Overview | **[1896] 1 Ch 199**, | 65 LJ Ch 225, | 44 WR 330, | 40 Sol Jo 131, | 73 LT 638, | 12 TLR 111

MARA v. BROWNE. [1890 M. 3191.] [1896] 1 Ch. 199

[COURT OF APPEAL]

LORD HERSCHELL., A. L. SMITH and RIGBY L.JJ.

1895 Nov. 14, 25, 26, 28; Dec. 17.

Trustee — Breach of Trust — Solicitor — Agent — Solicitor becoming Constructive Trustee — Liability of Partner.

It is not within the scope of the implied authority of a solicitor carrying on business in partnership to constitute himself a constructive trustee, and thereby to subject his partner to liability in that character, the partner being ignorant of the dealings by which the constructive trust is established.

It having been held by North J. that a solicitor had constituted himself a constructive trustee, and that both he and his partner in business were liable to make good a loss which had resulted from improper investments of the trust funds:-

Held, by the Court of Appeal, upon the evidence, that in the matters in question the solicitor had acted only in the character of solicitor to the trustees, and that consequently neither he nor his partner were liable as constructive trustees.

Decision of North J. ([1895] 2 Ch. 69) reversed.

APPEAL by the defendants against a decision of North J. (1), holding them jointly and severally liable to make good a loss which had resulted from improper investments of trust funds.

The defendants Hugh Browne and Arthur Browne were brothers, carrying on business as solicitors in partnership. North J. held that Hugh Browne had so acted as to constitute himself a constructive trustee, or trustee de son tort, and that his partner was liable for his acts.

The following statement of the facts is taken from the written judgment of A. L. Smith L.J.:-

By a marriage settlement dated August 30, 1875, made in contemplation of the marriage of Harold Reeves with his future wife, then Miss Ellen Jane Walker (the now plaintiff, Mrs. Mara), the then present and after-acquired property of the wife, which together amounted to a little over 10,000*l.*, was vested in two trustees (James Walker and Bernard Edwin James) in trust (so far as is material) for the wife for life, with remainder to the husband for life, with remainder to the issue of the

(1) [1895] 2 Ch. 69.

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marriage. Power was given to the trustees to invest the trust funds in (amongst other securities) leasehold securities in England, and power was also given to the husband and wife, or the survivor of them, to appoint new trustees. There were two children of the marriage, who were still infants, and were co-plaintiffs in this action by a next friend. The other plaintiffs were Arthur Reeves and Marian Reeves, the existing trustees of the settlement. The trust fund was managed by the trustee James, who was a Liverpool solicitor. In December, 1883, Mr. Harold Reeves and his wife became dissatisfied with the way in which the trust was being administered by James. The other trustee, Walker, had for some years taken hardly any part in the management of the trust, having left that to James. At this time (December, 1883) Harold Reeves consulted his brother Arthur Reeves, who afterwards became a trustee of the settlement, and thereupon they communicated with the defendant Hugh Browne, who was a solicitor at Nottingham in partnership with the other defendant Arthur Browne, in order that he might look into the affairs of the trust, which he accordingly did. Grave irregularities, to say the least, upon the part of James were then discovered by Hugh Browne: portions of the trust property were not forthcoming, documents supposed to be spurious were produced by James, and it became evident that the great thing to be done was, if possible, to get the trust funds which were not then forthcoming, replaced and made good by James. Walker was desirous of being relieved of the trust, which he had left to the management of James, and upon January 7 or 8, 1884 (the deed was not dated), Mr. and Mrs. Harold Reeves, under the power contained in the settlement, by deed appointed Arthur Reeves to be a trustee in the place of Walker, who thenceforth took no further part in the management of the trust. This deed was duly executed by Harold Reeves and his wife. It was not executed by Walker or by Arthur Reeves; but the latter at once entered upon the management of the trust, and took an active part therein. Hugh Browne, at the instance of Mr. and Mrs. Harold Reeves and of Arthur Reeves, thereupon set to work to press James to make good the deficiencies in the trust funds, and, as North J. said: "it is doubtful

