FURNISS,
ET ALS,

Appellants,

AND

WILLIAM H. LEUPP, Trustee,

Respondent.

BRIEF OF WILLARD P. VOORHEES.

Of Counsel with Respondent.

This appeal is from an order of the Chancellor advised by Vice Chancellor Pitney allowing the trustee to withhold from life tenants of the trust fund certain deferred income collected by the trustee, and to apply the same in liquidation of certain indebtedness due from the life tenants to the trust. (Pg. 33 et seq.)

The proceedings were instituted in the Court of Chancery by the joint petition of Grace L. and William P. Furniss, praying that the Trustee might be directed to pay to the petitioners their deferred income. (P. 2.) The Chancellor after hearing, denied the relief.

The Trust arises under a deed dated July 31, 1882, made by the applicants to Solon Humphreys. (P. 10.)

The following recital of facts may aid in the consideration of the case.

On July 16th, 1901, an order was made by the Chancellor upon the petition of Grace Livingston Furniss appointing William H. Leupp, Trustee of the above

Trust, in the place of Solon Humphreys, deceased, who was the trustee originally appointed by the deed of settlement. (P. 5.)

This order was broad enough to vest in the new trustee not only the assets specifically enumerated in the order, but "All other assets of said Trust" as well. (Page 8, lines 19-23.)

On March 16th, 1904, Grace Livingston Furniss and her brother William P. Furniss, filed joint petition (p. 2) reciting among other things that Leupp, the present trustee, had theretofore "received the proceeds of a certain note and mortgage known as the Crosby mortgage, part of the assets of said estate the accrued interest on said mortgage amounting to more than thirteen hundred dollars."

That demand had been made upon the Trustee for payment to the petitioners of this accrued income, but said Trustee had refused. The petition prays for an order directing the Trustee to pay over this income. The petition has annexed to it a copy of the order appointing Leupp trustee (p. 5) and also a copy of the deed of settlement whereby the Trust was created, dated July thirty-first, eighteen hundred and eighty-two, made by the petitioners of the one part and Solon Humphreys of the second part. (P. 10.)

The order of appointment has the following clause: "Nothing herein contained shall be taken as an approval of the Master's Report *except as the same is herein expressly approved.*" (P. 10, l. 3.)

The settlement provided for the investment and reinvestment of certain securities of the par value of one hundred and two thousand seven hundred and nineteen dollars and forty-four cents (\$102,719.44), and the paying over the net income therefrom as follows (p. 15):

To William, the income on a certain mortgage for thirty-nine thousand three hundred and seventy-five (\$39,375.00) dollars, known as the Wall Street Mortgage, and on the securities in which the proceeds thereof may be invested, and also the income on three thou-

sand (\$3,000.00) dollars of New York City Bonds. (P. 15, l. 10.)

To Grace, the net income on the balance of the Trust, differences in proportional amounts so received by the parties to be adjusted by the Trustee, "it being the intent to provide for the payment to Grace of the income of securities of the par value of sixty-one thousand three hundred and fifty-nine dollars and seventy-two cents (\$61,359.72), and to William of the income of securities of the par value of forty-one thousand three hundred and fifty-nine dollars and seventy-two cents (\$41,359.72). All excess of income without the proportions herein expressed to be adjusted as aforesaid." (P. 15, line 19.)

If Grace die before William, then payment to be made as aforesaid to her issue until of age, when the capital shall be paid to the issue. (P. 15, line 36.)

If Grace die without issue then the principal to be paid to William, if living, if William then be dead, then the net income to Louise Evelyn Furniss, their mother (she is now deceased). (P. 16, line 10.)

If neither William nor his mother Louise Evelyn Furniss be living, at death of Grace (she leaving no issue), then the principal to be paid to next of kin of Grace, according to the New Jersey Statutes of Distribution. (P. 16, line 18.)

If William die leaving no issue, then his principal to be paid to Grace, if living. If at William's death, Grace be dead, then the income to be paid to Louise Evelyn, and if neither Grace nor her mother be living at William's death (he leaving no lawful issue), the principal to be distributed in like manner according to the New Jersey Statutes of Distribution to his next of kin. (P. 16, line 29.) Grace is unmarried. William is married and has children living.

The settlement also contains a clause against anticipation. Grace and William "shall not have any power to anticipate charge or encumber the principal fund . . . or the increase, interest or income thereof, or in any

way defeat the intent of this instrument." (P. 17, line 11.)

It also provides that "The Trustee shall not be responsible except for gross negligence, actual fraud or wilful misfeasance to said parties of the first part."

To this petition Leupp the present Trustee filed his answer (p. 20) setting up a written agreement of February twenty-five, eighteen hundred and ninety-five (1895), between William and his wife Hetty Hart Furniss, whereby he, William, assigned to her one-half of his income and directed the Trustee to pay to his wife such one-half part.

