

been superseded, and the defendants, not having moved to dismiss, were not entitled to complain of the action being revived.

Pearson, for the plaintiffs.

C. C. Robinson, for the defendants.

BOYD, C., FERGUSON, J.,
ROBERTSON, J.

[April 8.]

DAVIS *v.* DAVIS.

Will—Election—Period of accounting—Interest.

Testator by his will left the income of his estate to his wife for life, and directed that after her death it should be disposed of as set out in a codicil, not to be opened until after her death. By the codicil he disposed of all his estate among his children, giving to two of them, after the death of his wife, a certain property which in reality was hers. After his death, his widow, without proving the will, received all the income of the estate for five years, after the lapse of which the will and codicil were proved. She then elected against the will.

Held, that her election related back to, and she was liable to account from, the date of the testator's death; but, as she was not called upon to elect until this action was brought, she should not be charged with interest in the meantime.

Marsh, Q.C., and *G. G. S. Lindsey*, for the plaintiff.

D. Macdonald, for the defendant.

DIVISIONAL COURT.]

[April 10.]

BUILDING & LOAN ASSOCIATION *v.* POAPS.

Statute of Limitations—Sale of land—Trustee and cestui que trust—Possession by cestui que trust—Non-effective right of entry—Mortgage by trustee—Registry Act—Priority.

The relationship arising out of an agreement for the sale of land on payment of the purchase money, and the taking of possession by the purchaser, is that of trustee and cestui que trust, and as the former has no effective right of entry the Statute of Limitations does not apply in favor of the possession of the cestui que trust. The principle of the decision in *Warren v. Murray*, (1894), 2 Q. B. 648, applied.

A mortgage from the trustee under the above circumstances, who takes and registers his mortgage in ignorance that anyone other than the mortgagor is in occupation of the land, and without notice actual or constructive of any equitable right of the cestui que trust, is entitled to set up the provisions of the Registry Act, which is retrospective, and to plead it if it is necessary to do so.

Bell v. Walker, 20 Gr. 558; *Grey v. Ball*, 23 Gr. 390, followed.

Alan Cassels, for the plaintiff.

Leitch, Q.C., for the defendants.