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whether any one could have been found who would have shewn so much tact and have managed the matter with so much success" as Hugh Browne did. James was induced by Hugh Browne to make good the deficiencies, and between January, 1884, and May 9, 1884, James with this object made payments into an account opened at Messrs. Yates' Bank, at Liverpool, in the joint names of himself and Arthur Reeves. James agreed that he should retire from the trust when he had fully recouped the trust fund, and all deficiencies were made good by him by May 9, 1884. It was also arranged that Miss Marian Reeves, a sister of Harold and Arthur Reeves, should become trustee in the place of James when he retired; and on May 9, 1884, a deed appointing her trustee of the settlement in conjunction with her brother Arthur was executed. Between January, 1884, and May 9, 1884, the moneys paid by James into the joint account at Yates' Bank became available for the trust, they having been paid into the joint account by

James for that purpose. Harold Reeves and his wife were anxious that this money should be invested, and not lie idle, and that, if possible, 5 per cent. interest should be obtained for it; and they and Arthur Reeves agreed that Hugh Browne should look out for investments upon mortgage for the moneys as they were paid by James into the joint account. James was well aware that these moneys were being invested by Hugh Browne on behalf of the trust, and, in order that this might be done, he, in conjunction with Arthur Reeves, from time to time drew cheques upon the account in favour of Hugh Browne, who passed the money so received into his private banking account, and thereout advanced it to the different mortgagors as the buildings on their properties progressed. It appeared from the correspondence that all that was done by Hugh Browne in these matters had the sanction and approval of Mr. and Mrs. Harold Reeves, and of Arthur Reeves, who were kept fully informed of what was going on and the investments which were being made. James knew that investments were being made for the trust by Hugh Browne out of the moneys which he had paid into the joint account, and he was content that this should be done, though it would seem that, as regards the actual investments, he was

willing to leave this, and did leave it, to Arthur Reeves and Mr. and Mrs. Harold Reeves, and did not care to inquire into it.

The defendant *Hugh Browne* in person. In making the investments of which the plaintiffs complain, I acted not as a constructive trustee, but only as the agent of the then existing trustees, James and Arthur Reeves. The latter had been duly appointed a trustee in January, 1884, and was acting as such in conjunction with James. I am not, therefore, responsible for the loss which has resulted, even if the securities in question were improper ones.

Swinfen Eady, Q.C., and **Boome**, for the defendant Arthur Browne. Hugh Browne was not a constructive trustee, and a fortiori Arthur Browne was not: *Barnes v. Addy*. (1) If Hugh Browne made himself a constructive trustee he was not in so doing acting within the scope of his authority as a partner, and therefore Arthur Browne is not liable for what he did. A solicitor who acts for a trustee is not liable for a breach of trust committed by his client: *Robertson v. Armstrong* (2); *In re Spencer*. (3) There were existing trustees for whom Hugh Browne was acting as agent. *Soar v. Ashwell* (4) and *Blyth v. Fladgate* (5) were different cases. No money passed through the hands of Arthur Browne: *In re Barney*. (6)

[With regard to the operation of the Statute of Limitations, and the consent of Mrs. Mara to the investments complained of, they were stopped by the Court.]

Cozens-Hardy, Q.C., and **C. E. E. Jenkins**, for the plaintiffs. It is not disputed that the mortgages complained of were improper investments, and that breaches of trust were committed. Hugh Browne made the investments on his own responsibility without any directions from James or Walker. He does not shew that the trustees (if there were any then) assented to the securities. He received the trust money and applied it partly in repaying what he had himself already advanced to the mortgagors.

(1) L. R. 9 Ch. 244.

(2) 28 Beav. 123.

(3) 51 L. J. (Ch.) 271.

(4) [1893] 2 Q. B. 390.

(5) [1891] 1 Ch. 337.

(6) [1892] 2 Ch. 265.

