THE STATUTE OF LIMITATIONS & EXPRESS TRUSTEES. SOME REFLECTIONS ON MAYNE v. THE PUBLIC TRUSTEE.[1]

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In 1922, one L. voluntarily sequestrated his estate under the provisions of the *Bankruptcy Act* 1898 (N.S.W.). In his statement of affairs L. showed that he was entitled under a will to a life estate in certain government stocks producing an income of approximately £53 per annum. The trustees of the will were, apparently, unaware that the sequestration order had been made, and neither the official assignee originally appointed nor his successor appeared to have endeavoured to collect the income or sell the asset. The trustees continued to pay the income to L. until he died in 1942. Between the date of the sequestration order and the date of his death L. received the sum of £942 and did not account for any part of it to either official assignee. The official assignee then sought to recover this sum from the administrator of L.'s estate in the Court of Bankruptcy.

In an appeal from the decision of His Honor Judge Clyne in the Court of Bankruptcy, the High Court held that the administrator could rely on the Statute of Limitations and that, consequently, the assignee could only recover payments of income made to L. within 6 years before the commencement of these proceedings.[2]

The Court consisted of Latham C.J., Dixon & Williams J.J.; Williams J. delivered a judgment with which the other members of the Court concurred.

His Honor said it was clear that L. had received the payment of income as his own and not on account of any other person. Since L. was now dead, there could be no explanation of why he had not paid the money to the official assignee. It was possible that he honestly believed he was entitled to retain the money and it would be wrong in view of the absence of evidence to impute dishonesty to him.

It was therefore necessary for the Court to deal with the question of to what extent L. was a trustee for the assignee of the money he received. If he were in the position of an express trustee, then, of course, the Statute of Limitations would not run in his favour and the assignee, as *cestui que trust*, would be entitled to recover the full amount of £942.

If, however, L. was only a constructive trustee, then the assignee's claim would be barred after the lapse of 6 years—in other words, he would be limited to the recovery of such sums as had been paid to L. within 6 years of his commencing proceedings to recover the moneys. It was clear that L. was not an express trustee in the narrowest sense of that term since there had been no express declaration of trust in favour of the assignee. However, the authorities show that, when the term "express trustee" is used in connection with the Statute of Limitations, it has a wider meaning. The following four-fold division was adopted by Bowen L.J. in *Soar v. Ashwell*,[3] where he said that the doctrine that time

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1. 70 C.L.R. 395.
2. *Mayne v.The Public Trustee* 70 C.L.R. 395.
3. (1893) 2 Q.B. 390 at 396.

is no bar in the case of express trusts has been extended to the following cases :—

1. Where a person who is not a direct trustee nevertheless assumes to act as a trustee under the trust.

2. Where a stranger participates in the fraud of a trustee.

3. Where a person receives trust property and deals with it in a manner inconsistent with trusts of which he is cognizant.

4. The actual words of the learned Lord Justice in describing this category were :—

> "In some other cases, e.g. in *Bridgman v. Gill*[4] by Lord Romilly, and in *Wilson v. Moore*[5] by Lord Brougham, language has been employed in regard to the question of limitations of time in certain instances of constructive trust which can scarcely be reconciled with the language in *Bonney v. Ridgard*,[6] *Beckford v. Wade*,[7] *Townshend v. Townshend*,[8] and in other cases."[9]

It will be convenient to return to an analysis of this category at a later stage.

Williams J. in *Mayne's Case* came to the conclusion that L. should not be treated as being in the position of an express trustee. He said :—

> "The case made for the appellant (the assignee) was that, since the effect of the sequestration order was to vest the life estate in the assignee, the bankrupt ceased to be a *cestui que trust* under the trusts of the will, his place being taken by the official assignee, so that when the bankrupt received payments from time to time from the trustees of the will he received moneys which were to his knowledge impressed with an express trust in favour of the official assignee."[10]

The crucial part of the judgment is contained in two sentences[11] where His Honor is reviewing the possible reasons why L. never paid over the money to the assignee.

