

New Jersey Prerogative Court.

In the Matter

of

The Estate of F. AUGUSTUS
HEINZE, on appeal from order
of Hudson Orphan's Court; re-
moving an Administrator and
appointing others.

Mr. ROBERT H. McCARTER and Mr. FRANK P.
McDERMOTT for Appellant. McCARTER and ENG-
LISH, Proctors. Mr. GILBERT COLLINS for Respond-
ent. COLLINS and CORBIN, Proctors.

LANE, V. O.

This is an appeal from an order of the Orphan's Court, removing appellant Arthur P. Heinze as administrator of the estate of his brother, F. Augustus Heinze, and appointing in his place and stead Walter A. Fullerton, the administrator appointed by the Surrogate of Saratoga County, New York, and with him Albert C. Wall, Esq., a member of the bar of this state.

The application to remove was made by Walter A. Fullerton, as administrator, aforesaid, under provisions of section 149 of the Orphan's Court Act, 3 Compiled Statute, N. J., 3868, which so far as material provides that if it appears that executor,

administrator, guardian or trustee has embezzled, wasted or misapplied any part of the estate committed to his custody or has abused the trust and confidence reposed in him, the said Orphan's Court may revoke the letters of such executor, administrator or guardian, etc. The Court below, at the conclusion of the hearing held that the administrator had abused the trust and confidence reposed in him but did not specify particular instances. The facts may, I think, be summarized as follows: F. Augustus Heinze died, domiciled in Saratoga County, New York, November 4th, 1914. The day after his death Lida M. Fleitmann, a sister residing in the City of New York, having previously secured her appointment as guardian of Heinze's infant son, his only heir at law and next of kin, applied for letters of administration upon his estate in Saratoga County and thereupon without notice the Surrogate granted letters. The affairs of the deceased were very involved. He was a heavy operator in securities and had been for many years. He operated through dummy corporations and through individuals and it would appear that a large amount of his property was pledged for various loans, and that it was doubtful whether his estate was solvent. The estate unquestionably demanded an extremely efficient administration. A few days prior to his death there had been recovered against him in New York, by Edwin Gould, a judgment to the extent approximately of \$1,200,000. Lida M. Fleitmann continued to act as his administrator until she was removed by an order of the Surrogate of Saratoga County upon the 23rd day of August, 1916. Her removal was accomplished in proceedings instituted by Edwin Gould. It was charged that the administratrix had neglected to include in her inventory and had neglected to account for certain assets of the estate and it developed during the course of the hearing that there

was in existence what is known as the Silver King Coalition contract, a contract under which the American Smelting and Refining Company paid to decedent royalties amounting to from \$5,000 to \$10,000 a month upon the ore deliveries of the Silver King Coalition mine which agreement had to the 1st day of January, 1919, to run. The decedent had, on the 10th day of March, 1914, pledged such agreement with the American Smelting and Refining Company, together with certain securities consisting of \$255,000 of the face value of the bonds of the Bingham Central Railway Company, \$78,000 in face value of the Ohio Copper Company, \$38,000 in par value of the capital stock of the Ohio Copper Company and \$7,000 in par value of the capital stock of the Stewart Mining Company for the repayment of a loan made upon that date by the American Smelting and Refining Company to decedent or for his account. At the time of the death of the decedent there was a comparatively small balance due on this loan, I think approximately \$60,000. The securities and the equity in the contract were intact in the hands of the American Smelting and Refining Company.

