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THE PENNSYLVANIA STATUTE OF LIMITATIONS OF 1856

HAROLD S. IRWIN*

The Act of April 22, 1856,¹ which is still in force, reads, "No right of entry shall accrue, or action be maintained for a specific performance of any contract for the sale of any real estate, or for damages for noncompliance with any such contract, or to enforce any equity of redemption, after re-entry made for any condition broken, or to enforce any implied or resulting trust as to realty, but within five years after such contract was made or such equity or trust accrued, with the right of entry; unless such contract shall give a longer time for its performance, or there has been, in part, a substantial performance, or such contract, equity of redemption or trust, shall have been acknowledged by writing to subsist, by the party to be charged therewith, within the same period: Provided, That as to any one affected with a trust, by reason of his fraud, the said limitation shall begin to run only from the discovery thereof, or when, by reasonable diligence, the party defrauded might have discovered the same; but no bona fide purchaser from him shall be affected thereby, or deprived of the protection of the said limitation: And provided, That any person who would be sooner barred by this section shall not be barred for two years from the date hereof."

This section was amended by the Act of March 27, 1865² by providing, "So much of the sixth section of the act of April 22, 1856, as provides that no right of entry shall accrue, or action be maintained, to enforce any implied or resulting trust as to realty, but within five years after such trust accrued, be and the same is hereby repealed, so far as it relates to, or protects the title of, any attorney at law, to any lands purchased, or held by him, of, or for, his client, under, or subject to, such trusts."

Prior to the Act of April 22, 1856³ an action to enforce an implied or re-

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¹P. L. 532, section 6; 12 P. S. 83.

²P. L. 56, section 1.

³P. L. 532, section 6; 12 P. S. 83.

sulting trust could be maintained within twenty-one years from the time the trust arose,⁴ the Act of March 26, 1785⁵ applying.

The statute applies, by its terms, to three distinct situations. It limits the time for bringing (1) an action on a contract for the sale of realty, whether it be an action for specific performance or an action for damages for nonperformance and whether the action be at law or in equity, or in the Orphans' Court; (2) an action to enforce the equity of redemption of a mortgagor after re-entry has been made by the mortgagee for a condition broken by the mortgagor; (3) an action to enforce any implied or resulting trust as to realty.⁶

The statutory period within which the action must be commenced or the right of entry exercised is five years.

The statute prescribes that no action shall be maintained " * * * * but within five years after such contract was made or such equity or trust accrued, with the right of entry * * * * ." Do the words "with the right of entry" qualify the contract provision as well as the equity of redemption and trust provisions? There is nothing in the language used or in the extra-legislative punctuation thereof that makes this qualification apply to the latter two situations only and not to the former. If it does apply to the contract provision, the necessary deduction is that the statute was not meant to apply to suits for specific performance or damages for nonperformance brought by the vendor against the vendee. This must be true because the vendor normally retains possession until performance by the vendee and it would be senseless to talk of the owner in possession getting a right of entry by the contract before the limitation started running. On the other hand the vendee does get a right of entry by virtue of the contract that he did not have before the contract was made. Such right of entry ordinarily would accrue on the date set for completion of the contract, i. e. the date set for payment and transfer of possession. If the "right of entry" provision does not apply to contracts for the sale of realty, the limitation begins to run when the contract is made even though the contract calls for performance a year later and there would be no breach until a year later. Thus the limitation would start precluding an action before any action could be instituted. Such can not be its meaning. The conclusion that the statute does not apply to suits by the vendor against the vendee is buttressed also by the general purpose of the statute. This is

⁴McBarron v. Glass, 30 Pa. 133 (1858).

⁵2 Sm. L. 299, section 2.

⁶In Kingston Trustees v. Kingston Coal Co., 265 Pa. 232 (1919) an action of waste was held to be an action to enforce a trust where it was necessary in such action to establish such a trust to sustain the action.

clearly to protect the holder of the legal title to land against the dilatory assertion of equities—by mortgagors, by beneficiaries in implied and constructive trusts and by vendees. There are no authoritative decisions on this point but our conclusion is that the section meant to include "with right of entry" in the contract provision, that the limitation does not apply to suits by the vendor against the vendee either for specific performance or for damages,^{6*} and that the period begins to run, when, after the contract is made, there is a right of entry in the vendee and the contract is breached by the vendor.

To this general rule for starting the five year period, the section adds a qualification in the case of contracts, "unless such contract shall give a longer time for its performance or there has been, in part, a substantial performance, or such contract * * * shall have been acknowledged by writing to subsist, by the party to be charged therewith, within the same period."

