[IN THE COURT OF APPEAL.]

C. A.
1899
March 24.

BARNES AND ANOTHER *v.* GLENTON AND OTHERS.

Limitations, Statute of—Personal Action—Simple Contract Debt charged on Land—Period of Limitation—The Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*The Real Property Limitation Act*, 1874 (37 *&* 38 *Vict. c.* 57), *s.* 8.

Where an action is brought to recover a simple contract debt, and the money sought to be recovered is charged on land, the period of limitation is that imposed by the Limitation Act, 1623, and has not been enlarged to twelve years by the Real Property Limitation Act, 1874.

Judgment of Lord Russell C.J., [1898] 2 Q. B. 223, reversed.

Sutton v. *Sutton*, (1882) 22 Ch. D. 511, distinguished.

APPEAL from a judgment of Lord Russell of Killowen C.J., on further consideration, reported [1898] 2 Q. B. 223.

The action was brought to recover money lent. The three defendants were originally trustees under a will, and they borrowed a sum of money of the plaintiffs, to whom certain mortgages were transferred. By a declaration of trust made in 1882, to which the plaintiffs and the defendants were parties, it was provided that the money advanced by the plaintiffs should be a first charge on the transferred mortgages. Immediately after the execution of this deed one of the defendants, Angelo Lewis, retired from the position of trustee. Interest was paid by the other two defendants from time to time on the money borrowed of the plaintiffs up to March, 1896.

The action was commenced in April, 1897, to recover the money lent, due under the deed of 1882. The defendants disputed their personal liability, but this point was decided against them. The defendant Lewis further contended that the six years' limitation of actions applied, and was a defence in his case, as his liability (if any) was for a simple contract debt within the meaning of the Limitation Act, 1623, and that, as he had had nothing to do with the trust since 1882, he was within the protection of s. 14 of the Mercantile Law Amendment Act, 1856.

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Judgment was given against all the defendants. (1) The defendant Lewis appealed.

C. A. Russell, Q.C., and *Rufus Isaacs, Q.C.* (*H. Greenwood* with them), for the defendant Lewis. The debt being a simple contract debt, the Limitation Act, 1623 (21 Jac. 1, c. 16), applies, and that being so, the defendant Lewis is protected by the Mercantile Law Amendment Act, 1856, s. 14, from the effect of payment of interest by his co-defendants. The contention for the plaintiffs is that, the debt being charged on land, the case falls within s. 8 of the Real Property Limitation Act, 1874, and that with regard to debts so charged that section must be taken to repeal by implication the provisions of the statute of James I., the consequence being that the defendant Lewis would not come within the protection of the Mercantile Law Amendment Act, 1856, s. 14: *In re Frisby*. (2) But the Real Property Limitation Act, 1874, s. 8, cannot be construed as repealing the statute 21 James I. with regard to simple contract debts charged on land. The section does not say that an action to recover money charged upon land may be brought within twelve years, but that it may not be brought after that period. This provision is not inconsistent with the provisions of the statute of James I., by which actions for simple contract debts must be brought within six years.

[They cited *Sutton* v. *Sutton* (3); *Firth* v. *Slingsby* (4); *Toplis* v. *Baker* (5); *Brocklehurst* v. *Jessop*. (6)]

Dickens, Q.C., and *H. Manisty*, for the plaintiffs. The provisions of the statute of James I. are by necessary implication repealed by the Real Property Limitation Act, 1874, s. 8, as regards debts secured on land. The object of the Real Property Limitation Acts was to provide a complete code as to the periods of limitation for actions in respect of real property and sums of money secured by a charge thereon. Prior to the decision in *Sutton* v. *Sutton* (3) it had been supposed that s. 8 of the Real Property Limitation Act, 1874, only applied to

(1) [1898] 2 Q. B. 223, where the facts are more fully set out.
(2) (1889) 43 Ch. D. 106.
(3) 22 Ch. D. 511.
(4) (1888) 58 L. T. 481.
(5) (1789) 2 Cox, 118.
(6) (1835) 7 Sim. 438.

actions or other proceedings by which it was sought to enforce the charge upon the land, but it was held in that case that the section applied to the personal remedy upon the covenant in a mortgage deed. It would be inconsistent that there should be different periods of limitation provided with regard to the same class of debt by different statutes. There is nothing in *Sutton* v. *Sutton* (1) to indicate that s. 8 of the Act of 1874 does not apply to every action to recover money charged on land. The section does not, indicating the period of limitation, use the word "after" the period named; it says no action is to be brought "but within" the period. No doubt a statute of limitations is a disabling statute; but it may, and has in this case, given a time within which the remedy may be available. When *Toplis* v. *Baker* (2) was decided there was only one statute of limitations, so that the question now raised did not arise.

