Privy Council Appeal No. 51 of 1919.

Isabella Taylor - - - - - - - - *Appellant*

v.

Robert Davies and others - - - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1919.

Present at the Hearing :

VISCOUNT FINLAY.
VISCOUNT CAVE.
LORD SUMNER.
LORD PARMOOR.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal from a judgment of the First Appellate Division of the Supreme Court of Ontario, reversing the judgment of Mr. Justice Lennox in favour of the plaintiff, and directing judgment to be entered dismissing the plaintiff's action with costs.

The action was brought by Isabella Taylor on behalf of herself and all other persons entitled under the trusts of a deed of assignment for the benefit of creditors, made by William Thomas Taylor (the husband of the plaintiff), George Arthur Taylor and John Frederick Taylor, and dated the 14th June, 1901. The principal defendant was Robert Davies, who will be referred to as "the defendant"; and the object of the action was to set aside a release by the trustee of the deed to the defendant of certain property forming part of the trust estate on the ground that the defendant being in a fiduciary position was disabled from acquiring such property from the trustee. The plaintiff's allegations were disputed, and it was pleaded that the action was brought too late, and was barred by the plaintiff's laches and the Limitations Act.

The material facts may be stated as follows :—Prior to the 14th June, 1901, the firm of Taylor Brothers, consisting of the three persons above-named, owned, among other property, 144¼ acres of land in the valley of the River Don, within three miles of the centre of the City of Toronto. Upon part of this land the firm had carried on since 1891 the business of brick-making. By a deed dated the 28th November, 1894, the land was mortgaged to the defendant Davies for a sum of $73,362 with interest, the total sum owing on this mortgage at the date of the assignment hereafter mentioned being a little over $100,000. Towards the middle of the year 1901, Taylor Brothers became financially embarrassed, and on the 14th June, 1901, the firm made an assignment for the benefit of its creditors under the Act respecting Assignments and Preferences by Insolvent Persons then in force in Ontario (R. S. of Ontario, 1897, c. 147). By this deed the partners granted and assigned all their real and personal property to the respondent E. R. C. Clarkson (a chartered accountant) upon trust to sell and convert the same into money, and to apply the proceeds, first to the payment of expenses (including advances made by the assignee and his remuneration) ; secondly, in payment to the creditors of their debts rateably in compliance with the above-mentioned Act, and to pay the balance (if any) to the debtors.

The Act provided (by Section 17) that it should be the duty of the assignee within five days from the date of the assignment to convene a meeting " for the appointment of inspectors and the giving of directions with reference to the disposal of the estate " by mailing a notice of the meeting to every creditor known to him, and by advertisement in the Ontario Gazette, and that all other meetings to be held should be called in like manner. There was no express provision as to the duties of the inspectors. The rights of secured creditors were dealt with by section 20, of which sub-section (4) was as follows :—

> " Every creditor, in his proof of claim, shall state whether he holds any security for his claim or any part thereof ; and, if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon ; and the assignee, under the authority of the creditors, may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the assignee has realised such security ; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate."

On or shortly after the date of the execution of the assignment, Clarkson prepared a statement of affairs showing the assets and liabilities of the firm. Among the secured liabilities he included the liability to the defendant on his mortgage, and estimated the approximate value of the security at $35,000, leaving a net liability to the defendant of about $65,000. The statement showed a total estimated deficiency of about $135,000. On

the 21st June, 1901, the defendant made an affidavit of claim in which he put his claim under the mortgage at $100,164, but did not value his security as required by the statute. On the 25th June, 1901, an agreement was entered into between the defendant and Clarkson by which, after reciting that the amount due to the defendant on his mortgage exceeded the value of the property covered by it, it was agreed that the defendant should rent the brickyard from Clarkson for a month at $25. The defendant held possession of the land under this agreement until the delivery of the release hereafter mentioned. On the 5th July, 1901, there was a meeting of creditors of the firm at which the defendant was present, and on the motion of one of the creditors it was resolved that six persons, of whom the defendant was one, "be appointed inspectors of the estate with power, in conjunction with the assignee, to realise upon the assets to the best advantage." On the 31st July, 1901, the solicitors for the defendant wrote to the assignee stating that the defendant desired to retire from the position of inspector, and on the 3rd September the defendant himself sent to the assignee a formal letter of resignation. But it appears that Davies' resignation did not then take effect, as he afterwards, in June, 1902, executed a deed as inspector and attended a meeting of inspectors. Further, on the 3rd July, 1902, he signed and forwarded to the assignee a formal instrument of resignation as inspector of the estate; and it would appear that his retirement was not complete until the last-mentioned date.