What is meant by such contract giving a "*longer* time for its performance"? The only time mentioned in comparison with which another time could be *longer* is the five year period. Hence the fact that the contract gives a year for its performance, or two years, etc. is immaterial under this exception unless the time is more than five years. As stated above, however, such a shorter time being set in the contract for performance would be material in determining when the period would start to run under the general rule of the section. The section does not state when the period shall start if the contract does give such a longer time for performance. In fact, a literal reading of the statute would leave such a contract entirely outside of the limitation of the section. No logical reason can be suggested why in such a contract the five year period should not begin to run from such time set for its performance and why an unlimited time, except as qualified by laches in the case of specific performance or the general limitation on actions of *assumpsit*, should be permitted in such a case. It is to be hoped that the section will be held applicable from the time the contract was made with right of entry, thus making the exception of no importance as an exception.

What is meant by, in the case of contracts, "in part, a substantial performance"? By whom is the substantial performance to be given? Normally the only substantial performance which could be given by the vendor would be full performance, i. e., conveying the title to the vendee. Thus the section

^{6*}But see *Federal Realty Co. v. Bolland*, 59 Pitts. L. J. 474 (1911) where the section was applied to a suit by the vendor. The court shows no appreciation of the issue involved and even omits the words "with the right of entry" from its quotation of the section. See also *Taylor's Adm'r's v. Witman's Adm'r's*, 3 Grant 138 (1861) and *Reed v. Reed*, 46 Pa. 239 (1863). In *McSorley v. Mamaux*, 68 Pitts. L. J. 267 (1920) the act was not applied to a suit by the vendor against the vendee.

must mean that the performance is to be given by the vendee. This would be true, certainly, if the section does not apply to suits by the vendor as argued above. But why should substantial performance by the vendee make it unnecessary for such vendee to sue within the reasonable time set by the statute to compel the vendor to perform or to recompense the vendee for nonperformance? The purpose may well be to protect the vendee against the loss and inequity which would be suffered by him after he has substantially performed. This loss would be considerably greater than when no such performance had been made by him. Too, a vendor notified by the vendee's substantial performance of the contract has ample warning of the claim of the vendee within a seasonable time and the later assertion, by suit, of the claim of the vendee can not be regarded as a stale one. How far must the vendee perform to make his performance substantial? Does it require such performance as would take the contract out of the operation of the statute of frauds where the contract is an oral one? Most Pennsylvania cases require noncompensable improvements as well as possession and part payment by the vendee for this latter purpose. Substantial performance of the contract should not require improvements by the vendee, for, unless the contract calls for such improvements by the vendee, (and such contracts usually do not so provide), the absence of such improvements can hardly be called nonsubstantial performance and their presence is not performance of the contract. Such contracts ordinarily do not require the vendee to take possession of the property but merely give him the right or privilege of so doing. Hence failure to take possession can hardly be called nonsubstantial performance of the contract and taking possession can not be said to be substantial performance. The contract normally imposes on the vendee only the duty of payment of the price. Hence payment of a substantial part of the purchase price called for by the contract would seem to be the substantial performance contemplated by the exception.⁷ Mere payment of the "down money" would not be substantial performance unless it was an unusually large portion of the purchase price. It is to be remembered that such substantial performance must be made "within the same period," i. e., within the five year period. By such payment or tender of payment the vendor has seasonable notice of the intent of the vendee to assert his claim. Then, as discussed above, the statutory period should begin to run from the time of substantial performance (although the section

⁷But compare *Kerlin v. Knipp*, 50 Pitts. L. J. 420 (1903) where payment of the purchase price in full in the form of land was held not to be substantial performance. See *Cumming's Appeal*, 4 Walker 251 (1881). If the contract be fully executed, the section is inapplicable. *Lulay v. Barnes*, 172 Pa. 331 (1896).

does not so state) or the period for suit would be controlled by the limitation for actions of assumpsit or the doctrine of laches in equity. The problem of the written acknowledgement exception is discussed hereafter in connection with the trust situation, this exception being common to all three situations affected by the section.

The fact situation controlled by that portion of the section dealing with the equity of redemption rarely arises and any extended discussion of it is therefore omitted. The only case of any importance dealing with this portion of the section is *Harper's Appeal*.⁸ This case concerned a conveyance and repurchase agreement which was held by the court to create a mortgage. The mortgagor was seeking to enforce his equity of redemption from the mortgage more than five years after the making of the agreement. Possession had been taken by the mortgagee (apparent grantee) at once on the making of the agreement. Since the court held the transaction to be a mortgage it was not an attempt to compel specific performance of a contract for the sale (resale) of realty. It was decided also that the facts did not show a trust for none could arise until the mortgagee had been repaid by the rents and profits and this had not occurred. While the court conceded that the mortgagor was seeking to enforce an equity of redemption, section six had no application to the usual equity of redemption of a mortgagor for this limitation period applies only where there has been a re-entry by the mortgagee for the breaking of a condition by the mortgagor. Since the facts showed no such re-entry for this cause, the section was inapplicable.

