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Statute of Limitations--Action to Recover Excessive Sum Paid to Directors in Sale of Property to Corporation (Jno. Dunlop's Sons, Inc. v. Dunlop, et al., 259 App. Div. 233 (1st Dep't 1940))

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STATUTE OF LIMITATIONS—ACTION TO RECOVER EXCESSIVE SUM PAID TO DIRECTORS IN SALE OF PROPERTY TO CORPORATION.—The defendants, officers and directors of the plaintiff-corporation, according to the complaint, conspired to defraud it. The complaint further alleges that pursuant to such conspiracy in December of 1930 they agreed with the Irving Trust Company to purchase for eighty thousand dollars a certain plant to be used by the plaintiff for processing silk, and six months later sold the plant to the plaintiff-corporation at a personal gain of fifteen thousand dollars. This profit was revealed by an entry in the journal of the corporation made in April, 1932, while defendants still controlled the corporation. In February, 1939 the present action was commenced in equity for an accounting for the personal profits claimed to have been received by the defendants from the said transaction in violation of their fiduciary duty to the plaintiff. The defendants moved to dismiss the complaint as barred by the Statute of Limitations, for six years had elapsed since the cause of action accrued.[1] The motion was denied, and the court ruled under the authority of *Potter* v. *Walker* [2] that the ten-year Statute of Limitations [3] applied, because this was an accounting for "profits".[4] On appeal, *held,* order reversed, motion granted. The complaint was barred by the six-year Statute of Limitations, since the plaintiff had a complete and adequate remedy at law in an action for money had and received, and the attempt to characterize the resulting legal situation so as to bring the action within the ten-year Statute of Limitations is not binding on the court. *Jno. Dunlop's Sons, Inc.* v. *Dunlop, et al.,* 259 App. Div. 233, 18 N. Y. S. (2d) 818 (1st Dept. 1940).

Section 53 of the New York Civil Practice Act governs actions in equity [5] such as an accounting for wrongful personal profits made by officers or directors of a corporation in disregard of their position of trust and confidence.[6] This section was applied to the first and seventh causes of action in *Potter* v. *Walker,* which consisted of an accounting for secret profits received by several directors.[7] The situ-

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[1] N. Y. CIV. PRAC. ACT § 48 (1).
[2] 276 N. Y. 15, 11 N. E. (2d) 335 (1937).
[3] N. Y. CIV. PRAC. ACT § 53.
[4] 172 Misc. 66, 14 N. Y. S. (2d) 452 (1939).
[5] Butler v. Johnson, 111 N. Y. 204, 18 N. E. 643 (1888); Pitcher v. Sutton, 238 App. Div. 291, 264 N. Y. Supp. 488 (4th Dept. 1933), *aff'd,* 264 N. Y. 638, 191 N. E. 603 (1934); Hanover Fire Ins. Co. v. Morse Dry Dock & Repair Co., 270 N. Y. 86, 200 N. E. 589 (1936).
[6] Asphalt Const. Co. v. Bouker, 150 App. Div. 691, 135 N. Y. Supp. 714 (1st Dept. 1912), *aff'd,* 210 N. Y. 643, 105 N. E. 1080, *motion for rehearing or for amendment of remittitur denied,* 211 N. Y. 551, 105 N. E. 1080 (1914); Potter v. Walker, 276 N. Y. 15, 11 N. E. (2d) 335 (1937); Goldstein v. Tri-Continental Corp., 282 N. Y. 21, 24 N. E. (2d) 728 (1939); Mencher v. Richards, 256 App. Div. 280, 9 N. Y. S. (2d) 990 (2d Dept. 1939), *reargument denied,* 256 App. Div. 1003, 11 N. Y. S. (2d) 557 (2d Dept. 1939).
[7] It was alleged that certain directors of the Pan American Petroleum and Transportation Company, pursuant to a conspiracy to acquire for themselves

ation in the *Potter* case, however, is different from the present one, for in the former case the directors employed corporate property and a corporate transaction with another for their personal gain. In the instant case it is alleged that the directors were the recipients of more money than they deserved from the corporation, but this excessive sum, though it might be termed a "profit" to the directors, does not constitute a "profit" according to the definition used in stockholder's actions. The claim is essentially for the return to the corporation of a loss sustained by it, and the form of the pleading will not change this fact.[8] Furthermore, not all claims arising out of the wrongful acts of officers or directors may be pursued in equity, for the cardinal principle that equity will intervene only when there is no adequate remedy at law also controls here.[9] Thus, in actions to recover from delinquent directors for gifts to strangers,[10] payment of unauthorized bonuses [11] and excessive salaries, and money procured by directors in selling stock to their corporation at a price above the market value [12] the six-year limitation will apply, for the plaintiff can sue for money had and received,[13] and, such remedy being adequate, equitable relief is unnecessary. Also, the six-year Statute of Limitations, as it read prior to the enactment of the Laws of 1936,[14] was held to govern actions against directors for injury or loss to corporate property through their negligence, since the affected party could resort to a legal action for damages.[15]

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and Blair & Co. a majority of the voting stock of Pan American, used the money of the latter and derived secret profits. The directors were also charged with having obtained wrongful profits through the purchase of Lago Oil Stock by Pan American.

