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Double Liability of Stockholders - Statute of Limitations - Sterling v. Reecher

DOUBLE LIABILITY OF STOCKHOLDERS—STATUTE OF LIMITATIONS

Sterling v. Reecher[1]

Appellant, receiver of the Central Trust Company, pursuant to an order obtained in October, 1932, out of the Circuit Court of Frederick County, brought this action in the Circuit Court of Washington County in September, 1938, to recover an amount equal to the full par value of stock held by the appellee, as provided for in the Code.[2] The appellee pleaded that the cause of action did not accrue within three years before the institution of the suit, the period of limitations under the Code for actions of assumpsit and debt on simple contract.[3] The receiver demurred to this plea of limitations, contending that the suit was upon a statute and that the period of limitations for specialties was twelve years.[4] This demurrer was overruled and error was assigned on appeal.

The Court of Appeals, in reversing the lower court, held that as the action was one on a specialty, the period of limitations was twelve years and that appellant's demurrer should have been sustained. After holding that the liability of the appellee was wholly statutory, the Court pointed out that the question was one of the remedy rather than of the origin or nature of the liability, saying:

> "It has been held generally that when the statute creating a liability provides the remedy and allows no other, then the remedy could be only that provided, and it would be grounded on the statute, necessarily, but that a common law action of debt might lie either when such an action is given by the statute or when the statute provides for the payment of a sum of money but does not mention any mode of recovering it."

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[1] 6 A. (2d) 237 (Md. 1939).

[2] Md. Code (1924) Art. 11, Sec. 72.

[3] Md. Code (1924) Art. 57, Sec. 1: "All actions of account, actions of assumpsit, or on the case, actions of debt on simple contract, detinue or replevin . . . [must be brought] . . . within three years from the time the cause of action accrued . . ."

[4] Md. Code (1924) Art. 57, Sec. 3: "No bill, testamentary, administration or other bond (except sheriffs and constable's bonds), judgment, recognizance, statute merchant, or of the staple or other specialty whatsoever, . . . shall be good and pleadable, or admitted in evidence . . . after . . . twelve years standing; . . ."

The Court reasoned further that the element of contract in a subscription of stock, upon which the statute of Maryland lays the double liability, has produced uncertainty, raising the question of whether the liability was grounded on the contract or on the statute. What the statute provided was a question of the intention to be ascertained from express terms, or by implication. If the statute[5] merely intended that a new plaintiff should be substituted for the individual creditors on an old action, then it might be argued that a common law action had been continued and it might be a misinterpretation of the statute to say that it had provided an exclusive remedy so that the suit had to be one on the statute.

However, the Court went on to say that the statute[6] provided for an exclusive remedy, and the old one had ceased to exist. Citing *Ghingher v. Bachtell,*[7] the opinion pointed out that the Act of 1904, Chapter 101, took the remedy from the hands of the creditors and placed it in those of the receiver, the new law making the receiver, representing the interests of the corporation as well as all the creditors, the only proper party to initiate the proceedings against all the stockholders, at the same time, for the enforcement of their statutory liability. By the later Act of 1910, Chapter 219,[8] the liability of stockholders in trust companies and banks was united; and, by this coalescence, not only was the remedy for enforcement against both still exclusively that in the hands of the receivers, but the liability itself was placed on a new foundation. Previous to these statutes[9] a legal fiction of contract between stockholder and creditor was created to allow these suits by the individual creditors against the individual stockholders. This legal fiction was abandoned under these subsequent statutes and, instead, a liability directly owing to the bank or trust company was substituted. Stockholders at the date of the receivership were subjected to this liability regardless of whether they had been stockholders at the time the debt was incurred. Thus, under these subsequent statutes, there was no doubt that

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[5] Md. Code (1924) Art. 11, Sec. 72.

[6] *Ibid.*

[7] 169 Md. 678, 182 A. 558 (1936), noted (1936) 1 Md. L. Rev. 95; and (1937) 1 Md. L. Rev. 270. Affirmed in Peoples Banking Co. v. Sterling, 300 U. S. 175, 81 L. Ed. 586, 57 S. Ct. 386 (1937).

[8] Md. Code (1924) Art. 11, Sec. 72.

[9] Md. Laws 1904, Ch. 101; Md. Laws 1910, Ch. 219, Md. Code (1924) Art. 11, Sec. 72.

the remedy for the liability as well as the liability itself was purely statutory.