The statute sets a time limitation in the cases of implied and resulting trusts only and not for express trusts. The decisions have recognized two distinct classes of trusts (in reality three)—(1) express trusts, (2) trusts arising by (a) implication or (b) construction of law.⁹ Express trusts are trusts created by language of the parties sufficiently indicating an intention to create a trust.¹⁰ Express trusts are not included in section six of the Act of 1856 and the five year period of limitation has no application to such trusts.¹¹ The equitable doctrine of laches will bar the enforcement of express trusts.¹² The implied or resulting trusts within the meaning of section six would seem to be the same trusts that are excluded from the statute of frauds provisions of sec-

⁸64 Pa. 315 (1870). See also *Ballentine v. White*, 77 Pa. 20 (1874).

⁹*Jones v. Wadsworth*, 11 Phila. 227 (1876); 65 C. J. 220; 26 R. C. L. 1170.

¹⁰*Smith's Estate*, 144 Pa. 428 (1891).

¹¹*Kauffman v. Kauffman*, 266 Pa. 270 (1920).

¹²*Cohen v. De Cicco*, 90 Pa. Super. Ct. 51 (1927).

tion four of the same act.¹³ Section four excepts, "where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by implication or construction of law * * * * ." Such trusts are those (1) implied by the law as a result of the acts of the parties (other than language) showing an intent to create a trust, usually called resulting trusts,¹⁴ and (2) created by the law to protect the beneficial owner of property from acts of fraud and are imposed regardless of the intent of the parties.¹⁵ The most commonly litigated instances of trusts implied by the law (in fact the only cases arising under the act are of this type) are those where the purchase price of land has been paid by one party and the title to the land has been taken in the name of another party. It might be argued that the section in including "implied or resulting" trusts meant to include only those trusts implied to carry out the intention of the parties. The section, however, discloses clearly that it includes also those trusts created by the law as a remedy for or to prevent fraud by the proviso of the section dealing with when the limitation shall begin to run. Cases are numerous in which the section has been applied to such trusts *ex maleficio*.¹⁶

The courts at first had some hesitancy in deciding the theory on which to base the holding that the statute applied to trusts arising from fraud, by the purchaser of property. Such was the case in *Christy v. Sill*.¹⁷ Here the purchaser at a sheriff's sale prevented bidding on the sale of the realty in question by various fraudulent devices. The court conceived that there was some difficulty in holding the purchaser a trustee of the legal title for the seller since the statute of 13th Elizabeth, part of our common law, held such conveyances to be "utterly void" and hence no title passed of which he could be the trustee. But the court conceded that he did take sufficient title to pass a valid one to an innocent purchaser (which might be explained as a power to convey the title of the seller to an innocent purchaser) and also conceded that the defrauded party might ratify and confirm the conveyance without making a new one. Another case, *Pearsoll v. Chapin*,¹⁸ held that he was trustee of the land

¹³Act of April 22, 1856, P. L. 532, section 4. See dictum in *Watson v. Watson*, 198 Pa. 234 (1901).

¹⁴*Jones v. Wadsworth*, 11 Phila. 227 (1876).

¹⁵*Christy v. Sill*, 95 Pa. 380 (1880). It is submitted that the trust provisions in section six have nothing to do with the so-called trust arising out of contracts for the sale of realty. See *White v. Patterson*, 139 Pa. 429 (1890). The contract situation is covered separately and must be held to be covered exclusively therein.

¹⁶See for examples, *Inlow v. Christy*, 187 Pa. 186 (1898) and *Rice v. Braden*, 243 Pa. 141 (1914).

¹⁷95 Pa. 380 (1880).

¹⁸44 Pa. 9 (1862).

in his manual possession but not of the title. In any event, the cases make clear that the title of the purchaser will be an unimpeachable one under section six if the action be not brought within the time limit there set.¹⁹

In *Tanney v. Tanney*²⁰ one tenant in common had purchased the land so held at a sale for taxes. After more than five years the other tenant in common asserted his rights therein by action. The court held that the facts presented no implied or resulting trust under the Act of 1856 and that only twenty-one years adverse possession would bar the other tenant.²¹