[8] Instant case.

[9] Potter v. Walker, 276 N. Y. 15, 11 N. E. 335 (1937); Cwerdinski v. Bent, 256 App. Div. 612, 11 N. Y. S. (2d) 208 (1st Dept. 1939), *aff'd*, 281 N. Y. 782, 24 N. E. (2d) 475 (1939); Davis v. Cohn, 256 App. Div. 905, 9 N. Y. S. (2d) 881 (1st Dept. 1939); Mencher v. Richards, 256 App. Div. 280, 9 N. Y. S. (2d) 990 (2d Dept. 1939).

[10] Potter v. Walker, 276 N. Y. 15, 11 N. E. (2d) 335 (1937); Davis v. Cohn, 256 App. Div. 905, 9 N. Y. S. (2d) 881 (1st Dept. 1939).

[11] Cwerdinski v. Bent, 256 App. Div. 612, 11 N. Y. S. (2d) 208 (1st Dept. 1939), *aff'd*, 281 N. Y. 782, 24 N. E. (2d) 475 (1939); Davis v. Cohn, 256 App. Div. 905, 9 N. Y. S. (2d) 881 (1st Dept. 1939).

[12] Davis v. Cohn, 256 App. Div. 905, 9 N. Y. S. (2d) 881 (1st Dept. 1939).

[13] Mills v. Mills, 115 N. Y. 80, 21 N. E. 714 (1889); Middleton v. Twombly, 58 Super. Ct. 561, 9 N. Y. Supp. 924 (1890).

[14] N. Y. CIV. PRAC. ACT § 48 (3) ("An action to recover damages for an injury to property, or a personal injury, except in a case where a different period is expressly prescribed in this article." By L. 1936, c. 558, the words "an injury to property, or" were struck out from said section and inserted in N. Y. CIV. PRAC. ACT § 49 (6), the three-year Statute of Limitations, and subd. 7 was added to § 49 of said Act. Subds. 6 and 7 apply to actions for injury to property. The latter governs such actions generally, unless an action comes within an express provision to the contrary, and the former when due to negligence).

[15] Potter v. Walker, 276 N. Y. 15, 11 N. E. (2d) 335 (1937); Chance v. Guaranty Trust Co. of New York, 256 App. Div. 840, 9 N. Y. S. (2d) 478 (2d Dept. 1939); Mencher v. Richards, 256 App. Div. 280, 9 N. Y. S. (2d) 990 (2d Dept. 1939).

In the instant case it was found that the wrong alleged to be done to the complainant was no different from the wrong suffered by the corporation in the gift, salary or bonus cases, and the court could not "distinguish the sale of stock by directors at a price in excess of the market value from the sale of a factory to a corporation under similar conditions". However, it should be noted that the stock sale case, being a decision of the same court, lacks the force it would have had if it had been a Court of Appeals case to settle in New York the issue raised in the present case.

A. G.

TAXATION—FEDERAL TAX ON INCOME FROM ALIMONY TRUSTS. —In July, 1930, respondent and his wife, residents of Connecticut, entered into an agreement in contemplation of divorce. This provided for the creation of an irrevocable trust by respondent; the income to be used for the support of his wife and children or, if they should die, for the heirs of his wife or as she provided in her will. After ten years the stock was to be hers outright. The wife obtained a divorce in Reno, in November, 1930. The decree approved the agreement; accordingly, in December, 1930, the trust was created. The trustee received the dividends for 1931, 1932 and 1933 and used them for the wife, but upon respondent's failure to include them in his income tax returns deficiencies were assessed against him. The action by the Commissioner was sustained by the Board of Tax Appeals and reversed by the Circuit Court of Appeals. *Held,* one judge dissenting, affirmed. The Nevada law and the trust have given the husband *pro tanto* a full discharge from his duty to support his divorced wife and leave no continuing obligation on his part, hence the income to the wife from the trust is not taxable to the husband, but it is to be treated the same as income from property after a debtor has transferred that property to his creditor in full satisfaction of his obligation. *Helvering* v. *Fuller,* 310 U. S. 69, 60 Sup. Ct. 784 (1940).

Alimony is a personal or family expense and as such is not deductible in computing net income.[1] However, by statute,[2] income from an irrevocable trust is taxable to the beneficiary or, if so provided in the trust agreement, to the trustee but never to the grantor. It has been held by the Board of Tax Appeals that the grantor should not be taxed on income from an irrevocable trust created for the support of

[1] FEDERAL REVENUE ACT OF 1928, § 24 (a) (1) ("In computing net income no deduction shall in any case be allowed in respect of personal, living or family expenses."). TREASURY REG. 74, arts. 83, 281 (promulgated under the 1928 act defines alimony as a personal or family expense).

[2] REVENUE ACT OF 1928, §§ 166, 167. *Cf.* REVENUE ACT OF 1932.