C. A. 1882 DAWSON v. BEESON.

appeared on the motion for injunction and the Court were considering what order ought to be made.

On this point, I am of opinion that the part of the order which restrains the Defendant from soliciting the old customers of the firm ought to be struck out. There is nothing in the partnership articles to justify it. If either partner does certain acts or becomes subject to certain liabilities the partnership may be brought to an end, and he is entitled to be paid in that event the amount of his capital as if he were dead. There is nothing said about the purchase of his share of the business, but only of his capital. Therefore I think that although he cannot carry on the business as the business of the old firm there is nothing to prevent his carrying on the business on his own account. It is just as if the partnership had been dissolved and each party left at liberty to carry on the business as he likes.

With respect to the costs, I agree that they should be made costs in the action.

Solicitors: *J. Chapman; C. Butcher.*

M. W.

C. A. 1882 Dec. 12.

SUTTON *v.* SUTTON.

[1882 S. 1188.]

Statute of Limitations—37 & 38 *Vict. c.* 57, *s.* 8—*Covenant in Mortgage Deed.*

The limitation of twelve years imposed by the *Real Property Limitation Act*, 1874, s. 8, to actions and suits for the recovery of money charged on land applies to the personal remedy on the covenant in a mortgage deed as well as to the remedy against the land.

The marginal notes to the sections of an Act of Parliament are not to be taken as part of the Act.

Dictum in *In re Venour's Settled Estates* (1) corrected.

DEMURRER.

The statement of claim alleged as follows:—

By an indenture dated the 13th of May, 1868, and made between the Defendant of the one part, and *G. F. P. Sutton* of the other part, in consideration of £1850 advanced by *Sutton* to the Defendant the Defendant covenanted with *Sutton* that he

(1) 2 Ch. D. 522, 525.

C. A. 1882 SUTTON v. SUTTON.

would on demand pay or cause to be paid to *Sutton*, his executors, administrators, or assigns, the said sum of £1850, and interest at the rate of £5 per cent. per annum, and would also on demand pay to *Sutton*, his executors, administrators, or assigns, all costs of and relating to the said indenture and attending the execution of the trusts and powers therein declared.

G. F. P. Sutton died in March, 1870, having by his will appointed the Plaintiff his sole executrix, who proved the will on the 19th of December, 1881.

The Defendant paid various sums for principal and interest to *Sutton*, the last payment being of a sum of £100, which he paid on the 12th of November, 1869.

The Plaintiff had applied to the Defendant for payment of what was due for principal and interest, but he had refused or neglected to do so. The Plaintiff claimed payment of what should be found due under the covenant.

The Defendant put in a defence, in which he stated that the indenture of the 13th of May, 1868, was in fact an indenture of mortgage whereby the principal sum and interest mentioned in the statement of claim were secured by a mortgage of and charged upon certain lands and hereditaments at *Berkhampstead*.

The 4th paragraph of the statement of defence alleged that no part of the said principal money nor any interest thereon had been paid, nor had any acknowledgment of any right thereto been given in writing signed by the Defendant or any person as his agent, or otherwise to any person entitled thereto as his or her agent since the 12th of November, 1869, which was more than twelve years before the commencement of the action, and the Defendant claimed the benefit of the provisions of the *Real Property Limitation Act*, 1874, and of all Statutes of Limitation in bar to the relief sought by the statement of claim.

The Plaintiff demurred to the 4th paragraph as being bad in law.

Mr. Justice *Chitty* allowed the demurrer, and the Defendant appealed from this decision.

Romer, Q.C., and *J. G. Wood*, for the Appellant:—

The question turns upon the effect of the 8th section of the

Real Property Limitation Act, 1874 (1). The Plaintiff contends that although the right to enforce the charge on the land either by sale or foreclosure is barred at the end of twenty years, an action on the covenant may still be brought and will not be barred till the expiration of twenty years, as before the Act.

