

**HUTCHINGS v. LAMPSON et al.**

(Circuit Court, N. D. Illinois, N. D. November 8, 1897.)

**LIMITATION OF ACTIONS—IMPLIED PROMISE—CORPORATIONS.**

Under statutes making stockholders liable for corporate debts in case the same cannot be collected from the corporation, the liability is based upon an implied promise created by the acceptance of the stock, within the purview of the Illinois statute barring actions on oral contracts in five years.

This was an action at law by Charles F. Hutchings, as executor, against S. Warren Lampson and others. The case was heard on demurrer to the declaration.

Thompson, Delamater & Clark, for plaintiff.  
David Kirtan, for defendants.

GROSSCUP, District Judge (orally). The action is to recover against the defendant on his statutory liability as a shareholder in a Kansas corporation. The declaration sets up the existence of the corporation, the constitution and statutory provisions of Kansas relating to liability of shareholders therein, the obtaining of the judgment, and the issuance of execution thereon, returned nulla bona, and some other facts not essential to the inquiry raised by the demurrer. The declaration shows that the original debt, merged into the judgment, was contracted in January, 1882, and matured four years thereafter; that judgment thereon was recovered in the United States circuit court for the district of Kansas October 8, 1888, and on the 25th of September, 1890, a pluries execution was issued thereon, which on the 25th of September, 1890, was returned by the marshal nulla bona. The action in this court was begun on the 24th of August, 1897, and is by the executor of the party to whom the debt was originally due. It is not alleged when he became such executor, nor is the date of the decease of the original creditor averred. The question raised by the demurrer to the declaration relates to the statute of limitation.

In states where the statutory liability of the shareholder is primary (that is, where the creditor can proceed against the shareholder irrespective of a judgment and execution against the corporation), an action such as this is considered to be upon the original indebtedness; and, if the evidence of such original indebtedness is a promissory note, the statutory limitation of 10 years, beginning at the maturity of such note, would be applied. The promissory note evidencing the original indebtedness in this case matured in January, 1886; and but for the fact that the payee, in the interval, died, the statute of limitations would have run in January, 1896. The declaration does not show any facts which legally enlarge the time of the running of this statute.

But the liability of the defendant in this cause is not primary, under the laws of Kansas. Such liability is contingent upon the failure to collect the debt from the corporation. Clearly, then, this action is not upon the original promissory note. Nor is it an action upon the judgment entered in the circuit court of the United

States for the district of Kansas. The defendant was individually no party to that judgment. For the purposes of proceedings of that kind, the corporation and its shareholders are distinct and separate persons. The legal source of liability in actions like this, which seems to have met the approval of the supreme court of the United States (*Carroll v. Green*, 92 U. S. 509), may be stated as follows: The shareholder, acquiring stock in a Kansas corporation, impliedly undertakes, by virtue of the constitution and laws of Kansas entering into the contract, to be personally liable to creditors of the corporation, to the extent of his stock, in the contingency that the corporation itself cannot pay its debt. The liability, therefore, is a contract liability, and resides in the act of accepting the stock of such a corporation. The action upon such liability is not, therefore, upon a written promise or undertaking to pay money, nor upon any judgment, but upon the stockholder's implied promise in his act of accepting the stock. In this view of the case, the five-year limitation applies. It follows, therefore, that the demurrer to the declaration must be sustained.

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AMERICAN EXCH. NAT. BANK OF NEW YORK v. FIRST NAT. BANK  
OF SPOKANE FALLS et al.

(Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

No. 336.

1. NOTICE TO TAKE DEPOSITIONS—REASONABLENESS AS TO TIME.

What constitutes a reasonable notice, in point of time, of the taking of depositions, under Rev. St. §§ 863-865, depends upon the circumstances of each particular case; the chief circumstances to be considered being distance, number of witnesses, and facility of communication to obtain proper representation at the taking.

2. DEPOSITIONS—NOTARY'S CERTIFICATE.

A statement in the certificate of a notary taking a deposition that he is "not of counsel nor interested in any manner whatever in this cause" is a substantial compliance with the requirement of Rev. St. § 863.

3. BANKS AND BANKING—COVERT BORROWING BY BANK.

If, for the purpose of enabling a bank to borrow without having its printed statements show it as a borrower, another bank credits a sum to the borrower's account, and charges the same to a special account, and takes an individual guaranty note from the borrower's directors, amounts drawn on the credit constitute a loan to the bank, and not to its directors.

4. SAME—TRIAL—QUESTION FOR JURY.

Upon the question whether a loan was made to the defendant bank itself, and secured by a guaranty note of its directors individually, or was made to the directors upon their own note, there was conflicting testimony as to the original agreement, but it appeared that interest was charged to the bank, and by it entered on its books under profit and loss; that the note itself was a promise to repay loans made to the bank; that the bank's cashier, in transmitting the note, referred to it as a guaranty; and that the loan was credited to the bank, and drawn on by it in the ordinary method and course. *Held*, that there was sufficient evidence of a loan to the bank to warrant a submission to the jury.

5. SAME—BORROWING IN DIRECTORS' NAMES.

On the question whether a loan was made to a bank or to its directors, the private arrangements of the directors as to how the transaction should