Mrs. Fleitmann owned the entire stock of a concern known as the Miners Smelting Company, incorporated under the laws of the State of Maine with an office in New York. It was one of Augustus Heinze's corporations. Through the Miners Smelting Company Mrs. Fleitmann claimed as against the estate the securities pledged with the American Smelting and Refining Company. Her testimony taken before the Surrogate in New York developed an astonishing lack on her part of knowledge of any facts upon which such a claim could legitimately be based. The testimony in this case demonstrates that the theory upon which she claimed them was the conception of her New York counsel, Mr. McIntyre. She did not seem to know

just what her claim was. That the Miners Smelting Company was involved in some way or another with the loan made from the American Smelting and Refining Company to secure which the contract and securities were taken is demonstrated by the answer filed by the American Smelting and Refining Company to the bill of complaint of Arthur P. Heinze, administrator, against the American Smelting and Refining Company in the Court of Chancery of this state which will be hereafter adverted to. And it is clear that in any litigation in which the rights of the Miners Smelting and Refining Company and the estate of F. Augustus Heinze are to be settled, the estate should be represented by some one in no way connected with Mrs. Fleitmann. At the time of her appointment Mrs. Fleitmann had been directed to give a bond of \$20,000 which she did. Prior to her removal she was directed at the instance of Edwin Gould to furnish a further bond of \$250,000, which after some delay she did. Arthur P. Heinze admitted he was present on several occasions at the hearings in Saratoga County, that he was very friendly with Mrs. Fleitmann, that she asked him on several occasions for legal advice, and while denying that he acted as her counsel, yet admitted that upon several occasions he gave her legal advice, and I am convinced notwithstanding his denial, from all the circumstances in the case that in the New York proceeding he was acquiescent with her claim of title to these securities through the Miners Smelting Company, his object being to prevent their being taken under the judgment of Edwin Gould. He testified to his friendship with Mrs. Fleitmann from the time of her appointment until the time of his, he said that he gave her the best advice he had with regard to the administration of the estate, that at no time did he have any differences with her with respect to the administration of the estate; that the pro-

ceeding taken in New York to remove her he thought was blackmail; that during all of this time he knew of the existence of this contract and the securities and knew that the Miners Smelting Company claimed them and that company was owned by Mrs. Fleitmann. A man named Geer, who will be subsequently referred to, Vice-President of the Miners Company, was very closely connected with him in business, he said, "He, (Geer) has been every kind of—runs errands if you want to call it that way." Geer was the man delegated by Heinze to buy in the market certain of the stock belonging to the estate. For a period of one year and four months Heinze permitted Mrs. Fleitmann to administer the affairs of the estate in New York without endeavoring to assert the interests of the estate in this contract and the securities which he knew to be claimed by the administratrix as her property and I think actively allied himself with her in the proceeding to remove her which was based in part, at least, upon such claim made by her and her failure to account for this contract and the securities as assets of the estate. The first public disclosure of their existence was made on the 1st day of March, 1916. I believe that Mrs. Fleitmann and her counsel and Heinze, from the disclosures which took place in the Surrogate's Court in New York, were convinced in their own minds although he denies it that the ultimate result might well be removal. On the 27th of March, 1916, Heinze applied to the Surrogate of Hudson County for administration upon the estate of his brother. He presented to the Surrogate a waiver, dated March 21, 1916, of Mrs. Fleitmann as guardian of F. Augustus Heinze, Jr., the infant son of F. Augustus Heinze. This is witnessed by the same man, Geer, heretofore referred to. He also presented her waiver as administratrix of F. Augustus Hinze as well as the waiver of Otto C. Heinze, another brother. Just what was

