EDYTHE G. LAMPORT (PLAINTIFF).....APPELLANT;

AND

STANLEY ALEXANDER THOMPSON AND CHARTERED TRUST AND EXECUTOR COMPANY, EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF ALEXANDER M. THOMPSON, DECEASED, AND TRUSTEES OF THE EDYTHE G. LAMPORT TRUST, AND THE SAID STANLEY ALEXANDER THOMPSON IN HIS PERSONAL CAPACITY AND AS ADMINISTRATOR AD LITEM OF THE ESTATE OF HARRY ALCROFT THOMPSON, AND CHARTERED TRUST AND EXECUTOR COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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* March 12, 13, 14, 17, 18.
* June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Limitation of actions—Action for alleged breach of trust—Application of s. 46 (2) of The Limitations Act, R.S.O., 1937, c. 118—Proviso in s. 46 (2) (b) that statute shall not begin to run against beneficiary

* PRESENT:—Duff C.J. and Rinfret, Kerwin, Hudson and Taschereau JJ.

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unless and until interest of beneficiary becomes an interest in possession—Beneficiary having an interest in possession as to revenue of fund and a contingent interest in corpus.

This Court dismissed an appeal from the judgment of the Court of Appeal for Ontario, [1940] O.R. 201, dismissing the appellant's appeal from the judgment of Hogg J. (*ibid*) dismissing her action, which was brought for relief for alleged breach of trust.

Under the will of her father, who died on October 18, 1929, appellant was entitled, during a certain period after her father's decease, to part, and after expiration of said period, to the whole, of the revenue from a trust fund to be set apart by the trustees and executors of the will; should appellant become a widow, she was to receive the corpus of the fund, but if she died without having become a widow, the fund was to go to her brothers.

The trust fund was partially set up in December, 1929, and was completed in 1936. In the action, commenced in March, 1937, against the executors and trustees of the will, appellant alleged that a certain mortgage, included in the partial set up of the fund in December, 1929, was not a proper security to have been included therein. There was no allegation of fraud or fraudulent breach of trust.

Held (*per* Rinfret, Kerwin, Hudson and Taschereau JJ.): As the action was commenced more than six years after the alleged breach of trust occurred, it was barred by s. 46 (2) of *The Limitations Act* (R.S.O., 1937, c. 118). Appellant did not come within the proviso in s. 46 (2) (*b*) that the statute of limitations "shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession." So far as the revenue from the trust fund was concerned, appellant's interest was one in possession; and, that being so, it could not be said that, because she had only a contingent interest in the corpus of the fund, she came within said proviso. The proviso is not intended to protect an interest *in rem* but a beneficiary. Appellant's cause of action, if it existed, arose when her interest as the person entitled to the income or part of it was an interest in possession, and the lapse of time had barred her claim for the alleged breach of trust, even though she might be entitled to a further interest in the property in the future. (Hudson J. held also that, on the evidence, appellant must fail on the ground that her action was barred by a certain agreement of August 7, 1931, made for the purpose of settling matters in dispute between her and the defendants).

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario (1) dismissing her appeal from the judgment of Hogg J. (1).

The plaintiff was a beneficiary under the will of her father who died on October 18, 1929. The defendants were executors and trustees of the will; and two of them

(1) [1940] O.R. 201; [1940] 2 D.L.R. 619.

were brothers of the plaintiff and were the residuary legatees under the will. The action, commenced on March 19, 1937, was for relief for alleged breach of trust. (The defendant Harry Alcroft Thompson died on May 16, 1939, since the trial of the action; and the defendant Stanley Alexander Thompson was appointed administrator *ad litem* of his estate).

By the will the testator gave all his estate to his executors and trustees upon certain trusts, one of which was to set apart for the benefit of the plaintiff the sum of $100,000 and to keep the same invested in good legal securities and to pay to her the sum of $2,500 per year out of the net revenue thereof, for a period of the first ten years after the testator's decease, and after the expiration of said period of ten years she was to receive the full revenue from said $100,000, together with any increase that there might be to the same owing to her receiving only a portion of the net revenue therefrom for the said period of ten years. The full net revenue was to be paid to her for the balance of her life only. Should she become a widow then she should receive the corpus. After her death without having become a widow, the said bequest so set apart for her benefit should revert and become part of the residue of the estate and be divided equally between the testator's two sons.

In December, 1929, assets representing the sum of $60,000 were set apart as part of the plaintiff's trust fund. In the action the plaintiff alleged that a certain mortgage for $30,000, included in these assets so set apart, was not a proper security to have been included therein, and that defendants failed in their duty as trustees in allocating this mortgage to the plaintiff's trust fund.

The defendants completed the whole of the trust fund in 1936.

There was an agreement dated August 7, 1931, for the purpose of settling matters in dispute between the plaintiff and the defendants. In the action the plaintiff asked that this agreement be set aside for the reason that she did not have independent advice and was not aware, when she executed the agreement, of the state or condition of the property covered by said mortgage for $30,000 allocated to her trust fund and approved by her under the terms of the agreement as part of the fund.