Where the parties enter into an oral express agreement that one of them shall pay the purchase price and that the legal title shall be taken in the name of the other, the courts treat the trust as an implied trust arising from the acts of the parties and not as an express one arising from the language of the parties.²² While this conclusion has been reached in cases dealing with the necessity of complying with the statute of frauds provisions of section four, the same conclusion should be reached under section six dealing with the time for suit, no compelling reason dictating an inconsistent holding. If the trust so created is an implied one when the language of the agreement is oral merely, it should be an implied one where the language is in written form and signed by the party holding the title to the land, for the mere change in the manner of recording the intent should not alter the nature of the trust.²³ Hence even though the parties agree to the trust in a form complying with the statute of frauds, the limitation period of five years would apply to such a trust resulting from the payment of purchase price by one with the title taken in the name of the other. The five year limitation period would apply to the other types of resulting trusts in realty, such as where the disposition is in trust but no trust is declared, although no cases of these other types have arisen under the statute. The cases are uniform in Pennsylvania in holding that a mere breach of an oral promise to hold in trust, as for example an oral promise to purchase at a sheriff's sale and to hold the land in trust for the judgment debtor and a later refusal to recognize the interest of such person, does not create a trust *ex maleficio* and hence section six cannot apply to such facts.²⁴ The

¹⁹See also *Silliman v. Haas*, 151 Pa. 52 (1892) and *Frost v. Bush*, 195 Pa. 544 (1900). But see *Dunn v. Truitt*, 8 Phila. 27 (1871) where a creditor of a grantor who had conveyed to defraud his creditors sought recovery in ejectment, the court holding the statute inapplicable.

²⁰159 Pa. 277 (1893).

²¹Compare also *McCallion v. Broomall*, 2 Del. Co. 320 (1885).

²²*Ott v. Duffy*, 246 Pa. 211 (1914).

²³*Id.*

²⁴See, for example, *Salsbury v. Black*, 119 Pa. 200 (1888).

statute, by its terms, applies only to implied or resulting trusts of realty, and has no application to such trusts of personal property.²⁵

In applying section six to actions for the sale of realty or to trusts, does it forbid merely the bringing of an action or does the passing of the limitation period also bar the assertion of the contract or trust as a defence? The language of the section is, "No right of entry shall accrue, or action be maintained * * * * ." *Clark v. Trindle*²⁶ says in regard to the right of entry, "Entry is regarded as a legal remedy, and under the doctrine of remedies it is denominated remedy by act of the party." Hence the statute speaks only in terms of barring the right to maintain a remedy, the one of entry by act of the party and the other by act of the law. In *Webster v. Webster*²⁷ the defendant asserted a contract to purchase the realty as a defence in an action of ejectment by the seller, the statutory period having elapsed. The decision was based on the fact that the vendee had been in possession, the court ruling that the statutory period did not run against one in possession. But the court intimated that the statute did not bar the setting up of an equity by way of defence as it would bar the enforcing of it by action. Subsequent cases, however, are uniform in ruling that the statute has the effect of vesting an absolute title in the trustee and that it does not merely affect the remedy.²⁸ *Chulek v. U. S. Ins. Co.*²⁹ holds that the effect of the running of the limitation period is a change of title to the insured property. Since title passes, entry and possession of the land taken after the limitation period has run would be the possession of a stranger to the title and have no effect on the disability to assert the trust.³⁰

In the case of trusts, the period begins to run when the trust accrued, with the right of entry. This must mean that it begins to run when the cestui has a cause of action against the holder of the legal title. Resulting or constructive trusts are passive ones with the only duty of the trustee being to convey the legal title to the cestui. Hence the cause of action is the fact situation giving the cestui the right to maintain ejectment or a bill in equity to compel a conveyance. This cause of action in the case of trusts resulting from payment of the purchase price by one and the title being taken in the name of the

²⁵*Christian Brewing Co. v. Rusch*, 272 Pa. 181 (1922).

²⁶52 Pa. 492 (1866).

²⁷53 Pa. 161 (1866).

²⁸*Townsend v. Roy*, 9 Phila. 120 (1873); *Way v. Hooton*, 156 Pa. 8 (1893); *First Pool Gas Co. v. Wheeler Co.*, 301 Pa. 485 (1930); *Buchner v. Buchner*, 114 Pa. Super. Ct. 503 (1934).

²⁹30 Pa. Super. Ct. 435 (1906).

