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LACHES OF STOCKHOLDERS SUING ON BEHALF OF THE CORPORATION.

The case of *Pollitz v. the Wabash Railroad Co., et al.*, 100 N. E., 721, decided in the New York Court of Appeals last December, involves an interesting point as to the doctrine of laches. The facts, sufficient for the purposes of this discussion are these: Five directors of the Wabash Railroad Co. about August, 1904, consummated an agreement, the effect of which was to place in their hands stock of the Wabash Company to the amount, par value, of $10,000,000. In June, 1906, James Pollitz, plaintiff in this action, became a stockholder in the company. In December, 1909, his request to the company to institute this action was refused. He thereupon brought suit for damages against the company and the five directors, alleging that the securities received by the company in consideration for the stock were absolutely worthless, that the transaction was fraudulent and had resulted in damage to the company to the extent of $10,000,000. The prayer of the bill was that the company have judgment against the individual defendants for $10,000,000 with interest, and that they be compelled to account to the company for their official conduct as officers or directors during the period, and pay to the company the loss it sustained as the result of the wrongful and illegal transactions set forth.

It is important to note here that this is not an action to set aside the sale of the stock, but an action to recover damages resulting from the sale.

One of the defenses set up was that the laches of the plaintiff had barred him from getting relief, which defense was demurred to upon the ground, in the words of the Code of Civil Procedure of New York, "that it was not sufficient in law upon the face thereof". The Court of Appeals, standing four to three, held that such defense was sufficiently pleaded. The argument of the majority was that "knowledge on the part of the plaintiff of the essential facts constituting the alleged wrong, the opportunity for seeking and enforcing the remedy, and prolonged delay in doing so are shown." The argument of the minority, speaking through Cullen, C. J., was, "The claim for damages can be barred only by the same statute of limitations that would bar an action by the company for the same relief. . . . as long as the legal right exists, the party is entitled to maintain his action in equity."

The doctrine of laches is an equitable doctrine, growing out of the maxim, *vigilantibus non dormientibus aequitas subvenit.* The fundamental proposition of justice behind that maxim is the same as that which gave rise to the statutes of limitation governing actions at law. The purpose sought to be accomplished by the doctrine of laches is exactly the same as that accomplished by the statutes of limitation. The difference between the methods of applying the two is the natural result of the difference between equitable and legal remedies. It is quite proper, because of the inherent nature of that kind of relief which Courts of Law grant, to say, that a party shall have relief provided it is asked for within a certain stated time. On the other hand, the nature of equitable relief, such as the granting of specific performance, injunctions, bill *quia timet,* etc., makes it necessary in such cases to consider, more especially than at law, the peculiar circumstances of each case, and to require of a suitor greater merit on his part to entitle him to that higher order of relief which he seeks. In some cases diligence is a most important part of that merit, and to such particularly does the doctrine of laches apply.

But when that kind of relief known to us as legal, is sought, for reasons of jurisdiction in a Court of Equity, the Court should look for guidance, not to the principles and rules that govern the administration of equitable remedies, but to those which govern

the kind of relief that is asked for, that is legal relief. The doctrine of laches was not designed to reach cases of this nature, and the statutes of limitation were.

In the principal case the plaintiff is asking that a legal remedy be granted to the company, who is entitled to it, but who cannot obtain it at law because the legal representatives of the company refuse to ask for it. The jurisdictional reason that brings the plaintiff into equity has nothing to do with the nature of the remedy that he seeks, and it should not subject him to the operation of rules which do not apply to that kind of remedy. Thus the matter appears upon principle and we find good authority in support thereof.

Plumer, Master of the Rolls, in *Cholmondeley v. Clinton,* 2 Mer., 173, at page 357, says, "that whenever a bar has been fixed by statute to the legal remedy in a Court of Law, the remedy in a Court of Equity has, in the analogous cases, been confined to the same period." See also the opinion of Lord Eldon, Chancellor, upon appeal in the House of Lords. 4 Bli., 1. This language looks to the nature, whether legal or equitable, of the remedy sought.

That a stockholder fraudulently induced to purchase shares in a company must not be guilty of laches in suing the company to set aside the purchase (equitable relief), but that this rule does not seem to apply to a suit against the fraudulent directors themselves for damages (legal relief), see the following cases:

Burgess' Case, L. R., 15 Ch. Div., 507; *Oakes v. Turquand,* L. R., 2 H. L., 325; *Stone v. City and Co. Bank,* L. R., 3 C. P. Div., 282; *Houldsworth v. City of Glasgow Bank,* L. R., 5 App. C., 317, 323; *Tennant v. City of Glasgow Bank,* L. R., 4 App. C., 615, 621; *Kent v. Freehold Co.,* L. R., 3 Ch., 493; *In re London, etc., Bank,* L. R., 12 Eq., 331; *In re Overend, etc. Co.,* L. R., 3 Eq., 576.

That laches acts only under peculiar circumstances where diligence is an important part of that merit which must be shown to entitle the plaintiff to equitable relief, see the able opinion of Lord Cottenham in *Duke of Leeds v. Amherst,* 2 Phil., 117, 123.

A doctrine very forcibly announced by Lord Redesdale in *Hovenden v. Annesley,* 2 Sch. & Lef., 630, is that although Courts of equity are not within the words of the statutes of limitation, they are within their spirit and meaning, and act as to legal titles

and demands, not by analogy, but in obedience to them. See also upon this point, *Ferson v. Sanger,* 8 Fed. Cases, 4752; *Foley v. Hill,* 19 Eng. Ch., 399; affirmed in the House of Lords, 2 H. L. Cas., 28. This language might be well otherwise worded to the effect that the granting of legal relief, whether in a Court of Law or of Equity, must be done according to the rules applicable to the nature of the relief sought.

