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Notes and Comments

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fessor John P. Dalzell, Assistant to the Solicitor, Department of the Interior, Washington, D. C. Professor Frank W. Hanft, Major, Army Specialists Corps, now in training for military government, Charlottesville, Va. Professor M. T. Van Hecke, Regional Director, National War Labor Board, Atlanta, Ga.

During the Summer Session of 1943 at the Law School of the University of North Carolina Judge J. Warren Madden, of the United States Court of Claims, gave the course in Labor Law. Dean Robert H. Wettach has been serving as Public Panel Member for the Regional War Labor Board.

The executives of the Editorial Staff of the NORTH CAROLINA LAW REVIEW for 1943-44 are: William A. Johnson, Editor-in-Chief, John F. Shuford and Cecil J. Hill, Associate Editors. They are likewise the recipients of the faculty research assistantships for the current year.

John T. Kilpatrick, Jr. and Fred R. Edney, Jr. were elected last spring to the honorary Law School society of the Order of the Coif.

Of last year's editorial staff the following are in military service: C. D. Hogue, Jr., Arthur C. Jones, Jr., Wallace C. Murchison and H. Milton Short, Jr.

NOTES AND COMMENTS

Domestic Relations—Work and Labor—Contracts Between Persons Living in a Family Relationship

Plaintiff, daughter-in-law of the defendant's intestate, and her husband moved into the home of her father-in-law in June, 1929. In March, 1936, the father-in-law suffered a stroke of paralysis, causing a gradual deterioriation in his health until his death in 1941. During the period of illness the plaintiff acted as housekeeper-nurse for her father-in-law, doing such menial tasks as washing his bed clothes two or three times weekly, bathing him, giving him medicine, and preparing a special diet. There was no express contract to pay for these services between the parties, but the father-in-law said in plaintiff's presence that he expected her to be paid out of his estate after his death.[1] Plaintiff brought an action against the administrators of her father-in-law's estate to recover for the value of her services rendered during the illness on the basis of an implied contract to pay. The defendants argued that such services were rendered by a person living in a family relationship and, therefore, were gratuitous. The court held there was sufficient evidence of an implied contract to allow plaintiff to recover.[2]

[1] Francis v. Francis, 223 N. C. 401, 26 S. E. (2d) 907 (1943), Record on Appeal, 20-29.

[2] Francis v. Francis, 223 N. C. 401, 26 S. E. (2d) 907 (1943).

Generally, where one voluntarily accepts the benefits of services performed in his behalf, he ratifies the act of the party performing them and becomes liable to him for the reasonable value thereof.[3] The rule does not usually apply to services rendered between persons living in a family relationship, regardless of the kinship between the parties. The law presumes that services are performed freely because of the desire to promote family interest and goodwill when performed between husband and wife,[4] parent-in-law and child-in-law,[5] uncle and nephew,[6] brother and brother,[7] parent and child,[8] stepfather and stepchild,[9*] or even strangers living in the family relationship.[10] It is essential in the above relationships that the parties live together as a family.[11*]

It must be noted, however, that kinship alone does not create a presumption of gratuitous service.[12] Where the parties do not live together in the family relationship, the presumption of the gratuitous nature ceases to exist, or is greatly weakened, according to the proximity of relationship and the nature of the services performed.[13]

The presumption of gratuity may be overcome by proof either of an express agreement to pay, or of such facts and circumstances as satisfactorily show that both parties at the time expected payment to be made, thus giving rise to an implied contract.[14*] Where the family relationship exists, the claimant has the burden of refuting the presumption and proving the existence of an express or implied under-

[3] Shippen v. Walker, 26 Ga. App. 280, 105 S. E. 853 (1921); Winkler v. Killian, 141 N. C. 575, 54 S. E. 540 (1906); 28 R. C. L. 668, §3.

[4] Coleman v. Burr, 93 N. Y. 17, 45 Am. Rep. 160 (1883).

[5] *See* Brown v. McCurdy, 278 Pa. 19, 22, 122 Atl. 169, 170 (1923).

[6] Bolling v. Bolling's Adm'r, 146 Ky. 313, 142 S. W. 387 (1912).

[7] Hodge v. Hodge, 47 Wash. 196, 91 Pac. 764 (1907).

[8] *See* Thysell v. McDonald, 134 Minn. 400, 402, 159 N. W. 958, 959 (1916); Williams v. Halford, 73 S. C. 119, 53 S. E. 88 (1905) (illegitimate children).

