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Banks and Banking--Reorganization of Insolvent Banks by Banking Commissioner

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RECENT CASE COMMENTS

BANKS AND BANKING — REORGANIZATION OF INSOLVENT BANKS BY BANKING COMMISSIONER — IMPAIRMENT OF OBLIGATION OF CONTRACT OF DEPOSITORS. — Defendant bank, being insolvent, closed its doors in October, 1931, and reopened under the same name and management in November, 1931. The reorganization was accomplished under the statute of 1929 and the ruling of the banking commissioner requiring 66 2/3 per cent. of the stockholders to pay a voluntary assessment on their stock in consideration of 66 2/3 per cent. of depositors consenting to the freezing of their deposits over a period of years. On March 2, 1933, the banking commissioner, pursuant to the statute of March 1, 1933, required the defendant further to restrict deposits. Plaintiff, not having assented to the agreement of reorganization, sues to recover in her own right a savings account deposited in 1930 and as executrix a checking account deposited in 1930. *Held*: The reorganization statute of 1929 was constitutional, and where a common fund is involved a small minority shall not defeat the wishes of an overwhelming majority: *semble*, that the ruling of March 2, 1933, violated no constitutional rights. *Timmons v. Peoples Trust Company*.¹

It has long been recognized that a state in the absence of conflicting federal legislation may enact insolvency laws permitting a substantial per cent. of creditors to bind the non-consenting minority in some sort of composition or compromise.² Several states have provided that in an agreement for reorganization of an insolvent corporation a three-fourths majority in value of

¹ 173 S. E. 79 (W. Va. 1934) (two actions). The reorganization agreement provided that one-half of checking accounts would be payable in 1934 and the remaining half in 1935, that one-half of the savings accounts would be payable in 1936 and the remaining half in 1937. The notice for withdrawal of savings accounts was changed from 30 days to six months. Depositors not assenting were to be paid when sufficient assets were collected. Actually 85 per cent. of depositors and stockholders complied with the plan.

The ruling of the banking commissioner of March 2, 1933, required the bank to retain 50 per cent. of all deposits until October, 1936, and the remaining 50 per cent. until October, 1937.

² *Brown v. Smart*, 145 U. S. 454, 12 S. Ct. 958 (1891); *Denny v. Bennett*, 128 U. S. 489, 9 S. Ct. 134 (1888). In *Sturges v. Crowninshield*, 4 Wheat. 122 (1819), the insolvent statute was held invalid only as to the facts of the case. There the date of the contract was March, 1811, and the act pleaded as a defense was passed in April, 1811.

But such insolvency laws do not apply to creditors of a foreign state. *Ogden v. Sanders*, 12 Wheat. 213 (1827); *Security Trust Co. v. Dodd*, 173 U. S. 624, 19 S. Ct. 545 (1899).

creditors in a given class shall bind the non-assenting ones.³ In each instance such legislation does not impair the obligation of contracts made subsequent thereto because it becomes a part of the contract made between parties.⁴

Proceeding on this premise certain states in recent years, because of the prevailing economic conditions, have adopted bank reorganization statutes giving to a requisite per cent. of depositors the power to bind the non-assenting minority in freezing deposits of an insolvent bank, until the bank is able to pay in full or in part.⁵ But the West Virginia law, involved in the present case, is very broad and general leaving as it does the whole plan of reorganization practically in control of the banking commissioner;⁶ and because of this feature it seems arguable that such a statute might not become a part of a subsequent contract as the rulings of the banking commissioner actually determine the rights of the

³"DELAWARE GEN. CORP. LAWS (1931) § 5 (9); KENTUCKY STAT. (Carroll 1930) § 771a (Reorganization of Insolvent Railroads and Bridge Companies); NEW YORK STOCK CORP. LAW (1930) §§ 95-99; WEST VIRGINIA OFF. CODE (1931) ch. 31, art. 1, § 6(h); MINNESOTA, LAWS OF 1933, ch. 300, § 54. See also Gilfillan v. Union Canal Co., 109 U. S. 401, 3 S. Ct. 304 (1883).'' This footnote is from a collection of statutes listed by Billig, *Corporate Reorganization: Some Recent Developments*, 18 MINN. L. REV. 14 at 21 (1933).

