

[HIGH COURT OF AUSTRALIA.]

CAMPBELL APPELLANT ;
PLAINTIFF,

AND

CAMPBELL AND OTHERS RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Mortgage—Interest in partnership—Bankruptcy of mortgagor—Sale under mortgage*
1916. *—Sale of interest by official assignee—Suit to set aside sale under mortgage—*
—Laches—Lapse of time—Acquiescence by official assignee.

SYDNEY,
March 30,
31 ;
April 3.

Griffith C.J.,
Barton and
Rich JJ.

A, one of the members of a partnership of five persons who owned a pastoral property, had mortgaged his interest in the partnership to B, another member of the partnership. In 1893 A was adjudged bankrupt and an official assignee of his estate was appointed. In 1894 A's interest in the partnership was sold under the mortgage and was acquired by B, who thereafter held it and dealt with it as owner. In 1904 A obtained releases from all his creditors including B. The partnership was subsequently reconstituted on the basis of B being the owner of two of the five shares. No claim was ever made by the official assignee in respect of A's share. In 1911 the plaintiff purchased from the official assignee A's interest in the partnership.

In a suit brought by the plaintiff against B claiming to have the sale by B of A's interest in the partnership set aside as having been at a gross undervalue,

Held, that the official assignee, whose rights the plaintiff had acquired, was only entitled, if at all, to impeach that sale as a preliminary to a suit against the other members of the original partnership, which had been dissolved by the bankruptcy of A, for an account of the partnership assets as in 1893, and that, as it was now too late to bring such a suit, an order setting aside that sale would be futile.

Held, also, on the facts, that the official assignee had not only not elected to impeach the sale but had actually affirmed it.

H. C. OF A.
1916.

Decision of the Supreme Court of New South Wales (*Harvey J.*) affirmed.

CAMPBELL
v.
CAMPBELL.

APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court of New South Wales in its Equity Jurisdiction, in 1911, by Percy Campbell against James Campbell senior, George Malcolm Campbell; Alexander Campbell junior, James Campbell junior, George Francis Cobb and the Bank of Australasia, in which the statement of claim was as follows :—

1. On 24th August 1888 one Alexander Campbell, hereinafter called Alexander Campbell senior, the defendant James Campbell, hereinafter called the defendant James Campbell senior, John Campbell, Donald Campbell and Mary Simpson were carrying on the business of graziers in partnership in the New England District of New South Wales under the name and style of Campbell, Simpson & Company and the said Alexander Campbell senior was entitled as a member of such partnership to one-fifth part share and interest in the business and property thereof.

2. The property of the said partnership comprised a certain grazing property or run known as Tumulla holding and about 3,000 acres more or less of freehold land in the District of Walcha in the said State, and certain sheep, cattle, horses and plant upon the said lands and used in the said business.

3. By indenture of mortgage dated 24th August 1888, to which the plaintiff craves leave to refer, the said Alexander Campbell senior mortgaged to the defendant James Campbell senior and the said John Campbell the whole of his said part share and interest in the said partnership to secure the repayment of the sum of £1,500 with interest.

4. On 17th February 1892 and 23rd May 1893 the said Alexander Campbell senior executed further mortgages to the defendant James Campbell senior of his said part share and interest in the said partnership to secure the repayment of the sums of £887 11s. 8d. and £20 respectively with interest.

5. On 16th August 1893 an order was made by this honourable

H. C. OF A. Court in its Bankruptcy Jurisdiction sequestrating the estate of the
1916. said Alexander Campbell Senior and appointing Augustus Morris,
CAMPBELL since deceased, the official assignee thereof, and subsequently, on
v. the death of the said Augustus Morris, William Harrington Palmer
CAMPBELL. was appointed official assignee in his place.

6. On 2nd November 1894 the said part share and interest of the said Alexander Campbell senior in the said partnership was sold by auction by the order of the mortgagees, the defendant James Campbell senior and the said John Campbell, and was purchased by the defendant George Malcolm Campbell, a son of the defendant James Campbell senior, and by conveyance dated 2nd November 1894, to which the plaintiff craves leave to refer, was conveyed by the defendant James Campbell senior and the said John Campbell to the defendant George Malcolm Campbell absolutely for the consideration of £600, and by conveyance dated 20th August 1895, to which also the plaintiff craves leave to refer, was conveyed by the defendant George Malcolm Campbell to the defendant James Campbell senior for the alleged consideration of £300.

7. Prior to the said auction sale of 2nd November 1894 the defendant James Campbell senior stated to the various persons including other members of the said partnership that he intended to bid at the said auction and to buy in the said part share and interest of the said Alexander Campbell senior for the other members of the said partnership, and by the said statements caused the said persons and others who would have attended and bid at the said auction to refrain from attending and bidding thereat and thereby greatly prejudiced the realization of a fair price at the said sale.