While the term specialty was, in its inception, formerly regarded as only applicable to bonds, deeds, or other instruments under seal, it later came to be used both in England and America to include debts upon statute as well as debts upon recognizances, judgments, and decrees.[10] This has been so in Maryland since an early date.[11]

While the Court felt it unnecessary to determine whether or not, prior to these subsequent statutes,[12] an action brought by a creditor directly against a stockholder would have been one upon a specialty, authority may be found for so holding. Prior to these subsequent statutes, the only liabilities applicable to banks were those imposed in Article 3, Section 39 of the Maryland Constitution of 1867,[13] which was the source of bank stockholders liability, and the statutory provision of the Act of 1870, Chapter 206.[14] Thus, it would seem that this liability imposed upon the stockholders was one arising directly from statute, regardless of whether the legal fiction of contract was used. Without the statutes the shareholders could not have been held liable to the creditors at all and the legal fiction of contract used by the courts to enforce this liability would have never come into existence. Hence the liability was one on the statute and not one on an implied contract.[15]

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[10] Wait's Actions and Defenses, 260; Mattare v. Cunningham, 148 Md. 309, 129 A. 654 (1925).

[11] Richards v. Maryland Ins. Co., 8 Cranch (U. S.) 84, 3 L. Ed. 496 (1814); Watkins v. Harwood, et al., 2 G. & J. 307 (Md. 1830); Ward v. Reeder, 2 H. & McH. 145 (Md. 1785); French v. O'Neale, 2 H. & McH. 401 (Md. 1790); Newcomer v. Keedy, 2 Md. 19 (1852).

[12] *Supra* n. 9.

[13] "The General Assembly shall grant no charter for Banking purposes, nor renew any Banking Corporation in existence, except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock . . . , for all its debts and liabilities upon note, bill or otherwise; . . ." See *infra* n. 28, concerning the recent change in this provision.

[14] "An Act to create State Banking Institutions . . . Section 11. And be it enacted, That the continuance of the said several corporations shall be on the condition that the stockholders and directors of each of said corporations shall be liable to the amount of their respective share or shares of stock in such corporation, for all its debts and liabilities upon note, bill or otherwise, and upon this further condition, that this Act and every part of it may be altered from time to time, or repealed, by the Legislature."

[15] Bullard v. Bell, 1 Mason 243 (1817). In this case, Mr. Justice Story held that the statute of limitations of New Hampshire did not bar an action of debt brought by a creditor against a stockholder of a bank under the provision of its charter imposing a personal responsibility upon the shareholders for notes of the bank. Mr. Justice Story pointed out that, except for some special provision by statute, the shareholders could not be

Even if it was thought that the action was one arising out of the legal fiction of contract, there was authority showing that the English courts held that the statute of limitations was not applicable to such contracts raised by implication of law[16] and this view has been followed by some of our American courts.[17]

So, even prior to these later statutes, a result similar to that of the instant case might have been reached,[18] although the opinion of the Court in the principal case seemed to rest entirely on these later statutes as interpreted in *Ghingher v. Bachtell*[19] and *Robinson v. Hospelhorn*.[20] Aside from these cases there are only two earlier Maryland cases that are relevant to the problems presented here.

In *Mister v. Thomas*,[21] an action was instituted by the receiver of the Farmers Trust, Banking and Deposit Co. which had been incorporated by the Act of 1902, Chapter 191, providing that, once a shareholder had fully paid for his shares of stock, he was not thereafter assessable nor liable for or on account of any purpose whatsoever. A receiver was appointed in October, 1907 and the court granted an order in March, 1910 directing the receiver to proceed against the stockholders of the bank. Defendant shareholder pleaded the three years limitation period. On appeal, the Court held that the defendant was subject to the statutory liability regardless of the act of incorporation and pointed out that, at the time of the incorporation, Article 3, Section 39 of the Constitution of

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made answerable for the acts or debts of the bank. Although the law contemplated a privity between them it has also created an obligation and debt lies since a duty on the stockholder is a determinable sum and the law esteems this an obligation created by the highest kind of specialty. If debt lies it is hard to see how assumpsit would and there is no pretext of any express promise; and if a promise be implied, it must be because there exists a legal liability, independent of any promise sufficient to sustain one.

[16] Hodsden v. Harridge, 2 Wm. Saund. 64, 85 Eng. Rep. 672 (1671).

[17] Jordan v. Robinson, 3 Shipley 167 (Me. 1838); Lane v. Morris, 8 Ga. 468 (1850).

[18] The text statement assumes that the intention of the provisions of Art. 3, Sec. 39 of the Maryland Constitution of 1867, and of the Act of 1870, Chapter 206, as construed by the courts, was not merely to give bank and trust companies a qualified corporate capacity, which would reserve the common law liability of the members for the debts as if they were unincorporated bodies. See Corning v. McCullough, 1 Comstock 47 (N. Y. 1847).