[9*] *See* Sargent v. Foland, 104 Ore. 296, 308, 207 Pac. 349, 352 (1922) (The mere relationship of stepfather and stepchild does not raise the presumption of gratuity, for the parent does not have to receive the child.).

[10] Gjurich v. Feig, 164 Cal. 429, 129 Pac. 464, Ann. Cas. 1916B, 111 (1913).

[11*] The federal rule accords with that of the states: The Morning Star, 1 F. (2d) 410 (W. D. Wash., 1924).

An interesting point arises in the case of bigamous marriages. In Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721 (1888) the court held that one could not recover against an administrator for services rendered during a bigamous marriage. North Carolina has taken a contrary view on another ground. In Sanders v. Ragan, 172 N. C. 612, 90 S. E. 777 (1916) the court held that a woman, innocently believing that she was becoming a lawful wife, was entitled to recover, by reason of a fraud practiced upon her, the value of her services above the benefits she may have received in clothes and maintenance.

[12] Kerr v. Wilson, 284 Pa. 541, 131 Atl. 468 (1925); Gibb's Estate, 266 Pa. 485, 110 Atl. 236 (1920).

[13] Hartley v. Bohrer, 52 Idaho 72, 11 P. (2d) 616 (1932).

[14*] Einolf v. Thompson, 95 Minn. 230, 103 N. W. 1026 (1905). For a complete discussion of family contracts see Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations* (1932) 41 Yale L. J. 386.

standing between the parties that a charge for the services was to be made and to be met by payment.[15]

Many elements are considered by the courts in determining the validity of a contract between persons living in a family relationship.[16*] While there are varying theories as to presumptions and counterpresumptions, and what evidence rebuts presumptions, and as to the implications to be drawn from the evidence, the difference is so minute as to be of no practical value. The difference of opinion is based upon the court's views as to whether there should be a higher degree of certainty and definiteness in the evidence in contracts arising in the family relationship than those arising in the ordinary civil case.[17]

In proving the validity of a contract the evidence must show something more than a mere expression of gratitude. In *Dowell* v. *Dowell's Adm'r*[18] two sons, living on their father's farm and reaping the profits therefrom, endeavored to recover for services rendered the father at his request prior to his death. The father expressed his appreciation for the services and promised to pay for them by leaving them his farm at his death. But his statement at no time amounted to an express promise on his part to pay for the services, and were not sufficient to constitute an *unqualified* acknowledgment of an indebtedness on his part for such services. The court by implication held that such expressions were merely gratitude, and the free use of the farm afforded ample compensation.

A mere expectation to pay by the person receiving the benefits does not create a contract. In *Avitt* v. *Smith*[19] a mother remarked in the plaintiff's presence that "she wanted the plaintiff to have sixty acres of her land in consideration of his taking care of her." The court held that the old lady's remark showed a "kind disposition," but failed to show any evidence of a contract or promise to pay. This case is distinguishable from the *Francis* case in that there was a reciprocity of services here. The plaintiff testified that the entire family worked together: "I (plaintiff) supported them and they supported me."

Justice McIver in *Ex parte Aycock*[20] seems to have summed up the requirements in saying: "It must have been the purpose . . . to assume a legal obligation, capable of being enforced."

In the case of infants there can be no contract between a parent and a minor child on a master-servant basis unless the child is shown

[15] Hartley v. Bohrer, 52 Idaho 72, 11 P. (2d) 616 (1932); Miller v. Richardson, 56 S. W. (2d) 614 (St. Louis Ct. of App., Mo., 1933); 28 R. C. L. 677, §13.
[16*] See (1908) 11 L. R. A. (N. S.) 873 for extended annotation on this point.
[17] *Ibid.* *See* Bryant v. Fogg, 125 Me. 420, 424, 134 Atl. 510, 512 (1926).
[18] 137 Ky. 167, 125 S. W. 283 (1910).
[19] 120 N. C. 392, 27 S. E. 91 (1897).
[20] 34 S. C. 255, 13 S. E. 450 (1890).

to have been emancipated, and the burden of proof of emancipation rests upon the one alleging such.[21]

Although it has been held that in the absence of an express contract the services are presumed to be gratuitous,[22] the majority of the decisions hold that a contract may be inferred from sufficient facts and circumstances in the evidence reasonably justifying the inference of an agreement to pay[23*] In *Miller* v. *Richardson*[24] the plaintiff cared for her father after the death of her mother, doing such menial tasks as cooking for him, caring for the livestock, and acting as his nurse during his illness. He gave certain proceeds of his farm to her sporadically. On various occasions he said in the plaintiff's presence that she was to be paid well, and the plaintiff had replied: "I expect to be repaid." The court held that there were sufficient facts and circumstances to justify the inference of a mutual understanding between the parties for an implied contract.

