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Double Liability of a Bank Stockholder for a Debt of the Bank Incurred Before His Ownership of the Stock - Ghingher v. Bachtell

DOUBLE LIABILITY OF A BANK STOCKHOLDER FOR A DEBT OF THE BANK INCURRED BEFORE HIS OWNERSHIP OF THE STOCK—*GHINGHER V. BACHTELL*[1]

Appellant, receiver of an insolvent bank, petitioned the trial court for an order adjudging that the stockholders, including the appellees, should be required to pay to the receiver sums equal to the par value of the stock held, under the "double liability" of stockholders in State banks. The trial court passed a summary order to that effect, which order the appellees petitioned to have rescinded. The petition for rescission specifically contested the liability of the stockholders for such debts of the bank as were incurred at times when the petitioners were not then stockholders. This petition alleged "That the statutes of Maryland under and by virtue of which said order of assessment was passed, impair the obligation of contracts, are discriminatory and deprive your petitioners of equal protection of the law, deprive your petitioners of property without due process of law, and otherwise contravene the provisions of the Constitutions of Maryland and of the United States." The trial court granted the petition for rescission of the summary order and the receiver appealed. *Held*: Decree reversed and cause remanded with costs to the appellant.

The ruling of the trial court limited the double liability of stockholders at the time of receivership to debts of the bank contracted during the period of such stock ownership. The ruling of the Court of Appeals held them liable for all debts of the bank regardless of when such debts were incurred.

[n] Sturges v. Crowninshield, 4 Wheat. 122, 4 L. Ed. 529 (1819).

[1] 164 Md. 678, 182 Atl. 558 (1936). Appeal pending in the Supreme Court of the United States, No. 298, October Term, 1936.

Prior to 1851 there was no "double liability" of bank stockholders. The Constitution of 1851,[2] the Constitution of 1864,[3] and the Constitution of 1867,[4] all provided for it. The last named constitutional provision has now been repealed by vote of the electorate at the November, 1936, election in passing on a proposed constitutional amendment to that effect.[5] In addition to the constitutional double liability of bank stockholders, there is a statutory double liability of stockholders in trust companies, going back to 1892,[6] and a statutory double liability for bank stockholders dating from 1910.[7]

The Court pointed out that prior to 1904[8] in the case of trust companies and prior to 1910[9] in the case of banks the double liability was enforced by a direct suit between the creditor and the stockholder. It is only since those dates that there is provision for the receiver's collecting the double liability from the stockholders and holding it for the benefit of the creditors generally. Today the practice under the statutes of 1904 and 1910 makes it clear that the stockholder's double liability constitutes an asset of the bank, rather than an obligation to the creditor as such. The Court pointed out that, with reference to banks, prior to 1910 there had been provided no statutory method of enforcement of the Constitutional liability. So it was that the law worked out a fictional contract between creditor and stockholder, in order to support the action brought by the former against the latter.

When the double liability had to be enforced on the basis of a contract between stockholder and creditor, it was obvious that there could be such a contract only if the stockholder was such at the time the debt between creditor and bank was incurred. So it was, that prior to 1910, bank stockholders were doubly liable only for debts incurred at

[2] Art. III, Sec. 45.
[3] Art. III, Sec. 38.
[4] Art. III, Sec. 39.
[5] See a comment on this in the editorial section, supra, of this number of the Review.
[6] Acts, 1892, Ch. 109.
[7] Acts, 1910, Ch. 219.
[8] Acts, 1904, Ch. 101.
[9] Acts, 1910, Ch. 219.

the time they were stockholders. But the court pointed out that the change made by the statute of 1910 which empowered the receiver to collect from the stockholder and made the liability an asset of the bank resulted in the stockholder's being liable to the full extent of his double liability, if necessary, even though some of the proceeds were to be applied to debts of the bank incurred before he became such a stockholder, or at a time when he was not a stockholder.

The Court pointed out that adoption of the rule contended for by the stockholders would lead to innumerable bookkeeping difficulties in its application.

The Court rejected the contention that, as to stockholders who became such prior to 1910, the change of that date was unconstitutional as depriving creditors of their direct remedy against the stockholder. But it was pointed out both that the legislature had reserved existing rights in the Act of 1910 and that, even if it had not, there is no vested right in a remedy so long as one of substantially equal effect is substituted. Another minor point in the case was as to the right of stockholders who were also depositors to set off their deposits against their double liability. The Court ruled that this could not be done.

Aside from the minor constitutional point mentioned in the preceding paragraph, the Court did not go at all into the constitutionality under the United States Constitution of imposing upon a stockholder double liability for a debt of the bank incurred at a time when he was not such a stockholder. The Court put its decision entirely upon an interpretation of the Maryland constitutional provision for double liability and of the statutes passed thereunder. In view of the fact that the case interprets a provision of the Maryland Constitution it must be taken that there is implicit in the decision that it does not violate the Maryland Constitution to impose liability for debts incurred at a time when the stockholder was not such. But there is left unanswered whether this step violates the Constitution of the United States with respect to those parts thereof set out by the stockholders in their petition.

The Review is informed that an appeal to the Supreme Court of the United States has been entered in the principal case and in its companion case.[10] In view of the policy of the Review of not commenting on trial court cases until it is certain that no appeal will be taken, nor on Court of Appeals cases known to have been appealed to the Supreme Court, the Review will refrain from comment on the instant case until the appeals are decided. For the present the Review will content itself with the above summary of the facts and opinion.

It was felt desirable to call the attention of the readers of the Review to the case for two reasons. One is the importance of the subject in the light of the large number of bank failures in the recent business depression. The other is because of the fact that the constitutional provision for double liability has recently been repealed by the vote of the electorate. Thus it is that in the future such cases cannot so frequently arise. But, no doubt, it will be some time before questions of double liability arising from bank failures before the repeal will be finally settled. Then, too, it is an open question whether the repeal of the double liability may be applied retroactively to banks which do not become insolvent until after the repeal, with reference to debts incurred by the bank prior thereto. Finally, the repeal of the double liability clause will not be effectual until the legislature follows up the vote of the electorate in repealing the constitutional provision with a repeal of the statutory provision,[11] which of its own force also imposes double liability on bank and trust company stockholders. Thus for these reasons the Review and, no doubt, its readers will await with interest the ultimate decision of the case of *Ghingher v. Bachtell* in the Supreme Court.

[10] Ghingher v. Kausler, 169 Md. 696, 182 Atl. 566 (1936), No. 299, October Term, 1936, Supreme Court of the United States.

[11] Md. Code, Art. 11, Sec. 72.