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CORPORATIONS — LIMITATION OF ACTIONS — NATURE OF DIRECTORS' STATUTORY LIABILITY FOR ILLEGAL LOANS TO STOCKHOLDERS — The creditors of a bankrupt corporation sued its directors under a New Jersey statute [1] that made the directors liable for all corporate debts to the extent of loans illegally made to stockholders. The decision hinged on the nature of the directors' liability with respect to the New Jersey statute of limitations.[2] The directors maintained that the action was either for a contractual debt or else for a

[1] N. J. Rev. Stat. (1937), § 14:8-10: "No corporation shall loan money to a stockholder or officer thereof. If any such loan be made the officers who make it, or assent thereto, shall be jointly and severally liable, to the extent of such loan and interest, for all the debts of the corporation until the repayment of the sum so loaned."

[2] N. J. Rev. Stat. (1937), § 2:24-1 et seq.

penalty, and that in either case it was barred by limitations. *Held*, that the liability of the directors was neither for a simple debt nor for a penalty within the meaning of the New Jersey statute of limitations, but for a debt on a specialty. *Cole v. Brandle*, (N. J. Eq. 1940) 11 A. (2d) 255.

There is good authority for that part of the present opinion which declares that a director's statutory liability for corporate loans illegally made is for a debt on a specialty and not for a simple debt.[3] But on the question whether such an action is for a penalty the decisions are conflicting and the reasoning is not consistent. The leading case of *Huntington v. Attrill*[4] decided that a New York statute making the officers of a corporation who sign and record a false certificate of the amount of its capital stock liable for all its debts might be enforced in Maryland because it was not a penal law in the strict or "international" sense. The court was careful to point out that it was dealing with "penal laws" in the strict sense, and that the term was commonly used in a general sense "as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered." The latter definition seems a reasonable one when the term is used with respect to the statute of limitations.[5] Applying it to a particular statute, it becomes necessary to determine (1) whether the statute expressly declares that it shall be wrongful for directors to perform certain designated acts,[6] and (2) whether the recovery against the directors is allowed as damages for injury suffered, or is fixed by a more or less arbitrary standard.[7] In the principal case the making of loans to stockholders is declared wrongful by the statute.[8] Again, the recovery against the directors cannot be said to be for damages, since it is allowed regardless whether the corporation is solvent or insolvent, and the creditors are not injured as long as the corporation remains solvent.[9] Also the recovery of corporate debts is none the less arbitrary because it is limited to the amount of the illegal loans that are not paid.[10] While there are a number of federal cases in which the courts have held that treble damages assessed for a violation of the anti-trust laws are not in the nature of a penalty with respect to the statute of limitations, those decisions are distinguishable from the problem in the present case. Under the anti-trust laws the plaintiff must show actual damages and the statute only trebles the verdict of the jury.[11] So also are to be distinguished the cases in which

[3] Cowenhoven v. Board of Chosen Freeholders, 44 N. J. L. 232 (1882); Warren County v. Harden, 95 N. J. L. 122, 112 A. 196 (1920); WOOD, LIMITATION OF ACTIONS, 3d ed., § 39 (1901); 10 AUST. L. J. 102 (1936).

[4] 146 U. S. 657, 13 S. Ct. 224 (1892). Quotation from 146 U. S. at 667.

[5] See 3 FLETCHER, CYCLOPEDIA CORPORATIONS, perm. ed., § 1208 (1931), and cases cited.

[6] Woolverton v. Taylor, 132 Ill. 197, 23 N. E. 1007 (1890); Vestal Co. v. Robertson, 277 Ill. 425, 115 N. E. 629 (1917).

[7] See Brown v. Clow, 158 Ind. 403, 62 N. E. 1006 (1902).

[8] Quoted note 1, supra.

[9] Vestal Co. v. Robertson, 277 Ill. 425, 115 N. E. 629 (1917).

[10] See Continental Oil Co. v. Montana Concrete Co., 63 Mont. 223, 207 P. 116 (1922).

[11] Shelton Electric Co. v. Victor Talking Machine Co., (D. C. N. J. 1922) 277 F. 433; Baush Mach. Tool Co. v. Aluminum Co. of America, (C. C. A. 2d, 1933)

the liability of bank directors for receiving deposits *after insolvency* has been held not for a penalty.[12] The depositor, in such case, is substantially injured by putting his money into an insolvent bank. It is unfortunate that the present court's reasoning on the penalty question was not given more detailed treatment in the opinion.

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63 F. (2d) 778. The Shelton case is cited as authority for the decision on the penalty question in the principal case. The only other case cited on this question is Appleton v. American Malting Co., 65 N. J. Eq. 375, 54 A. 454 (1903), which seems to the writer to be irrelevant.

[12] Noble v. Martin, 191 Wash. 39, 70 P. (2d) 1064 (1937). Compare Vroom v. Thompson, 227 Mo. App. 531, 55 S. W. (2d) 1024 (1932), which is critically analyzed in Noble v. Martin, supra.