

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Huntington v. Attrill, from the Court of Appeal for Ontario; delivered 17th February 1892.

Present :

THE LORD CHANCELLOR.

LORD WATSON.

LORD BRAMWELL.

LORD HOBHOUSE.

LORD MORRIS.

LORD SHAND.

[*Delivered by Lord Watson.*]

The Appellant, in June 1880, became a creditor for money lent to the Rockaway Beach Improvement Company, Limited, which carried on business in the State of New York, being incorporated pursuant to Chapter 611 of the State laws of 1875. Section 21 of the Act provides that, "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof."

The Respondent was, in June 1880, a Director, and in that capacity an officer of the Company within the meaning of the statute. On the 30th of that month he, along with other officers of the Company, signed and verified on oath, as

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prescribed by Section 37, a certificate setting forth that the whole capital stock had, at its date, been paid up in cash.

In the year 1883, the Appellant instituted a suit against the Respondent before the Supreme Court of New York State for the unpaid balance of his loan to the Company, alleging that the certificate contained representations which were material and false, and that the Respondent had incurred personal responsibility for the debt as provided by Section 21. The Respondent defended the action, but, a verdict having been found against him, the Court, on the 15th June 1886, gave final judgment, ordering him to pay to the Appellant the sum of \$100,240.

Having failed to recover payment the Appellant, in September 1886, brought an action upon his decree in the Common Pleas Division of the High Court of Justice for the Province of Ontario, where the Respondent resided. The only plea stated in defence was to the effect that the judgment sued on was for a penalty inflicted by the municipal law of New York; and that the action being one of a penal character ought not to be entertained by the Courts of a foreign State.

Mr. Justice Street, who tried the case, being of opinion that the enactments of Section 21 were strictly punitive and not remedial, dismissed the action with costs. The Judges of the Appeal Court were equally divided in opinion, the result being that the appeal taken from his decision was dismissed. The Chief Justice (Hagarty) and Mr. Justice Osler were of opinion that the statutory remedy given to the Appellant as a creditor of the Company being civil only, and not enforceable by the State or by the public, was not a penal matter in the sense of international law. Mr. Justice Burton was of the same opinion, but held himself precluded from

giving effect to it for reasons which he thus explains:—"The Courts of the State of New York have placed an interpretation upon this particular statute in which I should not have agreed, but those decisions are the law of the State of New York, and with that we are dealing. I am of opinion, therefore, that on that undisputed expert testimony this is a penal statute there, and the judgment obtained upon it cannot be enforced here." In the conclusion thus stated Mr. Justice Maclellan expressed his concurrence. But the learned Judge, in that respect agreeing with the Court of First Instance and differing from the other members of the Court of Appeal, held that the enactment was in itself undoubtedly penal, inasmuch as it was passed in the public interest, providing a punishment for an offence," and that "it makes no difference that what it exacts from the offender is given to persons who are ordinary creditors of a Company in payment of their respective debts."

Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the Courts of Ontario were bound to pay absolute deference to any interpretation which might have been put upon the Statute of 1875 in the State of New York. They had to construe and apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court whose jurisdiction is invoked. Judicial decisions in the State where the cause of action arose are not precedents which must be followed, although the reasoning upon which they are founded must always receive careful consideration, and may be conclusive. The Court appealed to must determine for itself, in the first place, the substance of the right sought to be enforced; and, in the second place, whether

its enforcement would, either directly or indirectly, involve the execution of the penal law of another State. Were any other principle to guide its decision, a Court might find itself in the position of giving effect in one case and denying effect in another, to suits of the same character, in consequence of the causes of action having arisen in different countries; or in the predicament of being constrained to give effect to laws which were, in its own judgment, strictly penal.

The general law upon this point has been correctly stated by Mr. Justice Story in his "Conflict of Laws" and by other text writers; but their Lordships do not think it necessary to quote from these authorities in explanation of the reasons which have induced courts of justice to decline jurisdiction in suits somewhat loosely described as penal, when these have their origin in a foreign country. The rule has its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the Courts of any other country.

