

66-383 1008 52

Record No. 1707

In the
Supreme Court of Appeals of Virginia
at Richmond

JOSEPH EDGAR MILLS, Plaintiff,

v.

ALVIN T. EMBREY, TRUSTEE, Defendant.

FROM THE CORPORATION COURT OF THE CITY OF FREDERICKSBURG.

“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 Act of Assembly, approved March 1, 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.

166 Va 383

IN THE
Supreme Court of Appeals of Virginia
AT RICHMOND.

Record No. 1707

JOSEPH EDGAR MILLS, Plaintiff,

versus

ALVIN T. EMBREY, TRUSTEE, Defendant.

PETITION OF JOSEPH EDGAR MILLS.

Your petitioner, Joseph Edgar Mills, respectfully shows unto your Honors, that he is aggrieved by a decree entered by the Corporation Court of the City of Fredericksburg, on the 24th day of June, 1935, in a certain chancery suit pending in said court, wherein your petitioner is plaintiff and Alvin T. Embrey, Trustee, is the defendant.

A transcript of the record of said suit, duly certified by the clerk of said court, is herewith presented, from which the error complained of by your petitioner, may be seen.

FACTS OF THE CASE.

By deed of September 3, 1908, Joseph W. Mills, deceased, who was the father of the petitioner, conveyed certain real estate, situate in the City of Fredericksburg, to Alvin T. Embrey, Trustee. The real estate was subsequently sold by the Trustee and the proceeds of sale are now held by him, to the extent of some \$3,000.00 or more.

The deed, among other things, contains a provision as follows:

“For the sole and separate use of the said Mabel Mills, wife of said Joseph W. Mills, for her maintenance and support, and that of her children, during the joint lives of the said Joseph W. Mills, and Mabel Mills, and upon the death of the said Joseph W. Mills, for the life of the said Mabel Mills, or until her remarriage, and upon the death or remarriage of the said Mabel Mills, which ever may first happen, then to be equally divided among the children of the said Mabel Mills by the said Joseph W. Mills, living at the death of the said Mabel Mills and to the issue of any such children as may have died in the life time of the said Mabel Mills.”

Joseph W. Mills, father of your petitioner, is dead, and Mabel Mills, mother of your petitioner, remarried one George C. Sparks, on or about December 30, 1931. From the inception of the trust to the date of the remarriage, the Trustee paid the annual income, less expenses, to the said Mabel Mills, as directed by the deed.

Your petitioner is the only child of the said Joseph W. and Mabel Mills, and upon the remarriage of the latter he requested the trustee to pay to him the principal and accrued interest of the trust, which the trustee refused to do, and this suit was instituted.

The bill prays that the trust may be construed by the court, the trustee required to account and to pay over the principal and accrued interest to your petitioner.

The bill, among other things, contains the following allegation, to-wit:

“Your orator further shows unto the court that it was the intent of the said Joseph W. Mills, that upon the death or re-marriage of the said Mabel Mills, which ever may happen first, that the trust estate should be paid over to their issue and your orator alleges that this is the true intent and purpose of the said deed of trust, when its provisions are taken and read together.

“That, therefore, he is now entitled to receive the trust estate, together with accrued interest thereon, and to have a final accounting from the said trustee of the sale of the trust property, of the investment of the money paid therefor and of the present status of the said trust.”

The defendant filed his answer, taking issue with the construction placed by the petitioner on the language of the deed

above cited, which answer contains the following statement, to-wit:

“It will be observed, and this respondent alleges, that the date of the death of the said Mabel Mills is the time fixed by the said trust to determine who receives the property. Should Joseph Edgar Mill predecease his mother, and leave issue, then such issue are the beneficiaries. On the other hand if Joseph Edgar Mills is living at the time of his mother’s death, then he is the beneficiary under said trust. Therefore, it appears that under the terms of said trust so long as Mabel Mills is living, there is no authority given under said trust for the disbursement of any of said money or property.”