Most courts follow the rule that there must be a reciprocity of benefits or a contract will be implied.[25*] In cases where the recipient of services rendered is mentally incapable of making a contract, one is implied for compensation for services of an unusual and extraordinary nature.[26*] It is not essential under an implied contract that the amount of the compensation be agreed upon.[27]

Many cases arise out of services rendered with the expectation of

[21] American Products Co. v. Villwock, 7 Wash. (2d) 246, 109 P. (2d) 570 (1941).

[22] Baldwin v. Kansas City Rys. Co., 218 S. W. 955 (Kan. City Ct. of App., Mo., 1920).

[23*] McGarvey v. Roods, 73 Iowa 363, 35 N. W. 488 (1887) (Intestate frequently said that plaintiff should be compensated, that all her property was devoted to this purpose, and that she had given her other children all that she had intended to give them. The court held this to be sufficient facts as evidence of an implied contract.); *In re* Grogan's Estate, 82 Misc. 555, 145 N. Y. Supp. 285 (1913) (Daughter, at the request of her father cared for him while he gradually became helpless at the great sacrifice of her own interests and pleasures without compensation therefor.); Winkler v. Killian, 141 N. C. 575, 54 S. E. 540 (1906) (Where a married daughter, living nearby, cared for her mother during old age.); Kerr v. Wilson, 284 Pa. 541, 131 Atl. 468 (1925) (An aged uncle sought a home with his nephew to care for him in his old age. No services were rendered by him, nor were any contemplated.).

[24] 56 S. W. (2d) 614 (St. Louis Ct. of App., Mo., 1933).

[25*] Marks Adm'r v. Boardman, 89 S. W. 481 (Ky. Ct. of App. 1905) (A sister cared for her brother at her home, nursing him and performing for him certain menial services, being only a detriment to her.); *accord,* Morton v. Ranier, 82 Ill. 215, 25 Am. Rep. 311 (1876) (Nephew lived with uncle, and after majority furnished his own clothes and paid his own bills.); *see In re* Grogan's Estate, 82 Misc. 555, 145 N. Y. Supp. 285 (1913).

[26*] Gover's Adm'r v. Waddle, 245 Ky. 652, 54 S. W. (2d) 19 (1932); Key v. Harris, 116 Tenn. 161, 92 S. W. 235 (1905). (The *Key* Case by way of dicta suggests that an allowance for services might be sustained on the ground that the same were necessaries, citing Waldron v. Davis, 70 N. J. L. 788, 58 Atl. 293 (1904). This theory is weakened in the *Key* Case, since the parties in *Waldron* v. *Davis* were not living in a family relationship.)

[27] *See* McGarvey v. Roods, 73 Iowa 363, 35 N. W. 488 (1887).

being paid by provision in a will. If such a provision is made and the will is later destroyed, there is sufficient evidence of an agreement to pay and to be paid; and the claimant does not have to wait until death to bring an action for recovery.[28] Where the testator has made it impossible to fulfill the contract by conveying substantial portions of the property to other parties, the one rendering the services can still recover for the reasonable value thereof under the common counts.[29]

In the *Francis*[30] case it would have been manifestly unjust to prevent recovery by the presumption of gratuity. The absence of a reciprocity of benefits is evidence that the plaintiff did not intend gratuity, and the statement by deceased that he expected plaintiff to be paid out of his estate adquately shows an implied contract.

CECIL J. HILL.

Garnishment—Bank Directors—Bank Stock

Action by M, judgment creditor, to garnish $1,000 worth of bank stock deposited with defendant bank by its owner, a director of the bank, as required by a state statute.[1] From a holding that the bank stock was exempt from garnishment, and an order discharging the bank as garnishee, M appeals. *Held,* one judge dissenting, *reversed.* The bank stock is subject to garnishment.[2]

This case squarely presents the question of whether or not bank stock owned by a judgment debtor, and held by the bank, to qualify him as a director in the bank can be garnished. It appears that the rule was well settled at common law that stock in a corporation was not subject to attachment or garnishment. This rule was based on the theory that choses in action could not be attached and in those states allowing attachment or garnishment of choses in action corporate stock could not be garnisheed unless the statute provided for it,[3] and the courts made no distinction between bank stock and any other corporate stock in applying this rule. However, it, like so many other common law rules, has been displaced by statute, in most states, which expressly or impliedly provide, or have been construed by the courts to provide that shares of stock in a corporation may be attached or gar-

[28] Einolf v. Thompson, 95 Minn. 230, 103 N. W. 1026 (1905).
[29] Patterson v. Franklin, 168 N. C. 75, 84 S. E. 18 (1915); *accord,* Messier v. Messier, 34 R. I. 233, 82 Atl. 996 (1912).
[30] Francis v. Francis, 223 N. C. 401, 26 S. E. (2d) 907 (1943).