> "It would be wrong, as His Honor (Judge Clyne) said, to impute dishonesty to him, and it is really immaterial whether he believed that he could lawfully retain the payments for his own benefit or not. The important point is that there is no evidence that he ever accepted payments as affected by a trust, or that his possession of the moneys was ever otherwise than adverse to the claim of the official assignee."

Thus Williams J. adopted this test for determining whether a person was an express trustee or not :—Did the person receive the property knowing that it was affected by a trust and intending to hold it on trust for another ? The learned Justice quoted the statement made by Dixon J. in *Cohen v. Cohen*,[12] where he said that although the Statute of Limitations did not expressly apply to equitable remedies, yet such remedies

4. (1857) 24 Beav. 302.
5. 1 M. & K. 337.
6. 1 Cox 145.
7. 17 Ves. 87.
8. 1 Bro. C.C. 550.
9. at p. 397.
10. at p. 401.
11. at p. 402.
12. (1929) 42 C.L.R. at 99, 100.

were barred in equity by analogy to the Statute. Dixon J. had then said :—

> "The analogy is found in the case of a constructive trustee where the equity is fastened upon the trustee not because he intended to become the fiduciary of property but because of the character of his dealings and in spite of his intention to take the property for himself. But courts of equity have refused to see any analogy when a person intending to act in a capacity which is fiduciary, has received, as and for the beneficial property of another, something which he is to hold, apply and account for specifically for his benefit. Such a person is either an express trustee, or if that name does not in strictness belong to him, he stands in the same position as a direct or express trustee (see *Soar v. Ashwell*)."

Now, without reference to the authorities, it is submitted that one would expect the equitable rule to be this : *Where a person takes property, which is part of a trust fund, knowing that another person is rightfully entitled to it, then he should be in the same position as an express trustee of that property and time should not bar any claim by the person rightfully entitled.* If he believed that he could lawfully retain the property—in other words if he was not aware that another person was rightfully entitled to the property—then he would only be in the position of a constructive trustee. The test would thus be a simple one with a broad moral basis. To hold that a person who, although not formally appointed a trustee, takes property intending to perform the trust cannot plead the Statute whereas a person taking trust property knowing he has no right to it but intending to keep it for himself, can plead the Statute seems to be putting a premium on dishonesty.

Both Williams J. and Dixon J. reject this test in favor of a narrower one, viz. that even though the person taking the trust property is aware that he is not entitled to it, yet if he intends to take it for himself and not to hold it for another he is merely a constructive trustee. It is submitted with the greatest respect that they are mistaken in so doing.

This submission is based upon a consideration of a number of cases decided in the Court of Chancery before 1875. These are, in my opinion, convenient examples of the way in which this problem was answered at a time when the Court took a broader view of this branch of the law. The first case is that of *Wilson v. Moore*.[13] This case was decided by Lord Brougham L.C. in 1834 and the facts and decision as set forth in the headnote are these:

> "Merchants, who, by the direction of an executor, their commercial correspondent, applied a fund, which they knew to be part of the testator's assets, in satisfaction of advances made by them in the course of trade to relieve the embarrassments of their correspondent, were held to be responsible for the fund, so applied, to general pecuniary legatees under the will of the testator."

They were held not entitled to rely on lapse of time because, being parties to a breach of trust, they were themselves in the position of express

13. 1 M. & K. 337.

trustees. It is clear, however, that they intended to take the trust fund for themselves.

In *Bridgman v. Gill*[14] a fund was standing to the account of two trustees in the books of some bankers who had notice that it was a trust fund. By the direction of the tenant for life alone the bankers in 1843 transferred it to his account and thereby obtained payment of a debt due from him to them. Sir John Romilly M.R. held that the trustees (representing the *cestuis que trust*) might sue the bankers to have the trust fund replaced and that the Statute of Limitations was inapplicable.