the purpose in presenting waivers other than those of Mrs. Fleitmann it is impossible to conceive. In view of the existence of the child the brothers and sisters were not next of kin nor heirs at law, although so incorrectly stated to be in the petition for administration. In this petition it was represented that the Surrogate of the County of Saratoga exacted from the administratrix a bond in the penal sum of \$20,000 which was approved and filed in the Surrogate's office in the County of Saratoga. Although this was strictly true I find that Heinze knew full well that she had been directed to give in addition a bond of \$250,000. The petition further states that the personal assets of said deceased within the State of New York have already been reduced to possession by the administratrix there. If the securities and the equity of the contract pledged with the American Smelting and Refining Company, all of which and the evidence of which, were physically in the State of New York were assets of the estate, and for this purpose they must be considered so, for Heinze is estopped to deny it, and were situate in New York, as I think they were, although they possibly might have been recovered in New Jersey, because of the fact that the domicile of the American Smelting and Refining Company is in New Jersey, then this statement is not correct. Jurisdiction was claimed in this state upon the ground that there was a chose in action within this state, to wit, the right of the estate to obtain an accounting from American Smelting and Refining Company and upon the payment of the balance of the loan for which the contract and securities were pledged, possession of the contract and securities. The situs of the contract was in New York, the siti of the securities were either in New York or where the corporations issuing them were domiciled, certainly not in New Jersey. The statute, Section 29, 3 Compiled Statutes, N. J.

L. 3823, permitting the appointment of administrators for non-residents provides that if any person not a resident within this state shall die, etc., possessed of personal property or choses in action within this state or the evidence of which shall be in the hands of any resident of this state, etc., then the Surrogate of the County in which, etc., choses in action or evidences thereof, etc., are situate may appoint. The evidence of the rights of the Heinze estate was undoubtedly within the possession of the American Smelting and Refining Company, a resident of this state, but physically within the State of New York, and the rights of the estate might have been properly determined in the State of New York where the domicile of the administratrix was located and in which the American Smelting and Refining Company and the Miners Smelting Company has offices and could be served, whereas the Miners Smelting Company had no office or agent within this state.

It is vigorously urged on me by the respondent that the Surrogate had no jurisdiction to appoint an administrator and that I should, while affirming so much of the order of the Orphan's Court as removed the administrator, reverse it so far as it appointed new administrators upon the ground that the Surrogate had no jurisdiction to make the original appointment. This, if properly before me, would raise a very interesting question whether among others the cases of *In the Matter of Cour- sen's Will*, 3 Gr., 408; considered in *Chadwick's case*, 80 Eq., 476, 477; *in re Geiser's Will*, 82 Eq., 311; *Russell's case*, 64 Eq., 313; *Murray vs. Lynch*, 64 Eq., 290, affirmed 65 Eq., 399; *Plumb vs. Howard Savings Institution*, 46 N. J. Law, 211; *Pesano vs. Shanley Co.*, 66 N. J. Law, 1; *Mellor vs. Kaign*, 99 Atl., 207; *in re Alexander*, 79 Eq., 226, either this Court or any other Court may modify, set aside or ignore the action of the Surrogate except upon

direct attack, where the question is one depending upon the existence of the jurisdictional facts and there is some evidence from which it might be found that there was jurisdiction, and the matter had been passed upon by the Surrogate. The respondent filed no cross appeal. He endeavored to raise the question by a statement contained in the answer. It has not been fully argued and I therefore decline to pass upon it, particularly in view of the fact that the result sought by respondent may be achieved if the administrator finds that there is no property in this jurisdiction by his accounting and being discharged. The question is raised by the American Smelting and Refining Company in the answer to the bill filed by Heinze as administrator in the Court of Chancery, hereafter referred to, and undoubtedly one branch of it will have to be passed upon by that Court.

By a bill verified on the 3rd of April, 1916, filed in the Court of Chancery against the American Smelting and Refining Company, the Miners Smelting Company and another not necessary to refer to here, Arthur P. Heinze, as administrator, sought to secure an account of the amount due and to grow due to the estate of F. Augustus Heinze on the contract, that he might be entitled to the benefit of such contract and that an injunction might issue restraining and enjoining the defendants from paying over to others than the complainant the moneys to grow due under the contract and securities. To that bill the American Smelting and Refining Company filed an answer in which they set up the invalidity of the grant of the letters of administration and then, *in extenso*, proceed to discover the relationships existing between the decedent and the American Smelting and Refining Company. Mr. McIntyre, counsel for Mrs. Fleitmann, then secures the appearance of the Miners Smelting Company and it files an answer setting up its right.

