

Chan. Cham.]

GUNN V. ADAMS.

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were barred by the Statute of Limitations. This, he submitted, was a question for the Master, and all that need be decided upon this application whether the petitioners were entitled to prove their claims, not whether they had any claims or whether their claims were good. The claim of Hardy was one in the schedule. He had endorsed a note of Pomeroy's, it was not due when Pomeroy left the country. He paid it when due, and thus became a creditor of Pomeroy's and when his right of action accrued Pomeroy was out of the country, and this fact apart from any trust in his favour under the deed was a bar to the Statute's running against him. So with Johnston's claim. He had become surety for Pomeroy in a bond to B. S. Upon Pomeroy's absconding Johnston became liable to and having paid B. S. he became a creditor of Pomeroy's. In addition to this he submitted that the trust deed had the effect of charging all Pomeroy's debts on his real estate, and preventing the statute from running against his creditors. (3.) As *laches* this objection could not apply to Hardy, to who had done every thing necessary except sign the deed, it was aimed at Johnston, and this very fact of his taking no steps independently, but acting as if he were a party to the deed was one of the grounds upon which he relied. If he had instituted proceedings for the recovery of his debt independently of the deed he might have disintitiled himself to any benefit under it. (4.) As to the last objection that assent alone was not sufficient, the petitioners could only have shewn their assent more strongly by executing the deed, and *Whitmore v. Turquand* was so clear on this point that it was useless to discuss it.

Mr. TAYLOR on this application allowed both petitioners to come in and prove their claims, holding (1) that it was not necessary to file a bill in order to obtain the relief sought from the fact that a suit was pending and the application was properly made in Chambers by petition in the suit. Hardy's case was a similar one to *Piper v. McDonald*, 5 U. C. L. J. (O. S.) 162, where no bill was considered necessary. (2.) That the debts were not barred by the statute for the absence of Pomeroy from the country during a period commencing before their right against him accrued and extending to the present time, had prevented the statute from beginning to run. Lastly, it was plain from *Whitmore v. Turquand*, 1 John & Hem. 444, and from the late case *Re Baber's Trusts*, L. R. 10 Eq. 554, that a party who had done nothing inconsistent with the deed was entitled to the benefits it secured, and in the latter case, too, the application had not been by bill.

On the 15th April last a similar petition was made by one C. Stead. His position differed materially, however, from that of the former petitioners, Hardy and Johnston, in this, that he was unable to plead ignorance of the deed, and his only ground for being admitted to share the benefits it conferred, was, that he had taken no proceeding hostile to it, but had thus virtually acquiesced in its provisions, and trusted to being paid his claim in due course of administration. Evidence was also put in by the creditors to shew that Stead's claim was a joint one against

Pomeroy and one Mathews; that he had sued the estate of Matthews, and proved his claim against it, and therefore could not prove against the Pomeroy estate.

C. Moss contended that to disintitle a creditor after any lapse of time to come in, it must be shewn that he acted contrary to the deed, e. g. by proceeding against the estate at law. He cited *Joseph v. Bostwick*, 7 Grant 332, where a creditor was debarred from enjoying the benefit of such a deed by contesting it, and trying to establish a prior claim; and he submitted that where a party had merely neglected to comply with the strict terms of the deed no lapse of time would prevent him from coming in under it, even, it seemed, where dividends had been paid, on the terms, however, of not disturbing such dividends, *Re Baber's Trusts*, L. R. 10 Eq. 554, was the latest authority, and there *Spottiswoods v. Stockdale*, 1 G. Cooper 102, was referred to where Lord Eldon lays down what was now contended, and that too in a case where a proviso was inserted in the deed that it was to be void unless executed by the creditors within eleven months. No such provision was contained in this deed, and there was no time limited for notifying the trustees; the year limited referred, only to the execution of the deed. He contended also that it need not be shewn on this motion whether or not Stead had been paid out of the Matthews estate or whether his claim was barred. These were questions for the Master. All that need be decided upon this motion was whether Stead was entitled to prove what he claimed.

Cassels argued that it should be shewn that he had a valid claim before putting the estate to the expense of investigating it, and that if a person having knowledge of the deed did not choose to ascertain whether he had a right under it, he should not be allowed to claim the benefit of it after allowing sixteen years to go by. Stead's evidence shewed that he had always thought the Matthew's estate was liable for his claim; he had a right to prove his full claim against it, as the note under which he was a creditor was joint, and it should be assumed that he had proved to the full extent of his right when he did prove against the Matthew's estate. He again urged the objection of the Statute of Limitations, and contended that it was properly urged now, for though it was for the Master to decide a disputed *amicus*, yet it should be shewn on this application that the debt was a valid one.

Moss replied that the evidence shewed that he still claimed \$5,000, and that as Stead was mentioned as a creditor in the schedule to the deed, he became a *cestui que trust*, and the Statute of Limitations ceased to affect him from the date of the assignment to the trustees and their acceptance of the trusts.

MR. TAYLOR, THE REFEREE IN CHAMBERS.—The petitioner claims to be a creditor of S. S. Pomeroy, and, as such, entitled to the benefit of an assignment, made by Pomeroy for the payment of his creditors, the trusts of which are being carried out under decree in this cause. His claim appears to have arisen thus: He held a note made in April, 1856, by Mrs. Matthews and Pomeroy, the consideration for the note being an alleged balance due to him for