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BANKS AND BANKING — STOCKHOLDER'S STATUTORY LIABILITY FOR ADDITIONAL ASSESSMENT — STATUTE OF LIMITATIONS — The plaintiff, receiver of the Bank of Saginaw, a Michigan state bank, sought to collect an assessment of one hundred per cent on ninety-six shares of stock of the bank, held by the respondent as trustee for Gardner Grout Rose. On August 31, 1933, the Commissioner of the Michigan State Banking Department, with the approval of the Governor, ordered the then conservator to levy an assessment on stockholders of the bank. On October 31, 1933, the conservator was replaced by a receiver. On September 5, 1934, the Michigan State Banking Commissioner, also with the approval of the Governor, made an order to enforce the liability of the stockholders. The action in this suit was commenced September 3, 1937. Defendant moved for summary judgment on the ground that the cause of action did not accrue within three years next preceding the commencement of the action. *Held*, the New York three-year statute of limitations commenced to run on the date of the first order, and the action was barred. *Bicknell v. Central Hanover Bank & Trust Co.*, 169 Misc. 7, 6 N. Y. S. (2d) 704 (1938).

During the bank crisis of 1933, temporary, emergency legislation was enacted in Michigan,[1] enabling the banking commissioner, upon the application of the board of directors of a bank, to appoint a conservator to take charge of the affairs of the bank pending investigation of the feasibility of reorganization. If reorganization were deemed impracticable, the act provided for the appointment of a receiver to replace the conservator, for the winding up of the bank's affairs.[2] This legislation replaced the older and more cumbersome procedure of court action, and provided a speedy and workable method of conserving the assets of the questionable bank until a reorganization plan could be worked out.[3] The problem presented by the principal case was whether the act provided one procedure or two separate plans, i.e., does the receiver succeed to the position of the conservator, or are his actions entirely independent of those of his predecessor? The aim of each was of course different; the one involved reviving the bank, the other closing it up. However, as the court points out, the order of assessment was common to both plans, and the first order did not appear to have been recalled in any way.[4] Further, the statute providing for double lia-

[1] Mich. Pub. Acts (1933), No. 32, §§ 4, 5, as amended by Pub. Acts (1933), No. 95. For comparable legislation, see Mass. Acts (1933), c. 59 [Laws Ann. (Michie Supp. 1938), c. 167, § 36A et seq.]; N. Y. Laws (1932), c. 399.

[2] Mich. Pub. Acts (1933), No. 32, § 6. This section empowered the receiver to take over all the books, records, and assets of the bank, and to collect all debts belonging to it, and to enforce the statutory liability of the stockholders.

[3] For a discussion of the act, see In re Burger's Estate, 276 Mich. 485, 267 N. W. 887 (1936). The act was held constitutional in Emery v. Shinn, 278 Mich. 246, 270 N. W. 284 (1936).

[4] The court said, "It appears to be a policy of the law of Michigan that an assessment is for the benefit of creditors and there is no right in anyone to waive or release

bility on bank stock seems to indicate that when an order of assessment is once made, a cause of action thereupon arises in favor of the bank, or of any receiver or other officer succeeding to the legal rights of the bank.[5] Thus, when the order of assessment was made while the conservator had charge, the stockholders were immediately liable therefor, and when the receiver succeeded the conservator, he had power to make the collection for the benefit of creditors of the bank.[6] In view of these facts and in view of the purpose of the emergency legislation, it would appear that the act contemplated one procedure with two phases: If possible, the bank was to be saved from the financial crisis; if these efforts proved fruitless, the plan was to procede with liquidation. The whole plan was under the direction of the State Banking Commissioner, and his order of September 5, 1934 merely directed collection, in effect, of the assessment levied under the prior order. Being one procedure, the cause of action accrued upon the date of the original order, and was barred by the applicable three-year statute of limitations in New York.[7]

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it without the creditors' consent." Principal case, 169 Misc. 7 at 8-9, citing In re Burger's Estate, 276 Mich. 485, 267 N. W. 887 (1936).

[5] Mich. Comp. Laws (1929), § 11945. "Such liability may be enforced in a suit at law or in equity by any such bank in process of liquidation, or by any receiver, or other officer succeeding to the legal rights of said bank."

[6] The conservator in this case was one Frank W. Merrick. He was appointed conservator on March 28, 1933. On October 31, 1933, he was appointed receiver. Merrick having become ill, T. Wayne Winn was appointed acting receiver on the 23rd of May, 1935, and this appointment was made permanent on the 3rd day of June, 1935. Winn resigned, and Howard C. Lawrence was appointed his successor on September 3, 1935. Lawrence resigned, and the plaintiff was appointed on February 15, 1936. Both orders pertaining to the assessment were made while Merrick was in charge, the first while he was conservator, the second after it had been decided to wind up the affairs of the bank.

[7] N. Y. Civ. Prac. Act, § 49: "The following actions must be commenced within three years after the cause of action has accrued: . . . 4. An action against a director or stockholder of a moneyed corporation, or banking association, to recover a penalty or forfeiture imposed, or to enforce a liability created by the common law or by statute. The cause of action is not deemed to have accrued until the discovery by the plaintiff of the facts under which the penalty or forfeiture attached or the liability was created." The question of conflict of laws had been decided in an earlier suit. In an action involving the same receiver, it was held that the New York statute, rather than the Michigan statute, applied to an action brought in New York to collect the assessment. Bicknell v. Hood, 168 Misc. 727, 6 N. Y. S. (2d) 449 (1938). In this action, it was assumed that the cause of action accrued on the date of the second order, September 5, 1934. The earlier order apparently was not drawn in question. The reason for this may lie in the fact that, inasmuch as the summons was not served in the Hood case until November 27, 1937, sufficient time had elapsed after the second order to bar the action under the New York statute.