³⁰*Townsend v. Roy*, 9 Phila. 120 (1873).

other would arise normally at the time the legal title is placed in the one not paying the consideration, the other having already paid the purchase money.³¹ Where the purchase money was paid by the holder of the legal title as a loan to the other party, the cause of action would arise, i. e., the trust really accrue on repayment or tender of the amount of the loan. In constructive trusts arising from fraud or to prevent fraud, the trust would accrue when the legal title vested in the holder thereof.³² The added clause, "with right of entry," would prevent the limitation period from starting in the case of remainder interests until the death of the life tenant for until then the cestuis would have no right to possession.³³

In the case of trusts arising from fraud, the section provides that the limitation shall begin to run only from the time of discovery of the fraud or from the time when, by reasonable diligence, the party defrauded might have discovered the fraud. In so providing the statute is incorporating the usual equitable rule in fraud cases.³⁴ Does recordation of a deed in form absolute when it should be in trust give sufficient notice of the fraud to start the limitation period running? In *Maul v. Rider*³⁵ it was held that such recordation is not a case of "when by reasonable diligence the party defrauded might have discovered the same." Cases applying this clause of the section are numerous.³⁶

Another method of barring the action of the cestui by the terms of the section is the sale of the land by the trustee ex maleficio to a bona fide purchaser. It reads, "but no bona fide purchaser from him shall be affected thereby or deprived of the protection of the said limitation." "Thereby" as used in this clause must mean the fraud or the trust arising from the fraud. The added language "or deprived of the benefit of the said limitation" seems surplusage and adds nothing to the meaning of the words immediately preceding them. Certainly the grantee of the trustee after the limitation has run would be protected whether a bona fide purchaser or not since the title of the trustee becomes unimpeachable even in the trustee's hands.

The statute is silent on the effect of a sale by a trustee under a purchase

³¹See *Nixon's Appeal*, 63 Pa. 279 (1870).

³²*Bell v. Parrell*, 5 D. & C. 387 (1924). Compare *Church v. Ruland*, 64 Pa. 432 (1870).

³³*Preston v. Preston*, 202 Pa. 515 (1902); *Peters v. Kerper*, 5 W. N. C. 523 (1878).

³⁴*Dorr v. Leippe*, 286 Pa. 17 (1926).

³⁵59 Pa. 167 (1869). See also *Madole v. Miller*, 276 Pa. 131 (1923).

³⁶*Rider v. Maul*, 70 Pa. 15 (1871); *McKean Co. v. Clay*, 149 Pa. 277 (1892); *Olinger v. Shultz*, 183 Pa. 469 (1898); *Inlow v. Christy*, 187 Pa. 186 (1898); *Frost v. Bush*, 195 Pa. 544 (1900). See *Orr v. Orr*, 22 Dist. Repts. 887 (1913) applying this exception to a purchase money trust case.

money trust to a bona fide purchaser. This situation is now covered by the Act of June 4, 1901³⁷ protecting a purchaser without notice from such legal title holder. Hence such a sale would bar the action of the cestui in this type of trust also.

The other exception in the statute which will prevent the running of the limitation period reads, "or such contract, equity of redemption or trust, shall have been acknowledged by writing to subsist, by the party to be charged therewith, within the same period."

It is to be noted that the language does not say that the writing is to be signed by the party but merely acknowledged by writing by the party. The various statute of frauds provisions in Pennsylvania all require by specific words a signed writing. It is of peculiar significance that section four of this same statute in dealing with the proof of the existence of express trusts requires a writing signed by the party holding the title to the land. The omission of this requirement of signing in section six would seem to have been deliberate and intentional and that an acknowledgment of the subsistence of the trust in the writing of the party charged therewith, even though unsigned by him, should be sufficient to toll the limitation. The issue here presented has not been raised in the decisions. The only decisions dealing with acknowledgment in writing take it for granted that the signature is required, each case having such signature present. It seems likely, although illogical, that the signature will be required by judicial construction of the legislative intent.³⁸

The acknowledgment in writing is to be made *by the party to be charged* with the contract, equity of redemption or trust. If the conclusion reached above is correct that the section does not apply to suits by the vendor against the vendee, then the party to be charged with the contract will be the defendant in the action—the vendor. Acknowledgment by the vendee would be immaterial in its effect on the limitation. The party to be charged with the equity of redemption after the mortgagee has re-entered would be the mortgagee and the acknowledgment would have to be by him. The party to be charged with the resulting or constructive trust would be the holder of the legal title, the trustee. If the cestui be chargeable with any obligation, it

³⁷P. L. 425, section 1. See also 37 Dickinson Law Review 282 (1933).

³⁸In *Buchner v. Buchner*, 114 Pa. Super. Ct. 503 (1934) the court, by Stadtfeld, J. says, "The authorities cited by the appellee simply support the proposition that the act makes void any trust of this character and that no action shall be maintained to 'enforce any implied or resulting trust as to realty' unless the same be in writing, 'signed by the party holding the title' within the period of five years after such trust accrued with the right of entry." This statement by the court is an obviously incorrect one and is a confusion of the terms of the fourth section of the statute with those of the sixth section.

would be for the payment of the purchase price, reimbursement for expenses and the like and he would not be chargeable with the trust.