There were no actual trustees at the time, and he became a constructive trustee or trustee de son tort. At any rate, he does not shew that he had authority from both the trustees. A receipt by one trustee is not a good discharge: *Lee v. Sankey*. (1) A solicitor who obtains possession of trust money ceases to be a mere agent, and becomes accountable as a trustee: *Morgan v. Stephens* (2); *Brinsden v. Williams* (3) *Attorney-General v. Corporation of Leicester*. (4)

[LORD HERSCHELL referred to *Fyler v. Fyler*. (5)]

If Hugh Browne is responsible for the breaches of trust his partner is also responsible. There is evidence that the firm often undertook to receive and invest money of their clients. The firm charged and received costs in relation to the transactions: *Rhodes v. Moules* (6); *Moore v. Knight*. (7) There can be no ratification of a breach of trust; a ratification would itself be a breach of trust.

Swinfen Eady, Q.C., in reply. There were duly constituted trustees at the time when the securities were taken, and Hugh Browne only acted as their solicitor. There was nothing to prevent Arthur and Marian Reeves from ratifying what had been done: *Foster v. Bates* (8); *Hill v. Curtis*. (9) James in fact directed the making of the investments. An appointment of a new trustee by writing was sufficient, and Arthur Reeves was thus duly appointed in January, 1884, in place of Walker.

Cozens-Hardy, Q.C., for the plaintiffs. The appointment of January, 1884, was not set up by the pleadings or relied upon in the Court below. It was merely a conditional appointment, and was executed as an escrow.

Cur. adv. vult.

1895. Dec. 17. LORD HERSCHELL read the following judgment:- On August 30, 1875, a settlement was executed on the marriage of Mrs. Mara (then Miss Ellen Jane Walker), one of the plaintiffs in this action, with her first husband, Harold Reeves.

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(1) L. R. 15 Eq. 204.

(2) 3 Giff. 226.

(3) [1894] 3 Ch. 185.

(4) 7 Beav. 176.

(5) 3 Beav. 550.

(6) [1895] 1 Ch. 236.

(7) [1891] 1 Ch. 547.

(8) 12 M. & W. 226.

(9) L. R. 1 Eq. 90.

[1896] 1 Ch. 199 at 204

The trustees of this settlement were James Walker and Bernard Edwin James. The latter was a solicitor, and his co-trustee left the management of the trust property almost entirely to him. Towards the end of the year 1883 Harold Reeves consulted the defendant Hugh Browne as to the course that should be taken, as Mr. and Mrs. Reeves entertained grave doubts as to the safety of the trust investments. The amount invested on these securities exceeded 10,000*l.* The defendant Hugh Browne was a friend of Harold Reeves, and was in practice as a solicitor in Nottingham in partnership with his brother Arthur Browne, the other defendant. It was in consequence arranged that Walker should retire from the trust, and that the plaintiff Arthur Reeves should become a trustee in his stead. To this all parties, Mr. and Mrs. Harold Reeves, Walker, and Arthur Reeves, assented. Accordingly a deed was prepared, by which Mr. and Mrs. Reeves, in whom the power of appointment was vested, appointed Arthur Reeves as trustee in the place of Walker. This deed was executed by Mr. and Mrs. Reeves about January 7 or 8, 1884. It was not executed by Arthur Reeves. On January 11 a meeting took place between Hugh Browne and James, which left upon the mind of Hugh Browne the impression that the securities were not in order, and, indeed, that some of them were forgeries. James, however, expressed his willingness to take over the securities himself, and to pay the amount of the trust funds in cash, expressing himself willing to retire from the trust. A sum of 1405*l.* 15*s.* was at once forthcoming from James, and this was placed in the bank of Yates & Co. at Liverpool, to the credit of an account opened in the joint names of James and Arthur Reeves. I may state at once that various moneys were from time to time paid by James to the credit of this account until the whole of the trust funds for which he was responsible were accounted for. Some time in January, 1884, apparently soon after James had expressed his willingness to retire from the trust, it was arranged that Marian Reeves, a sister of Harold Reeves, should become trustee in his place. On May 9, 1884, a deed was duly executed by Mr. and Mrs. Reeves, as well as by the retiring and new trustees, by which Arthur Reeves and Marian Reeves were