Their Lordships have already indicated that, in their opinion, the phrase "penal actions," which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic *forum*, does not afford an accurate definition. In its ordinary acceptation, the word "penal" may embrace penalties for infractions of general law

which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. The phrase was used by Lord Loughborough and by Mr. Justice Buller in a well known case (*Folliott v. Ogden*, 1, H.B., 135; and *Ogden v. Folliott* 3, T.R., 734), and also by Chief Justice Marshall, who, in the "*The Antelope*" (10, Wheaton, 123), thus stated the rule with no less brevity than force,—“The Courts of no “country execute the penal laws of another.” Read in the light of the context, the language used by these eminent lawyers is quite intelligible, because they were dealing with the consequences of violations of public law and order, which were unmistakably of a criminal complexion. But the expressions “penal” and “penalty,” when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the State in the interest of the community, or by private persons in their own interest.

The Supreme Court of the United States had occasion to consider the international rule in *Wisconsin v. the Pelican Insurance Company* (127, U.S. (20 Davis), p. 265). By the statute law of the State of Wisconsin, a pecuniary penalty was imposed upon corporations carrying on business under it who failed to comply with one of its enactments. The penalty was recoverable by the Commissioner of Insurance, an official entrusted with the administration of the Act in the public interest, one half of it being payable

into the State Treasury, and the other to the Commissioner, who was to defray the costs of prosecution. It was held that the penalty could not be enforced by the Federal Court, or the judiciary of any other State. In delivering the judgment of the Bench, Mr. Justice Gray, after referring to the text books, and the *dictum* by Chief Justice Marshall already cited, went on to say: "The rule that the Courts of no country
 " execute the law of another applies not only to
 " prosecutions and sentences for crimes and mis-
 " demeanors, *but to all suits in favour of the*
 " *State* for the recovery of pecuniary penalties
 " for any violation of statutes for the pro-
 " tection of its revenue or other municipal laws,
 " and to all judgments for such penalties."

Their Lordships do not hesitate to accept that exposition of the law, which, in their opinion, discloses the proper test for ascertaining whether an action is penal within the meaning of the rule. A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favour of the State whose law has been infringed. All the provisions of Municipal Statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the State law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the State, unless their vindication rests with the State itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the State, or of an official duly authorized to prosecute on its behalf, or of a member of the

public in the character of a common informer. An action by the latter is regarded as an *actio popularis* pursued, not in his individual interest, but in the interest of the whole community.

The New York Statute of 1875 provides for the organization and regulation of Corporations formed for the purpose of carrying on all kinds of lawful business with the exception of certain branches therein specified. It confers rights and privileges upon persons who choose to form a trading association, and to become incorporated under its provisions, with full or with limited liability; and, in either case, it varies and limits the rights and remedies which, under the common law, would have been available to creditors of the Association, as against its individual members. On the other hand, for the protection of those members of the public who may deal with the Corporation, the Act imposes upon its directors and officers various stringent obligations, the plain object of which is to make known, from time to time, to all concerned, the true condition of its finances. Thus they are required (Section 18) to publish an annual report, stating the amount of capital, the proportion actually paid in, the amount and nature of existing assets and debts, the names of the shareholders and the dividends, if any, declared since last report; and (Section 37) to certify the amount of capital stock paid in within thirty days after payment of the last instalment. In both cases the consequence of the report or certificate being false in any material representation, is, that every director or officer who vouched its accuracy becomes, under Section 21, liable personally for all the debts of the Corporation contracted during his period of office.

The provisions of Section 21 are in striking contrast to the enactments of Section 34, which inflicts a penalty of \$100 upon every director or officer of a corporation with limited liability,

who authorises or permits the omission of the word "limited" from its seal, official publications, or business documents. In that case, the penalty is recoverable "in the name of the people of the State of New York by the district attorney of the county in which the principal office of such corporation is located, and the amounts recovered shall be paid over to the proper authorities for the support of the poor of such county." It does not admit of doubt that an action by the district attorney would be a suit in favour of the State, and that neither the penalty, nor the decree of a New York Court for its amount, could be enforced in a foreign country.

In one aspect of them, the provisions of Section 21 are penal in the wider sense in which the term is used. They impose heavy liabilities upon directors, in respect of failure to observe statutory regulations for the protection of persons who have become or may become creditors of the corporation. But, in so far as they concern creditors, these provisions are in their nature protective and remedial. To use the language of Mr. Justice Osler, they give "a civil remedy only to creditors whose rights the conduct of the Company's officers may have been calculated to injure, and which is not enforceable by the State or the public." In the opinion of their Lordships, these enactments are simply conditions upon which the Legislature permits associations to trade with corporate privileges, and constitute an implied term of every contract between the corporation and its creditors.