The Court accepted the construction placed on the deed by the defendant and refused to require the Trustee to pay over either principal or interest to the petitioner, the decree containing the following language, to-wit:

“And it further appearing to the Court that the true construction, intent and purpose of the said deed, is that Mabel Mills, upon her remarriage, relinquished all interest in the fund in the hands of Alvin T. Embrey, as Trustee, and this fund (both principal and interest), under the trust cannot be paid out until Mabel Mills’ death, although Joseph Edgar Mills is the only child of Joseph W. Mills by Mabel Mills. This fund can not be paid to him since the trust provides that this fund, principal and interest, shall not be distributed until the death of Mabel Mills, and then to Joseph Edgar Mills if living at the death of Mabel Mills, and if not living, to the issue of any children of the said Joseph Edgar Mills as may have died in the lifetime of the said Mabel Mills, such children to take *per stirpes*; the court doth so adjudge, order and decree.”

ASSIGNMENT OF ERROR.

(1) The Court erred in refusing to require the trustee to pay over the corpus of the trust to the petitioner, at this time.

(2) The Court further erred in refusing to require the trustee to pay over the accrued income and the annual interest hereafter to petitioner.

ARGUMENT.

It is respectfully submitted that the construction placed by the Court upon the language of the deed, is a strained and technical one, and not in accord with the plain intent of the grantor, as gathered from its language. It will be observed that the trustee, in the deed from the grantor, was to hold the property,

“for the life of the said Mabel Mills, *or* until her remarriage and upon the death or remarriage of the said Mabel Mills, which ever may first happen, *then*, to be equally divided among the children of the said Mabel Mills, by the said Joseph W. Mills”.

If the scrivener had stopped at this point, suit would not have been necessary.

The language which immediately follows the above quotation is confusing and apparently ignores the contingency of remarriage provided for above. This language is as follows, to-wit:

“living at the death of the said Mabel Mills, and the issue of any such children as may have died in the life time of the said Mabel Mills, such children to take *per stirpes*”.

Obviously there would have been no sense in providing that the corpus should be distributed upon the remarriage of Mabel Mills and then postponing distribution until her death. This could not have been the intention of the maker of the trust. It is a fair inference that the scrivener, in his labored language, became confused and in the latter portion, cited above, failed to consider what had first been provided.

The construction placed on the language of the deed by the Corporation Court, creates a contingent remainder, whereas, under the construction of appellant, the remainder would be vested.

It is perhaps unnecessary to cite authority for the rule that:

“Courts always favor the vesting of estates, and in doubtful cases, lean in favor of construing language as creating vested rather than contingent remainder.”

This rule is supported by abundant Virginia authorities, assembled in Michie's Digest of Virginia and West Virginia Reports, Vol. 8, page 607.

Of course, it is realized that if the intent be apparent on the face of the trust, the technical rule does not apply, but in the instant case the apparent intent of the maker of the trust was to not only vest title in his children, but to give them possession upon the death or remarriage of his wife, which ever should happen first.

It seems needless to cite further authority on this case since, as was said by Morton, J., in *Olney v. Hull*, 21 Pick 311, and reported in *Cheatham v. Gower*, 94 Va. 386:

“The construction of wills and other instruments, depends so much upon the peculiar expressions used in each, that not much aid can be derived from adjudged cases.”

What has been said above applies to the first alleged error of the Court, and we now direct attention to the second.

(2) It will be observed from the language of the deed that its object was to provide for the maintenance and support of Mabel Mills and her children by Joseph W. Mills. The trustee so provided until the remarriage of Mrs. Mills and then declined to continue payments to cover maintenance and support of petitioner, the child of the said Joseph W. and Mabel Mills. It seems clear that the grantor intended that the annual income should be applied for this purpose and not discontinued upon his wife's remarriage. It is true that petitioner is now an adult, but if he were an infant the decision of the Court would deprive him of that support which his father evidently intended he should have.

It is respectfully submitted that the Court erred in both of its holdings, cited above, and that both should be reversed.

