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THE CANADA TRUST COMPANY appointed to represent the Estate of Mary C. Nash, deceased (*Defendant*) ..... APPELLANT;

AND

AMANDA LLOYD and ALBERT C. LLOYD as Administrators of the Estate of Reuban Lloyd, deceased (*Plaintiffs*) ..... RESPONDENTS;

AND

CANADA PERMANENT TRUST COMPANY, Executor of the Estate of Fred E. Roets, deceased, GLADYS WARREN WELLS and JOHN WARREN WELLS, Executors of the Estate of John Wells, deceased, and GUARANTY TRUST COMPANY OF CANADA, Administrator ad litem of the Estate of Edward C. Remick, deceased (*Defendants*) .....RESPONDENTS;

AND

THE ATTORNEY GENERAL FOR SASKATCHEWAN as representing Her Majesty the Queen in the right of the Province of Saskatchewan (*Defendant*).

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Equity—Laches—Improper withdrawals of funds from company by directors—Liquidation of company some forty-three years later—No grounds for equitable relief—Contribution of directors' representatives must be amounts taken together with interest thereon—Period for which interest payable.

Remick, Lloyd & Co. was incorporated in 1911 under the laws of West Virginia and in the same year was registered in Saskatchewan as a foreign corporation. The company's capital was invested in farmlands in Saskatchewan. Its charter was forfeited in 1932 and in 1933 the company was struck off the register in Saskatchewan, but the lands remained in the name of the company and as time went on became valuable and a source of profit. These lands were managed by one of the directors until his death in 1942 as though the company was still in existence and thereafter by another director until the appointment on December 18, 1964, of an interim receiver.

Some time prior to December 6, 1921, three of the shareholders who were also directors of the company improperly withdrew from the company and converted to their own uses respectively funds which together totalled $73,082.21. The said directors later pledged their shares as security for the moneys so withdrawn.

*PRESENT: Cartwright C.J. and Martland, Judson, Ritchie and Hall JJ.

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In an action brought to secure (a) appointment of a receiver of the property of Remick, Lloyd & Co., (b) realization of the assets of the company and payment of debts, and (c) distribution of the residue amongst those entitled thereto, the trial judge confirmed the appointment of Montreal Trust Company as receiver but refused to order forfeiture or foreclosure of the pledged shares. He ordered that interest should be assessed against the directors' withdrawals at the rate of 6 per cent for a period of six years. On appeal, the Court of Appeal upheld the judgment of the trial judge in so far as it dealt with forfeiture of the shares, but varied the judgment by ordering that interest should be charged on the withdrawals at the rate of 5 per cent per annum, not compounded, from December 6, 1921, to the date of judgment.

On the present appeal, at the conclusion of the argument on behalf of the appellant, the Court directed that it was not necessary to hear from the respondents on the issue of forfeiture of the shares, the judgment of the Court of Appeal being upheld on this point. The appeal, accordingly, proceeded on the interest issue, the respondents contending that the judgment of the Court of Appeal should be varied to limit interest to the six-year period fixed by the trial judge. The appellant contended that interest should run from December 6, 1921, as ordered by the Court of Appeal.

Held: The cross-appeal on the interest issue should also be dismissed.

Although the delay here was of long duration, 43 years, that fact alone did not determine whether equitable relief should or should not be granted nor the extent to which in the instant case interest should be charged on the moneys improperly withdrawn in 1921. No colour of right, mistaken belief or other factors which might warrant some consideration in equity existed here. The three directors in question took the moneys and enjoyed the full benefits thereof since 1921. Their situation was analogous to that of a legatee who must bring into account even a statute barred debt before he can claim the legacy left to him in the testator's will.

Accordingly, the Court agreed with the judgment of the Court of Appeal that the contribution of the representatives of the three directors who improperly withdrew the moneys must be the amounts taken by each of them with interest thereon at 5 per cent per annum, not compounded, from December 6, 1921.

Erlanger v. New Sombrero Phosphate Co. (1878), 3 App. Cas. 1218; *Harris v. Lindeborg* [1931] S.C.R. 235, applied.

APPEAL and CROSS-APPEAL from a judgment of the Court of Appeal for Saskatchewan[1], varying a judgment of MacPherson J. Appeal and cross-appeal dismissed.

S. J. Safian, Q.C., for the appellant.

Hon. C. H. Locke, Q.C., for Lloyd estate and Wells estate.

Hon. P. H. Gordon, Q.C., for Lloyd estate.