A number of American authorities were cited in the course of the argument, which may be briefly noticed, seeing that they were made the subject of comment in both Courts below. With one exception, they do not appear to their Lordships to have a direct or material bearing upon the point raised in this appeal.

In *Steam Engine Company v. Hubbard* (101, U. S. (XI. Otto) 188) the facts were these. The law of Connecticut, in the event of the President and Secretary of a corporation intentionally neglecting to issue a certain certificate, made them jointly and severally liable "for all debts contracted during the period of such neglect." Under that provision an action was brought by a creditor of the Corporation against its President, for a debt contracted before the period of neglect began, which remained unpaid during its continuance. There was no question as to enforcing the claim in another State. The Supreme Court of the States held that the enactment was penal, and therefore to be strictly construed; and also that the President was not liable, inasmuch as the debt was not contracted during the period of his default. The decision appears to be absolutely right; but their Lordships apprehend that the canon of construction applied in that case would be equally applicable to the case of a penalty stipulated by bond, or in a mercantile contract.

Flash v. Conn (109 U.S. (2 Davis), 371), another decision of the Supreme Federal Court, was relied on by the Appellant. In that case a New York Statute of 1848 had provided that, until the whole capital stock of the Corporation was paid up, every stockholder should be liable to its creditors to an amount equal to the amount of stock held by them. It was decided that the claim of a creditor under that provision was contractual and not penal, and might therefore be enforced by an action at law. The result appears to be inevitable, because the liability was not imposed in respect of failure to perform any duty prescribed by the Act; but it throws no light upon the present question.

The Respondent, in his argument, placed great reliance upon *Merchants' Bank v. Bliss* (35 N.Y.

(8 Tiffany), 412), which was decided in 1866. The statute of 1848, already referred to, required the trustees of the Corporation to make a report at a stated period, and, in the event of their failure to do so, rendered them jointly and severally liable for all its debts then existing, or which might be contracted before the report was actually made. The suit was by a creditor against a defaulting trustee, and the only question raised was this,—whether the action was for a “liability created by statute, other than penalty or forfeiture,” within the meaning of the Statute of Limitations, or “for a penalty or forfeiture, when action is given to the party aggrieved”? The Supreme Court of New York decided that the liability belonged to the second category, and that suit was consequently barred by the lapse of three years. In another case, *Wiles v. Suydam* (64 N.Y., 173), the same Court held that a similar claim by a creditor, being for a statutory penalty or forfeiture, could not be joined in a declaration with a claim upon contract. Their Lordships see no reason to question the propriety of these decisions, but it is hardly necessary to say that a delict may give rise to a purely civil remedy, as well as to criminal punishment. Although a right of action is given to the party aggrieved, it does not follow that the law of nations must regard his action as a suit in favour of the State.

Attrill v. Huntington (70 Maryland, 191) is, however, an authority upon the very point raised in this appeal. During the dependence of the present action the Appellant preferred a bill in equity, before the Supreme Court of the State of Maryland, to set aside certain transfers of stock by the Respondent, upon the allegation that they were fraudulently made in order to defeat his claims under the decree of June 1886. The

Primary Judge granted the relief craved, but the Court of Appeal, by a majority of five judges against two, reversed his decision and dismissed the bill, holding that the decree, being for a penalty, could not be enforced beyond the limits of the State of New York. Their Lordships are constrained to differ from the reasons assigned by Mr. Justice Bryan in delivering the judgment of the majority, which do not appear to them sufficiently to recognize the distinction, from an international point of view, between a suit for penalty by a private individual in his own interest, and a suit brought by the Government or people of a State for the vindication of public law. The distinction is clearly pointed out in the opinion of the dissentient Judges as expressed by Mr. Justice Stone, in whose reasoning their Lordships concur.

Being of opinion that the present action is not, in the sense of international law, penal, or, in other words, an action on behalf of the Government or community of the State of New York for punishment of an offence against their municipal law, their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to give decree in favour of the Appellant, with costs in both Courts below. The Appellant must have the costs of this appeal.