[19] 169 Md. 678, 182 A. 558 (1936). Affirmed in Peoples Banking Co. v. Sterling, 300 U. S. 175, 81 L. Ed. 586, 57 S. Ct. 386 (1937).

[20] 169 Md. 117, 179 A. 515, 103 A. L. R. 740 (1935), stating that the liability created by Md. Code (1924) Art. 11, Sec. 72 is wholly statutory.

[21] 122 Md. 445, 89 A. 844 (1914).

Maryland and the Act of 1892, Chapter 109,[22] were in force; that the Act of 1904, Chapter 101, effected both a change as to the amount of the liability and the remedy for its enforcement. As to the period of limitations, the Court did not consider whether or not this was a specialty, but merely stated that three years had not run since the action accrued.

In the case of *Mattare v. Cunningham*[23] the question presented was whether the period of limitations on an award made by the State Industrial Accident Commission was three or twelve years. The Court held that the award was not a judgment, as the Commission was not a court but an administrative body which acted in a quasi-judicial capacity, but that the award was a specialty, and was not barred by limitations if suit was brought thereon within twelve years. In its opinion the Court stated that statutory liabilities had been frequently termed specialties by the courts and that specialty by statute meant some right or cause of action given by statute which did not exist at common law, which did not depend upon any contract relation, and where there was no original obligation whatever created by the parties. Quoting from Wood on Limitations, the Court said:[24]

> "In section 39 the author also says: 'The test, whether a statute creates a specialty debt or not, might be said to be whether, independent of the statute the law implies an obligation to do that which the statute requires to be done, and whether independently of the statute a right of action exists for the breach of the duty or obligation imposed by the statute. If so, then the obligation is not in the nature of a specialty, and is within the statute, so long as the common law remedy is pursued; but if the statute creates the duty or obligation, then the obligation thereby imposed is a specialty, and is not within the statute. If the statute imposes an obligation, and gives a special remedy therefor, which otherwise

[22] Relating to safe, deposit, trust, guaranty, loan and fidelity companies, etc. Sec. 85L provided that "Each stockholder shall be liable to the depositors and creditors of any such corporation for double the amount of stock at the par value held by such stockholder in such corporation." This Act really provided for triple liability. Later the Act of 1904, Chap. 101 reduced it from triple liability to double liability.

[23] 148 Md. 309, 129 A. 654 (1925).

[24] 148 Md. 309, 314-315, 129 A. 654, 656 (1925) citing Wardle v. Hudson, 96 Mich. 435, 55 N. W. 992 (1893); Wood on Limitations (4th Ed.), Sec. 39; and 26 Amer. & Eng. Encyc. of Law, 3.

> could not be pursued, but at the same time a remedy for the same matter exists at common law independent of the statute, and the statute does not take away the common law remedy, the bar of the statute is effectual when the common law remedy for the breach of the common law duty or liability is pursued, but is not applicable when the special statutory remedy is employed.' "[25]

The Court concluded that the proceeding before the Commission was created by the statute, and had its foundation therein, and had for its purpose the award as compensation for death; that the suit on the award, which was merely the approved way of enforcing it, was simply compelling the complete performance of the obligation imposed by statute.

This case was relied on in the instant decision and seems to couple with *Ghingher v. Bachtell*[26] and *Robinson v. Hospelhorn*[27] as clear authority for the result.

Because of the recent changes[28] prohibiting double liability as to stock in banks and trust companies in the future, and provisions allowing for the retirement of the already existing shares, the importance of such result may be chiefly in its implications as to limitations with reference to related problems arising under statutes.

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[25] 148 Md. 309, 315, 129 A. 654, 656 (1925).

[26] 169 Md. 678, 182 A. 558 (1936).

[27] 169 Md. 117, 179 A. 515, 103 A. L. R. 740 (1935).

[28] Md. Laws 1937, Ch. 81. This act provides that this double liability shall not apply to any stock originally issued subsequent to Nov. 13, 1936 and also provides that it shall cease on all the stock outstanding prior to Nov. 13, 1936 when the bank or trust company complies with certain requirements. The constitutional amendment deleting the double liability requirement from Article 3, Section 39 of the Constitution was Md. Laws 1936 (Sp. Sess.), Ch. 151, approved by the voters at the November 7, 1936 election.

We can readily see that this subject of double liability on bank stock in Maryland is not dead wood. This act does not compel the bank or trust company to comply with these requirements as to outstanding stock and the instant case extends the period of limitations to twelve years from the date the court order for the enforcement of stockholders liability is obtained.