8. At the date of the said auction sale, viz., 2nd November 1894, and also at the said 20th August 1895 the fair market value of the said part share and interest of the said Alexander Campbell senior in the said partnership was greatly in excess of the amount realized therefor at the said auction sale and of the amount alleged to have been paid by the defendant James Campbell senior to the defendant George Malcolm Campbell as consideration for the said conveyance on 20th August 1895, a fair estimate of the said value at the time of the said sale and conveyance being between £7,000 and £8,000.

9. Notwithstanding the said bankruptcy of the said Alexander

Campbell senior and the said subsequent dealings with his said share, the said partnership was not dissolved but continued to be carried on under the said name and style of Campbell, Simpson & Company by the members of the said partnership other than the said Alexander Campbell senior, the said share of the said Alexander Campbell senior and the profits thereof being held and enjoyed by the defendant James Campbell senior in addition to the share which he originally held as a member of the said partnership, and the shares of other members thereof who have since died being held and enjoyed by their next of kin or the persons entitled under their respective wills, up to the bringing of this suit except so far as the carrying on thereof has been affected by a suit now pending in this honourable Court instituted on 6th November 1906 by certain members of the said partnership for the dissolution thereof.

H. C. OF A.
1916.

CAMPBELL
v.
CAMPBELL.

10. By indenture of mortgage dated 16th April 1895, to which the plaintiff craves leave to refer, the defendant James Campbell senior, the said John Campbell, the said Annie Campbell and the said Mary Simpson by her committee in lunacy mortgaged the whole of their shares in the said partnership to the defendant Bank of Australasia Limited to secure the payment of certain advances, and the said mortgage still subsists.

11. By indenture of mortgage dated 20th August 1895, to which the plaintiff craves leave to refer, the defendant James Campbell senior mortgaged his share and interest in the said partnership to the defendant Bank of Australasia Limited to secure the repayment of certain advances, and the said mortgage still subsists.

12. On 2nd August 1901 the said John Campbell died, and on 14th February 1902 probate of his will was granted by this honourable Court in its Probate Jurisdiction to the defendants Alexander Campbell, hereinafter called Alexander Campbell junior, James Campbell, hereinafter called James Campbell junior, and George Francis Cobb.

13. The said Alexander Campbell senior is still a bankrupt, and the said William Harrington Palmer is still official assignee of his said estate.

14. By deed of assignment dated 3rd March 1911, to which the plaintiff craves leave to refer, the said William Harrington Palmer,

H. C. OF A. with the consent of the said Alexander Campbell senior and the
1916. approval of this honourable Court in its Bankruptcy Jurisdiction,
CAMPBELL assigned absolutely to the plaintiff the whole of the right title and
v. interest of himself and the said Alexander Campbell senior in the
CAMPBELL. said share of the said Alexander Campbell senior in the said partner-
ship to the plaintiff for the consideration of £10.

15. The plaintiff charges :—(1) That the defendant George Malcolm Campbell in the purchase of the said share of the said Alexander Campbell of 2nd November 1894 was in fact acting as the agent for and in the interest of the defendant James Campbell senior, and that the said purchase was in fact a purchase by the defendant James Campbell senior, and that the subsequent transfer of 20th August 1895 by the defendant George Malcolm Campbell to the defendant James Campbell senior was in fact the carrying out of an arrangement between the defendants George Malcolm Campbell and James Campbell senior for the acquisition by the latter of the said share of the said Alexander Campbell senior, and that the purchase thereof by the defendant James Campbell senior was improper and fraudulent. (2) That owing to the conduct of the defendant James Campbell senior in connection with the said sale by auction the said sale and the said subsequent purchase by him were to the knowledge of the defendants James Campbell senior and George Malcolm Campbell at a gross undervalue.

16. The plaintiff, in the event of the said purchase by the defendant James Campbell senior being set aside by this honourable Court, is willing and offers to redeem the said mortgage and to pay to the defendant James Campbell senior the amount, if any, found on proper inquiry to be due to him for principal and interest under the said mortgage.

The plaintiff therefore prays :—

1. That the said transfers of 2nd November 1894 and 20th August 1895 be set aside.

2. That the defendant James Campbell senior be declared to be a trustee of the said share of the said Alexander Campbell senior in the said partnership for the plaintiff as assignee of the said Alexander Campbell senior subject to the rights of the defendant Bank of Australasia Limited against the said share.