There is no doubt whatever in my mind but that there was an arrangement between Mrs. Fleitmann and Heinze prior to this suit being commenced, and prior to the application for administration in New Jersey, for just what took place here and that the purpose was to remove from the State of New York the determination of the rights of the Miners Smelting Company. The Courts of New York had based their removal of Mrs. Fleitmann in part at least upon her failure to include this chose in action, if such it may be called, in the assets of the estate. It is said that one of the purposes was to secure these assets for the benefit of the general creditors of the estate or for the benefit of F. Augustus Heinze, Jr., the law of New York providing that the judgment of Edwin Gould is a preferred claim. How the rights of F. Augustus Heinze, Jr., could be better protected in New Jersey than in New York it is impossible to perceive and there were no New Jersey creditors at that time, at least, demanding administration in this state. The parties were dissatisfied with the treatment that they were receiving in the State of New York and attempted to secure a new forum. On the 9th of June, 1916, two letters were received by the American Smelting and Refining Company, one signed by August P. Heinze, administrator of the estate of F. A. Heinze, deceased, and the other by the Miners Smelting Company per Calvin O. Geer, Vice-President. Both were mailed at the Hudson Terminal at the same hour. From my inspection of them and the testimony I conclude that they were both written upon the same typewriter; the one from Heinze demands the delivery to the estate of sixty-three per cent. of the various securities deposited with the American Smelting and Refining Company, this being a percentage which that company might release under the terms of the contract; the one from the Miners Security Company informs

the American Smelting and Refining Company that it has been notified of such a request, denies the right of the administrator and demands a delivery to the Miners Smelting and Refining Company. Remembering that Geer was a confidential man of Heinze and considering what followed there is no doubt in my mind but that the letters both were dictated by Heinze and for the purpose of securing the release of this sixty-three per cent. and were designed to form the basis of what subsequently occurred in the Court of Chancery. Application was made to that Court for an order permitting the release of this percentage and upon the 29th day of June, 1916, a consent order was taken ordering that the American Smelting and Refining Company release and deliver to said Miners Smelting Company a portion, approximately sixty-three per cent., of each of the securities held by said American Smelting and Refining Company and it was further ordered that upon such delivery being made it, the Miners Smelting Company, should at the same time execute and deliver to August P. Heinze, the administrator, a bond for the sum of \$30,000, upon this condition "that if the Chancellor shall find upon the final hearing of this cause that the said complainant is entitled to have the said securities delivered to him by said American Smelting and Refining Company that said Miners Smelting Company will forthwith turn over the said securities to said complainant, or, in default thereof pay to the said complainant the full amount received therefor by said Miners Smelting Company, and upon such further conditions as may by the agreement of the parties to said bond, be incorporated in said bond for the protection of the obligees thereof." It will be immediately observed that this order puts these securities out of the control, either of the Court or of the complainant. The Miners Smelting Company might dispose of them at any time,

at any price, within reason of course, and the administrator would have nothing to say. I can not escape the conclusion that when Arthur Heinze, the administrator, wrote the letter of June 9th, he contemplated, at that time that, these securities were to be released not to himself but to the Miners Smelting Company. It is true that nothing has been done under this order, for what reason does not, I think, clearly appear. There is evidence of dealings between the administratrix in New York and Mr. Heinze with respect to assets of the estate, evidence of purchase by him of assets of the estate either in his own name or in the name of corporations in which either he or his relatives are interested; evidence of his attempt to reduce to his possession or at any rate to interfere with assets of the estate without this state, which I will not consider in detail, but which alone demonstrate, I think, that Mr. Heinze ought not to be permitted to act as administrator in this state. The application to remove him was made by Walter A. Fullerton, as the administrator appointed in New York, and the petition was filed in October, 1916, and Heinze was enjoined from taking any steps as administrator. Apparently now dissatisfied with the treatment he was receiving in New Jersey he goes to Nassau County, New York, and obtains an injunction restraining Fullerton from prosecuting the proceedings in New Jersey. This was upon hearing denied. He said that he did this because it was the county in which he resided and he could get jurisdiction over the administrator, and matters might be considered which could not be considered in the Hudson Orphan's Court. Even if he had a legal right to take the course that he did he ought not to have done it. Either the Surrogate's Court of Saratoga County or the Hudson Orphan's Court should have dealt with the conditions.