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[1896] 1 Ch. 199 at 205

appointed trustees in the place of Walker and James. The transactions for which it is sought to make the defendants responsible in the present action all took place between the previous month of January and the date of that deed. The defendant Hugh Browne was undoubtedly asked by Harold Reeves, with the full knowledge of Arthur Reeves, to look out for investments by way of mortgage, to which the moneys paid in by James to the bank in Liverpool could be applied. Mr. and Mrs. Reeves were naturally anxious that the money should begin bearing interest as soon as possible. Hugh Browne accordingly suggested a series of investments. I do

not differ from the learned judge who tried the case in the conclusion that the investments were not proper ones for trustees to make. The money was to be lent upon building property of a speculative character, and the margin was not satisfactory. If the action had been one charging the defendants with negligence as solicitors, with a view to make them responsible for such loss as the trust estate had sustained owing to the investments made, it may well be that there would have been no answer to the action had it been brought in due time; but any such claim is now barred by the Statute of Limitations. The case sought to be made against the defendants is that their liability is the same as if they had been the appointed trustees of these trust funds, and bound as such to see, not only that the investments were within the terms of the investment clause, but that they were of a proper nature. The learned judge in the Court below held that the plaintiffs had established their case. "The moneys," he said, "laid out by him" (Hugh Browne) "while there were no trustees were advanced upon his own responsibility, he being a principal in the matter, and not a mere agent for persons under whose lawful directions he was acting." I find myself quite unable to take this view of the facts.

It becomes necessary now to advert more particularly to the manner in which the trust funds came into the hands of Hugh Browne. In each specific case the particulars of the investment which Hugh Browne had to propose were communicated to Arthur Reeves, and a cheque was drawn for the purpose of being applied to that particular investment,

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the cheque being signed by both Arthur Reeves and James, in whose names the banking account stood, and the money, when so received by Hugh Browne, was paid over to the intended mortgagors. It is true that in two instances Hugh Browne had himself advanced a portion of the sum which the mortgagor required, and of course paid over to the intending mortgagor the balance only, and that he sometimes delayed paying a portion of the sum agreed to be advanced until the mortgagor had proceeded further with the buildings he was erecting; but I do not think these circumstances make any difference. The moneys sent by Arthur Reeves and James were in every case applied to obtaining the investments for the purpose of which they were sent. James, indeed, probably was not made aware, as Arthur Reeves was, of the particulars of the proposed investments, and perhaps did not trouble himself about them, but he undoubtedly knew that the money was being sent for investment on mortgage securities which had been offered, since that very circumstance was employed as a means of putting pressure upon him to complete as speedily as possible payment into the bank of the full value of the trust estate. It was conceded by Mr. Cozens-Hardy, in his argument for the respondents, that, if the transactions now impeached had taken place after the date of the deed of appointment of May, 1884, he could not have maintained that the defendant Hugh Browne was to be regarded as a constructive trustee. North J. appears to have taken the same view, for he refused relief in respect of advances made when the trusteeship was, as he said, full. In my opinion the distinction made is not a sound one. I do not think that it is correct to say that prior to that date there were no trustees. It appears to me that from the date, at all events, when the account was opened in the names of Arthur Reeves and James, down to the appointment by deed in the May following, those two gentlemen were the trustees of the settlement. It may be quite true that, when the circumstances of suspicion in relation to James's conduct became known to Arthur Reeves after January 11, he was unwilling to be joined with James as trustee, and that, if he had not intermeddled with the trust in any way, the deed

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of appointment executed by Mr. and Mrs. Reeves would have been ineffectual. But, in the circumstances which actually occurred, I cannot treat that instrument as a mere nullity. Arthur Reeves actually became a joint recipient with James of the whole of the trust funds, and jointly with him disposed of them at a time when James, though he had expressed his willingness to retire, was still a trustee. It is admitted that Arthur Reeves by so doing subjected himself to the responsibilities of a trustee in respect of the trust fund. He became, it is said, a trustee de son tort. But does it not seem strange thus to designate him when he had, immediately before this, been appointed a trustee with his assent by those who were competent to make the appointment? It is surely more reasonable to refer his acts as trustee to this appointment than to treat them as tortious. In my opinion, therefore, the trusteeship was full during the period covered by the transactions in question as truly as it was after the subsequent 9th of May, and the learned counsel for the respondents made, in my opinion, no greater concession than he was compelled to make when he conceded that, if the money had come into Hugh Browne's hands from duly appointed trustees for application upon specific investments, his responsibility would have been that of a solicitor, and not of a trustee.