But that is not the true construction of the section. The words of the section are copied from the 40th section of the 3 & 4 Will. 4, c. 27. That section applied to covenants in a mortgage deed, and it was held in *Harlock* v. *Ashberry* (2) that it did not apply to a foreclosure suit, which is a suit for the recovery of land: *Wrixon* v. *Vyse* (3). In *Doe* v. *Williams* (4) *Littledale*, J., says the 40th section relates to actions to recover the money, either upon the covenant usually inserted in the mortgage deed or on the bond which usually accompanies it. This is borne out by the marginal note of sect. 8 of the Act of 1874, which says, "money charged on land and legacies to be deemed satisfied at the end of twelve years." If the money is satisfied it cannot be recovered under any proceeding. The marginal note may now be read in aid of the interpretation of the section: *In re Venour's Settled Estates* (5).

[JESSEL, M.R.:—The *dictum* in that case is not strictly correct. I have since ascertained that the practice is so uncertain as to the marginal notes that it cannot be laid down that they are always on the Roll. But the title of the Act is always on the Roll.]

The expressions used in the section shew that personal actions

(1) 37 & 38 Vict. c. 57, s. 8: "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent, and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment or the last of such payments or acknowledgments if more than one was given."

(2) 19 Ch. D. 539.

(3) 3 D. & War. 104.

(4) 5 A. & E. 291.

(5) 2 Ch. D. 525.

C. A. 1882 SUTTON v. SUTTON.

as well as suits for the recovery of the land were intended. The Act was passed before the *Judicature Act* came into operation, when there was a distinction between actions at law and suits in equity. It also refers to legacies, and that word cannot be confined to legacies charged on real estate.

Macnaghten, Q.C., and *Etherington*, for the Plaintiff:—

The section in question only applies to the recovery of the money by enforcing the charge on the land. Its object was to clear the land from the incumbrance; it leaves untouched the personal remedies of the mortgagee by covenant or otherwise. The effect of deciding that this section bars the remedy on a covenant in a mortgage deed will be that mortgagees will have to take a covenant by a separate deed. The observation of *Littledale*, J., which has been referred to was merely a *dictum*.

Although the present question could not arise under the 40th section of the 3 & 4 Will. 4, c. 27, because the periods of limitations for enforcing the charge on the land and suing on the covenant were the same, yet a similar question arose under the 42nd section, and it was decided that although six years arrears of interest could only be recovered against the land, the right to recover on the covenant remained for twenty years: *Hunter* v. *Nockolds* (1); *Lewis* v. *Duncombe* (2); *Sims* v. *Thomas* (3).

[JESSEL, M.R., referred to *Henry* v. *Smith* (4).]

Our construction is borne out by the title of the Act, which only refers to "real property," and the preamble, which only speaks of the "recovery of land or rent," and this is also the understanding among conveyancers: *Prideaux* on Conveyancing (5).

JESSEL, M.R.:—

This is an appeal from a decision of Mr. Justice *Chitty*. I am sorry to say that we have not been furnished with any note of the judgment in the Court below, and therefore I am unable to

(1) 1 Mac. & G. 640.
(2) 29 Beav. 175.
(3) 12 A. & E. 536.
(4) 2 D. & War. 381.
(5) 11th Ed. vol. i. p. 468.

ascertain the real grounds on which the learned Judge founded his decision.

The sole question that we have to decide is whether when no principal or interest in respect of a mortgage debt has been paid, and no acknowledgment in writing has been given for the space of twelve years, an action on the covenant contained in the mortgage deed is maintainable or not. That question depends for its decision upon the true construction of the 8th section of the *Real Property Limitation Act*, 1874 (37 & 38 Vict. c. 57).