Appellant, therefore, prays for an appeal from said decree and that this court will enter such decree as the lower court should have entered.

Counsel, adopting this petition as his brief, certifies that a copy of same was mailed to W. W. Butzner, attorney for the appellee, on the 5th day of September, 1935.

Respectfully,

JOSEPH EDGAR MILLS.
By C. O'CONOR GOOLRICK,
His Attorney.

I, C. O'Connor Goolrick, an attorney at law, practicing in the Supreme Court of Appeals of Virginia, do hereby certify that in my opinion the decree complained of in the foregoing petition should be reviewed and reversed by the Supreme Court of Appeals of Virginia.

C. O'CONNOR GOOLRICK.

Received Sept. 7, 1935.

H. H. WAYT, Clerk.

Sept. 19, 1935. Appeal awarded by the Court. Bond \$300.00.

M. B. W.

Received Sept. 25, 1935.

M. B. W.

RECORD

In the Clerk's Office of the Corporation Court of Fredericksburg, Virginia:

BE IT REMEMBERED, that heretofore, to-wit, on the 4th day of February, 1935, came Joseph Edgar Mills, and filed his bill and exhibit against Alvin T. Embrey, Trustee, as follows:

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BILL.

(Filed as of 2nd February Rules, 1935.)

In the Corporation Court of Fredericksburg, Virginia.

Joseph Edgar Mills

v.

Alvin T. Embrey.

To the Honorable Frederick W. Coleman, Judge:

Your Orator, Joseph Edgar Mills, respectfully shows unto the Court, that he is the only child of the late Joseph W. Mills, and Mabel E. Mills, his wife, and that he is over the age of twenty-one years; that by deed of September 3, 1908, your orator's father, Joseph W. Mills, conveyed certain real estate, situate in the City of Fredericksburg, Va., and there-

in described to Alvin T. Embrey, Trustee, which deed is duly recorded in the Clerk's Office of this Court in deed Book M. M., page 187, certified copy being herewith filed as exhibit "A" and prayed to be read as part of this bill;

That Mary A. Mills, therein referred to, as life tenant of a certain portion of said real estate, is dead, and that your Orator's father is likewise dead; that said deed, among other things, contains a provision by which the Trustee aforesaid, is to hold the property, as follows, to-wit:

"For the sole and separate use of the said Mabel Mills, wife of the said Joseph W. Mills, for her maintenance and support, and that of her children, during the joint lives of the said Joseph W. Mills and Mabel Mills, and upon the death of the said Joseph W. Mills, for the life of the said Mabel Mills, or until her remarriage, and upon the death or remarriage of the said Mabel Mills, which ever may first happen, then to be equally divided among the children of the said Mabel Mills by the said Joseph W. Mills, living at the death of the said Mabel Mills and to the issue of any such children as may have died in the life time of the said Mabel Mills."

Your Orator further shows unto the Court that the said Trustee was authorized to sell said property conveyed unto him; did sell same and invested the proceeds of sale, to the extent, as your Orator is informed, of some \$3,000.00 that he paid the income from said investments, semi-annually, in April and October of each year, to the said Mabel Mills, in accordance with the terms of the trust; that the said Mabel

page 3 } Mills, your Orator's mother, had no children by the said Joseph W. Mills, save your Orator; that she accepted the provisions of the said trust and received income therefrom, until her remarriage, to one, George C. Sparks, on or about December 30, 1931, and even after her remarriage a part of the annual income was paid to her by the said Trustee, by and with the consent of your Orator;

Your Orator further shows unto the Court that it was the intent of the said Joseph W. Mills, that upon the death or remarriage of the said Mabel Mills, which ever may happen first, that the trust estate should be paid over to their issue and your Orator alleges that this is the true intent and purpose of the said deed of trust, when its provisions are taken and read together;

That, therefore, he is now entitled to receive the trust estate, together with accrued interest thereon, and to have a

final accounting from the said trustee of the sale of the trust property, of the investment of the money paid therefor and of the present status of the said trust.

