could not prove on the notes in this administration suit, *Reynell* v. *Sprye*, 1 D. M. & G. 671, and *Hutley* v. *Hutley*, L. R. 8 Q. B. 112, considered.

McMichael, Q.C., and *A. Hoskin*, Q.C., for the petitioner.

Foster, Q.C., and *J. B. Clarke*, contra.

Boyd, C.] [Nov. 24, 1886.

BEATTIE v. SHAW ET AL.

Mortgage by executor to co-executor—Death of mortgagee—Discharge by survivor—Validity of discharge—Improvements under mistake of title.

The Rev. W. H. died, leaving F. H. and W. H. his executors, who both proved the will. F. H., on January 17, 1874, mortgaged certain lands to W. H., his co-executor, to secure certain moneys due by F. H. to the estate of Rev. W. H., both mortgagor and mortgagee being described as executors of that estate. Interest was paid on that mortgage up to April 1, 1885. The executor, W. H., died intestate in July, 1879. On April 10, 1884, F. H. sold the lands to M., and on same day executed a discharge of his own mortgage, which was registered April 15, 1884, in which the mortgage was misdescribed as if it had been taken to the Rev. W. H.

In an action by the plaintiff, who had been appointed by an order of court to represent the estate of Rev. W. H. on the mortgage against several defendants who had become owners of the land, in which the defendants contended that the discharge of F. H. was valid, and claimed for their improvements under mistake of title, it was

Held, that the mortgage was not discharged, nor the estate reconveyed to F. H. by what was done, and that the legal effect of the mortgage was to enable W. H. to hold the estate in his own right as against F. H., although, as regards the beneficiaries under the Rev. W. H.'s will, W. H. was only a trustee. R. S. O. c. 3, s. 67, contemplates the action of two parties, one to pay and the other to receive, and not both represented by one and that one whose duty and interest were in direct conflict; and under these circumstances such a transaction cannot stand. The defendants had actual notice by the registered discharge that F. H., as surviving executor of the Rev. W. H., was attempting to deal with himself as mortgagee, and it was at their peril they took such a title without satisfying themselves that there was a real satisfaction and discharge of the mortgage moneys as regards the persons entitled under Rev. W. H.'s will. But a reference was ordered as to improvements under mistake of title. *Bacon* v. *Shier*, 16 Gr. 485, considered and distinguished.

J. C. Hamilton and *Alan Cassels*, for plaintiff.

Bain, Q.C., for defendants.

Divisional Court.] [January 8.

COYNE v. BRODIE ET AL.

Trustee and cestui que trust—Principal and agent—Statute of limitations.

J. C. died in 1876, and left an estate, very much embarrassed, to his wife; the plaintiff, B., an active business man, acted as agent for the plaintiff in settling up the estate, and induced a very large majority of the creditors to give up their claims, or settle them on terms very favourable to the plaintiff. He also sold a house, part of the estate, for her, and part of the purchase money was taken in the notes of F., the purchaser. The notes came to the hands of S., a brother of the plaintiff, who held them and collected some of them for her.

Some little time after, B. asked S. if the notes were all paid, and when he was told some of them were not, he said the money for a loan to F. was then going through his hands, and if he had the notes he could collect them, and so save them for the widow and orphans out of that money. The notes were given to him and he collected them; but the money was left in his hands unclaimed for eight years, until he made an assignment for the benefit of creditors.

In an action against him and his assignees, in which the defendants set up the Statute of Limitations as a bar, and the plaintiff contended that B. was a trustee, and that the statute could not be pleaded,

Held, CAMERON, C.J. C.P. (at the trial), that B. received the notes as agent of the plaintiff for the purpose of collecting the money as agent for the plaintiff, and that the statute was a bar. There was no express trust, only such a trust as arose from the relation of principal and agent, which does not prevent the operation of the statute.

On appeal, as the Divisional Court was evenly divided, this judgment was affirmed.