Also that Leupp, Trustee, on October twenty-nine, nineteen hundred and three (1903), recovered from the estate of the former trustee, Solon Humphreys, seven thousand and sixteen dollars and ninety-two cents (\$7,016.92), being the Crosby Loan (made by Humphreys, Trustee, in his lifetime upon inadequate and improper security), of which amount, thirteen hundred and sixteen dollars and ninety-two cents (\$1,316.92) was accrued interest, which amount of accrued interest admittedly belonged to the beneficiaries of the Trust, subject to the charges of the Trust.

The answer then alleges that Grace borrowed of Humphreys, Trustee, on July twenty-first, eighteen hundred and eighty-nine (1889), on mortgage on Nantucket property, fifteen hundred dollars (\$1,500.00), that she transferred this property to William on April fourteen, eighteen hundred and ninety-four (1894), and that William assumed the payment of the mortgage, that on September thirty, eighteen hundred and ninety-seven (1897), William borrowed of Humphreys, Trustee, on mortgages on the aforesaid property at Nantucket and also upon other property at Nantucket, three hundred and fifty (\$350.00) dollars and alleged that these loans were made by Humphreys in excess of his power as Trustee and contrary to law, because on inadequate security and upon lands out of the State of New Jersey, and because made to the *cestuis que trustent*, and that William is primarily liable for these mortgages and

Grace secondarily liable for the fifteen hundred (\$1,500.00) dollar mortgage and the whole of the aggregate principal, eighteen hundred and fifty (\$1,850.00) is due and unpaid on the mortgages, with large arrears of interest, and that Grace and William are not entitled to be paid the income upon the Trust Estate until these mortgages have been paid to the Trustee.

It was also claimed in the answer that inasmuch as the Trustee alone is a party to these proceedings and the rights of others are necessarily involved, no binding decree could be made thereon, and further that the questions could not be determined *upon petition*, but that resort must be had to *bill and subpoena*.

As authority for the last position see

Receiver of State Bank vs. First National Bank,
7 Stew. 450.

When this matter was presented to the Court, it was suggested by the Vice Chancellor that if the loans upon the Nantucket mortgages were in violation of the so-called "*Spend-thrift*" clause that fact might prevent the former trustee (who had thereby been guilty of a breach of trust in connection with Grace and William) from recovering from them, and that the present Trustee might also be precluded from enforcing the return of such moneys from them being in no better position than his predecessor.

The so-called spend-thrift clause or restraint of alienation or anticipation in the deed of settlement, however, is inoperative in this case.

It seems to have been lost sight of that Grace L. Furniss and William P. Furniss are the children of William Furniss and Louise Evelyn Furniss, and are, therefore, brother and sister. (P. 11, line 4.) Consequently Grace L. Furniss is an unmarried woman.

It is said in 1 Perry on Trusts, page 386:

"Trusts cannot be created with a proviso, that the equitable estate or interest of the *cestui que trust*, shall not be alienated or charged with debts.

The law does not allow property, whether legal or equitable, to be fettered by restraint upon alienation. Therefore, when an equitable interest is once vested in the *cestui que trust*, he may dispose of it."

And in section 387, speaking of the exception to the rule, the author says:

"A further exception to the general rule with an equitable interest, without the right to alienate cannot be created is the case of Trusts created for married women."

The leading case is *Tullett v. Armstrong*, 1 Beav. 1-33, 4 My. & Cr. 390.

The rule, as derived from this case, found in 3d English Ruling Cases (page 214), is as follows:

"A restraint against anticipation is valid only as a modification of the separate estate conferred upon a married woman. If a gift of income is made to a woman, who is unmarried, expressed to be for her separate use, without power of anticipation, then since the separate use, cannot, while she is unmarried, have any effect, the restraint on anticipation is likewise suspended. But if she marries without having alienated the future payments, both the separate use and the restraint attach during the coverture. On becoming discoverd she again becomes free to alienate."

See also *Shirley v. Shirley*, 9 Paige, 363.

2d Pomeroy, Eq. Jur. Section 989.

Methodist Episcopal Church v. Jaques, 3d Johnson Chancery, 76.

S. C. on Appeal, 17 Johnson, 548.

There was no discretion in this case left in the Trustees as to when they would pay over the income or for what purpose. But they were directed "to pay over the net income thereof semi-annually on the first day of January and July, from and after the date of these presents, to the parties of the first part." (Page 15, line 6.) Hence the clause against anticipation is in this case suspended as to Grace L. Furniss until she should become

a married woman, and was never operative against William P. Furniss.

There was no anticipation by the life tenants in this case.