The property containing 144¼ acres (including the brickyard) had considerable potential value, containing as it did brick-earth of good quality and of such variety as to enable the owner to manufacture and supply the different kinds of bricks required for building purposes. The land was well situated near the centre of Toronto, where there was a large and growing demand for bricks. The assignee caused the land to be valued by two surveyors named Stewart and Galley, and they valued the land, buildings and machinery at $45,000; but it seems that this valuation was somewhat hastily made, and that the valuers had no special knowledge as to the brick-making business. In the month of February, 1902, the deed of release which the plaintiff in this action claims to have set aside was prepared by the defendant's solicitor and forwarded to the trustee for execution. By this deed, which was dated the 10th February, 1902, and was made between Clarkson of the first part and the defendant Davies of the second part, after reciting (among other things) that "it had been agreed by and between the parties thereto that the party of the first part would assign and convey to the party of the second part all his interest in the land above-mentioned, upon condition that the party of the second part would accept the said lands in satisfaction of a certain amount of the monies secured by the said mortgage and for which the party of the second part would be entitled to prove against the estate of Taylor Brothers," it was witnessed that in consideration of $1

paid by the defendant to Clarkson the latter granted and released to the defendant in fee simple the above-mentioned land amounting to 144¼ acres. On the 22nd April, 1902, there was a meeting of the inspectors of Taylor Brothers, at which the defendant was present, and the following extract appears in the minutes of this meeting :—

> " On the motion of Mr. Worrell it was agreed to accept the valuation of $45,000 for the brickyard and plant covered by mortgage to Mr Robert Davies for $100,000. Mr. Davies was to rank on the estate for the balance of the claim, and the release of the equity of redemption was given to Mr. Worrell to pass upon."

On the 24th April Mr. Davies wrote to Mr. Clarkson as follows :—

> " Pursuant to the arrangement made with you, I beg to notify you that in consideration of your having given me a Quit Claim Deed of the property comprised in the Don Valley Brick Works, I have agreed to waive my right to rank on the above estate for $45,000 of the claim of $100,000 proved by me in respect of the mortgage which I hold from Taylor Brothers. The sum of $45,000 is the valuation which has been made of the said property."

On the 30th April Mr. Worrell, who had been requested to " pass upon," *i.e.*, to advise upon, the form of release, wrote to Clarkson that it was in somewhat different form from that generally given by an assignee, and that it would be better to follow the procedure of the Act, and if necessary to have the transaction confirmed by the creditors. On the 7th June, doubtless in pursuance of this advice, the assignee sent to the creditors a notice in the following form :—

> " Toronto,
> " 7th June, 1902.
>
> " In the matter of The Estate of Taylor Brothers.
>
> " Notice is hereby given that a meeting of Creditors of the above will be held at the office of the undersigned, on Wednesday, 18th June, at 3 o'clock p.m., to consider the settlement and ranking of secured claims and such other business as may come before the meeting.
>
> " E. R. C. CLARKSON,
> " Assignee."

This notice was perhaps in form sufficient to cover the proposed confirmation of the release to the defendant; but it appears to their Lordships that it did not give to the creditors any real or effective information as to the transaction which it was proposed that they should sanction. The notice was not, as required by the Act, advertised in the Ontario Gazette. A meeting was duly held on the 18th June, but the minutes have been lost. It appears from the evidence that very few creditors attended the meeting, and that a resolution approving the release to the defendant was carried with little or no dissent. On or about the 15th September, 1902, the release dated the 10th February, 1902, was executed by the trustee and delivered to the defendant, who thenceforth remained in possession of the property under the release. He proceeded to develop the brick-field, spending considerable sums in the provision of plant and

machinery, and there is no doubt that it turned out to be a property of considerable value. The dividend paid to the creditors of Taylor Brothers was less than three cents in the dollar.