[1] ILL. STAT. ANN. (Smith-Hurd, 1934) c. 16½, §4.
[2] Molner v. South Chicago Savings Bank, 138 F. (2d) 201 (C. C. A. 7th, 1943).
[3] 4 AM. JUR. (1936), Attachment & Garnishment, §351; 10 FLETCHER, PRIVATE CORPORATIONS (perm. ed. 1931) §4759; *cf.* Elgart v. Mintz, 123 N. J. E. 404, 197 Atl. 747 (Ch. 1938); Lambert v. Huff, A. & T. Co., 82 W. Va. 362, 95 S. E. 1031 (1918).

nished. The statutes nor the courts do not appear to distinguish between bank stock or any other form of corporation stock. As a result the generally accepted view today is that shares of stock in a corporation are subject to attachment or garnishment just as any other property or claims which the judgment debtor has.[4] It must be remembered, however, that the right to attach or garnish shares of stock, if it exists at all, depends on and is measured by the statute.[5]

The case which we have before us differs from the usual one involving attachment or garnishment of stock shares in that the stock sought to be garnished was owned by the director and held by the bank pursuant to a state statute. The relevant part of this statute reads thus: "Every director of any bank . . . must own in his own right, free from lien or encumberance, shares of the capital stock of the bank . . . of which he is a director, the aggregate par value of which shall not be less than one thousand dollars ($1,000) and the stock certificates evidencing . . . (such shares) shall be filed unendorsed and unassigned by him with the cashier of such bank during his term as director. Any director who ceases to be the owner of capital of such bank . . . of the aggregate par values of one thousand dollars ($1,000) or becomes in any form disqualified, shall vacate his place as such director."[6] Does the presence of this statute have any effect on the general rule, or does it warrant a holding that the stock is not garnishable?

The correct answer to this query would seem to depend upon the question of what is the proper construction of the statute and the applicability and effect of certain principles of the law of garnishment. Most of the states have statutes similar to the Illinois statutes requiring that bank directors own stock in the bank of which they are a director,[7]* but it appears to be the only one which requires that the

[4] Alexander v. Livestock National Bank, 282 Ill. App. 315 (1935), (1936) 3 U. CHI. L. REV. 511; 4 AM. JUR. (1936), Attachment & Garnishment, §351; 10 FLETCHER, PRIVATE CORPORATIONS (perm. ed. 1931) §4759.

[5] 4 AM. JUR. (1936), Attachment & Garnishment, §351; 10 FLETCHER, PRIVATE CORPORATIONS (perm. ed. 1931) §4759.

[6] ILL. STAT. ANN. (Smith-Hurd, 1934) c. 16½, §4.

[7]* The statutes listed in this footnote are grouped, roughly though not completely accurately, according to the amount of stock which a bank director in that state must own. (1) *$200 par value bank stock:* ALA. CODE ANN. (Michie, 1940) tit. 5, §185; MISS. CODE ANN. (1930) §3805. (2) *$500 par value bank stock:* ARIZ. CODE ANN. (1939) §51-219 ($200 if bank is in town of less than 20,000 people); ARK. DIG. STAT. (Pope, 1937) §714; IDAHO CODE ANN. (1932) §25-406; IND. STAT. ANN. (Baldwin, 1934) §18-510 ($1,000 if bank has over $50,000 capital stock); IOWA CODE (Reichmann, 1939) §9217-2 ($200 if bank has less than $30,000 capital stock); KAN. GEN. STAT. ANN. (Corrick, 1935) §9-104; KY. REV. STAT. (1942) §287.060(d); MD. CODE ANN. (Flack, 1939) art. 11, §6; N. J. STAT. ANN. (1939) §17: 4-46; N. C. CODE ANN. (Michie, 1939) §221(c) ($200 if bank has less than $15,000 capital stock); OHIO GEN. CODE ANN. (Page, 1937) §710-65; R. I. GEN. LAWS ANN. (1938) §132-1; S. D. CODE (1939) §6.0315; UTAH CODE ANN. (1943) tit. 7-3-21 ($200 if bank is not in city of first or second class). (3)

