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Article 13

Actions To Be Commenced Within Six Years

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Walters, discussed above, from ever arising again.[13] The statute, as it now stands, also embraces a case where there are three subscribing witnesses who are legatees. Even in such a case, a witness would not be protected, for the statute demands two other subscribing witnesses who are not beneficiaries. The statute aims to provide equal treatment of all legatee-witnesses and its language seems clear enough to effect its purpose.

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ACTIONS TO BE COMMENCED WITHIN SIX YEARS

A legislative note on the present statute of the period of limitations in stockholder's derivative actions

A recently passed amendment concerning the rights of stockholders in derivative actions has thrown an entirely new light on what was heretofore a confused, ambiguous and indiscernible rule. This statute, a section of the Civil Practice Act, provides for a clear and satisfactory method of computing the time within which derivative actions may be brought under varying facts.[1] To better appreciate and understand the significance of this new rule let us briefly examine the earlier situation. Formerly, in determining the period of limitation several theories were advanced. The earliest and most adhered to was the *trust or equitable theory,* wherein the action was brought by the stockholder as trustor against the directors as trustees of the corporate property. In *Brinkerhoff v. Bostwick* [2] it was held that the director was the "guardian" of the corporate property and answerable and responsible to the stockholders for any misconduct. All trust

[13] Note of Commission, MCKINNEY, DEC. EST. LAW (1942) Supp. 49. ". . . The purpose of this amendment is to prevent the circumvention of the statute in the manner outlined in Matter of Walters (285 N. Y. 158, 33 N. E. [2d] 72). . . ."

[1] Section 48 (subd. 8, added by L. 1942, c. 851, in effect Sept. 1): *"Actions to be commenced within six years.* The following actions must be commenced within six years after the cause of action has accrued . . .

> "Subd. 8. An action legal or equitable, by or on behalf of a corporation against a director, officer, or stockholder, or a former director, officer, or stockholder, if such action is for an accounting, or to procure judgment on the ground of fraud, or to recover a penalty or forfeiture imposed or to enforce a liability created by common law or by statute unless such action is one to recover damages for waste or for an injury to property or for an accounting in connection therewith in which case such action shall be subject to the provisions of subdivision seven of section forty-nine."

[2] 99 N. Y. 185, 1 N. E. 663 (1885).

concepts arising in equity provide for the ten-year period of limitation. Subsequent cases held to the ten-year period after the basic reason for its invocation had been discarded. As stated in the leading case of *Potter v. Walker*[3] the trust theory had given way to a computation determined by nature of the individual case. For example, if the court found the plaintiff had a remedy at law or had actually sought one there in the first instance, the period governing actions at law was applicable.

Thus the ten-year statute became obsolete except where the relief sought was in fact equitable. This rule, however, led to greater difficulty, for the next problem was to determine when the plaintiff had an equitable remedy and when it was legal. Stress was always laid on the nature of the complaint and never the facts or circumstances surrounding the individual case. Once the plaintiff had categorized himself in the legal courts, there remained the further classification of the type of corporation the director represented and what relief the stockholder was seeking. We might offer this summary[4] as a part of the ritual involved in the attempt of suiting the plaintiff to the proper remedy.

A—Was the action equitable or legal?

I—If it was equity he sought—the ten-year period.

II—If the remedy was not exclusively equitable but

(a) the corporation was a moneyed corporation the three-year period applied as of the time *from* the discovery of the facts.

(b) where it was not a moneyed corporation:

(1) Six years in actions for money had and received.

(2) Three years for injury to property.

(3) Six years after discovery of facts in fraud actions.

This intricate and complex yet apparently simple formula led to chaos and confusion. If the plaintiff sought to recover profits from the conspiring directors and based his action on a money-had-and-received theory, he went to law and was entitled to recover as damages all he had put in issue. If another under the same set of facts had sought a similar remedy, but had petitioned equity for an accounting, he was entitled to recover all sums he knew of and all those disclosed after an examination of the books. We see, therefore, as pointed out in *Falk v. Hoffman*,[5] the plaintiff at law got exactly what he sought

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[3] 276 N. Y. 15, 11 N. E. (2d) 335 (1937).
[4] *Law Revision Commission Report*, LEGIS. Doc. No. 65(E) (1942).
[5] 233 N. Y. 199 (1922).

and not what the facts in the case as brought out at trial might reveal. An even finer distinction then arose; this reasoning enabled many an over-crowded court to almost "dump" their cases into equity. If it were found that the facts in the case were too complex, if they were replete with confusing features and figures, the proper niche was equity and not law. There a capable and experienced judge might thoroughly be apprised of the facts, instead of having the average minds of a jury at law pass upon them.[6] Thus we have the trust concept from earliest times, and now the complex-features cases.