It is submitted that there is nothing in the loaning by the trustee to the life tenants upon good security of a portion of the corpus of the trust estate, which amounts to an anticipation. It may be an act deserving adverse criticism and one which a trustee would not do, but the act itself does not amount to an anticipation or alienation.

The words in the settlement are "anticipate, charge or encumber." The last two are not applicable to this case, and the first is not met by the facts. There is no payment of principal or income before it is due under the deed. There is no violation of the settlement or attempt to defeat its intent which is declared to be "to make provision for the support and maintenance of the parties of the first part *free from liens and claims of creditors.*" (P. 17, line 22.)

The restraint upon anticipation even if valid will not prevent the recoupment.

By denying the right to recoup the Court would aid the *cestui que trust* in getting possession of the *corpus* of the estate and assist in what has been urged as a violation of the settlement rather than in preserving it.

Let us assume then that the loans to Grace and William were violative of the clause under consideration. *Perry on Trusts* (2d Edition), Sec. 543, says:

"If at any time the tenant for life obtains more than belongs to him, *the trustee may withhold or recoup from the present income.*" and cites *Williams vs. Allen*, 32 *Beav.* 650. *Barratt vs. Wyatt*, 30 *Beav.* 442.

In *Lewin on Trusts* (1st American from 8th English Edition), at page 911, it is said: "If a *cestui que*

trust, whether tenantfor life or other person having a partial interest be responsible for having joined in a breach of trust all the benefit that would have accrued to him either directly or derivitively (*Jacobs vs. Ry-lance*, 17 L. R. Eq. 341), either from that trust fund or any other estate comprised in the same settlement, may be stopped by the *cestius que trust* or other person having a similar equity as against him and all who claim under him *until the amount impounded with the accumulations thereon has compensated the trust estate for the loss* for which that *cestui que trust* is responsible, and this rule applies to *femme covert* entitled to separate use, where her power of anticipation is restrained, and if the *cestui que trust* be one of three trustees and joined with the co-trustees in a breach of trust and the co-trustees have been made to repair the breach of trust, the co-trustees have a lien on the share of the *cestui que trust*, who is also a trustee for contribution of one-third towards the amount paid by them for clearing the joint breach of trust."

Raby vs. Ridgehalgh, 7 Deg. M. & G. 104, was a case in which trustées had committed a breach by making an unlawful investment on mortgage, and that at the instance of one or more of the *cestius que trustent* without regard to the interest of the others from which a loss resulted; it was held to be a breach of trust for which the trustee was responsible. Lord Justice Turner said:

"The Trustees then being liable to replace those trust funds the next question is, What is the extent of liability which attaches upon the *cestius que trustent* for life in consequence of their having induced the trustees to commit the breach of trust? Now the *cestius que trustent* for life who instigated the trustees to commit the breach of trust, have derived from that breach of trust the advantage of enjoying the increased income of the fund not duly invested according to the trust and the consequence of that is that the *cestius que trustent* in remainder have a right to have that income refunded and made good by the *cestius que trustent* for life. It is trust money received by them under

a breach of trust to which they were privy and the effect I apprehend must be that, as the loss which ought to fall on those who instigated the breach of trust has been laid by the Court upon the Trustee, the trustees are entitled to stand in the place of the *cestius que trustent* in remainder for the purpose of recovering against the *cestius que trustent* for life who instigated the breach of trust, or their estate, the benefit actually received by them in consequence of such breach of trust. It seems to me to be the necessary consequence of the *cestius que trustent* for life having received the income of the trust fund unduly invested, that the trustees have a right to be indemnified as against the *cestuis que trustent* for life or their estates, to the extent to which those estates have been benefitted by the "improper investment."

See also *Moore v. Moore*, 1 *Collier, Chap. 54*; *Buttler v. Cumpson*, *L. R. Eq. Cases, Vol. 7, p. 16*, aptly cited by the learned Vice Chancellor.

These cases certainly establish the principle that the Trustee stands for the remaindermen and that his participation in a breach of trust does not prevent his recovery from the other guilty party, for the benefit of the remaindermen.

If the mortgages in the present case are considered an advancement, then Grace and William's liability is measured by the amount borrowed and assumed by them.

The present Trustee in his official capacity represents the fund and the remaindermen. He has a right to enforce the contract of Grace and William to repay the loans.

A National Bank is prohibited by law from loaning on mortgage, yet the mortgagor cannot avail himself of such defence.

National Bank St. Louis vs. Matthews, 98 U. S. 621.

Fortier vs. New Orleans National Bank, 112 U. S. 439.

Thompson vs. St. Nich. National Bank, 146 U. S. 240.

It is respectfully submitted that the contention by the Trustee of his right to recoup the accrued income against the debt of the life tenant should be sustained, and the appeal dismissed.

WILLARD P. VOORHEES,
Of Counsel with Respondent.

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