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LIMITATIONS OF ACTION-STATUTE OF LIMITATIONS AS GUIDE FOR DETERMINATION OF LACHES WHERE CONCURRENT REMEDIES ARE AVAILABLE IN LAW AND EQUITY

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LIMITATIONS OF ACTION—STATUTE OF LIMITATIONS AS GUIDE FOR DETERMINATION OF LACHES WHERE CONCURRENT REMEDIES ARE AVAILABLE IN LAW AND EQUITY—In 1926 Bovay, one of the complaining trustees in bankruptcy herein, organized an Arkansas corporation to construct and operate a vehicular traffic bridge across the Mississippi River. Defendants agreed to finance the project but were dissatisfied with the voting control of the Arkansas corporation lodged in Bovay and organized a Delaware corporation, the bankrupt herein, to take an assignment of the bridge franchise. The bankrupt issued 60,000 shares of no par value common stock, 40,000 shares going to defendants though no consideration was paid, and 20,000 shares to Bovay. Defendants also named five of the nine members of the board of directors. The bankrupt sold $7,500,000, $100 par value debenture and first mortgage bonds at 90 to the defendants who already had contracted for their resale at more than par. The defendants also fleeced the bankrupt of $275,000 for alleged divers expenses in organizing the Delaware corporation. Though insolvent from its conception by virtue of the frauds perpetrated by the defendants, the bankrupt operated the bridge in an incompleted state until 1934 when it was finally adjudicated a bankrupt by a federal court in Mississippi. The trustees in bankruptcy filed a plenary suit against the defendants for breach of fiduciary trust, but the complaint was dismissed for lack of jurisdiction in June 1936. For some unknown reason permission to sue in the Delaware courts was not granted until January 1939 when Plaintiff's complaint was promptly filed. The trial court dismissed the bill on the ground that since the cause of action was not within the exclusive jurisdiction of equity, the three years statute of limitations was conclusive of laches. *Held*, reversed. *Bovay v. H. M. Byllesby & Co.*, (Del. 1944) 38A. (2d) 808.

Where the law and equity courts have concurrent remedies for the same cause of action, even though the equitable relief is more desirable, the statute of limitations ordinarily is employed by chancery to determine conclusively the presence of laches.[1] But where the cause of action falls exclusively within the cognizance of courts of equity, the statute of limitations is not controlling unless the statute expressly so provides.[2] Thus, in the field of trusts, the statute does not run against express trusts cognizable only in equity, but does bar suits based on implied trusts, which have counter remedies, in the courts of law. In many states the statute of limitations applies to all equitable suits as well as legal actions.[3] In those jurisdictions which have abolished the distinction between legal and equitable forms of actions the statute of limitations is, of course, applicable to all

[1] Minion v. Warner, 238 N.Y. 413, 144 N.E. 665, (1924); Hughes v. Brown, 88 Tenn. 578, 13 S.W. 286 (1890); Baker v. Cummings, 169 U.S. 189, 18 S. Ct. 367, (1898); Browne v. Browne, 17 Fla. 607 (1880). See 2 POMEROY, EQUITY JURISPRUDENCE, 5th ed., § 418 (1941).

[2] Evans v. Moore, 247 Ill. 60, 93 N.E. 118 (1910); Shelby v. Shelby, 3 Cooke (Tenn.) 179, (1812); Felsenheld v. Bloch Bros. Tobacco Co., 119 W. Va. 167, 192 S.E. 545 (1937); Union Bank v. Stafford, 12 How. (U.S.) 327 (1851); But courts of equity usually hold statute of limitations obligatory upon them where chancery is enforcing merely legal rights; Riddle v. Whitehill, 135 U.S. 621, 10 S. Ct. 924 (1890); Phalen v. Clark, 19 Conn. 421 (1849).

[3] Boyd v. Blankman, 29 Cal. 19, (1865); Stoneham Five Cents Sav. Bank v. Johnson, 295 Mass. 390, 3 N.E. (2d) 730 (1936); Washington Sav. Bank v. Butchers' & Drovers Bank, 107 Mo. 133, 17 S.W. 644 (1891); Smith v. Fly, 24 Tex. 345 (1859); Ellis v. Ward, 137 Ill. 509, 25 N.E. 530 (1890).

suits.[4] In the principal case, the trustees in bankruptcy either could have sued at law in tort or in equity for an accounting on a constructive trust theory. The defendants strenuously argued that inasmuch as concurrent legal and equitable remedies were available for the same cause of action, the court was bound by the general rule to accept the expiration of the 3 years statute of limitations as conclusive of laches. And by the great weight of authority,[5] the statute of limitations applies to both actions at law and suits in equity to compel officers, directors, or promoters of a corporation to account for assets misappropriated by them or to hold them liable for losses caused by their wrongful or unauthorized acts. The court in the principal case admitted that where suits are instigated to recoup losses of the corporation suffered by the passive neglect of duty of its officers or directors, the statute of limitations should be held applicable in order to afford ample protection to retiring officers and directors. But where they have unlawfully enriched themselves at the expense of the corporation by their wrongful acts of commission, as distinguished from acts of omission, a different rule should apply. In such instances, the court argued, equity should not regard their wrongful acts as mere torts but as breaches of trust of so serious a nature as to justify treating the trust as an express trust outside the protection of the statute of limitations. A like result has been reached in other jurisdictions.[6] The majority rule is to be criticized in two respects: (a) it affords to corporate officers an ample opportunity to cover their misfeasances by lapse of time, (b) and by affording protection to the corporate officers, the public is denied the opportunity of safely investing in and lending credit to corporate enterprise. The writer submits the minority rule, expressed in the principal case, rests on sounder reasoning.

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[4] Patterson v. Hewitt, 195 U.S. 309, 25 S. Ct. 35 (1904); Trail v. Firth, 186 Cal. 68, 198 P. 1033 (1921); Chinn v. Trustees, 32 Ohio St. 236 (1877); Hotchkin v. McNaught-Collins Imp. Co., 102 Wash. 161, 172 P. 864 (1918).

[5] Anderson v. Gailey, (D.C. Ga. 1929) 33 F. (2d) 589; Blythe v. Enslen, 203 Ala. 692, 85 S. 1 (1919); Lippitt v. Ashley, 89 Conn. 451, 94 A. 995 (1915); Landis v. Saxton, 105 Mo. 486, 16 S.W. 912 (1891); Brinckerhoff v. Bostwick, 99 N.Y. 185, 1 N.E. 663 (1885); Wallace v. Lincoln Savings Bank, 89 Tenn. 630, 15 S.W. 448 (1891); Jones Mining Co. v. Cardiff Mining & Milling Co., 56 Utah 449, 191 P. 426 (1920). The statute of limitations does not begin to run until the wrong doing officer-director has been removed from office; Curtis v. Connly, 257 U.S. 260, 42 S. Ct. 100 (1921); Becker v. Billings, 304 Ill. 190, 136 N.E. 581 (1922).

[6] Ellis v. Ward, 137 Ill. 509, 25 N.E. 530 (1890); Williams v. McKay, 40 N.J. Eq. 189 (1885); Ventress v. Wallace 111 Miss. 357, 71 S. 636 (1916).

In California, a statute imposing liability on corporate promoters, officer-directors provides that no statute of limitations shall be a bar to any suit under the statute.