[They cited *In re Stephens.* (3)]

A. L. SMITH L.J. There is no controversy in this case as to the facts. The action was brought upon a simple contract debt. The loan was secured by a charge on land, and the action was not brought within six years after the right of action first accrued. The question is whether the Real Property Limitation Acts, 1833 and 1874, have repealed the provisions of 21 Jac. 1, c. 16, s. 3, which allows a debtor, in cases where the creditor has slept on his rights for six years, to set up the statute as an answer to the claim made against him. It is clear that the statute of James was passed in favour of debtors, because by it they were allowed to plead the lapse of six years as a bar to an action. Where is to be found, in the statutes of William IV. and of the Queen, that this right is taken away? I cannot find anything to that effect; and, in my opinion, the case of a simple contract debt is not affected by the later statutes. The Real Property Limitation Act, 1833, enacted that no action or suit should be brought to recover any sum of money charged upon land "but within

(1) 22 Ch. D. 511. (2) 2 Cox, 118.
(3) (1889) 43 Ch. D. 39.

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twenty years" after the right of action has accrued. That, upon the face of it, means the right to bring an action of the class enumerated in the section. Where in that section is there anything to be found as to actions for simple contract debts to which, I may point out, the statute of James is limited? I need not refer to the Real Property Limitation Act, 1874, because its effect is only to cut down the period of twenty years to a period of twelve years. Then it is said that *Sutton* v. *Sutton* (1) shews that the rights under the statute of James have been altered by the subsequent Acts. In that case it was held that the limitation of twelve years imposed by the Act of 1874 on actions to recover money charged on land applied to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land. That decision is binding on us, but it does not cover the case of a simple contract debt. Some detached statements of the Master of the Rolls and Bowen L.J. were pressed on us to shew that even a simple contract debt comes within s. 40 of the Act of William IV.; but it is sufficient to say that the passages refer to the case of a covenant with which the Court was dealing, and not to a case of a simple contract debt which was not before them. What other authorities are there? *Toplis* v. *Baker* (2) is against the argument advanced on behalf of the plaintiffs. *In re Stephens* (3) is, as far as it goes, also against that argument, because Kay J. dealt with the statute of James as still existing, but said that as the debt was charged on the testator's real estate the claim was not barred by the lapse of six years. In *Firth* v. *Slingsby* (4) Stirling J. decided this very point—that in such a case as the present the debtor was entitled to set up the statute of James as an answer. The text-books, as a rule, are to the same effect.

The Lord Chief Justice seems to have been led into an erroneous view of the case because the main argument was directed to the point whether the money was charged upon the land. No case appears to have been cited except *Sutton* v. *Sutton* (1), and he came to the conclusion upon some of the

(1) 22 Ch. D. 511.
(2) 2 Cox, 118.
(3) 43 Ch. D. 39.
(4) 58 L. T. 481.

observations in that case that he ought to hold that the claim, though on a simple contract debt, came within the statute of 1874. For the reasons I have given I think the judgment cannot be supported, and that the appeal must be allowed.

COLLINS L.J. I am of the same opinion. The action is on a simple contract debt which is also charged on land, and the argument for the plaintiff is that under s. 8 of the Act of 1874 the period of limitation of that section now governs all claims, personal or against the land, where the debt is charged on land.

