

*Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of Spencer v. Sands and McDougall Limited, and Sands and McDougall Limited v. Spencer, from the Supreme Court of Western Australia ; delivered 16th June 1894.*

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Present :

LORD HOBHOUSE.

LORD ASHBOURNE.

LORD MACNAGHTEN.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

These are cross appeals. The Plaintiff in the action below, Charles Spencer, is the Appellant in the principal appeal, and the Defendants, Sands and McDougall, are Appellants in the cross-appeal.

By his statement of claim filed in July 1891 the Plaintiff alleges that he is entitled to the possession of certain property in Perth. He shows title as the sole trustee of a deed made in the year 1846, being the marriage settlement of Mr. and Mrs. Henry Spencer; and he claims possession and other relief.

The Defendants deny the Plaintiff's title; they allege that the title of the trustees of the settlement and of their beneficiaries has been barred by laches, waiver, acquiescence and the Statute of Limitations; and they claim to be lawfully in possession under a lease executed by Mrs. Spencer in the year 1883.

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and on the 6th October 1846 was executed the settlement above referred to. The deed is not an appointment but a statutory release; and by it Mrs. Mayo is made to convey (with the consent of Henry Spencer, who does not himself convey) the property to two trustees their heirs and assigns. Then it declares uses. The uses are,—first, to Mrs. Mayo until the marriage; secondly, after marriage to Henry Spencer for life; thirdly, to the trustees and their heirs to preserve contingent remainders during Henry Spencer's life in the usual way; fourthly, after Henry Spencer's death to Mrs. Mayo for life; fifthly, to the trustees and their heirs to preserve contingent remainders during her life; and then the deed goes on thus: "And from and immediately after the decease of the survivor of them," the husband and wife, upon trust that the trustees and the survivor of them and the heirs and assigns of such survivor shall sell the property and divide the proceeds among the children of Mrs. Mayo whether born before or after the contemplated marriage.

The intention of this deed is very clear; and supposing that the intending husband and wife were able to pass, and did pass, the legal estate, its effect is equally clear. The fee simple is conveyed to the trustees. The declared uses are all executed uses. Passing over the first use which is extinguished by the marriage, and the springing uses for preserving contingent remainders, the legal estate is vested in the husband for life with remainder to the wife for life. There the uses stop; the legal reversion remains in the trustees, who are to use it for the purpose of sale; but all legal interest prior to that reversion is taken out of them by the declarations of uses.

In the year 1865 Mrs. Spencer obtained a



in fee, and thereby, as their Lordships understand the argument, had destroyed the marriage settlement and the Plaintiff's title with it.

The Plaintiff appealed against this judgment, and on appeal the Defendants renewed their motion for nonsuit. The appeal was heard before the Chief Justice and Mr. Justice Stone, and on the 17th March 1892 separate Orders were made, one dismissing the Plaintiff's appeal with costs, and the other dismissing the Defendant's motion with costs. Each party now appeals to Her Majesty in Council from the Order adverse to each.

On the question of nonsuit Mr. Justice Stone concurred with the Chief Justice that Mrs. Spencer passed the legal fee to the trustee of her marriage settlement, and that therefore the Plaintiff was in a position to bring the action. On the merits of the case he disagreed with the view of the Chief Justice that they could be affected by the public estimate of Mrs. Spencer's interest in the property. As the learned Chief Justice acquiesced in that conclusion, and as it has not been suggested in this appeal that public rumour could affect the Plaintiff's title, their Lordships say nothing further on this point. But then Mr. Justice Stone went on to hold that Mr. and Mrs. Spencer had set up an adverse title to their trustees; first by purporting to execute a mortgage in fee to a Mr. Burt in the year 1847, and afterwards by other dealings inconsistent with a mere tenancy for life. He considered that the Statute of Limitations had been running ever since the mortgage of 1847, and that the title of the trustees was extinguished. And in this view the Chief Justice concurred.

Their Lordships feel difficulty in grasping this view of the case; and they have not been assisted by the Defendants' Counsel, who does not support the judgment, but rests his case



1883 was a valid exercise of the power of leasing contained in the settlement, beyond saying that as at present advised they are not satisfied that the power was rightly construed below. They think that the question, in case it should arise hereafter, ought to be left unprejudiced by any expression of opinion pronounced in the course of this litigation.

Although the Plaintiff's case wholly fails their Lordships do not think it would be right to give the Defendants the whole costs of the litigation which have been unduly and unnecessarily increased by the lines of defence which they thought fit to adopt. Their Lordships can not find any justification for the conduct of the Defendants in suggesting doubts as to the validity of the marriage of Mr. and Mrs. Spencer, and seeking to impeach the marriage settlement on account of the acts and conduct of one or both of the tenants for life. It seems to their Lordships that the justice of the case will be fairly met by disallowing one-fourth of the costs of the Defendants throughout the litigation.

Their Lordships think that the proper order to make on these appeals will be, to discharge all the orders in the Courts below, to direct judgment to be entered for the Defendants, and to direct the Plaintiff to pay the costs of all the proceedings in the Courts below and the costs of these appeals less one-fourth of such costs respectively. Their Lordships will humbly advise her Majesty accordingly.

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