TRUSTEE ACT, 1888.

51 & 52 Vict. c. 59.

An Act to amend the Law relating to the Duties, Powers, and Liability of Trustees.

[24th December, 1888.]

The whole of this Act, except sections 1 and 8, is repealed by the Act of 1893; see section 51 of 1893 Act and Schedule, *post*, pp. 170, 172.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows; that is to say—

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Short title, extent, and definition.

Section 1.—(1.) This Act may be cited as the Trustee Act, 1888.

(2.) This Act shall not extend to Scotland.

(3.) For the purposes of this Act the expression "trustee" shall be deemed to include an executor or administrator and a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.

(4.) The provisions of this Act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

Subsection 2.—See the notes to section 52 of the Trustee Act, 1893, *post*, p. 171; and see also notes at pp. 21, 178, 190.

Subsection 3.—Cf. section 50 of the Trustee Act, 1893, *post*, p. 163; and see notes on the definition in that section of "trustee." On the question who is a trustee within the meaning of section 8 of this Act, see *infra*, p. 6.

Subsection 4.—See *post*, pp. 7, 10.

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Statute of limitations may be pleaded by trustees.

Section 8.—(1.) In any action or other proceeding 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 or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him.

(*b*) If the action or other proceeding 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 or other proceeding 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 a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

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(3.) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

"Action or other Proceeding against a Trustee."—It has been said (*re Chapman* (1896) 1 Ch. at p. 326) that a summons by one trustee to ascertain the liability of the trustees in respect of a breach of trust is not a proceeding "against a trustee." It is submitted that any proceeding in which the liability of the trustee could be declared or enforced is a proceeding against the trustee for the purposes of the section.

In the case of *re Cornish* (1896) 1 Q. B. 99, there is a *dictum* of Esher, M.R., to the effect that the section only applies when a claim is made upon a trustee for the payment of money, and not to a claim for an account for the purpose of showing whether any further claim can be made upon him. The point was not necessary for decision, and the *dictum* is inconsistent with *re Page* (1893) 1 Ch. 304, in which North, J., held that the Act applied to a summons asking for the usual accounts in an administration action, dissenting from the argument addressed to him, that the Act was not intended to relieve trustees from the necessity of accounting to their *cestuis que trust*, and that it could only be used as a bar to an application for payment. See also *How* v. *Earl Winterton* (1896) 2 Ch. 626.

"Trustee."—See definition in section 1, *supra*. Directors of a company are trustees for the company of assets which have come into their hands, or which are under their control. *Kingston Cotton Mill Co.* (1896) 1 Ch. 331, at p. 347; *Forest of Dean Coal Co.*, 10 C.D. 450; *Percival* v. *Wright* (1902) 2 Ch. 421. In respect of dealings with such assets they are trustees within the meaning of this section. *Lands Allotment Co.* (1894) 1 Ch. 616 (*ultra vires* investment); *National Bank of Wales, Ltd.* (1899) 2 Ch. 629, at p. 663 (dividends paid out of capital); S.C. sub. nom. *Dovey* v. *Cory* (1901) A. C. 477, at p. 489; *Whitwam* v. *Watkin*, 78 L.T. 188 (*ultra vires* purchase).

A husband who takes possession of his wife's separate estate is a trustee for her, *Wassell* v. *Leggatt* (1896) 1 Ch. 554, in the absence of clear evidence of a gift, *re Flamank*, 40 C.D. 461.

The section does not apply to a trustee in bankruptcy called on to render accounts to the Board of Trade. *Re Cornish* (1896) 1 Q.B. 99.

Mortgagees who have sold under a power of sale are trustees within the section, of the surplus proceeds. *Thorne* v. *Heard* (1894) 1 Ch. 599; see p. 607; S.C. (1895) A.C. 498.

As to executors, see *infra*, p. 10, 11.

"Any Person claiming through him."—These words mean,

not his *cestuis que trust*, but his executors, administrators, or assigns. *Leahy* v. *de Moleyns* (1896) 1 I.R. 206.