In *Ernest v. Croysdill*[15] two provisionally registered projected railway companies had the same finance committee, which in 1845 transferred sums amounting to £17,000 from the account of one company to the account of the other. The directors of the latter company, without authority, paid £10,000, part of the above amount, as a deposit in respect of an unauthorised contract to purchase canals from certain canal companies and afterwards in 1846 repaid to the other company £14,200. In 1849, both companies were ordered to be wound up. In 1850, the official manager of the borrowing company sued in equity the canal companies for the £10,000 and obtained a decree for the payment of that amount, but being unable to enforce payment assigned the benefit of the decree for £7,300, which was applied partly in payment of debts of the borrowing company and partly in payment of costs. In 1858 the official manager of the lending company claimed from the official manager of the borrowing company the difference between £17,000 and £14,200.

Both Knight Bruce and Turner L.JJ. held that the official manager of the lending company was entitled to recover this amount and Turner L.J.[16] said :—

> "It was attempted also on the part of the Defendants to resist the Plaintiff's claim upon the ground of the Statute of Limitations, but the Plaintiff's case does not rest upon the mere claim of debt. It proceeds upon the right to recover monies affected by a trust which have got into the hands of other persons with notice of the trust, and in truth the case before us is no more than this—that if a trustee, lending monies in breach of the trust, and the borrower, with notice of the trust, applying the moneys to his own use, in which case the conscience of the borrower being affected by the trust, he cannot as I apprehend be permitted to separate the loan from the trust, and insist that the loan being barred by the Statute the trust is barred also."

The later cases of *Soar v. Ashwell*[17] ; *In re Dixon, Heynes v. Dixon*[18] ; *In re Eyre-Williams ; Williams v. Williams*[19] : *In re Blake ; Re Minahan's Petition of Right*[20] were cited in *Mayne v. The Public Trustee.*

These cases were interpreted in a narrow way by Williams J. and this enabled him to follow the proposition laid down by Dixon J. in

14. (1857) 24 Beav. 302.
15. (1860) 2 De G. F. & J. 175.
16. at p. 198.
17. (1893) 2 Q.B. 390.
18. (1900) 2 Ch. 561.
19. (1923) 2 Ch. 533.
20. (1932) 1 Ch. 54.

Cohen v. Cohen[21]. It is, however, desirable to look at these cases both to observe the attitude towards this problem taken by the judges who decided them and to see whether they support the proposition contended for in this article.

In *re Dixon*, the trustees of a marriage settlement, with the consent of the wife, lent the trust fund to the husband on the security of his bond in a penal sum conditioned for repayment to the trustees of the sum advanced with interest. The husband and wife lived together for more than twenty years after the date of the bond. After the death of the husband, the wife sued to recover the amount due.

It was argued that the Statute of Limitations barred the plaintiff's claim. The Court of Appeal decided that it did not. The Court reached this conclusion chiefly upon an analysis of the law relating to bonds, but it also held that the husband was in the position of an express trustee. Webster M.R. cited *Soar v. Ashwell* and quoted Bowen L.J.'s third category. He then said :—

> " Having regard to that statement[22] I think that treating this bond as having been given by the husband in consideration of an advance of what he knew to be trust money, which advance was in effect a breach of trust, he was in the position contemplated by Bowen L.J. and was not a person entitled to plead the Statute of Limitations as a bar to the recovery of the money that was in his hands "[23]

Rigby L.J.[24] appears to have agreed with the views of Webster M.R. and indeed in the course of the argument seems to have been surprised that it should be denied that a man who takes trust money knowing it is trust money is an express trustee[25].

Collins L.J. cited *Spickernell v. Hotham*[26] and thought the present case indistinguishable from it " and numerous other cases to the same effect which have been cited."[27]

In *Re Eyre-Williams*[28], Mr. Eyre-Williams, who was entitled to a mortgage debt vested in a trustee for him, assigned it to trustees of his marriage settlement in 1886, upon trusts under which he took the first life interest, and his wife a life interest after his death, and an ultimate remainder to himself. The trustee of the mortgage debt was neither a party to, nor informed of, the settlement. In 1887 the mortgage money was paid to Mr. Eyre-Williams who never accounted for it to the settlement trustees. He died in 1916 and the trustees and the widow then claimed the mortgage moneys.