I think it right, however, to say that I am not satisfied that, even if Arthur Reeves is to be regarded as not having been duly appointed, the result would have been different. Hugh Browne was certainly not purporting or intending to act as trustee, nor was he supposed by any one to be so acting. He purported to act throughout as solicitor, and was understood by all parties to be so acting. Even conceding that he might in some circumstances, notwithstanding this, be held liable as a trustee, what are the circumstances here? James was undoubtedly a trustee, and Arthur Reeves, with the assent of Walker, the other trustee, and of those who had the power of appointing a new trustee, acted as such. Although James may not have troubled himself about the investments, I can entertain no doubt that both he and Arthur Reeves regarded and dealt with Hugh Browne as solicitor to the trust, and as such handed

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to him the trust funds to be applied to specific investments. Under circumstances such as these I am not, as at present advised, prepared to hold that Hugh Browne would be liable as a constructive trustee.

What I have already said is sufficient to dispose of the action. But I desire to add that, even if in the circumstances of this case Hugh Browne had been held liable as a trustee, I should still have come to the conclusion that the defendant Arthur Browne was not so liable. The only case against him is that, during the period covered by these transactions, he was in partnership as a solicitor with the other defendant. He took no part in them, and was ignorant of their nature. In my opinion, it is not within the scope of the implied authority of a partner in such a business that he should so act as to make himself a constructive trustee, and thereby subject his partner to the same-liability. I think the appeal must be allowed, and the action be dismissed with costs.

A. L. SMITH L.J. read the following judgment:- In this case North J. has held two solicitors, Hugh and Arthur Browne, liable as constructive trustees to make good a loss which has accrued to a trust fund by reason of its having been invested in improper securities, and the question is whether either or both of these gentlemen are so liable. The plaintiffs are Mrs. Mara, who has a life interest in the trust funds, her two infant children, and the present trustees of the fund. No case is made against the defendants that they were liable to make good the loss by reason of

negligence whilst acting as solicitors, and, had it been, the defendants would have had a good answer to such a claim, by either Mrs. Mara or the trustees, under the Statute of Limitations, for the investment of the trust funds, which is the subject-matter of complaint, took place as long ago as the months of February and March, 1884, and the writ in the action was not issued till November 7, 1890, and, as regards the infant plaintiffs, *Rae v. Meek* (1) shews that they could not maintain an action for negligence against the defendants, for the breach of duty, if it existed, was to the trustees

(1) 14 App. Cas. 558.

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and not the beneficiaries. [His Lordship stated the facts as above, and continued:-]

North J. found, and I agree with him, that eight of the mortgages taken for the trust funds were speculative and risky, and not such as could be justified by a trustee - in fact, these investments constituted breaches of trust. Although this might well render the trustees liable for a breach of trust, it certainly does not per se render their solicitor so liable.

But it is said that the facts skew that there should be imputed to Hugh Browne the character of a trustee, or, in other words, that he was a trustee de son tort, and upon this ground the learned judge has held him liable. It is not contended on behalf of the plaintiffs that Hugh Browne has been guilty of any fraudulent or dishonest conduct to the injury of the cestuis que trust, nor, to use Lord Langdale's words in *Fyler v. Fyler* (1), did he, being a solicitor, "take advantage of his position to acquire a benefit for himself at the hazard, if not to the prejudice, of the trust"; but it was said that he had made himself a constructive trustee, which, so far as I know, is the same thing as a trustee de son tort. Now, what constitutes a trustee de son tort? It appears to me if one, not being a trustee and not having authority from a trustee, takes upon himself to intermeddle with trust matters or to do acts characteristic of the office of trustee, he may thereby make himself what is called in law a trustee of his own wrong - i.e., a trustee de son tort, or, as it is also termed, a constructive trustee. Lord Selborne L.C. dealt with this question in *Barnes v. Addy*. (2) He said(3): "That responsibility" (i.e., of a trustee) "may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may

(1) 3 Beav. 560.