"Except where the Claim is founded upon any Fraud," etc.—The fraud must be that of, or be in some way imputable to, the person who invokes the aid of the statute, *Thorne* v. *Heard* (1895) A.C. 495.

In order to charge any person with a fraud which has not been personally committed by him, the agent who has committed the fraud must have committed it while acting within the scope of his authority, while doing something and purporting to do something on behalf of the principal. *Thorne* v. *Heard*, *supra*.

"To which the Trustee was Party or Privy."—It is only by a misuse of language that a person who, in fact, knows nothing of the fraudulent conduct of another, and who in no way benefits by it or ratifies it, can be said to be party or privy to it. One person may be, and often is, liable in law for frauds which he has not committed, but to say that he is party or privy to them is quite another matter, and is only true when he has personally participated in them: *per* Lindley, L.J., *Thorne* v. *Heard* (1894) 1 Ch., at p. 606. The words indicate moral complicity: *per* Kay, L.J., *ibid.*, at p. 608. See also S.C. (1895) A.C. 495.

"Or is to recover Trust Property . . . still retained."—The word "still" refers to the commencement of the action or other proceeding in which the question arises. *Thorne* v. *Heard* (1894) 1 Ch. 599; (1895) A.C. 495.

A trustee may be liable to make good trust money as if it were still in his hands, although he has, in fact, parted with it. (Cf. cases referred to in notes to section 9 of the Trustee Act, 1893, *post*, p. 47.) But in construing this statute the exception is confined to cases in which, at the commencement of the action or other proceeding, the trustee actually has in his hands or under his control the trust property or the proceeds thereof sought to be recovered. *Thorne* v. *Heard*, *supra*. If it is lost either by the trustee's negligence or unauthorised dealing with it, the exception does not apply. *Ibid.*, *How* v. *Lord Winterton* (1896) 2 Ch. 626; *re Timmis* (1902) 1 Ch. 176.

The exception does not apply to a case where a trustee retains a share of the trust estate, other than the share in respect of which a breach of trust has been committed. *Re Timmis* (1902) 1 Ch. 176.

"Previously received . . . and converted to his Use."—This exception probably applies to the case of money entrusted to a firm as trustees and converted to the use of the firm, although the member of the firm sued had neither received the money nor converted it to his own use; for under section 1 the provisions of the Act apply as well to several joint trustees as to a sole trustee. See *Moore* v. *Knight* (1891) 1 Ch. 547, at p. 553. These words mean money which the trustee can be called

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upon to refund. Thus, where trustees lend trust money on improper security to a person who is indebted to one of the trustees, and out of the money so raised on mortgage the debt to the trustee is discharged, the transaction, if honest, is not a conversion to his own use by the trustee. *Re Gurney* (1893) 1 Ch. 590.

Subsection 1 (*a*).—The meaning of this subsection has been the subject of much discussion. In *re Bowden*, 45 C.D. 444, Fry, L.J. (sitting as an additional judge of first instance), said, with reference to this clause, "If a person had not been a trustee, he could not be sued for a breach of trust; and there is no right or privilege that I am aware of conferred by any statute of limitations in respect of a breach of trust." With reference to this remark, Lindley, L.J., in *How* v. *Earl Winterton* (1896) 2 Ch. 626, observed, that to exclude the operation of clause (*a*) in all cases on the short ground stated by Fry, L.J., would be to deprive clause (*a*) of all meaning whatever.