Romer J. held that Eyre-Williams was a constructive trustee who was in the same position as an express trustee for the purposes of the Statute of Limitations. After citing *Soar v. Ashwell* and referring to Bowen L.J.'s third category, he said :—

21. (1929) 42 C.L.R. at pp. 99, 100.
22. i.e. of Bowen, L. J.
23. p. 574.
24. p. 580.
25. p. 570.
26. Kay 669.
27. p. 584.
28. supra.

> "Bowen L.J. clearly lays it down that a man who receives trust property with knowledge that it is trust property, though without the knowledge of the trustee, will be treated by the Court of Equity, for the purposes of ascertaining whether the Statute of Limitations is available to him or not, exactly as it would treat an express trustee."[29]

There is an *obiter dictum* of Maugham J. in *Re Blake*[30] where the learned Justice said :—

> ". . . Where the constructive trust is one in which an equitable obligation arises from the circumstances of the case, and there has been no intention to create a trust, and no improper conduct in relation to trust property from which the Court will infer a direct trust, there is in general no objection to the defendant appealing to the lapse of time . . .
> To avoid misconception I repeat that I am not considering cases where trust moneys have been received with the full knowledge that they are subject to a trust. In such a case the person receiving the money puts himself in the same position as an express trustee: *Soar v. Ashwell*; *In Re Eyre-Williams*."

There are other dicta *In re Robinson*[31] and *In re Mason*[32] where the same view is taken. Williams J. suggests[33] that in both *Re Dixon* and *Re Eyre-Williams* "the moneys were in fact paid to the accounting parties in such circumstances that they were received in a fiduciary capacity." But it is submitted that in both these cases the person receiving the trust property had no intention of holding the property on behalf of another and yet was held to be in the position of an express trustee.

The cases of *Bonney v. Ridgard, Beckford v. Wade*[34] and *Townshend v. Townshend* which Bowen L.J. referred to as creating some difficulty in connection with his fourth category of express trusts, are considered by Kay L.J. in his judgment in *Soar v. Ashwell*[35]. He prefaces his remarks with the statement that "the authorities do not seem to have drawn with any precision the line of distinction between express and constructive trusts."[36]

The report of *Townshend v. Townshend*[37] is a difficult one to follow. In substance it appears to have been a case in which X made two settlements of certain property. The first, to which his second wife was a party, was a post-nuptial settlement in favour of the children of the second marriage. The second settlement was made a number of years later and was in favour of the children of his first marriage. This settlement was made for valuable consideration and the second wife was also a party to this deed.

29. p. 539.
30. (1932) 1 Ch. at p. 63.
31. (1911) 1 Ch. 502 at 513 per Warrington, J.
32. (1928) 1 Ch. 385 at p. 394 per Romer, J.
33. 70 C.L R. at p. 404.
34. (1810) 17 Ves. 87.
35. (1893) 2 Q.B. pp. 400-402.
36. at p. 401.
37. 1 Bro. C.C. 550.

Many years later the person entitled under the first settlement sought to recover the property from the person holding under the second settlement. Lord Commissioner Ashhurst referred to the plaintiff's claim as " so doubtful an equity "[38] and dismissed the bill on the ground that there was no evidence that the second settlement was fraudulent. He said he would infer that the parties knew that the first settlement, although it was expressed to be made pursuant to an ante-nuptial agreement, was in fact voluntary and therefore liable to be defeated by a settlement for valuable consideration (which would have been the case at that time) or that some compensation had been paid to the persons entitled under the first settlement.

In other words, the Lord Commissioner said that the persons entitled under the second settlement took trust property knowing it to be trust property, but honestly believing that they were entitled to retain it. They were therefore, at the most, constructive trustees and within the protection of the Statute of Limitations.

Mr. Cox, the reporter of this case, refers in a footnote[39] to Sir W. Grant's judgment in *Beckford v. Wade* as a " very luminous judgment." Lord Commissioner Ashhurst's judgment merits no such praise.