stock be deposited with anyone, bank official or otherwise. The presence of this factor might seem to lessen the value of a discussion of this problem since the question of garnishment can arise only when property of the judgment debtor is in the hands of a third party. However, in those states which do not have provisions similiar to those embodied in the Uniform Stock Transfer Act[8] the problem before us could arise, for in the absence of such provisions for attachment and levy the common law rule that stock could be reached by garnishment proceedings against the corporation would apply. Also, it appears that even in those states having the Uniform Stock Transfer Act a judgment creditor could, by first securing an injunction against the transfer of the stock, resort to garnishment against the corporation to satisfy his claim.[9] Further, if the creditor resorted to a direct proceeding against the debtor his rights to the stock would depend on the debtor's rights since his rights should be no greater than those of the debtor.

The widespread policy of requiring bank directors to own a stipulated amount of stock in the bank of which they are a director is described thus by Morse in his work on *Banks and Banking:* "A method frequently resorted to for securing the fidelity of directors in the exercise of their duties is to require them to own in their own right and unencumbered a certain number of the shares of the corporation."[10]

$1,000 par value bank stock: ILL. STAT. ANN. (Smith-Hurd, 1934) c. 16½, §4; MASS. ANN. LAWS (Michie, Supp. 1942) c. 172A, §3; MICH. STAT. ANN. (Henderson, 1936) §23.19 ($300 if bank has less than $25,000 capital stock); MINN. STAT. (Mason, 1927) §7670 ($500 if bank has less than $25,000 capital stock); MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §6014.15; NEV. COMP. LAWS (Hillyer, 1929) §659; N. Y. BANKING LAW §116; OKLA. STAT. ANN. (Supp. 1943) tit. 6, §94 ($500 if bank has capital stock of less than $25,000); TEX. ANN. REV. CIV. STAT. (Vernon, 1925) art. 388 ($500 if bank has capital stock of less than $17,500); WYO. REV. STAT. ANN. (Courtright, 1931) §10-209 (Savings Associations). (4) *Shares of stock of no certain value:* COLO. STAT. ANN. (Michie, 1935) c. 18, §12 (5 shares if bank has capital stock of less than $30,000; 10 shares if capital stock is over $30,000); DEL. REV. CODE (1935) §2305 (No specified number of shares required); Mo. STAT. ANN. (1932) p. 7585, §5363 (2 shares if bank has capital stock of less than $25,000; 5 shares if capital stock is over $25,000); N. M. STAT. ANN. (1941) §52-208 (10 shares); S. C. CODE (1942) §7748 (10 shares); WASH. REV. STAT. ANN. (Remington, 1932) §3237 (5 shares if bank has capital stock of less than $50,000; if over $50,000, 10 shares); (5) *Miscellaneous:* NEB. COMP. LAWS (Dorsey, 1929) §8-121 (Each director must own stock equal to 4% of the capital stock of the bank if the capital stock is less than $50,000; $3,000 worth of stock if capital stock of the bank is more than $50,000); PA. STAT. ANN. (Purdon, 1930) tit. 7, §819 ($3,000 worth of stock); VA. CODE ANN. (Michie & Sublett, 1937) §4149(19) ($100 worth of stock for each $10,000 worth of capital stock if capital stock of bank is less than $50,000; $500 for each $10,000 worth of capital stock of capital stock is over $50,000 and less than $100,000; $750 for each $10,000 worth of capital stock if total capital stock is more than $100,000 and less than $300,000; $1,000 for each $10,000 worth of capital stock if total capital stock is more than $300,000).

[8] 6 U. L. A. §13.

[9] Rioux v. Cronin, 222 Mass. 131, 109 N. E. 898 (1915); *cf.* Elgart v. Mintz, 124 N. J. E. 136, 200 Atl. 488 (Ch. 1938).

[10] 1 MORSE, BANKS & BANKING (6th ed. 1928) §138.

