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IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

RECORD NO. 2557

J. POWELL ROYALL, Receiver,
APPELLANT,

vs.

BETTIE J. PETERS, Et Als.,
APPELLEES.

PETITION OF APPELLANT TO REHEAR

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PRAYER FOR REHEARING

Your Petitioner, J. Powell Royall, Receiver, appellant in the above entitled cause, respectfully prays that the decree of affirmance, entered by this Court, in this cause, on the 9th day of September, 1942, may be reheard, set aside and annulled.

We respectfully submit that the Court in its decision did not approach this case from the proper angle. The

issue in this case, as we see it, is this: There is a fund in the hands of a receiver of the Court belonging to a life tenant and her children as remaindermen. This fund is to be administered by the Court in this suit during the natural life of Bettie J. Peters, the life tenant—the net income of the fund to be paid to her during her life and at her death the corpus to be paid to her children. The receiver is simply the arm of the Court to aid the Court in administering the fund. If the life tenant should, by mistake of the receiver, receive more of the fund than she is entitled, that is, should encroach on the corpus, it is the duty of the Court to make proper correction. The fund is still in the hands of the receiver, under the control of the Court, and it is merely a matter of bookkeeping to make the adjustment.

This is not like a case where a fiduciary has made a bad loan and the fund has been lost and cannot be recovered, and the Court is called upon to decide who shall bear the loss. The law books are filled with decisions of cases where the fiduciary has been negligent or deliberately violated the directions of the Court and the fund was absolutely lost. The law as laid down by the Courts in those cases is not applicable to the instant case where there has really been no loss of the fund or any part of it, but simply an overpayment, by mistake, which can easily be corrected by the Court by suspending future payments of income to the life tenant until the proper adjustment is made.

This case should not be considered as a dispute between the receiver on the one side and the life tenant on the other side, but rather should be considered as

an issue between the life tenant on the one side and the remaindermen on the other side as to the proper distribution of the funds of the receivership. The title is not in the receiver. See Lile's Equity Pleading and Practice, Secs. 481 and 482.

For example, suppose both the receiver and the surety on his bond should be wholly insolvent, then would the life tenant be permitted to retain the $1,133.64 overpayments which justly belong to the remaindermen? It is a question of *title* to the funds as between the life tenant on the one side and the remaindermen on the other side, and we submit that it is the absolute duty of the Court to see that neither the life tenant nor the remaindermen unjustly encroach upon the rights of the other. The fact that the receiver, who acted as the arm of the Court, made certain mistakes in administering the fund, should not relieve the Court of its paramount duty of seeing that the fund is not paid to the wrong person.

Now, if there had been an absolute loss of a part of the fund by the negligence of the receiver the loss should fall on him and his surety, and not on the life tenant and the remaindermen; but where there is no absolute loss of any part of the fund, but merely an overpayment by mistake of the receiver, we respectfully submit that the Court should, really on its own motion, correct the mistake to the end that no part of the fund under its control should be misapplied. Any controversy or difference between the Receiver and any of the beneficiaries should not relieve the Court of its absolute duty to seeing to a proper distribution of the fund as long as the suit is on the docket and the fund is under the control of the Court and the mistake can be corrected.

RES ADJUDICATA

The doctrine of *res adjudicata* is applicable only in a *second suit* involving the same point which had been *finally* adjudicated in a prior suit. The case of *Pickerel* v. *Federal Land Bank,* 177 Va., 743, cited in the opinion of the Court in the instant case, deals with *final judgments* in prior actions involving the same issues, and does not apply to the instant case.

We refer to page 3 of appellant's brief filed in this case, calling attention to the fact that the decree of December 20, 1940, confirming the report of Commissioner Higginbotham, did not give judgment against receiver Royall, but merely adjudged that J. Powell Royall "be, and he is hereby *charged* with said sum of $12,090.33 corpus or principal fund" etc., and it further adjudged that said receiver was "chargeable" with the sum of $592.64 interest due Bettie J. Peters. Inasmuch as there was no recovery of judgment against the receiver in said decree, there was no need for him to appeal from that decree even if he had known at that time that there was a shortage in the assets, as such decree was merely interlocutory.

