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## Banks and Banking--Enforcement of Stockholders' Double Liability

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STUDENT NOTES

**BANKS AND BANKING — ENFORCEMENT OF STOCKHOLDERS' DOUBLE LIABILITY.** — Although stockholders in corporations generally are liable to creditors only to the amount of their respective subscriptions,<sup>1</sup> a different basis of liability has been adopted for the holders of shares in banking corporations by the West Virginia Constitution itself.<sup>2</sup> They are liable to creditors "over and above the amount of stock held by them respectively to an amount equal to their respective shares so held, for all its liabilities accruing while they are such stockholders". The method of enforcement of this liability and the supervision of banking institutions generally has been prescribed by a series of statutes, the latest revision occurring in 1929.<sup>3</sup> This is now written into the Revised Code (1931).<sup>4</sup>

The purpose of these acts, and particularly the last, has been to provide a safe, speedy and economical manner of administering banking institutions in general; to throw safeguards about those that are sound and to wind up swiftly and efficiently those that have ceased to be so. The commissioner of banking is given broad powers. If it shall appear to him that the capital is impaired or the institution insolvent he may appoint as receiver an employee of his department, and upon such appointment shall bring any suit or suits necessary to wind up the corporation's affairs and collect all assets, including the liability of the stockholders on their respective shares,<sup>5</sup> if the assets do not seem equal to the liabilities.

That such enactments as these are constitutional and do not impair the obligation of the stockholders' prior contract with the state appears to be well-settled. They generally prescribe merely a new means of enforcing an already existing obligation<sup>6</sup> and are

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<sup>1</sup> W. VA. REV. CODE (1931) c. 31, art. 1, § 35 provides, in effect, that liability to creditors shall extend only to the amount subscribed but that a release of the unpaid portion, if any, shall be ineffective as to creditors. For an exposition of the state of the law generally see MORSE, BANKS AND BANKING (6th ed. Voorhees, 1928) § 675.

<sup>2</sup> CONSTITUTION OF WEST VIRGINIA art. 11, § 6. W. VA. REV. CODE (1931) c. 31, art. 4, § 16.

<sup>3</sup> Acts 1929, c. 23.

<sup>4</sup> W. VA. REV. CODE (1931) c. 31, arts. 4 and 8.

<sup>5</sup> These provisions are contained in W. VA. REV. CODE (1931) c. 31, art. 8, § 32. And see the appended notes of the revisers and the Legislative Committee.

<sup>6</sup> For a general discussion of the problem see MORSE, BANKS AND BANKING (6th ed. Voorhees, 1928) § 676-677. Of course, a statute creating an entirely new liability on the shareholders would impair the obligation of their contract with the state, unless there is a statute declaring such charters sub-

within the regulatory principle of the police power of a state.<sup>7</sup> As to the basic nature of this liability, *i. e.*, whether the liability is that of principal or surety, there is a split of authority.<sup>8</sup> The view adopted by the West Virginia court is that the stockholder is only secondarily liable as surety.<sup>9</sup> It is submitted that there is no practical difference. Under each view the stockholder is liable at the same time for the full amount of the liability imposed upon him. He must pay the maximum amount of his statutory obligation, and, if only a portion is needed to pay creditors, the stockholder must wait until full settlement before receiving back his *pro rata* share.<sup>10</sup>

That the determination of the fact of insolvency by the commissioner of banking, as provided by the statute, is incontestable has been decided recently in *Tabler v. Higginbotham*.<sup>11</sup> This case further holds that as a condition precedent to establishing the liability the statutory receiver must show that the debt was incurred while the alleged stockholder was such.<sup>12</sup> Of course, the liability extends to all such debts and it has been held to accrue the instant the debt was contracted.<sup>13</sup> And a renewal of the debt will not operate to extinguish this liability if the stock has been transferred in the meantime.<sup>14</sup>

This section of the Constitution and its corresponding statute<sup>15</sup> do not expressly state that a transfer of the stock shall not transfer the liability and it would appear that they might be interpreted so that such a transfer would transfer the corresponding

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ject to amendment. Grand Rapids Savings Bank's Appeal, 52 Mich. 537, 18 N. W. 356 (1884).

