

Err. & App.]

IN RE GOODHUE, ETC.

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sion and enjoyment only postponed, it is agreed among themselves that they shall enter into immediate possession of such estates vested in interest in them, without waiting for the arrival of the period named in testator's will for that purpose, and that they should apply to the Legislature to confirm the deed, upon the representation that the confirmation of the deed by the Legislature would be necessary for the reason only of some of the parties to the deed being *femmes couvertes*, and of the *insufficiency* of the powers conferred by the will upon the trustees, and upon the further representation that all that was desired to be done was to secure the immediate possession of estates already vested in interest in testator's children, that by such representations they had applied to the Legislature for, and upon the faith of the representations procured an Act of the Legislature, which, after reciting the scope, object and purpose of the deed to be as above, and the alleged infirmity in the deed, which occasioned the sole necessity for applying to the Legislature, enacts and declares that the said deed, which is set out in the Act, with all its recitals therein contained, shall be valid; that testator's children thereupon, (still representing their estates under the will to be vested in interest,) by summary application upon petition, without notice to the infant plaintiffs, and without making them parties to the proceeding, applied for and obtained from the court what the infant plaintiffs allege and insist was an *ex parte* order, whereby it is ordered that the testator's residuary estate shall be divided into six parts, that is, as many parts as there are children of the testator, and that the trustees of the will shall immediately transfer and convey one of such parts to each of testator's children absolutely in severalty; that the infant plaintiffs and the trustee, Becher, contend that the testator's children have not, under the testator's will, an estate vested in interest in his residuary estate or in any part thereof, and that they may never have any such or any estate therein; and that such residuary estate may, under the will, devolve wholly upon the infant plaintiffs and others, testator's grandchildren; that if the trustees should obey the order of the court they would be guilty of a breach of the trust reposed in them by the will, and would wholly subvert the testator's will; that the defendants, while admitting that the testator's children have in reality no estate vested in interest in testator's residuary estate, insist that the operation and effect of the Act of the Legislature so obtained is to give them such an estate, although before they had none, and to deprive the infant plaintiffs of all prospect of enjoying any benefit from testator's bounty, and they insist that the order of the Court of Chancery is authorized and required by the Act, whereas the infant plaintiffs and the trustee, Becher, insist the contrary, and contend that the Legislature had no power to pass an Act having such effect as is contended for by the defendants; and (although they do not in express terms contend, yet they allege sufficient to raise the point) that the proper construction to put upon the deed and the Act is, that the Legislature has only authorized to be conveyed to the testator's six children the

estates, if any, which, as they alleged, were vested in interest in them, and that testator's grandchildren, not being named in the Act, are not affected thereby; and that the order of the Court of Chancery, being made in their absence, and without their being made parties to the proceeding, and without any notice to them, and contrary to the course and practice of the court, without suit, is wholly inoperative to bar their rights. They pray, therefore, that the order of the Court of Chancery so obtained may be reversed; that a proper construction may be put upon the deed executed under such circumstances, and the Act of the Legislature so obtained; and that it may be declared that the infant plaintiffs are not thereby deprived of the benefit of the testator's will; that the trusts of his will in their favor shall be adhered to, their rights and interests protected, and the defendants restrained from proceeding upon the *ex parte* order so obtained, so as to affect or prejudice any rights, estates and interests devised by the will to the infants.

To drive these plaintiffs from the threshold of the Court by allowing a demurrer for want of equity, upon the ground that they have no *locus standi* in equity, because their own bill shows that the operation of the deed, Act of the Legislature, and order of the court, although they were never named in or made parties to, or had an opportunity of contesting any of such proceedings, and upon which deed, Act of Legislature and order they ask the court by bill to put a construction, has been to deprive them of all interest in the testator's will, seems to me, I must confess, to be a mockery of justice. I am of opinion, therefore, that the demurrers should be wholly disallowed, that the order made by the Court of Chancery is inoperative as affects any of the rights and interests of the infants, and that what these rights and interests are must be declared in a decree to be made in the suit, and that in the meantime all proceedings upon the order in Chancery should be stayed.

As to the appeal of the trustee, Becher, against the order itself. His is certainly a very critical position. If the testator's grandchildren, or any of them, should become entitled, as they may, to demand and receive from him the estate devised to them by their grandfather's will, he would, according to the ordinary recognized doctrine of the court, be liable as for a breach of trust if he should not have the estate forthcoming. Now the statute does not in terms direct him to transfer to testator's children any estate in which testator's grandchildren are, or may become, interested; it is only by a strained inference, if at all, that the Act can have that effect. Whether it has or not that effect can only be determined in a suit whereto all parties claiming under the testator's will are made parties, and by a *decree* in such suit. Now the statute does not profess to fetter the court in the exercise of its discretion; it does not *direct* the court *peremptorily* to proceed according to a course which would be subversive of the ordinary established doctrine of the court, that is to say, in the absence of parties interested or claiming to be interested, or to convey or cause to be conveyed to one set of persons estates not