THEREFORE, being without remedy, save in a court of equity, where all such matters are properly cognizable, your Orator prays that Alvin T. Embrey, trustee, may be made party defendant to this suit, and required to answer same, answer under oath being expressly waived; that the said trust, may be construed by the Court; that the Trustee may render an accounting of his acts and doings thereunder; that the principal and accrued interest of said trust may be paid over to your Orator, and that your Orator may have all such other, further, and general relief as the nature of his case may require, or which to equity may seem meet and proper; And your Orator will ever pray, etc.

Respectfully,

JOSEPH EDGAR MILLS.
By C. O'CONOR GOOLRICK,
His Atty.

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EXHIBIT A.

COPY OF DEED.

JOSEPH W. MILLS TO ALVIN T. EMBREY, TRUSTEE.

Recorded: Deed Book M. M., page 187.

This Deed, Made this 3rd day of September, 1908, by and between Joseph W. Mills, party of the first part, Alvin T. Embrey, Trustee as hereinafter set forth, party of the second part, and Mabel Mills, the wife of the said Joseph W. Mills, party of the third part, and the children of the said Mabel Mills by the said Joseph W. Mills, as hereinafter set forth, parties of the fourth part, all of Fredericksburg, Virginia,

WITNESSETH; That for value received, the said Joseph W. Mills doth grant and convey with general warranty of title unto the said Alvin T. Embrey, Trustee, the following property, to-wit:

A Lot with house thereon situated at the southwest corner of Main and Canal Streets, Fredericksburg, Virginia, front-

ing 46.9 feet on Main Street, and running back westerly along Canal Street, and between parallel lines 134.48 feet, and is the same property conveyed unto the said Joseph W. Mills by W. D. Mills and others by deed dated March 12th, 1908, and duly recorded in the Clerk's Office of the Corporation Court of Fredericksburg in Deed Book "M. M.", pages 168, 169:

Also subject to the life interest of Mary A. Mills, therein, an undivided half interest in and to that

certain lot with house thereon in Fredericksburg, Virginia, fronting 80 feet, more or less, on the west side of Main Street between Commerce and Amelia Streets, and is the same property conveyed unto E. W. Mills by Alvin T. Embrey, Special Commissioner of the Circuit Court of Spotsylvania County, Virginia, by deed dated September 16th, 1904, and duly recorded in the Clerk's Office of the

Corporation Court of Fredericksburg in Deed Book "K. K.", page 160, and which, by the said E. W. Mills was conveyed unto Mary A. Mills for life and at her death to be equally divided between the said Joseph W. Mills, and Elsie L. Mills, who is now Mrs. H. K. Yerby, in trust however, to have and to hold the said property for the sale and separate use of the said Mabel Mills, wife of the said Joseph W. Mills, for her maintenance and support, and that of her children during the joint lives of the said Joseph W. Mills and Mabel Mills, and upon the death of the said Joseph W. Mills for the life of the said Mabel Mills, or until her remarriage, and upon the death or remarriage of the said Mabel Mills, which ever may first happen, then to be equally divided among the children of the said Mabel Mills by the said Joseph W. Mills living at the death of the said Mabel Mills, and the issue of any such children as may have died in the lifetime of the said Mabel Mills. Such children to take *per stirpes*, with authority in the said Trustee, upon the written request of the said Mabel Mills, if in the judgment of the said Trustee it would be proper to do so, to sell the said properties herein conveyed, or either of them, at either public auction or private sale, and to convey the same to the purchaser, or purchasers, thereof, and to re-invest the proceeds in other property to be held by the said Trustee upon the like trust, and any purchaser, or purchasers, of the said property shall not be liable to look to the application of the purchase money; and upon the further trust, that so long as said property remains unsold the said Mabel Mills shall and may personally look to the preserva-

tion and repair of the same, and shall collect the rents, issues and profits therefrom, and shall keep the same insured.