But before reading the section upon which, of course, everything turns, I must say a few words and a few words only upon the nature and origin of the limitation with regard to the right to sue under such circumstances. The period of twenty years having been established as a bar to actions of ejectment, the same period was extended by the Judges to actions on bonds by analogy, and eventually became the settled law. After the lapse of twenty years without any payment having been made, it was said that it must be presumed that the debt had been satisfied. Then again that doctrine was extended somewhat, and ultimately it went to this extent, that if the mortgagor remained in possession for twenty years, and did not give any acknowledgment the mortgage would be presumed to be satisfied. That being the state of the law the *Statute of Limitations* (3 & 4 Will. 4, c. 27) laid down the same limitation to the recovery of a mortgage debt. What did that mean? Did it mean to cut down the old right as to presumption of payment? Surely not. If there is a presumption of payment by non-payment of any of the principal and interest or by not giving an acknowledgment, the statute was not intended to interfere with that, but rather to give legislative authority to that which had previously rested on judicial decision only. I think that is the fair view which we ought to take of the statute. If that is so, of course, the mere fact of saying you shall not recover upon a mortgage, would not keep alive any remedy upon the mortgage, whether that remedy was upon a covenant contained in the mortgage itself, or upon the implied promise which is presumed in law from the fact of accepting the loan; because it has been decided that if there is no covenant and no accompanying bond, there is still the implied promise to pay;

C. A. 1882 SUTTON v. SUTTON. Jessel, M.R.

and if there is a time fixed either by recital or otherwise for the repayment, in many cases depending upon the construction of the instrument, the Court will imply even a covenant to pay. That being so, every mortgage contains within itself, so to speak, a personal liability to repay the amount advanced.

Let us now see what this 8th section of the *Real Property Limitation Act* says. [His Lordship read the section, and proceeded:—] Now the words that are material are, "No action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage." It is impossible to say that those words do not include this sum of money. It is a sum of money secured by a mortgage. Those who say that these words are not to be read literally must shew some reason why they should not. What they say is that it does not mean to recover any sum of money secured by a mortgage, but that it means to recover the money so far as it can be recovered by a sale of the land or by the receipts of the rents: that is to say, so far as you can get it out of the land. That construction puts words there which are not to be found in the section; and more than that, it gives no meaning to words which are to be found in the section, because you could not get that money as against the land at the period when this Act was passed except by a suit in the Court of Chancery. You could not have brought an action at law for that purpose. There is another reading which makes it much plainer, and that is that the words "at law or in equity" belong to the words "action or suit," because the words "at law" have no particular meaning when you have got the words "charged upon any land," and therefore it is probable that the words are not put in their right position. But independently of that, when you consider that a proceeding at law is called "an action" and a proceeding in equity is called "a suit," and when you get the two words "action" and "suit" together, it is plain to my mind that those who framed that section meant any proceeding in which any sum of money secured by a mortgage might be recovered. But the section does not stop there, for it says "or any legacy." To my mind there is nothing to cut down the meaning of the word "legacy." The word "legacy" stands there alone, following the words "otherwise charged upon or payable out of any land or rent at law or in

equity," and that has been held to apply to legacies payable out of personal estate. I think that gets rid of another argument, that the Act is obviously an Act passed with reference to real estate only, and therefore that we ought to restrict this section to real estate, because that is the general purview of the Act. But when you consider that you have the word "legacy" in it, which has been decided to be general and to apply to both real and personal estate, that shews that you cannot cut down the words by reference to the general purview of the Act. That gets rid of any question as to the preamble or the title.

Then there is this observation to be made. The principle on which the law has always been based is either actual satisfaction or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay. It seems absurd that you should get rid of the greater, so to speak, namely, the security upon the land, and should nevertheless retain the lesser, namely, the personal liability to pay. The result, to my mind, would be too absurd. It is not a decisive or conclusive reason, but it is a reason.