3. That the said last-mentioned share be ordered to be reconveyed to the plaintiff as assignee of the said Alexander Campbell senior subject to the mortgages hereinbefore mentioned to the defendant Bank of Australasia Limited on payment by the plaintiff to the defendant James Campbell senior of the amount, if any, found to be due for principal and interest by the said Alexander Campbell senior to the defendant James Campbell senior under the said mortgages of 24th August 1888, 17th February 1892 and 23rd May 1893.

H. C. OF A.
1916.

CAMPBELL
v.
CAMPBELL.

4. That it be referred to the Master in Equity to take an account of the moneys, if any, due from the said Alexander Campbell senior to the defendant James Campbell senior for principal and interest under the said last-mentioned mortgages, and to take an account as between mortgagor and mortgagee in possession of the rents and profits derived by the defendant James Campbell senior or by any person or persons by his order or for his use or that but for his or their wilful default or neglect would have been derived from the said share of the said Alexander Campbell senior in the said partnership up to the bringing of this suit.

5. That the plaintiff may have such further or other relief as to this honourable Court may seem meet.

The suit was heard by *Harvey J.*, who ordered that it should be dismissed.

From that decision the plaintiff now, by special leave, appealed to the High Court.

Other material facts are stated in the judgment of *Griffith C.J.* hereunder.

Bignold (with him *Waddell*), for the appellant.

Loxton K.C. (with him *Bethune* and *R. K. Manning*), for the respondents James Campbell senior and George Malcolm Campbell.

[During argument reference was made to *Lindsay Petroleum Co. v. Hurd* (1); *Nutt v. Easton* (2); *Re Carey* (3); *Fitzroy v.*

(1) L.R. 5 P.C., 221, at p. 239. (2) (1899) 1 Ch., 873, at p. 879; (1900) 1 Ch., 29.
(3) 14 N.S.W.L.R. (Bky.), 66.

- H. C. OF A. 1916. *Cave* (1); *Seear v. Lawson* (2); *In re Park Gate Waggon Works Co.* (3); *Guy v. Churchill* (4); *Bulli Coal Mining Co. v. Osborne* (5);
 CAMPBELL *Clarke v. Hart* (6); *Life Association of Scotland v. Siddal* (7);
 v. *Archbold v. Scully* (8); *Kennedy v. De Trafford* (9); *Halsbury's*
 CAMPBELL. *Laws of England*, vol. XIII., p. 169.]

GRIFFITH C.J. This suit has apparently been brought under a curious misunderstanding as to the nature of the plaintiff's rights, if he has any. The plaintiff's father, Alexander Campbell, was, in 1893, a member of a partnership which owned a pastoral property in New South Wales, and in which he held a one-fifth share. In 1893 he was adjudged bankrupt and an official assignee was appointed. The effect in law was that the partnership became dissolved altogether, and the official assignee became entitled to the bankrupt's share in the assets. Probably he became a tenant in common of the land and chattels. But practically all his rights were to have the partnership wound up and to receive the value of the bankrupt's share in the partnership estate. That was the only right which he acquired by the adjudication, and that right has never been increased by anything that has happened since. But his right to an account of the partnership assets was hampered by a mortgage of his interest in the partnership, which the bankrupt had before his bankruptcy given to his brother, the defendant James Campbell, who also was a member of the partnership. The amount due on the mortgage at the date of the bankruptcy amounted, in the opinion of *Harvey J.*, to about £3,800. In 1894 James Campbell advertised the bankrupt's interest in the partnership for sale by auction. At the auction it was knocked down to George Malcolm Campbell, son of James Campbell, for the sum of £3,000. A deposit of £50 was paid, afterwards repaid, but no other part of the £3,000 was ever paid. Some of the land was transferred to George but shortly afterwards retransferred to his father, and from that time forward James enjoyed that one-fifth

(1) (1905) 2 K.B., 364.

(2) 15 Ch. D., 426.

(3) 17 Ch. D., 234.

(4) 40 Ch. D., 481.

(5) (1899) A.C. 351, at p. 362.

(6) 6 H.L.C., 633, at p. 655.

(7) 3 De G. F. & J., 58, at p. 73.

(8) 9 H.L.C., 360, at pp. 383, 388.

(9) 65 L.J. Ch., 465.

share as owner of it. There were three possible grounds on which he could have founded his claim to ownership—(1) as having bought it from George, (2) as upon a rescission of the contract with George, or (3) as mortgagee in possession. He has, in any event, held it and dealt with it as owner from 1894 to the present time.

