

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Reid-Newfoundland Company v. The Anglo-American Telegraph Company, Limited, from the Supreme Court of Newfoundland; delivered the 23rd April 1912.*

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PRESENT AT THE HEARING:

LORD MACNAGHTEN.

LORD SHAW.

LORD MERSEY.

LORD ROBSON.

[DELIVERED BY LORD ROBSON.]

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This Appeal is from a Judgment of the Supreme Court of Newfoundland in an action brought on the 2nd November 1905 by the Anglo-American Telegraph Company against the Reid-Newfoundland Company, wherein the Defendants had pleaded the Statutes of Limitations (21 Jac. I, chapter 16, and local statutes) as to so much of the Plaintiffs' claim as accrued prior to the 2nd November 1899. The Plaintiffs had replied that the plea disclosed no defence because the action was taken on a specialty contract under which the period of limitation was 20 years. The issue thus raised was heard on the 1st February 1911 before the Full Court, which decided, by a majority of two out of three Judges (Mr. Justice Emerson dissenting), that the Plaintiffs' replication was good.

The Respondents are a Telegraph and Cable Company, which, at the times material to the

case, possessed certain privileges in relation to the construction and working of telegraph lines under the Newfoundland Statute, 17 Vict., cap. 2. The Appellants are the lessees of the Newfoundland Railways which they operate and manage by virtue of Statutory powers.

By an Agreement under seal made on the 11th August 1888 between the Newfoundland Railway Company (the former owners of a portion of the Appellants' Railway system) of the first part, F. H. Evans, the Receiver and Manager of the said Newfoundland Railway Company, of the second part, and the Respondents of the third part, it was agreed, among other things, that the Respondents should erect and maintain along the lands forming the roadways of the Southern Division of the Railway Company's railway between St. John's and Harbour Grace, and between Harbour Grace and Carbonar, a "special wire" for the Railway Company, their successors and assigns, for use in and about the operation of the said Railway as therein defined, and the Newfoundland Railway Company agreed "not to pass or transmit any commercial messages over the said special wire, except for the benefit and account of the Telegraph Company."

The Newfoundland Railway Company made default in completing the construction of the line, and on the 13th July 1897 that Company and its Receiver and Manager sold and conveyed the Railway to the Newfoundland Government, and the conveyance was expressed to be "subject to the subsisting contract with the Anglo-American Telegraph Company as regards the telegraph line along the said Railway."

The Government then undertook the completion of the Railway, as before defined, and further proceeded greatly to extend it to other parts of the island.

On the 3rd March 1898 a contract was made between one R. G. Reid and the Government, which was afterwards duly confirmed by statute, whereby the Government agreed to lease to the said Reid all the railways of the colony for a term of 50 years from the 1st April 1898, and in the year 1901 a further Act was passed by the Colonial Legislature for the purpose of incorporating the Appellant Company and transferring to it all the rights and liabilities of Mr. Reid under the contract of the 3rd March 1898.

Since the 1st April 1898 R. G. Reid and the Appellants have used the "special wire" in and about the operation of railways other than the railway between St. John's and Harbour Grace, and between Harbour Grace and Carbonear. In fact, they have used it for all the purposes of their business, including the new or extended lines of railway and their shipping business, and other commercial undertakings.

The Respondents accordingly brought this action against the Appellants for (1) an account of all telegraphic messages sent by R. G. Reid and the Appellant Company over the special wire since the 1st April 1898, other than messages connected with the operation of the railway as defined by the contract of the 11th August 1888, (2) payment of the amount found to be due, and (3) damages. The Supreme Court gave Judgment for the Telegraph Company on the general question of liability, and their Judgment was affirmed by this Board, but the question as to what, if any, period of limitation applied to the Plaintiffs' claims was, by arrangement between the parties themselves, left over for subsequent argument, and now comes up for final determination.

The Supreme Court have held, by a majority, that as the Agreement of the 11th August 1888, was under seal the Appellants were liable as on a

specialty. In their Lordships' opinion it is not necessary to determine this question on which the learned Judges disagreed. The claim of the Respondents rests on surer ground. The Appellants took over the railway together with the "special wire" comprised in the Agreement of the 11th August 1888, with notice of the limitations and conditions attached to the user of that wire. It seems to their Lordships that when and as often as the Appellants used the special wire for the transmission of unprivileged messages, an obligation in the nature of a trust arose on their part, and it became their duty to keep an account of the profits accruing from such use of the wire, and to set those profits aside as moneys belonging to the Respondents. To such a duty, so created, the Statute of Limitations can have no application unless by express statutory provision. The Appellants are accountable as trustees, and, in giving to trustees the protection of the Limitation Acts, the Trustee Act, 1898 (Newfoundland), 61 Vict., cap. 38, to which reference was made in the course of the argument, withholds such protection from a trustee when the proceedings are taken to recover property, or the proceeds thereof, still retained by the trustee, and converted to his own use.

The principle is laid down in *Burdick v. Garrick* (L.R., 5 Ch. A. 233). In that case an agent was entrusted with property which he was authorised to sell and he was directed to invest the proceeds in the name of his principal. Under this authority he received certain moneys and paid them into his own account at his bank. Afterwards, in an action for an account, the agent pleaded the Statute of Limitations, but Lord Hatherley, L.C., said :—

“How a person who is intrusted with funds under such circumstances differs from one in an ordinary fiduciary position I am unable to see.”

And the Court held that the Statute of Limitations had no application. Lord Justice Giffard followed in the same sense, and stated the principle broadly in these terms (afterwards cited with approval by Lord Macnaghten in *Lyell v. Kennedy* (14 A.C., p. 463)) :—

“ I do not hesitate to say that where the duty of persons  
“ is to receive property and to hold it for another and to  
“ keep it until it is called for, they cannot discharge them-  
“ selves from that trust by appealing to the lapse of time.  
“ They can only discharge themselves by handing over that  
“ property to somebody entitled to it,”

In *Lyell v. Kennedy*, Lord Selborne, in deciding that the facts were sufficient to establish a fiduciary character against a manager of property who had received rents on behalf of a principal, said :—

“ For the constitution of such a trust no express words  
“ are necessary ; anything which may satisfy a Court of  
“ Equity that the money was received in a fiduciary  
“ character is enough.”

Their Lordships will humbly advise His Majesty that this Appeal be dismissed with costs and that the accounts referred to the Registrar be made up from the 1st April 1898, when the special wire began to be used for unprivileged messages, until the discontinuance by the Appellants of the use of such wire.

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In the Privy Council.

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THE REID-NEWFOUNDLAND COMPANY

v

THE ANGLO-AMERICAN TELEGRAPH  
COMPANY, LIMITED.

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DELIVERED BY LORD ROBSON.

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