⁴Abilene Nat. Bank v. Dolley, 228 U. S. 1, 33 S. Ct. 409 (1913); O. B. & Q. R. R. Co. v. Cram, 228 U. S. 70, 33 S. Ct. 437 (1913); Farmers' and Merchants' Bank v. Federal Reserve Bank, 262 U. S. 649, 43 S. Ct. 651 (1923).

⁵LAWS OF FLA. (1927), ch. 11849 and amended by acts of 1929, ch. 14553 (requiring 75 per cent. of total deposits); KENTUCKY STATS. §§ 165a-17 (1932 Supp.) (agreement must be signed by depositors representing 75 per cent. of deposits); Minnesota, Mason Minn. Stats. (1927), §§ 7690-1, 2 (requiring 90 per cent. of deposits and unsecured creditors); North Dakota, Laws of 1927, ch. 99, § 20 (requiring 80 per cent. of deposits); South Dakota, Laws of 1925, ch. 104 (requiring 80 per cent. of deposits at date of suspension). For cases holding the above statutes valid see Dorman v. Dell, 245 Ky. 34, 52 S. W. (2d) 892 (1932); McConville v. Ft. Pierce Bank & Trust Co., 101 Fla. 727, 135 So. 392 (1931); Becker v. Amos, 105 Fla. 231, 141 So. 136 (1932); Hoff v. First State Bank, 174 Minn. 36, 218 N. W. 238 (1928); Paul v. Farmers' and Merchants' State Bank, 187 Minn. 411, 245 N. W. 832 (1932); Sueltz v. Bank of Hazelton, 61 N. D. 528, 238 N. W. 649 (1931); Farmers' and Merchants' Bank of Tomlison, 225 N. W. 305 (S. D., 1929). See 80 A. L. R. 1480 (1932).

⁶W. VA. REV. CODE (1931) c. 31, art. 8, § 29 (Acts of 1929, c. 23, § 31) "In any voluntary or compulsory proceeding to liquidate a banking institution, such banking institution, if the proceeding be not in court, with the consent in writing of the commissioner of banking, and if the proceeding be in court, with the consent in writing of the commissioner of banking and the approval of the court, may reorganize, reclaim possession of its assets, and continue in business"

Apparently the only law similar to the West Virginia statute is an Arizona statute, ARIZ. CODE (Struckmeyer, 1928) § 245, which provides that an insolvent bank may resume business upon such conditions as the banking commissioner may approve. No case involving this statute was found. See Note (1930) 28 MICH. L. REV. 1052.

depositors. Beyond this objection, however, such a statute is assuredly valid as to subsequent deposits and bridges a gap in insolvency administration, since the federal bankruptcy act does not apply to banking corporations,⁷ and the liquidation of national banks only is regulated by the federal banking laws.⁸ It, also, might be advisable to require a 100 per cent. of stockholders to pay the assessment on their stock.⁹

Yet as to the statute of March, 1933, and the order of the banking commissioner made pursuant thereto, the question of the impairment of the obligation of contracts is squarely presented,¹⁰ since the contracts of deposits were prior to the law.¹¹ However, what constitutes a violation of the contract clause is uncertain.¹² Charters and franchises granted by a state or governmental subdivision, and contracts between a public utility and private parties fixing charges are subject to modification by later legislation and orders.¹³ The existence of an emergency or economic disturbance,

⁷ Bankruptcy Act, § 4, 11 U. S. C. A. § 22a.

⁸ Compare the provisions of the federal Bank Conservation Act of March 9, 1933, 12 U. S. C. A. §§ 201-211, 1 MASON'S U. S. CODE, tit. 12, §§ 201-211.