The doctrine of *res adjudicata* applies only to *final judgments* on the merits. See authorities cited in Michie's Va. and W. Va. Digest, Vol. 4, p. 900-1.

Also see 34 C. J. p. 765 and following, from which we quote on page 765 as follows:

> "(§ 1179) c. *Form and Requisites of Judgment*—(1) *In General.* In order that a judicial decision should operate as a bar to further pro-

> ceedings on the same cause of action, it is necessary that it should be in the nature of a judgment, and contain all the elements of a valid and subsisting judgment, and a mere ministerial act of the court does not come within such requirement."

We also refer to 34 C. J., page 763-4, from which we quote as follows from p. 763:

> "(§ 1177) (5) *Decisions on Motions*—(a) *In General.* The detemination of a motion or summary application is not res judicata so as to prevent the parties from litigating the same matters again in the more regular form of an action, especially if the matter affected by the motion was only incidental or collateral to the determination of the main controversy."

Also see p. 764:

> *"Matters which might have been determined.* The rule that a judgment is a bar not only as to matters in issue and adjudicated, but also as to those matters which might have been determined, does not apply to orders made on motions."

Now, if judgment had been rendered against the receiver by the Court for the overpayments to the life tenant it would have presented a different situation with reference to the question of Res Adjudicata, but the decree merely "charged" the receiver with certain amounts in connection with his account without entering any judgment for the same.

PETITIONS FOR REHEARING

The Courts are not as reluctant to grant relief upon a petition to rehear as upon a bill to review. See *Hurley* v. *Bennett,* 163 Va., 241, at p. 250, in which the Court states as follows:

> "* * * It is settled that, where consideration of justice requires a rehearing, the courts are not as reluctant to grant relief upon a petition to rehear, as upon a bill to review. *Richardson* v. *Gardner,* 128 Va. 676, 105 S. E. 225, 12 A. L. R. 1383; Lile's Pleading and Practice, section 197."

We quote further from Lile's Pleading and Practice as follows:

> Sec. 196 * * * "it thus appears that the courts are *much more liberal* in entertaining complaints of error in previous proceedings before final decree, presented by petition to rehear, than after the final decree, set up by bill of review."
>
> Sec. 197. * * * "Being thus in the breast of the court, such decrees do not constitute final records; and hence they are subject to alteration and amendment, in the sound discretion of the court, at any future term and until adjournment after entry of the final decree. Hence, where considerations of justice require it, there is not the same reason for judicial reluctance to grant relief under a petition to rehear as in the case of the bill of review."

The Court in the opinion complained of has adopted the harsh rule applicable to petitions for review of final judgments instead of a more liberal rule that should prevail with respect to petitions for rehearing.

There is no evidence or claim to the effect that the life tenant has changed her position in reliance on the correctness of the former settlements, or that the parties cannot now be placed in *statu quo,* or that it would create a hardship on the life tenant for proper correction to be now made.

Bettie J. Peters was already a party to the receivership suit, and will continue to be a party to that suit as long as she lives. This suit has been on the docket during the last eighteen years and will continue to remain on the docket, no doubt, for many years to come. The suit is being continued on the docket for the proper administration of the receivership fund. Inasmuch as Bettie J. Peters was already before the Court, and the petition for rehearing was merely in the nature of a notice to her that the receiver had made certain mistakes in administering this fund, which were being called to the attention of the Court for correction, any harsh or arbitrary rule should not be applied to prevent the mistakes being corrected, and the fund under the control of the Court properly administered.

The doctrine of *res adjudicata* applies in its strictness to a second suit involving the same question that had been previously adjudicated, and brings the defendant back into Court a second time in a new suit and is harassing in its nature.