There are many other circumstances which in my judgment tend to show that Mr. Heinze abused the trust and confidence reposed in him as administrator and that fully warranted his removal. Although many of the acts herein referred to occurred long before Heinze was administrator yet they are clearly evidential to show a course of conduct which would indicate that, because of his past acts, Heinze was likely to abuse the trust and confidence reposed in him and it is not to be overlooked that he was once convicted of contempt of Court, committed, he says, in his zeal to secure his brother's interests. It must be kept in mind that Heinze had no right to administration—we have not the situation here of an executor or next of kin entitled in the first instance as a matter of right to act—he is a mere appointee of the Court. I do not think that the rule requires that there should be such strict proof under such circumstances.

The Court below appointed as co-administrator Mr. Fullerton of the New York Bar, the administrator appointed by the Surrogate's Court of New York. It is charged that the appointment was made for the benefit of Edwin Gould. This is of course denied and I should not in any event permit an attack upon the judgment of the New York Court. Nevertheless it is shown that Mr. Fullerton is closely connected with Sullivan and Cromwell, who are Mr. Gould's attorneys, and it is charged that he will so act as to attempt to get the complete administration in New York so that all of the assets may be subject to the judgment of Mr. Gould, to the detriment of New Jersey creditors. He is undoubtedly at all times in close communication with Mr. Gould's attorneys and it was frankly said on the oral argument that if the order of the Orphan's Court were affirmed the suit now pending in New Jersey, brought by Heinze,

would be discontinued. Whether this suit should be discontinued or not I think, under all the circumstances, should not be left to the judgment of Mr. Fullerton, in view of the fact that it is now represented that there are New Jersey creditors who are entitled to protection in this state, and I think that the Court below should have appointed someone who is absolutely free from any charge so that he might himself make an investigation untrammelled, and determine whether or not the suit should be continued or discontinued and might then seek the aid of the Court in determining what to do. If the administrator determines there are no assets in this state the matter here can be closed very simply. He can report and he may be discharged and matters in this state may be closed. This would achieve the same result as if I should now hold that the Surrogate had no jurisdiction to make the appointment and should for that reason dismiss the proceedings. It has been held that, on appeal from the Orphan's Court appointing a guardian or administrator, this Court will, if it thinks that the Orphan's Court should not have made the particular appointment it did, substitute its own appointee. Hills case, 55 Eq., 764.

The decree of the Orphan's Court will therefore be modified by striking out the appointment of Mr. Fullerton, and as so modified it is affirmed unless counsel desire to be heard on the question whether there should be another co-administrator appointed. Settle order on one day's notice.

It is distinctly understood that I have not intimated any opinion on whether the litigation now pending in the Court of Chancery should be continued or not, and no remarks that I have made are to be used by counsel in any Court as expressing such an opinion. It is a matter with which at this time I have no concern, and should be very care-

fully considered by the administrator, and he will undoubtedly seek the benefit of the advice of counsel for the complainant in that litigation. Nothing that I have said is to be construed as any reflection upon counsel on either side. There is no evidence or intimation that they have not done their full duty. The circumstances and the possibilities are such that I have concluded that the Orphan's Court was right in not permitting the litigation to be controlled by Mr. Heinze.

INDEX

MOORE

101

W. H. Moore

102

W. H. Moore

103

W. H. Moore

104

W. H. Moore

105

106

107

108

109

110

111

112

113

114

115

1897

1897