(2) L. R. 9 Ch. 244.

(3) L. R. 9 Ch. 251.

[1896] 1 Ch. 199 at 210

disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees." And James L.J. added (1): "I most cordially concur in the general principle with which the Lord Chancellor began his judgment. I have long thought, and more than once expressed my opinion from this seat, that this Court has in some cases gone to the very verge of justice in making good to cestuis que trust the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree, injudicious. I do not think it is for the good of cestuis que trust, or the good of the world, that those cases should be extended." In this, if I may respectfully say so, I entirely agree.

In the present case Hugh Browne never became possessed of the trust funds, excepting for the purpose of transferring them from the joint account at Messrs. Yates's to the mortgagors, which he faithfully carried out, and which he did with the sanction of James and of Arthur Reeves, who had been appointed trustee under the circumstances above mentioned; and no one can suggest any knowledge in Hugh Browne of a fraudulent design on the part of the trustees, for the simple reason that no such design in fact existed. In my judgment, the true inference to be drawn from the facts of this case is that Hugh Browne between January, 1884, and May 9, 1884, acted as solicitor for James and Arthur Reeves, and that he never assumed to act otherwise, that he never intended to act otherwise, and that, in truth, he never did act otherwise. Mr. Cozens-Hardy, on behalf of the plaintiffs, admitted, and I think that his admission was well founded, that if the deed of May 9, 1884, appointing Arthur Reeves and his sister Marian trustees, had been executed in January, 1884, he could not have contended that Hugh Browne was acting otherwise than as solicitor to the trustees in what he did between January and May 9, 1884, for he would then have been acting for principals - i.e., for trustees - in transactions within their legal power; but he contended that, as the deed was not executed until May 9,

(1) L. R. 9 Ch. 255.

[1896] 1 Ch. 199 at 211

1884, Arthur Reeves up till then was at the most a mere trustee de son tort, and that James, although an undoubted trustee, was not permitting Hugh Browne to act for him, and consequently, Hugh Browne having no principals, he must be held to have been a principal himself, and, therefore, a trustee de son tort. But why is it to be said that Arthur Reeves between January and May 9, 1884, was merely a trustee de son tort? He had been appointed trustee by deed under seal in January, 1884, and he at once undertook the burden of the trust, and the impeached investments did not take place until afterwards - namely, between February 20, 1884, and March 14, 1884. In my judgment it is incorrect to hold that he was acting as trustee de son tort; why is this to be assumed? The learned judge came to the conclusion that Arthur Reeves never acted under the deed of January, 1884, and that it was abandoned; but why is

this to be so held? We find Arthur Reeves after its execution at once entering upon the business of the trust; and why is it to be assumed and held that he then acted as a trustee in his own wrong rather than as a properly appointed trustee? I can draw no such inference. It is true that in 1890 Hugh Browne ran his pen through the signatures of Mr. and Mrs. Harold Reeves, lest, as he said, any person should mistake the deed for a living one; but this was many years after it was executed and at a time when it was no longer needed, for the deed of May 9 was all that was then required. The learned judge also held that Hugh Browne could not say that he was acting as solicitor for James, for he had treated him as a hostile party. But, with submission, although this was so at one time, the learned judge appears to me to have omitted to notice the part taken by James, as he made good the trust fund, in drawing the cheques in conjunction with Arthur Reeves upon their joint account with the express object that the moneys so obtained should be invested by Hugh Browne for the trust. Upon these questions of fact I find myself differing from the learned judge. In my opinion, between January, 1884, and May 9, 1884, it has been proved that Hugh Browne was acting for James and Arthur Reeves in making the investments, that they were the de facto trustees,

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and that he had them as principals, and that in what he did he was not, therefore, a trustee de son tort.