Must the written acknowledgment be delivered to the party who becomes the plaintiff in the action? The section does not so require in language. All it requires is the mere making of the written acknowledgment. If made and retained by the maker it should be effective to toll the limitation.³⁹ Its production might be required by using the act of February 27, 1798⁴⁰ or proved by secondary evidence after notice to produce followed by failure so to do.

The written acknowledgment must be made "within the same period." The same period means within five years of the accrual of the trust or equity of redemption or the making of the contract, with right of entry. Suppose the party to be charged with the trust acknowledge that the trust exists after the lapse of six years or ten years. Why should the trustee not be bound to perform if he acknowledges the trust after ten years? The statute in effect says that a written acknowledgment will toll the running of the statutory period and is silent on the subject of what is necessary to lift the bar of the statute once it has run to vest title in the trustee free of the trust. After such title has vested by the running of the limitation period, it should require some action by the former trustee, now the absolute owner, sufficient to transfer title, legal or equitable, to the erstwhile cestui as if such former trust had not existed. The statute being silent on the subject the ordinary rules of law applicable to situations where legal title has vested in one by the running of a statute of limitations should control. A mere acknowledgment, even though in writing and signed by the owner of the land formerly charged with the trust, if insufficient to act as a transfer of an interest in land would be of no effect, except possibly as a basis for an estoppel. Hence a written, signed statement, "I hereby acknowledge that I was trustee of Blackacre for X in 1930" would be insufficient to create an enforceable trust. Just as clearly a mere acknowledgment that X had paid the purchase money or that Trustee had defrauded X should be insufficient. To this effect is *Buchner v. Buchner*⁴¹ recently decided by the Superior Court and the decision is in no sense a strained or unnatural interpretation of the statute. In reality the statute does not apply to the situation since it deals only with the tolling of the statutory period of limitation and makes no provisions, negative or otherwise, for the situation after

³⁹Cohen v. De Cicco, 90 Pa. Super. Ct. 51 (1927); Arthurs v. Weisley, 3 Penny. 29 (1882).

⁴⁰3 Sm. L. 303.

⁴¹114 Pa. Super. Ct. 503 (1934).

the title has become free of the equity by the running of the period of limitation.

The *Buchner* case declares that the written paper signed by the party charged with a trust in an earlier Supreme Court case, *Lee v. Hamilton*⁴² "was merely an acknowledgment that the alleged cestui que trust had paid part of the purchase money." In making this statement the court has fallen into error for the paper reads, "I * * * * admit and declare that said premises were so conveyed to me and that I now hold one undivided third part of the same in trust only for the sole use and benefit of Charles Lee, his heirs and assigns * * * * ." The court in the *Lee* case said, "The paper can not be regarded as a valid declaration of an existing trust that had been created by the parties in July, 1882, for such a declaration, made in November, 1887—more than five years afterwards—would be of no validity under the Act of April 22, 1856, P. L. 532; but in November, 1887, the appellant, as the sole and absolute owner of the property, was competent to create and declare a trust in it for her brother, and she did so for a valuable consideration moving (to) her." The Superior Court seemed to feel that their holding was in some fashion inconsistent with this Supreme Court case, saying that this case "must not be extended further than is necessary." The case needs neither extension to fit the *Buchner* case nor distinction from it but is an exact precedent for the holding of the Superior Court. The other case on point is *Strickler v. Scheible*,⁴³ a lower court case decided before the *Lee* case. In many points it is in direct conflict with the *Buchner* case but it is now of no controlling force. The cases are in direct conflict on the matter of consideration. The *Strickler* case says that the former trust being wiped out by the limitation running left no obligation sufficient to act as consideration and that a moral obligation is not sufficient in equity, in any event. The *Buchner* case, now controlling, finds consideration in the former payment of part of the purchase money and holds such past consideration to be sufficient to support the express trust. The court thus leaves untouched the question, still an open one in Pennsylvania, of whether a consideration is necessary to support a declaration of trust by the holder of the legal title.⁴⁴

The acknowledgment within five years may be in the form of a deed even though the deed does not refer to the trust and names a consideration different

⁴²218 Pa. 468 (1907).

⁴³29 Co. Ct. Rep. 308 (1903).

