

and gave judgment for the plaintiff for \$936.61, which he found had been by mistake paid to other beneficiaries under the will. The defendant's appeal was from that part of the judgment; and the plaintiff's cross-appeal was to increase the amount to \$1,136.61.

No fraud on the part of the defendant in the procuring of the agreement, in the making of the affidavit, or in the procuring of the release, was alleged or proved. Innocent error was admitted. Under *In re Garnett* (1885), 31 Ch. D. 1, that was sufficient to set aside the release; but, no fraud being alleged or proved, and the defendant not having converted to his own use any part of the trust property, he is entitled to the benefit of sec. 47 of the Limitations Act, R.S.O. 1914 ch. 75. By sub-sec. (2) (b), the statute shall not begin to run against any beneficiary unless and until the interest of such beneficiary becomes an interest in possession.

The effect of the transaction of 1899, as indicated in the affidavit of the defendant, and the release given by the plaintiff and his mother, was such as to convert, as it were, the plaintiff's interest in remainder into an interest in possession as of the date of these documents; the plaintiff might, at any time after the making of the arrangements set out in these documents, have sued the defendant for the accounting that he now sues for and for the administration of the estate; therefore, the statute commenced to run against the plaintiff on the 5th October, 1899; and the plaintiff's right to recover was, at the time of the commencement of this action, barred. See *How v. Earl Winterton*, [1896] 2 Ch. 626; *In re Davies*, [1898] 2 Ch. 142; *Thorne v. Heard & Marsh*, [1895] A.C. 495, 504; *Halsbury's Laws of England*, vol. 28, p. 201.

The defendant's appeal should be allowed, and the plaintiff's cross-appeal should be dismissed; no costs in this Court or in the Court below.

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FIRST DIVISIONAL COURT.

JULY 4TH, 1917.

\*MIZON v. POHORETZKY.

*Covenant—Restraint of Trade—Sale of Business—Undertaking of Vendor not to Carry on Business in same City—Restraint Unlimited as to Time—Reasonable Necessity—Goodwill—Injunction—Damages.*

Appeal by the defendant from the judgment of LATCHFORD, J., ante 167.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.