In order to appreciate the point, it is necessary to see how the law stood before the Act of William IV., for the Act of 1874 only cuts down the period named in the earlier Act. Under the statute of James, in case of a simple contract debt, the period of limitation was six years. At the time the statute of William IV. was passed the claim of a creditor was barred on a simple contract debt after six years. That Act was passed to cut down and not to extend the rights of creditors. In a compendious section, which I will assume is large enough to embrace a simple contract to pay a sum charged on land, it limits to twenty years the period in which all proceedings covered by the section must be brought. But a certain class of the proceedings covered are already subject to the six years' limitation of the Act of James. How can the later enactment, by imposing a limitation of twenty years over a larger area, enlarge the period already defined as the limitation for a particular part of that area, namely, simple contracts? The words of the section debar the creditor from proceeding after twenty years; they do not confer any right of suit upon him which he did not before possess. The statutory prohibition against taking proceedings after the period named is not a statutory permission given to take them within that period, and it does not remove the existing fetter imposed in the case of simple contracts by the Act of James. The debtor is entitled to the benefit of either Act whenever the case falls within it.

It is said that *Sutton* v. *Sutton* (1) altered the law; but that case has no bearing on the point before us. All it decided was

(1) 22 Ch. D. 511.

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that s. 8 of the Act of 1874, which corresponds to s. 40 of the Act of 1833, embraces the personal remedy on the covenant of the debtor as well as the remedy against the land on which the debt is secured. Assuming that the Act applies to simple contract debts, its effect is to impose a fetter over an extended area, not to remove an existing fetter. This is emphasized by the express words of the later Act, the object of which is stated to be further to limit the time within which actions or suits may be brought for the recovery of land or rent, or of charges thereon. The matter was summed up by Stirling J. in *Firth* v. *Slingsby* (1), in which case he pointed out that the last-named statute was not in any sense an enabling statute, but that its language was entirely prohibitory. The opposite of that proposition underlies the argument placed before us on behalf of the plaintiffs. I agree, therefore, that the appeal must be allowed.

ROMER L.J. I am also of opinion that the appeal should be allowed. This is an action to enforce payment of a simple contract debt charged upon land. The point is whether the defendant can plead the statute 21 Jac. 1, c. 16, as a defence. Consider how matters stood prior to the statute 3 & 4 Will. 4, c. 27. If an action was brought on a simple contract debt the statute of James could be pleaded. The money sought to be recovered, though charged on land, could not be enforced, against the person who had undertaken to pay it, after the expiration of six years; but the remedy against the land would not have been barred under that statute. There could, therefore, have been a case in which the personal remedy was barred, but not the remedy against the land. That this was the position of things is clear from the cases of *Toplis* v. *Baker* (2) and *Brocklehurst* v. *Jessop*. (3) Then came the statute of William IV., altered as to the period of limitation by the statute of 1874, though in other respects the two statutes may practically, for present purposes, be treated as one. Since the case of *Sutton* v. *Sutton* (4) it must be admitted that s. 40

(1) 58 L. T. 481.
(2) 2 Cox, 118.
(3) 7 Sim. 438.
(4) 22 Ch. D. 511.

of the statute of William IV. is not confined to actions where the remedy is against the land, but includes also the personal remedy on the covenant to pay. Except so far as it decides that point, the case has no bearing on that which is before us. Now it is to be observed that the Acts of William IV. and of 1874 were not intended to take away from debtors any rights, or to give any additional rights to creditors. On the contrary, the intention was to give further rights to debtors to oppose the claims of creditors after the lapse of a certain time. The statutes do not say that debts may be recovered under certain conditions, but they negative the rights of creditors to bring actions after a certain time has elapsed. They were not intended to repeal the statute of James, and do not repeal it, so far as relates to simple contract debts charged on land, either expressly or impliedly. These two statutes and the statute of James are general, and have a wide operation, and they can well stand together. There would be no difficulty in framing a provision which would comprise the material provisions of the statutes so far as concerns the question before us. The effect of such combination may be stated briefly thus: "No action to enforce a simple contract debt, whether charged on land or not so charged, shall be brought after six years, unless interest has been paid or an acknowledgment given, and as to any debt charged on land, even if the debt be a specialty debt, no action shall be brought for a remedy against the land after twelve years unless interest has been paid or an acknowledgment given." This substantially represents the joint operation of the Acts, and shews that they in no way conflict. It follows that a defendant has, in a proper case, the right to resort to either of the statutes.

Appeal allowed.

Solicitors for plaintiffs: *Maudes & Tunnicliffe.*

Solicitors for defendant Lewis: *Calkin Lewis & Stokes.*

A. M.