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Article 7

# Banks and Banking - Insolvency - Receiving Deposits

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The effect of the decision is to render the landowner liable to infant trespasser only for acts of active negligence or deliberate entrapment.

To this extent the case seems directly contrary to a somewhat earlier ruling in *Herrem* v. *Konz,* 165 Wis. 574, 162 N.W. 654, where the defendant was held bound to anticipate injury might result to some child by coming into contact with a rapidly revolving shaft where he knew children of tender age were in the habit of playing in open spaces underneath the ground floor of a lumber mill in close proximity to the revolving shaft. Why one mill owner should be bound to anticipate injury from children playing near a revolving shaft, and another mill owner should not be bound to anticipate injury to children playing about a pit into which scalding steam was piped is a question referred to intellects more penetrating than that of the writer's. At any rate, insofar as the Lewko decision is followed and to the extent that the solicitude for the rights of landowners shown in a recent case involving adult trespassers[34] is continued it would seem that the Wisconsin courts, following the tendency in other jurisdictions to limit the scope of the doctrine,[35] have denied the application of the "attractive nuisance" doctrine to conditions or structures situated upon private property and not adjoining a public way.

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BANKS AND BANKING—INSOLVENCY—RECEIVING DEPOSITS. The case of Schroeder v. State of Wisconsin, 244 N.W. 599, is of especial importance at this time in view of current deflated values and the numerous bank failures which have occurred. Schroeder was convicted in the Circuit Court for having accepted deposits in the Franklin State Bank of Milwaukee in violation of Section 348.19 of the Statutes. This Statute makes it a criminal offense for an officer of a bank to receive deposits when he knows or has good reason to know that the bank is unsafe or insolvent.

When is a bank insolvent? This question is bound to be the primary issue in any case of this kind. It was answered in Ellis v. State, 138 Wis. 513, 119 U.W. 1110, as follows:

"A bank is insolvent when the cash value of its assets realizable in a reasonable time, in case of liquidation by the proprietors, as ordinarily

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the reasonable doctrine that a person shall take reasonable care to protect little children anywhere and everywhere."

[34] Frederick v. Great Northern Ry. Co. ——Wis.——, 241 N.W. 363.

[35] Kelly v. Benas, 217 Mo. 1, 116 S.W. 557; Louisville & N. R. Co. v. Ray, 124 Tenn. 16, 134 S.W. 858; Barnhardt v. Chicago M. & St. P. R. Co., 89 Wash. 304, 154 Pac. 441; Carr v. Oregon W. R. & N. Co., 123 Ore. 259, 261 Pac. 899; Lucas v. Hammond, 150 Miss. 369, 116 So. 536.

prudent persons would ordinarily close up their business, is not equal to its liabilities, exclusive of stock liabilities."

This rule was later applied to Sprague v. State, 188 Wis. 432, 206 N.W. 69, and was followed in the present case, the court holding, "After carefully reconsidering that rule and the problems that the entire subject matter involves, particularly under such unanticipated and distressing circumstances as are affecting values in these times, we have concluded that the rule, as laid down in the Ellis case, is as reasonable and fair to all concerned, and is as well and precisely stated as the circumstances permit."

This opinion is significant because there is at this time a feeling by many that the ordinary rules of valuation should not apply in the present period of depression. Various financial institutions have recently used other bases in reporting their assets in published statements. The court was clearly aware of the present financial situation and the abnormally low realizable values, but nevertheless held to the rule established in the earlier cases. It is to be observed that, according to the rule, a bank is not necessarily insolvent when it cannot pay all depositors on demand. It might be the victim of a run and be unable to raise at once sufficient funds to meet the unusual demands. On the other hand, a bank may be insolvent even though it is paying all demands against it as presented. The test is that the total of its debts, whether due or not, must not exceed the realizable value of its property. The capital, surplus, and undivided profits, of course, are not included in the term "debts."

What is the realizable value of a bank's assets? This is a difficult fact to determine. The court considered just two main types of items in ascertaining the loss on the assets of the Franklin State Bank, which loss greatly exceeded the capital structure. These items were the loans and the investments in bonds, carried on the books at $627,890 and $258,503, respectively. As to the loans and discounts, it was found that $28,179.16 were not secured, and $39,392.30 were not well secured. Both of these amounts came under and were presumably bad under Section 221.36 of the Statutes, which provides that all debts due to any bank on which interest is past due and unpaid for a period of twelve months, unless the same are well secured or in process of collection, shall be considered bad debts and shall be charged off to the profit and loss account at the expiration of one year. The court held that it was not incumbent upon the state to also prove that the debtors were insolvent, but that there was sufficient evidence otherwise to establish that these loans were a total loss. There were loans aggregating $139,-250.26 which were not prima facie bad by virtue of the above Section

but which were proven to be uncollectible to the extent of at least $108,232.

On June 16, 1931, the date when the deposits were accepted, the bank's investments in bonds were carried on the books at a figure which the state contended was $88,099 in excess of their realizable value. This value was arrived at by taking current market quotations. The plaintiff in error claimed that this was not the proper basis, and introduced testimony on the fixing of intrinsic or true value by plant valuation, average earnings, management, and other elements. It was further claimed that fictitious prices for securities are frequently created by various means, and that in view of the present depression a reasonable time to liquidate the list of bonds would be upwards of three years. This testimony, it was held, was admissible but not conclusive proof; likewise, market quotations from standard publications was undoubtedly evidence bearing on the question of the real value of the bonds although it was not conclusive. It was then said, if "because of current economic or financial conditions, which during the time permissible for liquidation affect the saleability of securities, their market value is not in conformity with their intrinsic value, then all that can, after all, be realized therefor is the market value. That alone, under such circumstances, may constitute the reliable although not the conclusive criterion as to the realizable value."

This test for the valuation of securities is a severe one for bankers under current deflated values. The net worth of a bank is generally small in proportion to its total resources. This net worth might easily be wiped out by a sharp fall in current quotations and other losses and the banker who knowingly keeps open for business thereafter makes himself liable to criminal prosecution. The court carefully considered the problems of the banker but also kept in mind the duty to depositors and to the state at large.

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CORPORATIONS—SALE OF ASSETS—RESTRICTIVE COVENANTS. Defendants were stockholders and officers of a corporation whose assets and good will were purchased by plaintiff, Defendants agreed not to engage in competition with plaintiff; but were allowed to accept employment with competitors of plaintiff in any capacity. Defendants organized B corporation, in which they, with one other, who had come in with full knowledge, owned all the stock, elected themselves officers, and entered into competition with plaintiff. Action to restrain defendants and B corporation from violating the restrictive covenant.

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