[1] (1967), 59 W.W.R. 340, 60 D.L.R. (2d) 559.

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E. C. Leslie, Q.C., for Roets estate.

M. W. Coxworth, Q.C., for Wells estate.

The judgment of the Court was delivered by

HALL J.:—This is an appeal from the Court of Appeal for Saskatchewan in an action brought to secure (a) appointment of a receiver of the property of Remick, Lloyd & Co., (b) realization of the assets of the company and payment of debts; and (c) distribution of the residue amongst those entitled thereto. The facts are set out *seriatim* in the judgment of Maguire J.A.[2] and may be summarized as follows:

Remick, Lloyd & Co. was incorporated in 1911 under the laws of West Virginia. The shareholders of the company were Reuban Lloyd, John Wells, Mary C. Nash, Fred E. Roets and Edward C. Remick and they contributed to the capital of the company the sum of $100,000 as follows:

Remick	325 shares	$ 32,500.00
Lloyd	325 shares	32,500.00
Roets	200 shares	20,000.00
Wells	100 shares	10,000.00
Nash	50 shares	5,000.00
		$100,000.00

The capital of the company was invested in farmlands in Saskatchewan where the company was until 1933 registered as a foreign corporation at which time it was struck off the register and never reinstated. The company's West Virginia charter provided that it should expire 50 years from the date of incorporation. The charter was forfeited by decree of the Court in West Virginia on May 27, 1932, for failure to pay its annual licence tax.

Some time prior to December 6, 1921, three of the shareholders who were also directors of the company improperly withdrew from the company all cash resources held by it at that time and converted to their own uses respectively the following amounts:

Remick	$61,329.46
Lloyd	7,838.97
Roets	3,913.68

For many years subsequent to 1921 and throughout the depression the affairs of the company were at a low ebb,

[2] (1967), 59 W.W.R. 340 at pp. 341-344, 60 D.L.R. (2d) 559 at pp. 560-563.

accounting, no doubt, for the forfeiture of the charter in 1932 and the company being struck off the register in Saskatchewan in 1933, but the lands remained in the name of the company and as time went on became valuable and a source of profit. These lands were managed by Lloyd until his death in 1942 as though the company was still in existence and thereafter by Roets until the appointment on December 18, 1964, of an interim receiver after the commencement of this action. Remick died in 1958, Roets in 1965. At the time of the trial the lands were said to have a value in excess of $300,000 and in addition there was some $80,000 in cash.

The Attorney General for Saskatchewan on behalf of the Crown in the right of the Province claimed all the assets of the company, real and personal, under the provisions of *The Escheats Act*, R.S.S. 1953, c. 81, or, alternatively, under the common law basing his claim on the fact that the company had been dissolved and had ceased to exist. The learned trial judge dismissed the claim of the Attorney General and no appeal was taken from that dismissal. The Attorney General has, therefore, no interest in the present appeal.

The appellant who was one of the defendants in the original proceeding contended that the shares of the three directors who had improperly withdrawn the funds of the company and who in 1928 had pledged their shares as security for the moneys so withdrawn should be deemed forfeited or foreclosed on the ground that the directors of the company as such were obligated to proceed against the three shareholders so improperly withdrawing moneys, and it also contended in the alternative that interest should be charged on the moneys so wrongfully taken from December 6, 1921.

The learned trial judge, MacPherson J.[3] confirmed the appointment of Montreal Trust Company as receiver but refused to order forfeiture or foreclosure of the shares in question. He ordered that interest should be assessed against the Remick, Lloyd and Roets withdrawals at the rate of 6 per cent for the period of six years. The appellant appealed to the Court of Appeal for Saskatchewan on both issues. No cross-appeal was filed.

[3] February 25, 1966, unreported.

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The Court of Appeal upheld the judgment of MacPherson J. in so far as it dealt with forfeiture of the shares, but varied the judgment by ordering that interest should be charged on the withdrawals at the rate of 5 per cent per annum, not compounded, from December 6, 1921, to the date of judgment.

The appellant in the present appeal contended that the judgment as to forfeiture of the shares should be reversed and that an order to that effect should be made.

The respondents Canada Permanent Trust Company and Guaranty Trust Company of Canada gave notice of intention to vary, claiming that no interest should be chargeable on the moneys so withdrawn or, alternatively, that if any interest should be allowed it should be for the period of six years only as directed by the learned trial judge. The respondents Amanda Lloyd and Albert C. Lloyd gave notice of intention to vary, claiming that interest should be allowed on the moneys improperly withdrawn to a period not later than April 4, 1940. However, by notice of motion for leave to amend the notice to vary, these respondents asked for and were given leave to amend the notice to vary by claiming that the judgment of the Court of Appeal should be varied by limiting recovery of interest to a period of six years.