Witness the following Signature and Seal.

JOSEPH W. MILLS. (Seal)

State of Virginia,
Corporation of Fredericksburg. ss:

I, S. C. Whitehouse, a Notary Public for the Corporation aforesaid in the State of Virginia, do hereby certify that Joseph W. Mills whose name is signed to the writing above bearing date the 3rd day of September, 1908, personally appeared before me in my Corporation aforesaid and acknowledged the same to be his act and deed.

Given under my hand this 3rd day of September, 1908.

S. C. WHITEHOUSE,
Notary Public.

My commission expires October 11th, 1911.

page 6 } Virginia:

In the Office of the Corporation Court of Fredericksburg, September 3rd, 1908. This deed was received and with the certificate of its acknowledgment annexed, admitted to record at 11:30 o'clock A. M.

Teste:

A. B. YATES, Clerk.

A true Copy—Teste:

A. B. YATES, Clerk.

A copy—Teste:

J. W. ADAMS, Clerk.

(Deed Book M. M., page 187.)

page 7 } And on another day, to-wit, on the 28th day of March, 1935, the Court entered decree as follows:

“This day appeared Alvin T. Embrey, Trustee, and upon his motion by counsel, he filed this day his Answer to the Bill of the Complaint.”

Whereupon, on the same day, Alvin T. Embrey, Trustee, filed his answer as follows:

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ANSWER.

In the Corporation Court of Fredericksburg, Virginia.

Joseph Edgar Mills

v.

Alvin T. Embrey, Trustee.

The Answer of Alvin T. Embrey, Trustee, to a bill in chancery filed against him in said court by Joseph Edgar Mills.

Without waiving any just exceptions that may be properly taken to the said bill of complaint and to the errors and inaccuracies therein contained, insofar as this respondent is advised it is necessary for him to answer, answers and says:

That he tried to faithfully perform his duties as Trustee under the deed of September 3, 1908, of Joseph W. Mills to the said Alvin T. Embrey Trustee; that he invested the money to his best ability paid the income, rents, issues and profits therefrom to the beneficiaries when and as the same accumulated and was collected, and what was paid to the said Mabel Mills after her marriage was due to this respondent's not being advised of her remarriage; and since he learned of her remarriage he ceased making further payments to her. Subsequent thereto the said Mabel Mills and Joseph Edgar Mills have endeavored to get this respondent to pay the income, rents, issues and profits over to the said Joseph Edgar Mills, but in view of the wording of the trust this respondent does not feel justified in paying over either the income, or the corpus of said trust to the said Joseph Edgar Mills for the simple reason that the trust provides:

“And upon the death or remarriage of the said Mabel Mills, whichever may first happen, then to be equally divided among the children of the said Mabel Mills by the said Joseph W. Mills living at the death of the said Mabel Mills, and to the issue of any such children as may have died in the lifetime of the said Mabel Mills.”

page 9 } It will be observed, and this respondent alleges, that the death of the said Mabel Mills is the time fixed by the said trust to determine who receives the property. Should Joseph Edgar Mills predecease his mother and leave issue, then such issue are the beneficiaries. On the other hand if Joseph Edgar Mills is living at the time of his mother's death, then he is the beneficiary under said trust. Therefore it appears that under the terms of said trust so long as Mabel Mills is living there is no authority given under said trust for the disbursement of any of said money or property.

This respondent joins in the prayer of the bill insofar as it requests a construction of the said trust by the court:

This respondent is perfectly willing—indeed is anxious—to have the court supervise and audit the receipts and disbursements of said trustee and he is delighted to have the court supervise the accounting of his receipts and disbursements since the marriage of the said Mabel Mills. All disbursements theretofore were properly made and there is no question or complaint about the same.