In the year 1909 the James Bay Railway Company (now the Canadian Northern Ontario Railway Company) in exercise of their statutory powers took part of the brickfield containing 11.85 acres for railway purposes; and in an arbitration as to the amount of compensation to be paid to the defendant in respect of this land he was awarded in the month of May, 1912, no less than $238,583. It seems probable that the publication of this award called the attention of the plaintiff (who was the wife of William Thomas Taylor, one of the partners, and the executrix of another partner, John Frederick Taylor, and was herself a creditor on the estate for $6,000) to the value of the property, and on the 21st July, 1914, the writ in this action was issued by her against Robert Davies, E. R. C. Clarkson and the Railway Company. By the Statement of Claim, which was delivered on the 15th October, 1914, the plaintiff alleged that the land was of much greater value than the amount due to the defendant Davies under his mortgage, and that the defendant as an inspector of the estate was disqualified from purchasing the property; and the plaintiff claimed to have the trusts of the assignment for the benefit of creditors enforced, to have the conveyance to Davies dated the 10th February, 1902, set aside and cancelled, and to have the amount of the award paid into Court, or in the alternative to redeem the mortgage of the 28th November, 1894. No claim was made against Clarkson personally. The defendant Davies denied the allegations and pleaded among other defences the Limitations Act and the plaintiff's delay. At the trial there was very little evidence as to the value of the property in question in 1902, but two witnesses called on behalf of the plaintiff stated that in their opinion the property was then worth not less than $500,000. Stewart and Galley were not called as witnesses. Davies was in bad health and could not be called as a witness. He has since died.

The action was tried by Mr. Justice Lennox, who determined the issues both of fact and of law in favour of the plaintiff. He held that the property was worth far more than the value that had been put on it for the purposes of the deed of release; that the defendant Davies was disabled by his position as inspector from becoming the purchaser of the property; that the plaintiff was not barred by acquiescence from impeaching the transaction; and that the Limitations Act did not apply. He accordingly made an order setting aside the release of the equity of redemption (subject to the title of the Railway Company to the land taken by them) and directing full accounts and consequential relief upon that footing. On an appeal by the defendants to the Appellate Division of the Supreme Court of Ontario, that Court reversed the decision of Mr. Justice Lennox. The learned judges of the Supreme Court were not agreed in their views as to the position

of the defendant at the time of his purchase; but they were unanimously of opinion that the Limitations Act applied and afforded a defence to the action, and they accordingly dismissed the action with costs. From this decision the present appeal is brought.

Upon the argument of the appeal before this Board, the appellant was heard upon the whole case; but, having regard to the view which their Lordships were disposed to take of the defence of the Limitations Act the respondent was content to rest his case upon the statute and was not heard upon the facts. In these circumstances their Lordships must assume for the purposes of this judgment only that the facts are as stated above; and upon that assumption it follows that at the date of the transaction which is impeached the defendant, although not a trustee of the estate, was still an inspector, and as such was under an obligation to keep a watch upon the assignee and to see that the assets were realised to the best advantage. If so, he was beyond question in a fiduciary relation to the general body of creditors and was disabled (under the ordinary rules of equity) from becoming a purchaser of any part of the estate or making any other arrangement with the assignee for his own benefit, except upon the condition of making full disclosure of all material facts within his knowledge; giving full credit for the value of his bargain; and obtaining the consent of the creditors. It has been suggested that the transaction in question was not a transaction of sale and purchase, that the defendant was entitled as a secured creditor to exercise the power conferred upon him by Section 20 of the Assignments and Preferences Act by valuing his security and (with the consent of the assignee) retaining it at the value so specified, and that the release can be upheld as having been made under that section; but their Lordships are unable to accept this view of the transaction. Doubtless the defendant was not treated as an ordinary purchaser, and some regard was had in the form of the assignment to his position as a mortgagee, but the requirements of the statute relating to a secured creditor were not complied with. He did not (as required by the Act) put a specified value on his security so as to give the assignee an opportunity of taking it over at an advance of 10 per cent. of such value; nor did the assignee, before consenting to the defendant retaining the security at the price of $45,000 and ranking for the excess of his claim, duly obtain the authority of the creditors. It is true that at the meeting of the 18th June some resolutions purporting to give such authority, appear to have been passed; but having regard to the insufficient notice given to the creditors of the nature of the proposals which were to be put before the meeting and to the absence of the advertisements required by the statute, their Lordships cannot regard these resolutions as effective consent within the statute. In effect there was an arrangement between the assignee and the defendant under which, without complying with the formalities required by law, the defendant obtained a release of the equity

of redemption on releasing the estate from part of his secured debt; and to such an arrangement the disabilities imposed upon the defendant by his fiduciary position apply.