At the conclusion of the argument on behalf of the appellant, the Court directed that it was not necessary to hear from the respondents on the issue of forfeiture of the shares, the judgment of the Court of Appeal being upheld on this point.

The appeal, accordingly, proceeded on the interest issue, the respondents contending that the judgment of the Court of Appeal should be varied to limit interest to the six-year period fixed by the learned trial judge. The appellant contended that interest should run from December 6, 1921, as ordered by the Court of Appeal. This issue was dealt with by MacPherson J. as follows:

> I think, in preparing my earlier judgment, I overlooked one factor which I should have considered. I decided to order no interest because the other parties had been guilty of laches. Laches does not start immediately upon the commencement of a cause of action. Laches is a defence only. Interest accrues from day to day and is therefore apportionable.
>
> It seems to me that equity and justice would be served if I were to order the estates of Messrs. Remick, Lloyd and Roets to be charged, on distribution, with interest at six percent for six years.

The law is clear that the awarding of full or only partial compensation by way of interest falls to be determined on the same equitable principles as govern a court in determining the just remedy to be granted in respect of the main claim. Lord Blackburn in *Erlanger v. New Sombrero Phosphate Company*[4] summarized the principles involved at pp. 1279-80 as follows:

> In *Lindsay Petroleum Company v. Hurd* [(1874), L.R. 5 P.C. 221, at 239, varying 17 Gr. 115], it is said: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

Rinfret J. (as he then was) dealt with the matter in *Harris v. Lindeborg*[5], as follows:

> . . . but the action is not barred by any statute of limitations and mere lapse of time is not sufficient to deprive the appellant of his equitable rights against the respondents. In order to decide whether the remedy should be granted or withheld, we must examine the nature of the acts done in the interval, the degree of change which has occurred, how far they have affected the parties and where lies the balance of justice and injustice.

I agree with Maguire J.A. that though the delay here is of long duration, 43 years, that fact alone does not determine whether equitable relief should or should not be granted nor the extent to which in the instant case interest should be charged on the moneys improperly withdrawn in 1921. No colour of right, mistaken belief or other factors

[4] (1878), 3 App. Cas. 1218.

[5] [1931] S.C.R. 235 at p. 248.

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which might warrant some consideration in equity exist here. The three directors in question took the moneys and enjoyed the full benefits thereof since 1921. Their situation is analogous to that of a legatee who must bring into account even a statute barred debt before he can claim the legacy left to him in the testator's will. Halsbury, 3rd ed., vol. 2 at pp. 484-5 puts the proposition as follows:

> . . . but the principle applicable is that a person who owes money which would swell the mass of the deceased's estate is bound to make his contribution to the estate before taking a part share out of it . . . . .

citing *Cherry v. Boultbee*[6] and *Courtnay v. Williams*[7].

The contribution which the representatives of the three directors who improperly withdrew the moneys must be the amounts taken by each of them with interest thereon at 5 per cent per annum, not compounded, from December 6, 1921. I agree with Maguire J.A. that the trial judgment should be varied by providing that in effecting distribution the receiver should add interest as aforesaid to the respective amounts chargeable against the Remick, Lloyd and Roets estates respectively. It follows that the cross-appeal on the interest issue should also be dismissed.

In the circumstances of this case and success in this Court being divided, the costs of all parties should be paid by the receiver out of funds in or coming into its hands.

Appeal and cross-appeal dismissed.

Solicitors for the defendant, appellant: S. J. Safian and Associates, Regina.

Solicitors for the plaintiffs, respondents: Embury, Molisky, Gritzfield & Embury, Regina.

Solicitors for the defendant, respondent, Guaranty Trust Company of Canada (Edward C. Remick Estate): Hill, Milliken, Rutherford & Hodges, Regina.

Solicitors for the defendant, respondent, Canada Permanent Trust Company (Fred E. Roets Estate): MacPherson, Leslie & Tyerman, Regina.

Solicitor for the defendants, respondents, Gladys Warren Wells and John Warren Wells (John Wells Estate): Morley W. Coxworth, Davidson, Saskatchewan.

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[6] (1839), 4 My. & Cr. 442.

[7] (1846), 15 L.J. Ch. 204.