⁴⁴See *Morrison v. Beirer*, 2 W. & S. 81 (1841) which indicates that consideration is necessary. Compare *Dennison v. Goehring*, 7 Pa. 175 (1847) and *Girard Trust Co. v. Mellor*, 1 Dist. Repts. 182 (1892).

from that on which the trust was founded, if the deed is ineffective as a conveyance to the cestui, at least as between husband and wife.⁴⁵ In *Smith's Estate*⁴⁶ it was held that the acknowledgment need not meet the requirements of the proof of formation of an express trust. Here a letter acknowledging the existence of a trust in "Sunny Slope" was held to be sufficient and that it could be supplemented by oral evidence to identify the property if necessary. The acknowledgment could take the form of a will and the revocability of the paper as a will would not affect its sufficiency under the limitation statute.⁴⁷

Does the exception in the statute, "unless such contract shall give a longer time for its performance" apply to the trust situation? The obvious answer is that it does not. It is clearly a reference to the contract for the sale of realty situation. No "such contract" is involved in the implied and resulting trust situations, their basis being acts other than contracts. Notwithstanding this seemingly inevitable conclusion, at least two cases suggest, while resting their decisions on other and more substantial grounds, that such exception does apply in the case of trusts.⁴⁸

Are there any implied exemptions from the operation of the statute not found therein in words? Will the limitation run if the cestui of the trust is a minor, non compos mentis, feme covert or imprisoned?

The first case in which the issue was presented was *Miller v. Franciscus*.⁴⁹ In this case the cestui was a married woman when the resulting trust arose. The court held that the general provisions in section one of the Act of 1856 applied to suits under section six and that since the action was brought within thirty years from the time the cause of action arose it had been brought in time although it otherwise would have been barred under section six.

The next case raising the point was *Warfield v. Fox*.⁵⁰ The point was raised under section seven of the statute dealing with decedents' estates but the court held that both sections were alike in re disabilities of the person suing. The rule was laid down that a saving from the operation of statutes for disabilities must be expressed or it does not exist. Since none was expressed in either section six or seven, no such exemption existed. It overruled the *Miller* case. The cases since the *Warfield* case have been uniform in

⁴⁵Hay v. Martin, 2 Monaghan 526 (1888).

⁴⁶5 Lanc. L. R. 153 (Alleg. Co. 1888).

⁴⁷Cohen v. De Cicco, 90 Pa. Super. Ct. 51 (1927); *Arthurs v. Weisley*, 3 Penny. 29 (1882).

⁴⁸*Kauffman v. Kauffman*, 266 Pa. 270 (1920) and *Buchner v. Buchner*, 114 Pa. Super. Ct. 503 (1934).

⁴⁹40 Pa. 335 (1861).

⁵⁰53 Pa. 382 (1867).

holding that the fact that the one having the cause of action is under a disability is immaterial.⁵¹

Would the fact that the cestui was the spouse of the trustee prevent the limitation from running? There can be no doubt that the one spouse could sue the other to enforce the trust. The Act of June 4, 1901⁵² specifically gives that right in the case of resulting purchase money trusts. The Act of March 27, 1913⁵³ gives either the right to sue the other spouse to protect or recover separate property. This is ample authority for suits to enforce implied and resulting trusts. *Morrish v. Morrish*⁵⁴ says that the statute of limitations does not affect the rights of one spouse as against the other, in that even though suit might lie, the law should not encourage domestic strife and internal discord by requiring suit under the pain of the penalty of the statute of limitations. The same effect can be reached in most cases by holding that the possession of the wife is sufficient to prevent the running of the limitation and most cases base their conclusion on this ground.⁵⁵

Will possession of the cestui at the inception of the trust prevent the limitation from beginning to run and will possession taken after the inception but within the five year period toll the running of the statute? The first dictum was that possession was immaterial, the statute meaning to require written evidence of the right of possession in addition to possession or a suit to prevent the limitation barring the action.⁵⁶ But in *Clark v. Trindle*⁵⁷ this dictum was disregarded and possession was held to prevent the statutory period from starting to run where possession was coincident with the accrual of the trust and to toll the statutory period if taken after the statute had started but within the five year period. The cases so holding since this case are numerous.⁵⁸

Must the possession to have this effect be exclusive or may it be concurrent with possession by the trustee or with a third person? *McLaughlin v.*

⁵¹*McCall v. Webb*, 88 Pa. 150 (1879) and *Hollinshead's Appeal*, 103 Pa. 158 (1883).

⁵²P. L. 425.

⁵³P. L. 14.

⁵⁴262 Pa. 192 (1918).

⁵⁵See *Miller v. Baker*, 166 Pa. 414 (1894).

⁵⁶*Miller v. Franciscus*, 40 Pa. 335 (1861).

⁵⁷52 Pa. 492 (1866).

⁵⁸*Williard v. Williard*, 56 Pa. 119 (1868); *Barrett v. Bamber*, 81 Pa. 247 (1876)—possession by agent of cestui collecting rents and paying to cestui; *Black's Estate*, 18 W. N. C. 455 (1886); *Bunn's Estate*, 1 Kulp 205 (1882); *Webster v. Webster*, 53 Pa. 161 (1866); *Lally v. Barr*, 4 Lack. L. N. 279 (1898); *Keck v. VanDyke*, 292 Pa. 532 (1928); *Quinn v. Gormley*, 302 Pa. 360 (1931); *Skarupski v. Scelinski*, 103 Pa. Super. Ct. 167 (1931).