Rigby, L.J., explained clause (*a*) as follows:—The clause assumes there is a right of action against the trustee. That must be founded upon some act or omission of his which would be, from the fact of his being a trustee, a breach of trust. Clause (*a*) has to do with remedies only, not with causes of action. A trustee who undertakes a trust agrees to perform that trust; discard the idea of breach of trust, he is still guilty of breach of duty, and for the purposes of clause (*a*) he is to be treated as though the breach of trust were nothing more or less than a breach of duty by reason of some act or omission of his. The duty may be thrown on him by virtue of his simple contract to undertake the trust, or by reason of his covenant to undertake it, as where the duty is thrown on him by a deed. Then you must look to the appropriate Act of Limitations to ascertain the period for the running of the statute. *How* v. *Earl Winterton*, *supra*. No covenant by a trustee is implied merely from his executing a deed containing an appointment of him as trustee, and a declaration by him that he accepts the office. *Holland* v. *Holland*, 4 Ch. 449. It is a question of intention of the parties whether a deed should operate as a covenant or not. *Isaacson* v. *Harwood*, 3 Ch. 225.

Where the trustee has not covenanted to perform the trust, the period of limitation for an action on an implied promise, or an action on the case for breach of duty, or an action for an account, is six years. See *per* Lindley, L.J., *How* v. *Earl Winterton*, *supra*, at p. 639. If the form of trust instrument is a covenant by the trustee to hold the trust property on specified trusts for specified persons, it is conceived that (if the construction suggested by Rigby, L.J., *supra*, be the correct one) the period of limitation for breach of trust would be twenty years. It would seem, therefore, that unless the trustee have covenanted to perform the trusts, the period of limitation will be the same whether clause (*a*) or clause (*b*) apply.

The form of order for an account by trustees entitled to the benefit of the section will be found in *re Davies* (1898) 2 Ch. 142.

Subsection 1 (*b*). "Brought to recover Money."—These words are satisfied if the action is to make the trustee pay money into a fund against which the applicant has a claim, *How* v. *Earl Winterton* (1896) 2 Ch. 626, at p. 642, or for accounts preliminary to an application for payment of money (*supra*, p. 6).

"And is one to which no Existing Statute applies."—The following cases have been held to fall within this clause, viz. action by newly appointed trustee against old trustees to make good losses from improper investments, *re Bowden*, 45 C.D. 444; the like action by a beneficiary, *re Gurney* (1893) 1 Ch. 590; *re Somerset* (1894) 1 Ch. 231; *Mara* v. *Browne* (1895) 2 Ch. 69; action by beneficiary to make good losses from failure to carry out trust for conversion, *re Swain* (1891) 3 Ch. 233; action by beneficiary for administration where the whole estate had been disposed of upwards of six years previously, *re Page* (1893) 1 Ch. 304; action by reversioners where capital of the trust fund had been paid to the tenant for life, *re Timmis* (1902) 1 Ch. 74; but see the construction put upon the section by Rigby, L.J., in *How* v. *Earl Winterton*, *supra* (*ante*, p. 8), under which some of the above cases would appear to fall under clause (*a*).

"An Action of Debt for Money had and received."—Under section 3 of 21 Jac. 1, c. 16 (Limitation Act, 1623), the period of limitation is six years after the cause of action arose. See *How* v. *Earl Winterton* (1896) 2 Ch. 626; *re Somerset* (1894) 1 Ch. 231, at p. 255; *re Timmis* (1902) 1 Ch. 176. This is, however, subject to 9 Geo. IV., c. 121 (the Statute of Frauds Amendment Act, 1828), which provides for cases being taken out of the statute by acknowledgment in writing, part payment of principal, or payment of interest. Payment of interest direct by the mortgagee to the tenant for life (which amounts to payment by the mortgagee to the trustees, and by the trustees to the tenant for life) is not an admission or acknowledgment sufficient to take the case out of the statute. *Re Somerset* (1894) 1 Ch. 231; *Mara* v. *Browne* (1895) 2 Ch. 69, at p. 95.