Now it is clear that the conditions under which alone such a transaction can be upheld were not fulfilled. The character and prospects of the brickfield, although probably well known to the defendant who was in possession under his agreement of tenancy, were never properly ascertained by the assignee or communicated to the creditors. It is not shown that full value was given for the property, and the evidence (so far as it goes) points to the conclusion that if the property had been offered publicly a much larger price would have been obtained for it. Doubtless some of the creditors assented to the transaction, but these were a small minority of the whole body, and it is doubtful whether, when they gave their assent they did so with knowledge of the material facts. In these circumstances, it appears to their Lordships that the arrangement, if impeached at the time, could not have stood but must have been set aside. It is not shown that the plaintiff only shortly before she brought her action had such knowledge of the facts as to be barred by laches or acquiescence from seeking such remedy as she may have. It follows that the true and only defence to the action (if any) is a plea of the Limitations Act, and that defence must now be considered.

The Limitations Act (now consolidated as R.S.O., 1914, chapter 75) provides (by section 5) that no person shall bring an action to recover any land or rent but within ten years after the time at which the right to bring such action first accrued to him or to some person through whom he claims; and (by section 20) that where a mortgagee has obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor or any person claiming through him shall not bring any action to redeem the mortgage but within ten years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the mortgagee's title or of his right of redemption has been given. Section 47 of the Act (which corresponds with section 8 of the English Trustee Act, 1888) contains the following provisions:—

> "(1) In this section 'trustee' shall include an executor, an administrator and a trustee whose trust arises by construction or implication of law, as well as an express trustee, and shall also include a joint trustee.
>
> "(2) In an action against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof, still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—
>
> "(*a*) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action if the trustee or person claiming through him had not been a trustee or person claiming through a trustee.

> "(*b*) If the action is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or person claiming through him shall be entitled to the benefit of, and be at liberty to plead, the lapse of time as a bar to such action in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received; but so, nevertheless, that the statute shall run against a married woman entitled in possession for her separate use, whether with or without restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession."

The interval between the delivery of the release to the defendant in September, 1902, and the date of the commencement of these proceedings exceeded ten years, and the defendant accordingly relied upon the above provisions as a sufficient defence to the action.

It was contended on behalf of the appellant that the plaintiff's claim was excepted from the provisions of section 47 of the Act as being (in the words of sub-section 2) a claim "to recover trust property or the proceeds thereof still retained by the trustee," and this on two alternative grounds. First, it was said that, having regard to the terms of the resolution of the 5th July, 1901, under which the defendant was appointed an inspector, he was an express trustee of the estate who at the time when the action was brought still retained part of the trust property, and that he fell as an express trustee within the exception above-mentioned. Their Lordships are unable to agree with this contention. It is true that the inspectors were empowered by the resolution in question to "realise upon the assets" in conjunction with the assignee; but the assets were not vested in them, and the assignee remained the sole trustee of the assets and was entitled to realise them subject only to the supervision of the inspectors.

Secondly, it was said that the defendant, having acquired the property in question at a time when he was disabled by his fiduciary position from so doing, became at all events a constructive trustee of the property, and so fell within the same exception, and this argument requires careful examination.

In order to ascertain the effect of the Trustee Act, 1888, and the corresponding Canadian statute, it is necessary to refer to the antecedent law of limitation as it applied to trustees. It is clear that apart from these statutes an express trustee could not rely, as a defence to an action by his beneficiary, either upon the statutes of limitation or upon the rules which were enforced by courts of equity by analogy or in obedience to those statutes. The possession of an express trustee was treated by the Courts as the possession of his *cestuis que trustent*, and accordingly time did not run in his favour against them. This disability applied, not only to a trustee named as such in the instrument of trust, but to a person who, though not so named, had assumed the position of a trustee for others or had taken possession or control of property on their behalf, such (for instance) as the persons