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The trial judge, Hogg J., dismissed the action (1). He held that the facts and circumstances present in the case were such that the defendants, as trustees, were protected from liability by s. 46 of *The Limitations Act* (now R.S.O., 1937, c. 118), there having elapsed over seven years from the time when, according to the plaintiff's claim, the defendants acted in violation of the trust, until the issue of the writ in the action. He dealt also, however, with other questions which were raised in the action and decided them in favour of the defendants. As to the said agreement of August 7, 1931, he held that the plaintiff's actions subsequent to the date of her execution of that agreement, and the length of time which had elapsed since she acquired knowledge of the matters with respect to which she now complained, were sufficient to show conclusively that she acquiesced in the agreement and its terms and that she elected to abide by it.

In the Court of Appeal (1), McTague J.A., with whom Robertson C.J.O. agreed, based his judgment, dismissing the appeal, upon s. 46 of *The Limitations Act* (R.S.O., 1937, c. 118), which, he held, applied and was an answer to the plaintiff's claim. Fisher J.A. agreed with McTague J.A. as to the action being barred by the statute; and he also held that the agreement of August 7, 1931, was a bar; that plaintiff had approved the agreement, received and accepted benefits thereunder, acquiesced in its terms and elected to be bound by it.

The plaintiff appealed to this Court.

R. L. Kellock K.C. and *J. E. Tansey* for the appellant.

D. L. McCarthy K.C. and *K. G. Morden* for the respondent Chartered Trust and Executor Company.

J. L. G. Keogh for the respondent Thompson.

THE CHIEF JUSTICE—I concur with the judgment dismissing the appeal with costs.

The judgment of Rinfret, Kerwin and Taschereau JJ. was delivered by

KERWIN J.—Under the terms of the will of her father the appellant was entitled, during the first ten years after his decease, to part of the revenue from a trust fund which he directed his executors and trustees to set apart. After

(1) [1940] O.R. 201; [1940] 2 D.L.R. 619.

the expiration of the ten years, the appellant was entitled to the entire revenue. Should she become a widow, she was entitled to the corpus of the fund but, if she died prior to becoming a widow, the fund was to be divided equally between her brothers. The latter and a trust company were named executors and trustees of the will and are the respondents in the present appeal. These executors and trustees set aside certain securities to constitute part of the fund, among them being a mortgage which the appellant as plaintiff in this action claimed was not a proper trust security and sued the respondents for breach of trust.

The trust fund was partially set up on December 12th, 1929, and the claim is that the breach of trust occurred at that time. As the respondents subsequently completed the fund and have retained nothing from it, I agree with Mr. Justice McTague when he observes: "It may be a case of improperly constituting the fund, but it is not a case of retention." Hence the action is not one to recover trust property or the proceeds thereof retained by the trustees or previously received by them and converted to their use, as mentioned in subsection 2 of section 46 of *The Limitations Act,* R.S.O., 1937, c. 118; nor is there any allegation of fraud or fraudulent breach of trust.

The action having been commenced more than six years after December 12th, 1929, it is barred by virtue of clause (*b*) of subsection 2 unless the appellant is brought within the following words of that clause:—

> but so nevertheless that the statute * * * shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

So far as the revenue from the trust fund is concerned, the appellant's interest was one in possession, and it was admitted by Mr. Kellock that her claim with respect to such revenue was barred, but he argued that that bar does not extend to the appellant's contingent interest in the corpus of the fund. For that contention he relied upon the remarks of North J. in *Mara* v. *Browne* (1), at pages 95 and 97. The decision in that case was reversed on another ground (2), and the Court of Appeal, therefore, did not deal with this point. It is a difficult one but, upon consideration, I am of opinion that the proviso in

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Kerwin J.

clause (*b*) is not intended to protect an interest *in rem* but a beneficiary. The appellant's cause of action, if it existed, arose when her interest as the person entitled to the income or part of it was an interest in possession, and the lapse of time has barred her claim for the alleged breach of trust, even though she may be entitled to a further interest in the property in the future.

This is sufficient to dispose of the appeal, which should be dismissed with costs. I say nothing one way or the other as to the other questions argued before us.

HUDSON J.—I agree that the plaintiff must fail in this action on the grounds stated by Mr. Justice McTague in the Court of Appeal. I am also of the opinion that the plaintiff must fail on the ground that her action is barred by the agreement of 7th August, 1931. It appears from the evidence that this agreement was in the nature of a family settlement; its terms were settled after protracted negotiations between her brothers, herself and the Trust Company. It also appears from the evidence that she is an intelligent and competent business woman and I quite agree with the learned trial judge and Mr. Justice Fisher in the Court of Appeal that she understood the agreement, and her subsequent conduct confirms this. She accepted benefits under the agreement which she would not otherwise have been entitled to, and this action was not commenced until more than five years after the agreement was made and until after the death of Mr. W. S. Morden, the official of the Trust Company who had the active management of the estate and who was the only official with whom the appellant had any interviews before negotiations leading up to the agreement. If the plaintiff ever had any right to complain, she acquiesced in what was done and should not now receive the aid of a court of equity.

I think the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant: *Lamport, Ferguson & Co.*

Solicitors for the respondent Thompson: *Hughes, Agar & Thompson.*

Solicitors for the respondent Chartered Trust and Executor Company: *Armstrong & Sinclair.*