This seems to be a fairly accurate description of the purpose of such statutes. Since the amount of stock which these statutes require a director to own would almost invariably constitute only a small percent of the total liability of the bank it is doubted if the legislatures intended, by such statutes, to provide a fund out of which those holding claims against the bank, in case of insolvency, could be indemnified. The applicability of this observation to the Illinois statute is borne out by the fact that the amount of stock which a director is required to own does not vary, regardless of the size of the bank.[11*] Furthermore, in the event that the bank should collapse, the shares themselves would be practically worthless with the result that creditors of the bank could realize very little or, more likely nothing from them. Of course, in the event that a director did some act for which he was liable to a still solvent bank such a deposit would provide an easily accessible source of indemnification up to the value of the director's stock. Even so, had the purpose of the statute been to provide an indemnity fund it seems that the legislature would not only have required that a much larger amount of stock be owned by the director, but also that there be a close ratio between the amount of stock the directors must own and the size of the bank. The wording of the statute fails to indicate that it has any purpose other than to curtail improper and unwise acts by the directors by the expedient of requiring them to own stock in the bank in the hope that such will give them a personal interest that they might not have otherwise and thereby more nearly assure that the directors will discharge their duties faithfully and with the best interests of the bank in mind. The situation before us is not at all analogous to the one presented by an attempt to garnish a bond deposited with a state officer, pursuant to a statute, by an insurance company doing business within the state.[12*] Such a bond is in the hands of a state official, usually the treasurer, and therefore is not subject to garnishment since it is considered to be in the hands of the law.[13] Further, such statutes usually state that the bond is held as indemnity for the citizens of the state to whom the insurance company may be liable. It has been held that such bonds are not subject to attachment or garnishment.[14] Such a holding seems to be entirely consistent with the purpose of the statute.

[11*] Some states do make a variation in the amount of stock a director must own depending on the size of the bank of which he is a director. But in no instance, except possibly Virginia, is the amount required of a size that would indicate that the purpose of the requirement was to provide an indemnity fund. See note 8 *supra*.

[12*] Defendant in the present action argued that it was an analogous situation. For an example of a statute of this type see VA. CODE ANN. (Michie & Sublett, 1936) §4201.

[13] 4 AM. JUR. (1936), Attachment & Garnishment, §386 *et. seq.*

[14] Buck v. Gurantors' Liability Indemnity Co., 97 Va. 719, 34 S. E. 950 (1900).

One of the most important aspects of this problem is the question of whether or not the director is free to resign at will, for, as it will appear later, the judgment debtor's, and thus the creditor's, rights in this stock will depend on whether or not he could resign from his position as director whenever he desired. Since the statute is silent on this proposition its determination depends on the construction to be given the statute. The statute provides that the directors are elected to serve as "managers for one year and until their successors are elected,"[15] but this does not provide a basis for a holding, one way or the other, on this point. Thus we must look to the general rules governing the right of a director to resign. It is a well established principle that directors of a corporation are free to resign at will, provided there is nothing to the contrary in the charter or by-laws of the corporation or a statute;[16] and it does not matter what form the resignation takes provided that the charter or by-laws, or a statute, do not require it to follow a prescribed form.[17] This rule applies to bank directors just as to any corporation directors.[18*] Unless the resignation is worded to take effect only upon acceptance, there is a vacancy of the office as soon as notice of the resignation is communicated to the proper officials,[19] even if the resignation has not been accepted and the by-laws or charter of the corporation, or a statute,[20] require that the director remain in office until a successor is duly elected and qualified.[21] There are, of course, certain instances in which a director cannot exercise this privilege,[22] but it does not appear that there were any such circumstances in the present case. The absence of any provision in

[15] ILL. STAT. ANN. (Smith-Hurd, 1934) c. 16½, §4.

[16] 13 AM. JUR. (1938), Corporations, §883; 2 FLETCHER, PRIVATE CORPORATIONS (perm. ed. 1931) §345; for an extended note on this point see: Westwood, *Resignation of Corporate Officers* (1936) 22 VA. L. REV. 527.

[17] Gerdes v. Reynolds, 28 N. Y. Supp. (2d) 622 (1941); Bell v. Texas Employers' Ins. Ass'n., 43 S. W. (2d) 290, 293 (1931); 13 AM. JUR. (1938), Corporations, §884; 2 FLETCHER, PRIVATE CORPORATIONS (perm. ed. 1931) §346.

[18*] Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. ed. 662 (1891). In holding that a director of a national bank was not precluded from resigning within the year, even though he had been elected for a one year term and until his successor was elected the court said: "We do not understand that because §5154 of the Revised Statutes provides that directors shall hold office for one year, and until their successors have been elected and qualified this prohibited resignations during the year. . . ."

[19] International Bank of St. Louis v. Faber, 86 Fed. 443 (C. C. A. 2nd, 1898); Lincoln Court Realty Co. v. Kentucky Title, Savings Bank & Trust Co., 169 Ky. 840, 185 S. W. 156 (1916); 13 AM. JUR. (1938), Corporations, §885.

[20] Briggs v. Spaulding 141 U. S. 132, 11 Sup. Ct. 924, 35 L. ed. 662 (1891); Dubois v. Century Cement Products Co., 119 N. J. E. 472, 183 Atl. 188 (1936).

