No. 4454 Equity

the loss occasioned by the breach of trust complained of. Mrs Foley has testified that Zimmerman told him "that he Zimmerman had got an order from the Court to sell the bank stock and buy land with it." This statement is fully verified by Zimmerman himself in his answer to the 128, interrogatory propounded to him. Again Foley says Zimmerman told him the trust funds would be replaced by the proceeds of the sale of timber to be cut from the land, and this Zimmerman distinctly corroborates in his answer to the 49 & 57 interrogatories. Foley further states that he believed what Zimmerman told him and did not discover the contrary until the spring of 1887. Being misled by the Trustee and being in ignorance of his rights and the remedies open to him, as he says he was, neither laches nor acquiescence can be imputed to him.

A careful examination of the record has failed to convince us that the defence relied on has been established, for all the other acts set up, such as bargaining for the land and cutting and hauling wood therefrom seem, as far as done by Foley, to have been done by him at the instance of and as the mere agent for his mother, the life tenant, and apparently in accordance with what Zimmerman said was the plan adopted to pay for the farm, whilst he Foley was wholly ignorant as to the true state of the facts. We are therefore of opinion that so much of the decree as holds Zimmerman liable to the Appellee for one third of the proceeds of the sale of the bank stock with interest from the date named in the decree, less the sums stated in the decree to be due by Foley to Zimmerman, is free from any Error.

We are unable however to agree with the learned Judge of the Circuit Court in charging the Trustee with the amount of the promissory note herein alluded to. The note had been barred by limitations for more than twelve years when Zimmerman received it. He was unable to get an acknowledgement from the maker, who repudiated it whenever called on for payment. It would have been useless for the Trustee to involve the Estate in the costs of a suit for collection under such circumstances. The note became valueless by no act or default of Zimmerman. And he ought not to be charged with the amount due upon it.

As the Bill was filed by the person owning only one third of the trust Estate and as the prayer for relief was restricted to that interest, the decree which inadvertently covers the whole of the trust fund and makes distribution of it to the several cestuis que trust is entirely too broad.

It results from what we have said that so much of the decree as holds the Trustee liable to the Appellee for one third of the proceeds of the sale of the bank stock and one third of the cash with interest from the date of Mary A Foley's death less the sums due by Foley to Zimmerman as found by the Court below, must be affirmed, and that the residue of the decree must be affirmed and the cause must be remanded that a decree may be passed in conformity with this opinion. Under the circumstances of this case one half of the costs in this Court and in the Court below must be paid by the appellee and the other half by the Appellants

Affirmed in part and reversed in part

and cause remanded

Certificate attached of Spencer C. Jones, Clerk of said Court of Appeals with seal of said Court that same is truly taken from Record of Proceedings &c dated May 7, 1889.

Filed 2