⁹ In the reorganization of corporations in an equity receivership proceeding, it is held that the rights of creditors are superior to those of stockholders. *Northern Pacific Railway v. Boyd*, 228 U. S. 482, 33 S. Ct. 554 (1928). It seems that before a non-consenting depositor's rights are affected all the shareholders should be required to pay the stock assessment.

¹⁰ Art. 1, § 10, U. S. Const.

¹¹ Acts of Legislature (Reg. Sess. 1933), Ch. 12. "The Commissioner of banking may, by and with the consent of the governor, permit or require any bank or banking institution authorized to do business in this state, or any number or all of such banks or banking institutions, to: (1) Operate and do business in such manner and under such limitations and regulations as the banking commissioner, with the approval of the governor, may prescribe, or, (2) Cease business for such period of time as the banking commissioner, with the approval of the governor, may direct, in which case the period of cessation shall be held to be a legal holiday, as now defined, as to such bank or banks. See the very important Bank Conservator Statute of April 12, 1933, Acts of W. Va. (Extraordinary Sess.), ch. 5.

¹² *C. Bunn, The Impairment of Contracts: Mortgage and Insurance Moratoria*, 1 U. OF CHI. L. REV. 249 (1933); *Home Building and Loan Ass'n v. Blaisdell*, — U. S. —, 54 S. Ct. 231 (1934); but *cf.*, *W. B. Worthen Co. v. Thomas*, — U. S. —, 54 S. Ct. 816, (1934).

¹³ *Public Service Commission v. Harpers Ferry and Potomac Bridge Co.*, 171 S. E. 760 (W. Va. 1933); *Laurel Fork and Sand Hill R. R. Co. v. W. Va. Transportation Co.*, 25 W. Va. 324 (1884); *Chicago & Alto R. R. Co. v. Tranbarger*, 238 U. S. 67, 35 S. Ct. 678 (1915); *Munn v. Illinois*, 94 U. S. 113, 94 L. Ed. 77 (1876). See Note (1919) 26 W. VA. L. Q. 67.

But compare *Piqua Branch of the State Bank of Ohio v. Knoop*, 16 How. 369 (1853), holding that a bank chartering act requiring the officers of a bank to declare semi-annual dividends and to pay six per cent of such dividends to the state which would be in lieu of all other taxation was a contract between the state and the bank and was impaired by a later act taxing all banks the same as other property. See *Shelby County v. Union and Planter's Bank*, 161 U. S. 149, 16 S. Ct. 558 (1895); *Bank of Commerce v. Tennessee*, 163 U. S. 416, 16 S. Ct. 1113 (1895); *Grand Lodge v. New Orleans*, 166 U. S. 143, 17 S. Ct. 523 (1896).

while not creating any power, may furnish the occasion for the legislature to alter existing rights.¹⁴ Generally, it has been said, a state under the police power may carry out any policy necessary for the protection of the health, morals and general welfare of its people, even though contractual obligations be occasionally impaired.¹⁵ Banking in recent years has become so interwoven with the business and economic life of the community that innumerable regulations and restraints have been imposed upon it.¹⁶ If there ever was a business affected with a public interest (if that clause may be used¹⁷), banking assuredly falls within that class.¹⁸ Whatever may be the objections, a statute permitting a competent public official to make reasonable restrictions on banking deposits when the financial life of a community is threatened is seemingly a valid exercise of the police power.¹⁹

¹⁴ *Home Building and Loan Ass'n v. Blaisdell*, *supra* n. 12; *Edgar A. Levy Leasing Co. v. Siegel*, 258 U. S. 242, 42 S. Ct. 239 (1921); *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170, 41 S. Ct. 465 (1921) (rent cases). See *Pestoe v. Sixth Nat. Bank of Philadelphia*, 171 Atl. 302 (Pa. 1934); *City of East Cleveland v. Fidelity & Deposit Co.*, 5 F. Supp. 212 (1934). But compare *Ghingher v. Pearson*, 168 Atl. 105 (Md. 1933).