In the instant case Bettie J. Peters was already before the Court as a party to the receivership suit, and was

receiving her income from time to time from the Receiver and necessarily kept in touch with the suit. We submit that the harsh rule applicable to *res adjudicata* should not be adopted by the Court as applying to cases of annual settlements of a receiver administering a fund under the control of the Court. It was as equitable duty of Bettie J. Peters, the life tenant, to see that she did not encroach on the corpus of this fund to the detriment of her children, and if by the mistake of the receiver she did encroach thereon, it was likewise her duty to restore to the corpus the excess amounts she had improperly received. In equity the entire obliga- did not rest on the receiver.

The itemized detailed statement prepared by Mrs. Lewis for the receiver, giving a full and complete record of the receivership from the year 1924 to 1941, filed with the record in this cause, and sworn to by her and the receiver, and not contradicted, shows that the life tenant was overpaid $1,133.64. This statement segregated the interest from the corpus, and should be accepted by the Court as correct.

CARELESSNESS OF RECEIVER

The Court, in its opinion in the instant case, states that the receiver by the exercise of due care should have known the condition of the estate at all times and he had no authority to pay out or expend the corpus in any manner or for any purpose except under the direction of the Court. The doctrine as announced by the Court in its decision would be accepted as sound if there had been a loss of any portion of the trust funds, but

we submit in all earnestness that the doctrine announced is not sound where there has been no loss of the trust funds and the Court can correct the mistake by restoring the overpayments to the corpus out of the income arising from the fund under its control.

Receiver's Settlements Were Approved By a Commissioner of Accounts and the Court

The receiver placed his accounts before the regular Commissioner in Chancery from time to time, and neither the Commissioner nor the Court required the Receiver to file as a part of his settlements a statement of his assets. The receiver simply followed the customary practice generally prevailing in the county and before the Commissioner of Accounts, and if there was any carelessness or laxity in keeping up with the status of the receivership account as between principal and interest in assets representing both, it was due to the prevailing custom and practice of the Commissioner of Accounts. The record in this case clearly shows that no statement of assets was ever requested by the Commissioner of Accounts, nor the Court, until the decree of December 20, 1940. If there was a loose practice in this respect by the Commissioner of Accounts, it would be unfortunate for a loss to be put on the receiver growing out of a mistake that was brought about by such loose practice when the mistake can easily be corrected and justice done.

Inasmuch as the decree of December 20, 1940, was an interlocutory decree, and the granting of the relief prayed for in the petition for rehearing is a matter for

the discretion of the Court, under all of the circumstances of the case, it is respectfully submitted that the heavy loss of $1,133.64 should not be thrown on the receiver by the adoption of a harsh and inequitable rule of law as properly applying to a case of the nature of the one here involved.

Such a rule should not be adopted where there has been no loss of the fund or any part thereof, but merely a mistake by which the life tenant received $1,133.64 more than she was entitled.

At the time of the filing of the first petition by the receiver in the trial Court he only knew of one ground for relief, and that was the excess payment of interest to the life tenant during the time the fiduciary funds were idle in bank on account of being unable to lend the same. This is the only ground set forth in the petition. It was after the Commissioner's report was confirmed before he learned of the additional shortage on account of other mistakes, and these other mistakes are clearly proven by the statement prepared by Mrs. Lewis, giving a complete history of the receivership account from the beginning to the end, and sworn to by her and the receiver. Under the doctrine laid down in the decision of the Court in the instant case it would appear that in cases involving a long receivership a mistake is discovered and a petition is filed to correct that mistake, the receiver would be barred from thereafter filing a new petition to correct other mistakes of which he had no knowledge when the first petition was filed. The opinion of the Court in the instant case adopts a policy that puts an unreasonable burden on a receiver to ascertain each and every mistake that was

made in the administration of the trust fund over a period of many years, or else be forever barred from thereafter correcting any other mistakes that might have been made during the receivership.