The report of *Beckford v. Wade*[40] consists solely of the judgment of Sir W. Grant M.R. and in this judgment there is no concise statement of the facts of the case. In dealing with the question of whether or not the defendants were trustees, the learned Master of the Rolls says :—

> " The other exception, within which the case is said to fall is that relating to trustees, and on that head the respondent thus states her case ; and for the purpose of trying, whether the Statute of Limitations applies to it we must take the case to be as she states it. She says, that the conveyances, under which the appellants claim, were the result of a fraudulent combination between the several parties to them and not made in the fair and necessary execution of the testator's Will ; that consequently the parties taking under those conveyances, and all who claim by virtue of them, or by title deduced from them, are in the contemplation of a Court of Equity to be considered as trustees for those who were injured by the fraud and who would be the owners of the estate, if the fraud had not been committed."[41]

He subsequently[42] makes the general statement regarding the distinction between express and constructive trusts which is cited with approval by Kay L.J. in *Soar v. Ashwell.*[43] If the facts in *Beckford v. Wade* required that the plaintiff should establish to its full extent the broad proposition for which the Master of the Rolls said she contended, it is plain that she could not succeed, and the case therefore cannot be said to be any authority as to the liability of a person receiving trust property with actual knowledge of the trust.

38. at p. 554.
39. at p. 554.
40. 17 Ves. 87
41. p. 95.
42. at p. 97.
43. (1893) 2 Q.B. ; at p. 401.

Kay L.J. in *Soar v. Ashwell*[44] said of *Bonney v. Ridgard* :—

"In *Bonney v. Ridgard* stated by Sir William Grant, leasehold property was bequeathed in trust for the testator's children. The executor sold it to a purchaser who had notice of the Will under circumstances which satisfied the judge that the sale was a gross fraud on the part of both vendor and purchaser; but Lord Kenyon refused to "turn the defendants into trustees" because of the lapse of time acting by analogy to the Statute of Limitations."

Thus the learned Lord Justice treated the case as one of a constructive trust, but in truth it seems to have been one of laches and acquiescence barring the beneficiary's remedy.

Lord Kenyon in his judgment said :—

". . . and though I admit the Statute of Limitations does not affect trusts, yet this court from a principle of convenience has borrowed an analogy from that statute. The common case is that of mortgagor and mortgagee; when a mortgagee has been in possession for 20 years, without any particular impediment to the mortgagor, or if such impediment has been removed for 10 years, it shall be a bar to the redemption. So in this case, I think the length of time ought to bar and if the authority did not say so, I would make the precedent, for this very case shows the good policy of the rule. Here the many persons, through whose hands this property has passed, have relied upon the undisturbed possession, and have laid out considerable sums of money in the improvement of it upon that idea. It would be too much at this length of time to give the plaintiffs the relief required when the accounts cannot be taken. If these plaintiffs had made their claims when they all came of age it would have been very different; but upon the whole, weighing the convenience with the inconvenience, I think it right to say that the length of time is a bar to this case."[45]

Thus it is submitted that these three cases do not afford any satisfactory authority against the principle contended for.

In *Mayne v. The Public Trustee,* the Court had the opportunity of basing its decision on the ground that there was no evidence that L. took money knowing that it was impressed with a trust in favour of the official assignee.

Williams J. said :—

"The important point is that there was no evidence that he (L.) ever accepted payments as affected by a trust, or that his possession of the moneys was ever otherwise than adverse to the claim of the official assignee. The facts, therefore, bring the transaction within the first, but not within the second, of the two propositions in *Cohen v. Cohen*, so that, if the law is correctly summarized in those propositions, the appeal must fail."[46]

44. at p. 402.
45. at p. 149.
46. p. 402.

His Honor then deals with the contention that a person who takes possession, though adverse, of property which is subject to an express trust with full notice of the trust thereby becomes liable to account in equity for the property at any length of time. In His Honor's opinion, the authorities did not afford support for this wider view. This article has set forth some reasons for believing, not only that the authorities do support the wider rule, but that the wider view is more soundly based on considerations of justice and equity.