[21] Briggs v. Spaulding, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. ed. 662 (1891); International Bank of St. Louis v. Faber, 86 Fed. 443 (C. C. A. 2nd, 1898); 13 AM. JUR. (1938), Corporations, §886. *Contra:* Timolat v. Held, 40 N. Y. Supp. 692 (1896).

[22] Zeltner v. Zeltner Brewing Co., 174 N. Y. Supp. 338, 66 N. E. 810 (1903); 1 MORAWETZ, CORPORATIONS (1852) §563; *cf.* Carnaghan v. Export & Prod. Oil Co., 11 N. Y. Supp. 172 (1890).

the statute regulating the right to resign indicates that the legislature did not intend to change the general rule as to this right. Thus it is suggested that the court was correct in proceeding on the theory that the director was free to resign whenever he desired.

As has already been pointed out the question of the director's right to resign is closely connected with those principles of garnishment which are relevant to the problem at hand. It is a cardinal principle of the law of garnishment that the garnishor has no greater rights against the garnishee than the judgment debtor would have,[23] except as provided for by statute[24] or when there has been fraud affecting the rights of the creditor with the result that he has equities which lift his rights above those of the debtor.[25] Illinois is in accord with this rule.[26*] Thus it has been held that a garnishee can assert against the garnishor any defenses that he might have asserted against the judgment debtor, and if the debtor, at the time of the answer to the garnishment, could not recover then the garnishor cannot.[27] A further rule of garnishment

[23] North Chicago Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. ed. 565 (1894); *accord,* United States v. Bank of United States, 5 F. Supp. 942 (S. D. N. Y. 1934); Green v. Green, 108 Colo. 110, 113 P. (2d) 427 (1941); Goodwin v. Clayton, 137 N. C. 224, 49 S. E. 175 (1904); State Bank of New Salem v. Schultze, 51 N. D. 66, 199 N. W. 138 (1924).

[24] Pullman v. Railway Equipment Co., 73 Ill. App. 313 (1897).

[25] Jasper Land Co. v. Riddlesperger, 26 Ala. App. 191, 157 So. 231 (1934), *cert. denied,* 229 Ala. 331, 157 So. 233 (1934); Booker T. Washington Burial Ins. Co. v. Roberts, 228 Ala. 206, 153 So. 409 (1934); Fosdick v. Robertson, 91 Conn. 571, 100 Atl. 1059 (1917); Crane v. Illinois Merchant's Trust Co., 238 Ill. App. 257 (1925).

[26*] Schmitz v. 75th & Exchange Drug Co., 303 Ill. App. 192, 196, 24 N. E. (2d) 889, 891 (1940) where the court said: "It is a well established rule that the creditor stands in exactly the same attitude in relation to a garnished fund that the judgment debtor does, and can enforce only such rights as the debtor might enforce. The right of the creditor against the garnishee cannot, by garnishment, rise higher than the right of the debtor against the garnishee. If the right of debtor is subject to the right of the garnishee, the right of the creditor is subject to the same right. The one exception of this rule occurs when there has been a fraudulent transfer of property."; Patton v. Washington Ins. Exchange, 288 Ill. App. 594, 6 N. E. (2d) 472 (1937); Matton Grocery Co. v. Struckmeyer & Olson. 326 Ill. 602, 158 N. E. 422 (1927); Hibernian Banking Ass'n. v. Marrison, 188 Ill. 279, 58 N. E. 296 (1899); Supreme Sitting, Order of Iron Hall, v. Grigsby, 178 Ill. 522, 47 N. E. 855, 59 Am. St. Rep. 309 (1897).