Then it is said that there is another ground for supporting the Respondent's contention, namely, that in the case of a bond or covenant where the debt is not secured upon land there is no such provision. The only answer to be given to that is that the Legislature has not provided for every possible case. No doubt there is an omission. The same observation would apply to "legacies" to which this section certainly has reference. It has been decided, and in my opinion rightly decided, that the word "legacy" includes a share of residue, but it only includes it where there is an executor named. If there is no executor named, so that the man dies intestate in law, or if he dies actually intestate, that is without having made any will at all, then the section does not apply, and therefore another Act was passed limiting the period to twenty years; but by some slip it has not been applied in this subsequent Act of Parliament to intestates. So that there again it is a case of omission. It only shews that there has been an omission, but that does not to my mind give an answer to the argument as to the absurdity of holding that the Legislature intended to retain the mortgage and to leave out the personal

C. A. 1882 SUTTON v. SUTTON.

liability. In my opinion the literal meaning is the right meaning, and therefore this action is barred as well as regards the covenant as the right to sue.

COTTON, L.J.:—

This case raises the question whether twelve years is a bar to an action upon a covenant contained in a mortgage deed to recover money. That question arises under the 8th section of 37 & 38 Vict. c. 57. I think the true principle of construing Acts of Parliament and other documents is to see what is the fair and reasonable construction of the words themselves and to apply them accordingly; and if Parliament has used language which does not express what the intention was, it is the duty of Parliament to correct its own language. I think the Courts bring themselves into great difficulties when they attempt to alter the fair meaning of a clause in an Act of Parliament and thus to frame what in their view would have been a better enactment. Where there is an obvious absurdity from reading words in a literal way, and where there are doubtful expressions which may have two meanings, one must not give a construction which will tend to an obvious absurdity, but to my mind there is no absurdity in reading this section grammatically and construing it according to ordinary rules. It reads, "No action shall be brought to recover any sum of money secured by any mortgage," and then it goes on to something else. I think that the words "action or suit" would, of themselves, apply to an action at law as well as to a suit in equity; but I think that the words "at Law or in Equity," although they are not very correctly brought in, do really apply to "actions, suits or other proceedings." Then what have we here? We have an action brought to recover a sum of money which is secured by mortgage, and such an action comes within the express provision of this statute. How then is it sought to be maintained that twelve years is not a bar? One difficulty I have felt has been in consequence of the case of *Hunter* v. *Nockolds* (1) decided by Lord *Cottenham*, in which he expressed an opinion that although in actions brought to recover money issuing out of the lands, only

(1) 1 Mac. & G. 640.

six years' interest could be allowed, yet he based his decision upon this ground, that one must take the two statutes 3 & 4 Will. 4, c. 27, and 3 & 4 Will. 4, c. 42, together. That might be right under the circumstances. He was driven to that by this consideration, that the one Act was only passed three weeks before the other, and therefore he said you must read the two together, and take the later one only as an explanation of the other Act. I think we are not in any such difficulty here, because the section we have to construe is contained in an Act passed in the year 1874, and therefore there is no necessity for construing this so as to leave the same bar to an action on the covenant as that which is provided by section 42 of the earlier Act. There is no necessity to follow in this case the way in which Lord *Cottenham* dealt with the two Acts passed almost simultaneously.

The other ground of contention is this, that this Act was intended to bar actions for the recovery of land, or for enforcing charges thereon. That is the primary object of the Act, but still, although it is an Act having that primary object we find that the clause in question according to its true construction goes beyond that and is not limited in its application to those actions which are the primary object of the Act. I think it would be wrong to hold that this section ought not to have its true construction. In my opinion the true construction makes twelve years a bar to any action upon the covenant, since it is an action to recover money charged upon land. The contention of the Respondent here is that you must treat this as a section preventing you enforcing any charge upon land whether it be by mortgage, charge, or lien. That is not the section, and I do not see how we can alter the language of the section and give it a different meaning from that which I think it bears.