We ask the indulgence of the Court to again call its attention to the case of *Wooding* v. *Bradley,* 76 Va., p. 614; and the case of *Gills* v. *Gills,* 126 Va., p. 547, in which it is stated as follows:

> "There is no rule of law or practice which forbids a court, so long as it retains a cause under its consideration, from receiving and entertaining an exception to a Commisioner's report, even after the same has been confirmed, if it be clearly shown that the report, if carried out, would be productive of injustice and wrong."

SHOULD THE RECEIVER HAVE RESIGNED?

The Court in its opinion in this case stated that the appellant was not compelled to accept the appointment as receiver and if he thought the duties imposed an unreasonable burden on him he should have declined the appointment, and if during the course of his duties he found the requirements of the decree too difficult to perform, he should have asked the Court to change the requirements, or tender his resignation.

One of the grounds for the petition for rehearing in the lower Court was to have the lower Court change the impossible requirements of the decrees of September 18, 1924, requiring the receiver to lend the fund at 6% and collect the interest annually and turn the

same over to the life tenant. The lower Court in dismissing the petition to rehear, refused to grant this relief or change the requirements of the decrees of September 18, 1924, and this is one of the grounds of error assigned in the petition for appeal.

The effect of the opinion of the Court is that the discretion of the trial Court is not reviewable, and that as soon as the Receiver found the requirements of the decrees of September 18, 1924, impossible of performance, it was his duty to apply for relief and if he failed to obtain the relief from the trial Court, it was his duty to resign, and that the discretion of the trial Court was not reviewable by the appellate Court. We submit that the decision of the trial Court in refusing to modify the decrees of September 18, 1924, is reviewable, and as shown by the testimony in this case, the performance of said decrees have been impossible of performance for several years, and are still impossible of performance, and the relief prayed for in that respect should have been granted by the lower Court.

The previsions of the decrees of September 18, 1924, absolutely requiring the receiver to lend the money at six per cent and to pay the interest, less certain deductions, to the life tenant are contrary to Sec. 5325 of the Code of Virginia, as amended, which provides as follows:

> * * * "provided, however, that such guardian or any other fiduciary shall only be required to exercise reasonable diligence in lending or investing trust funds, and if such guardian or other fiduciary is reasonably diligent in lending or investing such funds he shall be accountable only for such interest and profits as may be earned."

It is submitted that the receiver is entitled to have said decrees modified in accordance with said section of the Code, as amended, not only for his protection in the past but for his guidance and protection in the future. The trial court refused to modify said provisions of said decrees by dismissing the petition for rehearing, and that is one of the rulings and actions of the trial court of which the receiver complained and sought to have corrected by his appeal. It seems that the Supreme Court overlooked this feature of the case when it affirmed the action of the trial court in its recent decision. The trial court has already refused to modify said decrees, and if the decision of the Supreme Court affirming the trial court is allowed to stand, the receiver will of necessity have to resign for the reason that the requirements of said decrees are impossible of performance as shown by the testimony of bankers and others as set forth in the record in this suit. In addition to this, the opinion of the Supreme Court will of necessity be to the effect that the refusal of the trial court to modify said decrees is not reviewable, and that his discretion in the matter is absolute.

It is respectfully submitted that the appellate Court should reverse the erroneous decision of the trial Court in refusing to modify the impossible requirements of the decrees of September 18, 1924.

THE HARDSHIP OF THIS CASE

Under the present status of this case the receiver not only stands to lose the $1,133.64 overpayments made by mistake to the life tenant, but a considerable sum of

commissions for his time and services, and costs of the appeal aggregating more than $300.00.

Under all the circumstances in this case it does seem to be inequitable for the receiver to be penalized for his mistakes when no part of the fund has been lost and the Court is in position to correct the mistakes without doing any injustice to any of the parties to the suit.

CONCLUSION

The Court is respectfully asked to again consider the merits of this case; that a rehearing of said cause be granted, and that the relief prayed for in the petition for the appeal in this cause be granted, and said receiver also prays for general relief in the premises.

Respectfully submitted,

JAMES W. HARMAN,
Counsel for Appellant.