enumerated in the judgment of Lord Justice Bowen in *Soar* v. *Ashwell* (L.R., 1893, 2 Q.B. 390) or those whose position was in question in *Burdick* v. *Garrick* (L.R., 5 Ch. 233), Re *Sharpe* (L.R., 1892, 1 Ch. 154), *Rochefoucauld* v. *Boustead* (L.R., 1897, 1 Ch. 196), and *Reid-Newfoundland Company* v. *Anglo-American Telegraph Company* (L.R., 1912, A.C. 555). These persons though not originally trustees had taken upon themselves the custody and administration of property on behalf of others; and though sometimes referred to as constructive trustees, they were, in fact, actual trustees, though not so named. It followed that their possession also was treated as the possession of the persons for whom they acted, and they, like express trustees, were disabled from taking advantage of the time bar. But the position in this respect of a constructive trustee in the usual sense of the words—that is to say, of a person who, though he had taken possession in his own right, was liable to be declared a trustee in a court of equity—was widely different, and it had long been settled that time ran in his favour from the moment of his so taking possession. This rule is illustrated by the well-known judgment of Sir William Grant, M.R., in *Beckford* v. *Wade* (17 Ves., 87, at p. 97).

> "It is certainly true," said that learned judge, "that no time bars a direct trust, as between *cestui que trust* and trustee; but, if it is meant to be asserted that a Court of Equity allows a man to make out a case of constructive trust at any distance of time after the facts and circumstances happened out of which it arises, I am not aware that there is any ground for a doctrine so fatal to the security of property as that would be: so far from it, that not only in circumstances where the length of time would render it extremely difficult to ascertain the true state of the fact, but where the true state of the fact is easily ascertained, and where it is perfectly clear that relief would originally have been given upon the ground of constructive trust, it is refused to the party who after long acquiescence comes into a Court of Equity to seek that relief."

So in *Soar* v. *Ashwell* (L.R., 1893, 2 Q.B., at p. 393) Lord Esher, M.R, stated the rule as follows:—

> "If the breach of the legal relation relied on, whether such breach be by way of tort or contract, makes, in the view of the Court of Equity, the defendant a trustee for the plaintiff, the Court of Equity treats the defendant as a trustee become so by construction, and the trust is called a constructive trust: and against the breach which by construction creates the trust the Court of Equity allows Statutes of Limitation to be vouched."

And in the same case Lord Justice Bowen, speaking of constructive trusts of this kind, said:—

> "That time (by analogy to the statute) is no bar in the case of an express trust, but that it will be a bar in the case of a constructive trust, is a doctrine which has been clearly and long established."

As to the pre-existing law, then, there is no question; but it is contended for the appellant that the recent statute has altered the law in this respect. Section 47 (1), it is said, defines a trustee as including "a trustee whose trust arises by construction or implication of law," and accordingly the exclusion from section 47 (2) of a claim to recover "trust property or the proceeds thereof still retained by the trustee" must apply to property in the

hands of a constructive trustee or of any person claiming under him otherwise than by purchase for value without notice. If this contention be correct, then the section, which was presumably passed for the relief of trustees, has seriously altered for the worse the position of a constructive trustee, and (to use the words of Sir William Grant in the case above cited) a doctrine has been introduced which may be "fatal to the security of property." It does not appear to their Lordships that the section has this effect. The expressions "trust property" and "retained by the trustee" properly apply, not to a case where a person having taken possession of property on his own behalf, is liable to be declared a trustee by the Court; but rather to a case where he originally took possession upon trust for or on behalf of others. In other words, they refer to cases where a trust arose before the occurrence of the transaction impeached and not to cases where it arises only by reason of that transaction. The exception no doubt applies, not only to an express trustee named in the instrument of trust, but also to those persons who under the rules explained in *Soar* v. *Ashwell* (*supra*) and other cases are to be treated as being in a like position; but in their Lordships' opinion it does not apply to a mere constructive trustee of the character described in the judgment of Sir William Grant.

It is to be noticed also that, while section 49 of the Limitations Act prescribes the time at which a right to recover land is to be deemed to have accrued in the case of an express trustee, and provides that subject to section 47 "no claim of a *cestui que trust* against the trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any statute of limitation," there are no similar provisions in respect of a constructive trustee; and it is to be presumed, therefore, that such a trustee remains entitled to such protection as he had before the passing of the Act.

For the above reasons it appears to their Lordships that in the present case time ran in favour of the defendant Davies as from the date of the delivery to him of the release in question, and accordingly, that the Limitations Act afforded a good defence to that defendant in this action. They will accordingly humbly advise His Majesty that this appeal fails, and should be dismissed with costs.

In the Privy Council.

ISABELLA TAYLOR

v.

ROBERT DAVIES AND OTHERS.

DELIVERED BY VISCOUNT CAVE.

Printed by Harrison & Sons, St. Martin's Lane, W.C.

1919.