<sup>7</sup> *Shallenberger v. Bank of Holstein*, 219 U. S. 114, 31 S. Ct. 189 (1911); *Weed v. Bergh*, 141 Wis. 569, 124 N. W. 664 (1910).

<sup>8</sup> Under the Federal Act the stockholders are liable as principals. *Hobart v. Johnson*, 8 Fed. 493 (1881).

<sup>9</sup> See *Finnell v. Bane*, 93 W. Va. 697, 117 S. E. 549 (1923) for a discussion of the differences between the Federal Act, 12 U. S. C. A. c. 2, § 64 (1926), and the West Virginia statute, *supra* n. 2. Most of the differences have been eliminated, the chief remaining one being that under the Federal Act the stockholders are liable to the same amount without regard to when the debt was incurred by the bank, while in West Virginia to make the shareholder liable the debt must have been incurred while he was a stockholder. See note L. R. A. 1915B 168.

<sup>10</sup> W. VA. REV. CODE (1931) c. 31, art. 8, § 32.

<sup>11</sup> 156 S. E. 751 (W. Va. 1931).

<sup>12</sup> *Accord: Heater v. Lloyd*, 85 W. Va. 570, 102 S. E. 228 (1919).

<sup>13</sup> *Dunn v. Bank*, 74 W. Va. 594, 82 S. E. 758 (1914). *Cf. Heater v. Lloyd*, *supra* n. 12; *Clark v. Bank*, 72 W. Va. 491, 78 S. E. 785 (1913); *Benedum v. First National Bank*, 72 W. Va. 124, 78 S. E. (1913); *Pyles v. Carney*, 85 W. Va. 159, 101 S. E. 174 (1919).

<sup>14</sup> *Dunn v. Bank*, *supra* n. 13, holding further that after insolvency the liability of stockholders is an asset to be administered as any other.

<sup>15</sup> See n. 3, *supra*.

liability. But it seems that the manifest intent of the section, so far as such intent is judicially determined, was otherwise.<sup>16</sup> And a common-sense reading of it would seem to support this view. A contrary holding would throw open the avenue to considerable fraud. Persons in a position to know the institution's condition, and at least inferentially aware of the impending catastrophe, could transfer their stock to parties perhaps not financially responsible. Such a transfer would stand on approximately the same ground as a transfer of property in contemplation of bankruptcy.

On the whole the interpretation given by the court to this constitutional provision and its accompanying statutes, as evidenced in *Tabler v. Higginbotham*<sup>17</sup> and other cases, seems consonant with the idea of giving the depositor proper consideration and shortly determining the affairs of a defunct banking corporation.

—ROBERT E. STEALEY.

CONSTRUCTIVE TRUSTS AND CONTRACTS TO CONVEY IN WEST VIRGINIA.—The absence in a jurisdiction of a historic statutory provision that is in existence almost universally may raise as many difficulties as the existence of a peculiar local statute operating upon the general principles of the common law. This fact is strikingly shown in the absence of the seventh section of the English Statute of Frauds in West Virginia. The failure of our legislature to enact this section requiring all declarations of trust in realty to be in writing has caused quite a confusion in the cases as to the validity of oral trusts in West Virginia.

The cases coming within the scope of this problem may be readily divided into two classes—declarations of trust by the grantor, and like declarations by the grantee. As to the first class there are three separate situations set forth in the leading case of *Troll v. Carter*<sup>1</sup>, which has been adopted by the cases as the law of this state. They are:

- (1) When the grantee orally agrees to hold in trust for the

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<sup>16</sup> *Dunn v. Bank*, *supra* n. 13; MORSE, BANKS AND BANKING (6th ed. Voorhees, 1928) § 675a. Many legal theorists and philosophers maintain that the intent of the legislature is incapable of determination and is a myth used to cloak judge-made law. In the language of Justice Holmes, "A word is but the skin of a living thought". So a statute may be only a pallid skin. Nevertheless, from time and circumstances of its adoption the purpose of legislation can often be determined beyond reasonable doubt.

<sup>17</sup> *Supra* n. 11.

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<sup>1</sup> 15 W. Va. 567 (1879).