Finally, the courts had great difficulty in distinguishing between the money-had-and-received theory and the equitable accounting rule. In *Falk v. Hoffman* [7] it was held the adequacy of uncovering concealed profits of the directors far excelled the legal remedy, that the probative nature of equity will reveal facts dormant at law. Further, that together with the trust concept requiring a great degree of care due to a fiduciary relationship between the two, equity will afford greater relief. This method would compel the director to come forth and account for all profits realized, known or unknown. Of course all actions arising from actions of negligence resulting in gain or profit to the director were purely legal. Under the present classification or statute, an action based upon negligence, where it is not alleged that any wrongful profits were received by the directors at the expense of the corporation, could not come under the new six-year statute but would, of course, follow the six-year rule as provided in subdivision three of Section 48 in actions for personal injuries.[8] If, however, the stockholder alleges the recipients of certain bonuses failed to return the difference between the sums agreed upon under a corporate plan and the sums actually received, the action falls under the new subdivision eight and provides six years.[9]

In summation, we see that aside from the varying classification of legal actions there was left to equity three cases: those of great complexity, those requiring discovery and scrutiny of books, and those involving the trust concept. It may be said here that such classification soon outlived its purpose, for as time and courts developed, the law courts found it easy to place all "complex" cases in the hands of a referee where the jury might fail; that a bill of discovery could be entertained to search books, records, and documents before the trial,[10] that actions for accounting should be given equal consideration as to time with those concerning fraud, or recovery of penalties.

It can hardly be said that after a cursory glance at the past history of this subject the framers of this amendment were rash or unreasonable in their demand for a coherent and logical statute that would permit causes of action deserving a day in court, an opportunity

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[6] Cwerdinski v. Bent, 256 App. Div. 612, *aff'd*, 281 N. Y. 782 (1939).
[7] See note 5 *supra*.
[8] Potter v. Walker, 276 N. Y. 15, 11 N. E. (2d) 335 (1937).
[9] Cwerdinski v. Bent, 256 App. Div. 612, *aff'd*, 281 N. Y. 782 (1939).
[10] Mencher v. Richards, 283 N. Y. 176, 27 N. E. (2d) 982 (1940).

to be heard according to the merits of the particular case based upon reasonable and practical rules of procedure rather than some arbitrary fanciful rules that were as varied and many as the cases from which they arose.

GLORIA M. PÉQUINOT.

PENAL LAW §§ 1290 AND 1290a—LARCENY REDEFINED.—When § 1290 of the Penal Law was passed, it was thought that the common law distinctions between obtaining money under false pretenses, embezzlement and larceny, were extinguished in New York. Larceny, under this section was to include all these three.[1] When put into practice, however, it was found that these old distinctions were eliminated in name only. Although the indictment did not have to allege a particular type of larceny by name,[2] it was still necessary to allege facts to prove the particular offense charged.[3] For example, an indictment alleging common law larceny, could not be sustained by proof of an act which would constitute the crime of embezzlement or false pretenses.[4] This was true despite the fact that all these were "larceny".

A great deal of confusion arose because of the subtle distinctions which arose from decisions differentiating between the various classes of larceny. If an accused had induced the victim to pass only possession to him, the crime was larceny by trick and device. If the victim intended to pass title to the thief, the crime was obtaining goods by false pretenses.[5] Another distinction was that between embezzlement and larceny by trick and device. If a person obtained the property of another and thereafter appropriated it to his own use, the crime was embezzlement if the intent to use the property for his own purposes was formed *after* he received the property. If, however, such intent was formed *before* the receipt of the property, the crime was larceny by trick and device.

Prosecuting attorneys found themselves faced with a very difficult task. Many a defendant was freed because the indictment charged one type of larceny while the facts showed defendant was guilty of another. In some cases, it was impossible for the prosecutor to deter-

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1 People v. Krumme, 161 Misc. 278, 292 N. Y. Supp. 657 (1936); People v. Katz, 209 N. Y. 311, 103 N. E. 305 (1913); People v. Miller, 169 N. Y. 339, 62 N. E. 418 (1902).

2 People v. Dunn, 53 Hun 381, 6 N. Y. Supp. 805 (1889).

3 People v. Dumar, 106 N. Y. 502, 13 N. E. 325 (1887).

4 People v. Sloane, 165 Misc. 444, 300 N. Y. Supp. 1032 (1938), *mod.*, 254 App. Div. 780, 4 N. Y. S. (2d) 784 (1938), *aff'd*, 279 N. Y. 724, 18 N. E. (2d) 679 (1939).

5 People v. Noblett, 244 N. Y. 355, 155 N. E. 670 (1927); People v. Dumar, 106 N. Y. 502, 13 N. E. 325 (1887) (It is interesting to note the dissenting opinion of Judge Crane in the *Noblett* case).