*Fulton*⁵⁹ held that the possession need not be exclusive of the trustee, the cestui daughter living with her trustee father on the trust property. In other cases the possession was held to be effective although not exclusive.⁶⁰ Possession as tenant of the trustee or as agent for the trustee would be insufficient as it gives no notice of a claim by the possessor in his own right.⁶¹ Possession might be constructive merely as where the cestui was given a share of the rents collected from the trust property by the trustee.⁶²

Will mere entry not followed by actual possession and occupancy toll the running of the limitation? *Douglass v. Lucas*⁶³ considered this problem. The court held that mere entry would be insufficient to toll the running of the limitation. It held also that mere temporary occupancy would not be sufficient actual possession to have any effect. The court did not consider the Act of April 13, 1859⁶⁴ which says, "No entry upon lands shall arrest the running of the statute of limitations, unless an action of ejectment be commenced therefor within one year thereafter; * * * * ." Clearly this statute applies to the trust situation. It follows, then, that if mere entry be made within the five year period, but is followed within one year by an action of ejectment, such entry would toll the statute of limitations.

Would a tender back of the purchase price in a trust *ex maleficio* within the five years arrest the statute? One case held, by dictum, but correctly, that such would be of no avail.⁶⁵

Must the defence of the bar of the statute be specially pleaded? *Way v. Hooton*⁶⁶ says that since it is a statute of repose it need not be specially pleaded. The statute was said to lay down a rule of evidence making conclusive after five years that which was formerly *prima facie* only. A recent case⁶⁷ is instructive on the pleading of the statute. The court held that the rule that a statute of limitations must be pleaded as a defence and that such can not be taken advantage of by demurrer or now by the affidavit of defence in lieu of a demurrer does not apply to section six of the Act of 1856. Such rule applies where the statute affects the remedy merely and where a new promise

⁵⁹104 Pa. 161 (1883). But compare *Pfiffner's Appeal*, 2 Monaghan 160 (1888) where the lower court said that possession had to be exclusive. The Supreme Court ignored this statement and decided the case on other grounds.

⁶⁰*Miller v. Baker*, 160 Pa. 172 (1894); *Orr v. Orr*, 22 Dist. Repts. 887 (1913).

⁶¹*Konrad v. Nugent*, 51 Pitts. L. J. 116 (1903).

⁶²*Jones v. Jones*, 252 Pa. 553 (1916).

⁶³63 Pa. 9 (1870).

⁶⁴P. L. 603, section 1.

⁶⁵*Huffnagle v. Blackburn*, 137 Pa. 633 (1890).

⁶⁶156 Pa. 8 (1893).

⁶⁷*First Pool Gas Co. v. Wheeler Co.*, 301 Pa. 485 (1930).

will revive the claim. The Act of 1856 is not such a statute and the rule does not apply. There is no right of action unless it is asserted in accordance with the statute. But the statute can not be raised for the first time on appeal.⁶⁸

An amendment to an action brought within five years to enforce a trust will not be permitted after the lapse of five years from the accrual of the trust where the amendment seeks to include a second lot not included in the praecipe and writ of the original action.⁶⁹

The amendment to section six added by the Act of March 27, 1865⁷⁰ repealing section six in re constructive trusts so far as it affects attorneys at law is self explanatory. The statute does not run in his favor. Would a bona fide purchaser from the attorney get good title free of the trust? If the trust be a constructive one, the answer would seem to be that the purchaser does not get good title. The repeal would include the repeal of the provision of that section protecting bona fide purchasers and the general recording acts should not be applicable. This conclusion seems to have been taken for granted by the court in *Barrett v. Bamber*.⁷¹ But the Act of 1865 does not apply to purchasers from the attorney trustee and the five year period would begin when the purchase was complete.⁷² If the attorney were a purchase money trustee the purchaser would be protected for the Act of 1901⁷³ protecting purchasers without notice has no exception as to attorneys at law.

⁶⁸*Lehman v. Lehman*, 215 Pa. 344 (1906). If the defence of the statute is not raised, the court will not raise it for the parties. *Stewart's Estate*, 278 Pa. 318 (1924) in which the statute apparently was forgotten.

⁶⁹*Miller v. Bealor*, 100 Pa. 583 (1882).

⁷⁰P. L. 56, section 1.

⁷¹81 Pa. 247 (1876).

⁷²*Id.*

⁷³P. L. 425, section 1.