The real legal position was that the partnership had become dissolved by the bankruptcy of Alexander, and that a new partnership had been formed consisting of the other four partners, in which it was tacitly understood that James had a two-fifths share. The official assignee's right was, as I have said, to an account of the value of the interest of the bankrupt at the date of the bankruptcy and nothing else. There was no specific property held by the mortgagee which the official assignee could claim. His right to an account was against the members of the original partnership other than the bankrupt. Although, therefore, the official assignee was not hampered in maintaining a suit for an account by the mere existence of the mortgage, he was hampered to this extent, that it would have been a good defence that all the bankrupt's interest had been assigned to someone else. In order, therefore, to maintain such a suit successfully, the official assignee would have had to get rid of the alleged sale under the mortgage, and this suit is brought for that and nothing else. The plaintiff, who claims as purchaser from the official assignee, impeaches the sale solely on the ground that it was at a gross undervalue. It was suggested very faintly in the statement of claim that the sale might have been attacked on another ground, namely, that it was not a real sale at all, and even, indeed, fraudulent. But this suggestion is not made in such a form as to call upon the defendants to answer it. The only relief that the plaintiff asks is to have the sale by the mortgagee set aside.

Supposing, then, that the sale were set aside, what would be the position of the official assignee and of the plaintiff, who stands in his shoes? He would then have an unrestricted right to sue the members of the old partnership of 1893 other than the bankrupt for an account of the partnership assets as in 1893. But this action is not brought against those partners, and it is now too late to bring such an action, for the *Statute of Limitations* would be an obvious bar. Under those circumstances the decree which the Court is

H. C. OF A.
1916.

CAMPBELL
v.
CAMPBELL.

Griffith C.J.

H. C. OF A. now asked to make would be futile even if the plaintiff proved his
1916. case.

CAMPBELL
v.
CAMPBELL.
Griffith C.J.

But there are other answers to the action. The suit is to set aside a sale made in 1894. It is clear that a mortgagee's sale made at a gross undervalue is, at best, voidable and not void, and the rules applicable to suits to set aside voidable transactions are well known. In 1904, the bankrupt, hoping, no doubt, to get back his property and share in the partnership estate—and I believe that his brother James had promised to let him have it back—obtained releases from all his creditors, so that he remained the sole beneficiary of his bankrupt estate. The official assignee appears to have regarded him as such, and to have been fully aware of all that happened. Amongst other creditors from whom the bankrupt asked for a release was his brother James, who in 1904 released the mortgage debt. At that time Alexander knew, as he himself said in evidence, that James then claimed to retain the property as his own. The official assignee to whom the releases were produced also knew the facts. In the face of all this, it seems impossible to deny that the assignee not only did not elect to impeach the transaction under which James claimed to be entitled to the property but actually affirmed it, for James gave the release on the faith of the transaction, whatever it was, by which he claimed to have acquired the bankrupt's interest being valid. It is, at least, highly improbable that a mortgagee would give a release of his mortgage debt and at the same time intend to return the mortgaged property to the mortgagor. The evidence of an intention on the part of the official assignee to affirm the transaction seems to me conclusive. On the authority of *Kennedy v. De Trafford* (1) such an intention followed by inaction for a period of eight years constitutes of itself such laches as to prevent its subsequent impeachment.

For these reasons I think that the plaintiff's claim wholly fails.

I express no opinion as to the questions of fact whether or not the sale to George was a *bonâ fide* sale and valid, or whether the sale was voidable as a sale at a gross undervalue, which were the only points decided by the learned Judge.

The appeal must therefore be dismissed.

(1) 65 L.J. Ch., 465.

BARTON J. I am quite of the same opinion.

RICH J. I agree.

H. C. OF A.
1916.
CAMPBELL
v.
CAMPBELL.

Appeal dismissed with costs.

Solicitor for the appellant, *E. W. Warren.*
Solicitors for the respondents, *Pigott & Stinson.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FORD APPELLANT ;

AND

ANDREWS RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Local Government—Alderman—Ouster—Disqualification—Person engaged or interested in contract with council—Director of company which has contract with council—Knowledge of director—Possibility of future benefit—Local Government Act 1906 (N.S.W.) (No. 56 of 1906), sec. 70.

H. C. OF A.
1916.
SYDNEY,
April 27 ;
May 5.
Griffith C.J.,
Barton,
Isaacs and
Gavan Duffy JJ.

Sec. 70 of the *Local Government Act 1906* (N.S.W.) provides that a person is disqualified for the office of alderman if “(j) he is directly or indirectly by himself, or any partner, engaged or interested (other than as a shareholder in an incorporated company, association, or partnership consisting of more than twenty members) in any contract, agreement, or employment with, by, or on behalf of the council,” with an exception of certain specified contracts or agreements.

By the articles of a company the directors had power “to give any director or other officer or other person employed by the company a commission on the profits of any particular business transaction or share in the general profits of the company, and such commission or share of profits shall be treated