In the case of *Galway v. the Metropolitan Elevated Railway Co.,* 128 N. Y., 132, at page 146, Chief Justice Ruger says, "Inasmuch as the equitable remedy depends, among other things, upon the existence of a legal cause of action, it follows that those facts which will bar the legal action will also afford an answer to the equitable remedy, and that so long as a legal remedy exists an Equity Court is open to aid in the enforcement of the legal claim." All the justices concurred in this opinion.

We conclude that the doctrine of laches does not apply to those cases wherein relief of a legal nature is sought, such relief being barred only by the statute of limitations, and we find ourselves in complete agreement with Chief Justice Cullen, in his dissenting opinion concurred in by Vann and Willard Bartlett, J. J.

EFFECT IN A BURGLARY INSURANCE POLICY OF STIPULATIONS AGAINST LOSS WHERE THERE ARE NO VISIBLE MARKS OF FORCE OR VIOLENCE ON THE PREMISES.

In the case of *Rosenthal v. American Bonding Co.,* 100 N. E., 716 (N. Y.), the plaintiff took out a policy of insurance with the defendant company, whereby the latter agreed to indemnify him against loss occasioned by burglary, where the burglar entering or leaving the premises had used force or violence, it being further conditioned that there must be visible marks of such force or violence on the premises. Thieves gained entrance through an unlocked door, assaulted the clerks of the plaintiff, robbed the store, and left the premises by the same means through which they had effected their entry. Recovery was denied on the grounds that there was no visible marks of force on the premises.

It would seem that where a contract is couched in such unequivocal terms as is that which is under consideration in the principal case, there could be no room for doubt as to its import. That such is not the fact, however, readily appears from an examination of the cases, and from the fact that the decision in the

principal case reverses with two dissenting votes the holding of the lower Court, which has been cited for the past three years as authority to the contrary; 38 *Cyc.*, 276. It seems to be conceded in the principal case that there was such a forcible entering as to bring the crime within the definition of burglary. The case is made to turn upon the particular kind of burglary committed, the Court being led to view the case in this light by reason of the phrase in the policy limiting liability to burglary of which there is some visible mark of violence on the premises. Thus the case resolves itself into a consideration of the intention of the parties in inserting the words of limitation into the contract.

Practically all of the cases which have any bearing upon the point have been decided contrary to the principal case. This may be accounted for in two ways: (1) the reluctance of Courts generally to decide in favor of one who has dictated the terms of a contract when the words that he has employed are susceptible of two interpretations; *Schunmaker v. Great Eastern C. & I. Co.*, 197 N. Y., 58: (2) the tendency to regard similar phrases merely as rules of evidence to protect the insurer against fraud, and not as conditions limiting liability where proof is absolute and conclusive; *Mutual Accident Association v. Barry*, 131 U. S., 100. The reason and justice of the first point indicated are too obvious to require special discussion. The second is not so apparent.

From the earliest days of accident insurance there have been stipulations that the insurer shall not be liable unless there be outward and visible marks of the injury on the body, "the body itself in case of death not being deemed such mark." And yet, in practically every case, recovery has been allowed where death has occurred from accident, whether there was any visible mark at all, or whether the only visible mark was a change in the complexion of the corpse, due proof that the injury did result from accident being substantiated by other evidence; *Horsfall v. Pacific Mutual Life Insurance Co.*, 32 Wash., 132. This case is representative of the line of authority followed by the lower Court in deciding the principal case. And while the stipulations of the policies in those cases are analogous to those under consideration here, the Court refuses to apply them.

Is it reasonable then, to hold the insured to the literal meaning of the words employed? In spite of the definiteness with which it is stated that there shall be no liability unless there be visible marks of external violence, is it not fair to assume that nothing

more limiting on the insurer's liability was intended than past judicial interpretation has given to the words? Although the opinion discredits the contention that there could have been any uncertainty as to the intention of the parties in employing the terms used, it is submitted that when Courts for the past fifty years have given express words a particular meaning, those same words employed under similar circumstances in another case should be given the same meaning.

Certainly the primary object in taking out a policy of this sort is to secure to the insured protection against theft. If it is against a particular kind of theft, viz., that in which the burglar favors the insured by leaving the mark of his jimmy on the window sill or door jam, the Court is right in its holding. But it is submitted that were such the real nature of the policy, it would have but little *raison d'etre,* for what manner of man in full possession of his reasoning faculties would protect himself with such a policy at a time when burglary as a fine art has displaced the old time blunderbuss methods of operation? Such a policy offers immunity only against the clumsy amateur burglar, unskilled in the ways of the craft, against whom protection is seldom needed in a well ordered community, while as against his more skillful competitor, the cracksman who leaves behind him no mark of force or violence, the policyholder is without protection. Surely it could never have been the intention of the insured to enter into such an agreement.

Looking at the matter from the insurer's point of view we are forced to the same conclusion. The primary object of a corporation in conducting such a business is to sell as many policies as possible in order to realize on the premiums an amount above the losses sustained by reason of the indemnities. Offering such a policy as the Court would have us believe this to be, just how many policies would a company be able to dispose of?

Interpreting the contract in the light of former decisions, and with strict regard for the considerations which must have influenced the minds of the parties contracting, it is submitted that the words as used in the policy were intended only for protection against fraud in cases where other evidence of the breaking and entering was lacking. They were not intended to limit recovery to a particular kind of burglary, and the Court in deciding the principal case takes a most unique position which it is rather hard to justify or to reconcile with the law as it stands to-day.