Respondent further says that long before the suit was instituted the said Mabel Mills and Joseph Edgar Mills endeavored to get this respondent to pay the income over to the said Joseph Edgar Mills after his mother's marriage; that they employed an attorney who made demands on this respondent, and that this respondent consulted Wm. W. Butzner, an attorney, in connection therewith and that this respondent feels that the said Wm. W. Butzner should be compensated for his legal services prior to the institution of this suit and for his services in connection with this proceeding and that the said trust fund should bear the expense. And now having fully answered, this respondent prays to be hence dismissed, etc., and will ever pray, etc.

ALVIN T. EMBREY.

WM. W. BUTZNER, p. d.

page 10 } And on another day, to-wit, on June 24, 1935, the Court entered decree, as follows:

page 11 } In the Corporation Court of the City of Fredericksburg, Virginia, June 24th, 1935.

DECREE.

Joseph Edgar Mills, Plaintiff,

v.

Alvin T. Embrey, Trustee, Defendant.

Process having duly issued and having been duly executed and returned as to the defendant, and the plaintiff having filed his bill, with the exhibit of the deed of September 3, 1908, and the defendant having filed his answer; now this cause coming on to be heard upon the bill, with exhibit, and the answer, and was argued by counsel.

Upon consideration whereof, it appearing to the court that the deed of September 3, 1908, and of record in the Clerk's Office of the Corporation Court of Fredericksburg, Virginia, in Deed Book MM, page 187, and filed as an exhibit with the bill, in which Joseph W. Mills, party of the first part, Alvin T. Embrey, Trustee, party of the second part, and Mabel Mills, the wife of the said Joseph W. Mills, party of the third part, and the children of the said Mabel Mills by the said Joseph W. Mills, parties of the fourth part, all of Fredericksburg, Virginia, conveys the property therein described to Alvin T. Embrey, Trustee, upon the trust

"to have and to hold the said property for the sole and separate use of the said Mabel Mills, wife of the said Joseph W. Mills, for her maintenance and support and that of her children during the joint lives of the said Joseph W. Mills and Mabel Mills, and upon the death of the said Joseph W. Mills for the life of the said Mabel Mills, or until her marriage, and upon the death or remarriage of the said Mabel Mills, whichever may first happen, then to be equally divided among the children of the said Mabel Mills by the said Joseph W. Mills living at the death of the said Mabel Mills, and the issue of any such children as may have died in the lifetime of the said Mabel Mills, such children to take *per stirpes*."

page 12 } And it further appearing to the court that the said Joseph W. Mills is dead, leaving Mabel Mills surviving him, and that the said Mabel Mills has remarried, and that she has one son, Joseph Edgar Mills, who is over twenty-one years of age; that Mary A. Mills, in said deed described, is likewise dead;

And it further appearing to the court that the said real estate in said deed described has been sold and the proceeds therefrom invested by the said Alvin T. Embrey, Trustee.

And it further appearing to the court that the true construction, intent and purpose of the said deed is that Mabel Mills, upon her remarriage, relinquished all interest in the fund in the hands of Alvin T. Embrey, as Trustee, and this fund (both principal and interest) under the trust cannot be paid out until Mabel Mills' death, although Joseph Edgar

Mills is the only child of Joseph W. Mills by Mabel Mills. This fund cannot be paid to him since the trust provides that this fund, principal and interest, shall not be disturbed until the death of Mabel Mills, and then to Joseph Edgar Mills if living at the death of Mabel Mills, and if not living, to the issue of any children of the said Joseph Edgar Mills as may have died in the lifetime of the said Mabel Mills, such children to take *per stirpes*; the court doth so adjudge, order and decree.

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CLERK'S CERTIFICATE.

I, M. H. Willis, Clerk of the Corporation Court of Fredericksburg, Virginia, do hereby certify that the foregoing is a true copy of the entire record in the chancery cause pending in this court under the style of Joseph Edgar Mills *v.* Alvin T. Embrey, Trustee.

I also certify that the notice required by Section 6339 of the Code of Virginia was duly given in the manner required thereby.

M. H. WILLIS, Clerk.

Clerk's fee, \$.....

A Copy—Teste:

M. B. WATTS, C. C.

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