BOWEN, L.J.:—

I am of the same opinion. I think this case falls within the the express words of the Act. I start with this, that sect. 8 of the *Real Property Limitation Act*, 1874, appears to me clearly meant to apply not only to suits in equity, but to actions at law. It may be that the words "at law or in equity" are placed out of their ordinary position. I think that may be so, but whether

C. A. 1882 SUTTON v. SUTTON. Bowen, L.J.

they are placed in their right or their wrong position, it is clear that the section means to deal with actions at law as well as with suits in equity. If the judgment of the Court below is right, to what possible action at law could this section apply? There were two ways of suing at law when there had been a mortgage transaction. One was where there was a covenant upon the express covenant; but if there was no covenant the law presumed an implied promise arising out of the transaction itself to repay the money either at a fixed or an uncertain date, a promise which might, according to the character and construction of the document, be either a simple or a special contract. This particular action is an action of covenant. If this section applies to common law actions, and does not apply to an action of covenant, what does it apply to? It must apply to a common law action on an implied promise. What an extraordinary result would follow if it was decided that the section did not deal with express promises, but dealt with implied promises. What possible ground in reason could there be for putting that interpretation on the plain words of the section? It seems to me that the words themselves are really clear, "No action, suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage." Does that not mean that no action or suit shall be brought to recover any sum of money which is secured by any mortgage? If that is the true construction, this is a sum of money which is secured by a mortgage and the section does apply. It has been contended by Mr. *Macnaghten* that we are to read it in a non-literal sense, and that the words "sum of money secured by any mortgage," does not mean a sum which is secured, but as if it was "to recover any sum of money so far as it is secured." The first objection to that is that it is not the language of the section, and I think we ought to keep to the plain words of the Act of Parliament where we can. The second objection to it is that it gives no meaning whatever to the word "action," because there was no such thing, so far as I know of, as an action which could be brought to recover a sum of money so far as it was secured.

The preamble of the Act, it is said, shews that the only actions which were intended to be limited in time were actions which related to real property. I do not think that the preamble can

be taken to have cut down the express provisions of the statute, especially as there does not seem to be anything in them inconsistent with the spirit of the Act.

C. A. 1882 SUTTON v. SUTTON.

Solicitors: *Whitehouse & Etherington; Sutton & Ommanney.*

M. W.

WILSON *v.* TURNER.

C. A. 1883 *Jan.* 16.

[1880 W. 2947.]

Settlement—Maintenance Clause—Power or Trust—Direction to apply the whole or part of Income "for or towards maintenance"—Right of Father to claim Application of Income to Maintenance.

By a marriage settlement certain personal property was settled upon trust for the wife for life, and after her death for the children; and it was declared that the trustees should after the death of the wife apply the whole or such part as the trustees should think fit of the annual income of the expectant share of any child for or towards the maintenance of such child. The trustees after the death of the wife paid the whole income of the trust fund to the husband during the infancy of the child of the marriage without exercising any discretion as to its application to his maintenance:—

Held (affirming the decision of *Bacon*, V.-C.), that there was no absolute trust to apply the income to the maintenance of the children, but a discretionary trust equivalent to a power; and that as the trustees had not exercised any discretion, the estate of the husband must be held liable to repay the whole amount of the income received.

Ransome v. *Burgess* (1) disapproved.

Mundy v. *Earl Howe* (2) commented on.

THE action in this case was brought by *W. J. W. Wilson*, the only child of *William Wilson*, deceased, for the administration of his father's estate, and also for the purpose of setting aside a settlement executed by the Plaintiff at his father's request directly after the Plaintiff came of age.

By the settlement made on the marriage of the testator *William Wilson* with the mother of the Plaintiff, dated the 7th of April, 1855, certain personal property belonging to Mrs. *Wilson* was settled upon trust that the trustees, *J. D. Douglas*, and *A. N. Smith*, should pay the income to Mrs. *Wilson* during her life for her

(1) Law Rep. 3 Eq. 773. (2) 4 Bro. C. C. 224.

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Page	*Line*	*For*	*Read*
49	10	15	85
504	—3	LV	LIX
513	3	twenty	twelve