This suffices to determine this case; but, had Hugh Browne been acting as a trustee de son tort, I do not see how that circumstance would render Arthur Browne, his partner, liable for the consequences attaching to such a position. It is not, however, necessary to discuss this, nor the point, so much debated at the bar, as to what would have been Hugh Browne's position if he acted for James, who was an actual trustee, and Arthur Reeves, if he had been merely a trustee designated and not actually appointed. For these reasons I think that the appeal should be allowed with costs, and that the action must be dismissed with costs.

RIGBY L.J. read a judgment, in which (after stating the facts) he continued:- At what time the plaintiff Arthur Reeves first became aware of the payments made by James to the joint account in the names of himself and Arthur Reeves does not precisely appear; but he was sufficiently informed of them by a letter of January 29, 1884, and a letter of his own dated February 5, 1884, proves that he had himself obtained a copy of the bank account, shewing what payments had been made down to that time, and was acquiescing in further payments being made to the same account. Moreover, he operated upon the account by joining with James in drawing cheques in favour of the defendant Hugh Browne, for the express purpose of enabling the latter to invest the sums for which the cheques were drawn upon the leasehold securities complained of in the action.

In these and other matters he acted as a trustee of the settlement, and he was so treated by James, the other trustee.

It is true that after an interview on January 11, 1884, between Hugh Browne, Harold Reeves, and James, it became at once apparent that James could not remain a trustee, and that the plaintiff Arthur Reeves objected very naturally to have him as co-trustee; but before the middle of January it was arranged that he should retire, and that Marian Reeves should be appointed in his place to act jointly with Arthur Reeves. But this does not shew that Arthur Reeves was not acting as trustee

along with James, at any rate from February 5, and, if he were properly appointed, he could not after that date disclaim, even though his consent to act might in the first instance have been conditional only.

By the Conveyancing Act, 1881, s. 31, sub-s. 1, Mr. and Mrs. Reeves had power to appoint him by writing, and their execution of the deed of appointment on January 7 or 8, followed by his acceptance, operated as a valid appointment. By sub-s. 5 of the same section, "every new trustee so appointed, as well before as after all the trust property becomes-by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust."

Whatever was, at the time or afterwards, thought by the parties, Arthur Reeves and James were trustees in the interval between the acceptance of the trust by Arthur Reeves and the retirement of James which followed on May 9, 1884. It was during that interval that all the investments in respect of which relief has been granted were made; and the investments themselves, however improvident they may have been, were within the legal powers of the trustees. The defendant Hugh Browne in all that he did during the interval acted in the capacity of solicitor for one of the two trustees, whose directions as to investments were accepted or acted on by the other. The deed executed by Mr. and Mrs. Reeves on January 7 or 8, 1884, was very naturally left incomplete, in order that a deed suitable to the new state of things might be substituted for it; but its effect as an appointment in writing was not in the least altered. Under these circumstances it seems to me that Hugh Browne cannot be made liable as a constructive trustee, and it is too late to make him liable as solicitor. I do not think the circumstance of the appointment of Arthur Reeves and the effect of the deed executed by Mr. and Mrs. Reeves in January, 1884, as an appointment in writing under the Conveyancing Act, 1881, was so clearly brought before North J. as it was brought before us on the appeal. If it had been I do not think he would have arrived at a different conclusion of fact from that above stated.

I gather from his judgment that he would, if satisfied of this fact, have dealt with the questions of law as this Court is now doing.

The conclusion of fact at which we have arrived renders it unnecessary to consider in detail the questions of law which might have arisen if Arthur Reeves had only been what was called in argument a "trustee designate." I wish, however, to reserve for future consideration, whenever it may arise, the question how far a solicitor, acting as solicitor for a de facto trustee, can be made liable as a constructive trustee merely by reason of a defect in title of his principal. I think also, with Lord Herschell, that it is not within the scope of a solicitor's business to constitute himself a constructive trustee, so as to bind his partner and make him also liable as a constructive trustee, although he is not aware of the dealings by which the constructive trust is established.

Solicitors: *Swann & Co.; Steadman, Van Praagh, Sims & Co*.

W. L. C. (1)

(1) This report was partly prepared by the late Mr. Ware and has been completed by Mr. Cabell.

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