"Shall not begin to run . . . unless and until the Interest . . . shall be an Interest in Possession."—Where a beneficiary takes successive interests; *e.g.*, first a life interest to a married woman during the joint lives of herself and her husband, and secondly a life interest on her husband's death, although in respect of her first interest her rights may be barred, in respect of her second interest her rights will only be barred after the expiration of the statutory period commencing from the coming into possession of such second interest. *Mara* v. *Browne* (1895) 2 Ch. 69, at p. 95. The judgment on this point was not reversed on appeal. See S.C. (1896) 1 Ch. 199. The section has in no way altered the principles which determine the time at which a cause of action arises. *Thorne* v. *Heard* (1894) 1 Ch. 599; *Moore* v. *Knight* (1891) 1 Ch. 547. In the case of a breach of trust, a cause of action founded upon it accrues to the *cestuis*

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que trust upon the commission of the breach, and not from its discovery, nor from the time when the loss occurs. *Re Swain* (1891) 3 Ch. 233; *Thorne* v. *Heard*, *supra*; *Howell* v. *Young*, 5 B. & C. 259; *Smith* v. *Fox*, 6 Hare 386; see *Thomson* v. *Lord Clanmorris* (1900) 1 Ch. at p. 726. So, where trustees committed an innocent breach of trust by investing on mortgage of property of insufficient value, time ran against the beneficiary entitled in possession from the time when the investment was made. *Re Somerset* (1894) 1 Ch. 231.

Where an annuity was charged upon a fund composed in part of accumulations of rents of certain property during a term preceding the commencement of the annuity, and in breach of trust the trustee neglected to make the accumulations, time ran against the annuitant from the date at which the annuity commenced. *How* v. *Earl Winterton* (1896) 2 Ch. 626, at p. 637.

Notwithstanding that an action is not barred under this section, the plaintiff may still be refused relief on the ground of laches; *e.g.*, although time does not run against a beneficiary until his interest is in possession, he may be barred, if the circumstances are such as to show that he was guilty of laches in not suing while his interest was in expectancy. *Re Taylor*, *Atkinson* v. *Lord*, 81 L.T. 812; and see *Roberts* v. *Tunstall*, 4 Hare 257.

It has been suggested that where a fraudulent breach of trust is committed by one of several trustees, time may not run in favour of his innocent co-trustees until discovery of the fraud: *per* Stirling, J., in *Moore* v. *Knight* (1891) 1 Ch. 547, at p. 555. It is submitted, however, that as the claim against the innocent co-trustee is not founded on fraud as against him, time runs from the commission of the breach of trust.

Where one trustee claims contribution from a co-trustee in respect of a liability incurred from loss occasioned by their joint default, time does not begin to run till the date of the judgment establishing the liability of the trustee seeking contribution. *Robinson* v. *Harkin* (1896) 2 Ch. 415.

Subsection 3. "Shall not deprive any Executor or Administrator of any Right or Defence to which he is entitled under any Existing Statute of Limitations."—Under section 8 of the Real Property Limitation Act, 1874, no action or other proceeding can be brought to recover any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for the same, if no principal or interest shall have been paid or acknowledgment in writing given.

Under that Act, the executor, notwithstanding that he is constructively a trustee, *re Davis* (1891) 3 Ch. 119; *re Lacy* (1899) 2 Ch. 149, has a defence, although the legacy is still retained by the executor, or previously received by him and converted to his use—circumstances which would preclude him from relying on the present section.

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On the other hand, it may be necessary for a defendant to show that the present section applies, rather than section 8 of the Act of 1874, so that he may be in a position to rely on subsection 1 (*b*). Thus, where a residue is given to persons who are named both executors and trustees, and a breach of trust is committed, the question arises whether the trustees and executors are liable, *quâ* executors, for not distributing the residue, or as trustees for breach of trust. If the executors and trustees had been different persons, the duties of the executors would have been to pay the debts, legacies, and funeral and testamentary expenses of the testator, and pay the residue to the trustees. Hence, when the executors and trustees are the same person, they cease to hold the assets, *quâ* executors, when they have paid the debts, legacies, and expenses, and therenpon become trustees; and where they wrongfully deal with the residue they are liable as trustees, and an action against them is one "to which no existing statute of limitations applies." They are not to be treated as executors sued for a legacy within section 8 of the Act of 1874. *Re Timmis* (1902) 1 Ch. 176; *re Swain* (1891) 3 Ch. 233; *re Page* (1893) 1 Ch. 304.