

[Chan. Cham.]

GUNN V. ADAMS.

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not having complied with the terms of the deed in February, 1872, presented their petitions to be allowed to come in, and prove their claims in the Master's office. The petitioner Hardy at the time had been aware of an assignment having been made, but not of the terms of the deed. Within a year, however, he had assented to it, and gave a notice to one of the trustees, though whether in writing or not was doubtful, but he had never complied strictly with its terms. The petitioner Johnson, living in an out of the way place, and taking in no newspaper, had never heard of the deed, nor seen the published notice of it until he had filed his claim in the Master's office under the decree, and he then gave his assent. He had never taken proceedings to enforce his claim, nor in any way acted contrary to the provisions of the deed.

*W. G. P. Cassels*, for the creditors who had assented to the terms of the deed, opposed the application, and read affidavits as to the registration of the deed, and publication of notice of it with a view to proving a notice of its terms, which would be binding upon all creditors.

*C. Moss*, for the petitioners, said that it had been argued that the registration of the deed was notice of its provisions to all creditors, but this was not, he contended, the effect of the Registry laws. Their effect was to constitute registration notice to any one afterwards dealing with these lands, but that it was notice to all the world had never been held. The question of notice had been brought forward to shew that Johnson was debarred from proving his claim by the fact of an advertisement of the deed having been published eighty-two times in a newspaper. He thought it was necessary for such a contention to shew that the person against whom it was desired to prove notice, took in the particular newspaper. There was an analogy in the decisions as to dissolutions of partnerships. There an advertisement of the dissolution was not notice to any one not taking in the newspaper, *Boydell v. Drummond*, 11 East 142; *Leeson v. Holt*, 1 Stark 186; *Jenkins v. Blizard*, 1 Stark 420. And an advertisement in this country to constitute notice to all the world must be inserted in the *Gazette*. The facts of Johnson's not having been aware of the trusts of the deed until after decree pronounced of his never having acted contrary to his provisions, and of his willingness to assent to its terms when made known to him entitled him to share in the privileges of it. In the case of *Whitmore v. Turquand*, 1 Johns & Hem. 444, where the question was whether certain persons had assented to or gone against a deed. V. C. Page Wood said that persons who had done nothing either for or against a deed of this kind were entitled to come in and prove their claims, and this decision was affirmed upon appeal (3 DeCex. F. & J. 107). It was argued there that quiescence was not accession, and that the deed being expressly upon trust for those who assented within three months the Court had no jurisdiction to divide the property among persons who had not brought themselves within this description. But Lord Chancellor Campbell said that "since the case of *Dunch v. Kent*, 1 Vern. 260, the doctrine of the court has been that the time limited by such a deed for the creditors to come in is

not of the essence of the deed." Again, "the intention was that all creditors should come in and take a dividend, and that the debtor after his cession should be freed from his liability to these creditors. The deed was not for the benefit of any particular class of his creditors, but for all equally. The period of three calendar months is evidently introduced with a view to hasten the arrangement, and to authorize the trustees when that period has expired to make a dividend, which the subsequent claim of other creditors should not disturb. This is the understanding which has long prevailed on the subject: and with this understanding, the supposed hardship upon a creditor who executes the deed the last hour of the last day of the limited period does not exist; for if he thinks he is secure against any more creditors coming in afterwards, and feels confident that he must receive twenty shillings in the pound, and for this reason consents to execute the deed, he has a right only to blame himself for being ignorant of the law, which he ought to have known, as he ought to know the days of grace given for the payment of a bill of exchange.

*W. G. P. Cassels* objected that (1) Chambers was not the proper place for an application of this kind. There was no practice which could warrant the addition of parties in this way after a Master had refused to add them. In such a case they could only be added by filing a bill for that purpose. (2.) Both these claims were barred by the Statute of Limitations. Johnston's debt had accrued in 1859, and the petition and affidavit shewed no assent, he thought, to the deed, which could operate in taking it out of the statute. Johnston knew nothing of the deed, and he did not prosecute merely because he did not know of Pomeroy's having left any property so that there was nothing to prevent the estate from running (*Darby on Limitations*, 189). (3.) Both claims were also barred by *laches*. They had lain by now for ten years. In the cases of *Joseph v. Bostwick*, 7 Grant 832, and *Collins v. Reese*, 1 Coll. 675, it was true that the time had not been considered material, but this was on account of special circumstances, which were absent in this case. As to Hardy he had not actually executed the deed, but he had assented to it. This, he submitted, was insufficient. He must have done *some act* or must have been prejudiced and prevented from proceeding in some other way (*Snell Principles of Equity*, p. 71). And even supposing that Hardy was entitled, this fact could not save him from the statute. He must have been a party to the deed to render the statute inoperative.

*Rae*, for the defendants, and *Foster*, for the plaintiffs, submitted to what order the Court might make.

*Moss*, in reply: There was nothing to shew that the estate was not given to pay all claims in full, and in such case other creditors would not be allowed to take advantage of a mere error when the parties beneficially entitled to the residue made no objection. All the objections taken were technical (1) that the application was not made in the proper *forum*. But in all kindred cases it had been made in Chambers in *Schreiber v. Fraser*, 2 Ch. Ch. 271, and in *Anderson v. Moulton*, 1 Ch. Ch. 316; (2.) That the claim