In *Zimmerman v. Gibbes*, 172 S. E. 130 (S. C. 1933), affirmed in 54 S. Ct. 140, 78 L. Ed. 191 (1933), it was held that the emergency act of March, 1933, prohibiting all persons from instituting any legal proceedings against any state bank without the approval of the governor was constitutional. (Only the question of due process was raised).

¹⁵ *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 28 S. Ct. 529 (1908); *Manigault v. Springs*, 199 U. S. 473, 480, 26 S. Ct. 127 (1905), where the court said: "This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." But compare *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 43 S. Ct. 158 (1922); *White v. Hart*, 13 Wall. 646 (1871); *Bronson v. Kinzie*, 1 How. 311 (1843); *Sturges v. Crowninshield*, *supra* n. 2.

¹⁶ An examination of the legislation affecting banks in any state will show the extent that the business of banking has come under the control of the state. See W. VA. REV. CODE (1931) c. 31, art. 8, §§ 1-42.

¹⁷ *Nebbia v. New York*, — U. S. —, 54 S. Ct. 505 (decided March 4, 1934).

¹⁸ In *Zimmerman v. Gibbes*, *supra* n. 14, the state court at page 133 said: "It is well established that the banking business is affected with a public interest so as to be subject to legislative regulation and control as a part of the police power of the state; and that the Legislature has authority to prescribe and limit the method and manner of enforcing depositors' rights against the banks and stockholders thereof."

¹⁹ *In re Opinion of the Justices*, 278 Mass. 607, 611, 181 N. E. 833, 835 (1932), 80 A. L. A. 1021 (1933), where the court said: "The relations between savings banks and their depositors, so far as contractual in nature, have been entered into subject to the future exercise of the police power by the enactment of wholesome and reasonable laws for the common good. Laws of that character do not impair the obligations of contracts."

In *Home Building and Loan Ass'n v. Blaisdell*, *supra* n. 12, *Hughes, C. J.*, at page 241 said: "It is manifest from this review of our decisions that there has been a growing appreciation of public needs and of necessity of finding

It is submitted that outside of the objection and suggestion, stated above, the decision in the present case is sound and wholesome, and the fact that a one-hundred year old precedent is apparently *contra*²⁰ to the statute of March, 1933, should not be controlling in light of present-day needs.

—CHARLES W. CALDWELL.

FRAUDULENT CONVEYANCES — ASSIGNMENT OF LIFE INSURANCE POLICY IN FRAUD OF CREDITORS. — In order to obtain \$8000 from the plaintiff and to sell her certain notes, M told the plaintiff that he carried (and would continue to carry) from \$75,000 to \$100,000 in life insurance, payable to his estate. In fact, the actual amount of such insurance was only \$45,000. Less than two months thereafter, M, while insolvent, transferred the policies to his wife, the defendant, no consideration having been given for the transfer. At M's death, a week later, the face value of the policies was paid to the defendant. The appraisal of M's estate indicated that the liabilities were far in excess of the assets. Plaintiff sought by a suit in equity to reach the insurance monies. It was held, reversing the lower court, that while the transfer was constructively fraudulent as to the plaintiff, her recovery would be limited to the cash-surrender value of the policies at the time the change in beneficiaries was made. *Mahood v. Maynard*.¹

It is well recognized that a life insurance contract is not one of indemnity.² Unlike fire and accident insurance, the event upon which the sum is to be paid is certain to happen at a future time.³ The insurer promises to pay a fixed sum in consideration of annuities paid it; the premiums constitute the consideration for the

ground for a rational compromise between individual rights and public welfare." And further, it was added: "Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends."

²⁰ *Sturges v. Crowninshield*, *supra* n. 14.

¹ 171 S. E. 884 (W. Va. 1933).

² *Patterson*, *Insurable Interest in Life* (1918) 18 COL. L. REV. 381, 388. *Wurzburg v. N. Y. Life Insurance Co.*, 140 Tenn. 59, 203 S. W. 332 (1918).

³ VANCE ON INSURANCE (2d ed., 1930) 80.