[27] Chicago Riding Club for Use of Klein v. Avery, 305 Ill. App. 419, 27 N. E. (2d) 636 (1940); First Nat. Bank v. Hanhemann Institutions of Chicago, 356 Ill. 366, 190 N. E. 707 (1934); Schneider v. Autoist Mut. Ins. Co., 346 Ill. 137, 178 N. E. 466 (1931); Dennison v. Taylor, 142 Ill. 45, 31 N. E. 148 (1892); *accord,* Zink v. Black Star Line, Inc., 18 F. (2d) 156 (App. D. C. 1927), *cert. denied,* 275 U. S. 527, 48 Sup. Ct. 20, 72 L. ed. 408 (1927); Fidelity Trust Co. v. New York Finance Co., 125 Fed. 275 (C. C. A. 3rd, 1903); First Security Bank of Pocatello v. Zaring Farm & Livestock Co., 51 Idaho 700, 10 P. (2d) 303 (1932); Paul Davis Dry Goods Co. v. Paul, 205 Iowa 491, 218 N. W. 276 (1928); Scurry v. Quaker Oats Co., 201 Iowa 1171, 208 N. W. 860 (1926); Gentry v. Le Clair, 120 Kan. 183, 250 Pac. 257 (1926); Aetna Ins. Co. v. Commercial Credit Co. 252 Ky. 539, 67 S. W. (2d) 676 (1934); Metropolitan Life Ins. Co. v. Hightower, 211 Ky. 36, 276 S. W. 1063, 44 A. L. R. 1158, 1161 (1925); Silverman v. Grinell, 165 La. 587, 115 So. 789 (1928); Employers Liability Assur. Corp. Limited v. Perkins, 169 Md. 269, 181 Atl. 436 (1935); Braniff Inv. Co. v. Carter, 118 Okla. 599, 75 P. (2d) 439 (1937).

is the principle that the proceeding will not lie against the garnishee unless he is indebted to the debtor without contingency or uncertainty at the date when the answer to the garnishment suit is filed.[28] If these principles are applied in the light of the construction that we have placed on the statute, to wit, that the director was free to resign at will, then no reason for holding that the stock was not garnishable appears. If the director can resign whenever it suits his fancy then it can hardly be argued that he does not have a right to the stock. And since he has an absolute right to the stock, so does the creditor. If, however, he cannot resign at will, then it seems that the stock should not be subjected to garnishment for he would have no right to the stock and neither would his creditor. One uncertainty that complicates this aspect of the matter is the question of whether or not the director's right to the stock accrues as soon as he resigns. The preceeding remarks were made on the theory that it did. But if, after his resignation, the bank had a right to retain the stock until it had been determined that there was no liability on the part of the director, which would attach to the stock, then it seems that the stock should not be subjected to garnishment. In such a case the director would have no right to the stock until this had been determined; thus the creditor should not be able to garnish it before that time.

On the basis of these observations it does not seem that there are any evident reasons to be gained from the statute which free such bank stock from garnishment. Neither do any of the relevant principles of garnishment seem to warrant, in view of what we deem a proper construction of the statute, a contrary decision. Thus it is submitted that the holding in the instant case is proper and in accord with the general law of garnishment, even though it does permit a third party to deprive a bank of a director and a director of his position, irrespective of his value to the bank. However, it is suggested that the statute involved could be improved and clarified by certain amendments. It seems that it would be wise to incorporate into it some definite provision as to the rights of a director to resign during his term of office. Furthermore, a provision requiring that the stock remain in the hands of the cashier for a definite period after the director resigned, provided the right to resign is not abrogated entirely, would be an improvement on

[28] Keck v. Vogt, 108 Colo. 386, 117 P. (2d) 1005 (1941); Wetten v. Horix, 309 Ill. App. 535, 33 N. E. (2d) 615 (1941); Zimek v. Illinois National Casualty Co., 370 Ill. 572, 19 N. E. (2d) 620 (1939); Wheeler v. Chicago Title & Trust Co., 217 Ill. 128, 75 N. E. 455 (1905); *accord,* Malone v. Moore, 204 Iowa 625, 215 N. W. 625, 55 A. L. R. 356, 361 (1927); McKnight Co. v. Tomkinson, 209 Minn. 299, 286 N. W. 659 (1941); Salyers Auto Co. v. De Vore, 116 Neb. 317, 217 N. W. 94, 56 A. L. R. 594, 601 (1927); Acheson-Harder Co. v. Western Wholesale Notions Co., 72 Utah 323, 269 Pac. 1032, 60 A.L.R. 881, 884 (1928); *But cf.* Anderson v. Dugger, 130 Kan. 356, 285 Pac. 546 (1930).

the statute in its present form. Such a provision would eliminate the possibility of a director doing an act for which he might be liable and then resigning and withdrawing and disposing of his stock before his liability attached to it. Also, this would afford some protection to the bank, its stockholders, and depositors in that it would provide an easily accessible fund out of which some indemnification could be had in the event that the director was liable for some act of malfeasance or misfeasance during his directorship. In the event that a provision to this effect was adopted it seems that the stock could not be subjected to garnishment for the debtor-director, and thus the creditor, would have no right to the stock until the prescribed period had passed. Also, until this period had elapsed any claim which the director had on the stock would be subject to the contingency of whether or not any liability would be determined, and this would defeat garnishment proceedings by a creditor.

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