

Trusts--"Sole Risk" of Corporate Trustee (Central Hanover Bank & Trust Co. v. Flint, 269 N.Y. Supp. 470 (2nd Dept. 1934))

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strued to be synonymous,⁹ as in the case at bar, and in other instances, the courts have held them to be diverse.¹⁰

V. G. R.

TRUSTS—"SOLE RISK" OF CORPORATE TRUSTEE.—The appellant bank was a trustee under a trust deed that permitted it to invest in certain so-called "non-legals." It invested in its own mortgage participations, two of which did not mature till after the period for which the trust was limited. When the trust period expired, the beneficiary was offered the participations which, owing to conditions surrounding the real estate market, were worthless. He brought suit, claiming that the investments were imprudently and negligently made and that the bank guaranteed its investments under the New York Banking Law.¹ *Held*, that the investments were not impru-

⁹ Residence and domicile are generally construed as synonymous when used in the Constitution or in statutes relating to voting, eligibility for office, jurisdiction in divorce, probate and administration. *Barney v. Oelrichs*, 138 U. S. 529, 11 Sup. Ct. 414 (1891); *De Meli v. De Meli*, *supra* note 3; *Bell v. Pierce*, 51 N. Y. 12 (1872); see *Cincinnati, H. & D. R. Co. v. Ives*, 21 N. Y. Super. Ct. 67, 3 N. Y. Supp. 895 (1889).

Eligibility for office: *People v. Platt*, 117 N. Y. 159, 22 N. E. 936 (1889). Matrimonial actions: *De Meli v. De Meli*, *supra* note 3. Matter of succession and transfer taxes: *In re Martin's Estate*, 173 App. Div. 1, 158 N. Y. Supp. 915 (1st Dept. 1916); *In re Wise's Estate*, 146 N. Y. Supp. 789 (1914). Venue: *Klenrock v. Nantex Manufacturing Co.*, 201 App. Div. 236, 194 N. Y. Supp. 142 (2d Dept. 1922); *cf. Johnson v. Hoile*, 205 App. Div. 633, 199 N. Y. Supp. 875 (2d Dept. 1923). *Contra: Lyon v. Lyon*, 30 Hun 455 (N. Y. 1883). In this case, at page 456, the court says: "The section of the code referred to (§984 C. C. P. now §182 C. P. A.) makes the residence of the parties the controlling fact in fixing the place of trial. This means actual residence and not necessarily the domicile of one of the parties."

¹⁰ "Residence in attachment laws generally implies an established abode, fixed permanently for a time, for business or other purposes, although there may be an intent existing all the while to return to the true domicile." *Weitkamp v. Weitkamp*, 53 N. Y. Super. Ct. 79 at 82-3 (1886). *Hislop v. Taaffe*, 141 App. Div. 40, 125 N. Y. Supp. 614 (2d Dept. 1910); *Zenatello v. Pons*, 235 App. Div. 221, 256 N. Y. Supp. 763 (1st Dept. 1932).

¹ N. Y. BANKING LAW (1933) §188, subd. 7. "All investments of money received by any such corporation, and by any trust company * * * as * * * testamentary trustee * * * shall be at its sole risk, and for all losses of such money the capital stock, property and effects of the corporation shall be absolutely liable, unless the investments are such as are proper when made by an individual acting as trustee * * * or such as are permitted in and by the instrument or words creating or defining the trust. Investments in bond and mortgage by any such corporation as * * * testamentary trustee * * * may be made by apportioning or by transferring to any estate or fund so held a part interest in a bond and mortgage held by or in the name of such corporation * * * ; but such bond and mortgage shall be a legal investment for trustees under the laws of this state * * *."

dently and negligently made and that the bank did not become a guarantor. *Central Hanover Bank & Trust Co. v. Flint* — A. D. —, 269 N. Y. Supp. 470 (2d Dept., 1934).

The investing of trust funds in real estate mortgage securities was early recognized.² The use of participations in trust funds was held not to be a violation of the trustee's duty.³ The mere fact that two of the participations did not mature till after the expiration of the trust did not place the trust in such unrecalable shape as would violate the rule,⁴ especially inasmuch as at the time they were purchased, they were readily marketable for full value. The rapid decline of real estate values was unpredictable and unavoidable. Hence, no negligence could be imputed to the bank on that score.

"At its own risk"⁵ applies to corporate trustees in lieu of the bond required of the individual trustee.⁶ At any rate, that condition does not apply where the investment is permitted by the trust indenture.⁷

The trustee was never allowed to deal with himself in investing trust funds, such transactions being set aside regardless of whether or not they benefited the beneficiary, lest by making exceptions the court permit the rule of undivided loyalty from trustee to beneficiary to be eroded.⁸ This is still the law except where changed by statute. The New York Banking Law permits the corporate trustee to deal with itself by complying with certain conditions, one of which is that the investments be legal under "the laws of the state."⁹ The investment in "non-legal" mortgage participations was held to conform with this description.¹⁰

It is well settled that a statute which gives a privilege unknown to the Common Law, or enlarges one already present, by implication, forbids it to be done in any other way, even though that other way should be better.¹¹

J. D. G.

² *King v. Talbot*, 40 N. Y. 76, 83 (1869).

³ *Barry v. Lambert*, 98 N. Y. 300 (1885); *Matter of Union Trust Co.*, 219 N. Y. 514, 114 N. E. 1057 (1916).

⁴ *Marczak v. Brooklyn City R. R.*, 237 App. Div. 841, 261 N. Y. Supp. 27 (2d Dept. 1932); *Behrens v. Brooklyn City R. R.*, 237 App. Div. 836, 261 N. Y. Supp. 914 (2d Dept. 1932).

⁵ *Supra* note 1.

⁶ N. Y. SUR. CT. ACT (1920) §97.

⁷ *Supra* note 1.

⁸ *Wendt v. Fisher*, 243 N. Y. 439, 154 N. E. 303 (1926); *Meinhard v. Salmon*, 249 N. Y. 458, 164 N. E. 545 (1928).

⁹ *Supra* note 1.

¹⁰ Instant case.

¹¹ *Burnside v. Whitney*, 21 N. Y. 148 (1860); *People ex rel. Flatbush Gas Co. v. Cooler*, 190 N. Y. 268, 83 N. E. 18 (1907); *In re Hering*, 196 N. Y. 218, 89 N. E. 450 (1909); *Knickerbocker Ice Co. v. N. Y.*, 239 N. Y. 595, 147 N. E. 210 (1924); *Loewy v. Gordon*, 129 App. Div. 459, 114 N. Y. Supp. 211 (2d Dept. 1908).