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It is readily apparent that the instant case is considerably out of line with the authority as outlined above. The fact set-up seems to furnish adequate basis, in connection with the bank's insolvency, for protecting the equities of depositors, creditors, and other stockholders. The distinction pointed out by the court between the instant case and *Corporation Commissioner* v. *McLean*[30] would, in accordance with authority,[31] further impeach the result of the instant case. The court's reliance on the fact that the defrauding bank president would profit by his own fraud—described by the court as "the egg that spoils the omelet"—is, from the standpoint of innocent creditors, as unsatisfactory as it is unique. The court sems to have disregarded entirely the plain wording, as well as the evident intent of the North Carolina "double liability" statute.[32]

JAMES M. LITTLE, JR.

Banks and Banking—Power of Banks to Pledge Assets to Secure Depositors.

Plaintiff railroad had deposited its funds in defendant national bank on condition that the bank should furnish corporate surety bonds, which it did. While the bank was still solvent, it induced the railroad to accept a substitution of Liberty bonds owned by the bank for the surety bonds which secured the deposit. The bank failed, and this action is against the receiver who has failed to surrender the Liberty bonds. *Held:* The action cannot be maintained; the agreement by which the bank pledged some of its assets to secure private funds was beyond the power of the bank, and unenforceable.[1]

[30] 202 N. C. 77, 161 S. E. 854 (1932). The tenor of this case is distinctly in accord with the stricter view: "It is only when it is shown that a person whose name appears on the books of the corporation as a stockholder, is not in fact an owner of stock, that such person is not subject to the statutory liability. . . . The only issues of fact which may be raised by such appeal and determined in the Superior Court, ordinarily, are: (1) Was the appellant a stockholder of the insolvent banking corporation at the date of his assessment? (2) If so, how many shares of the capital stock of said corporation did appellant own at said date? . . . Having received all the benefits arising from the ownership from stock . . . it is not unjust that they should now bear their share of the burden imposed by law upon them by reason of their ownership of said stock."

[31] See note 8 *supra*.

[32] *Supra* note 21. The case is perhaps supportable by North Carolina authority dealing with corporations other than banks. Chamberlain v. Trogden, 148 N. C. 140, 61 S. E. 628 (1908).

A recent enactment, P. L. 1933, ch. 159, provides for a surplus fund in lieu of the additional liability imposed upon bank stockholders. The statute is mandatory as to banks organized after its ratification, and those then in operation are given the option of coming within its provisions.

[1] Texas & P. R. Co. v. Pottorff, 63 F. (2d) 1 (C. C. A. 5th, 1933).

The principal case and a prior case arising out of the failure of the same bank but involving the pledging of assets to secure *public* deposits, which pledge was upheld,[2] illustrate the distinction which courts often make between pledges securing private, and those securing public, deposits. It is generally conceded that a bank has the power to borrow money and to secure the obligation by pledging its assets,[3] and some courts have made no distinction between a loan and a deposit since a debtor-creditor relationship arises in both cases.[4] Other courts have rejected the loan analogy,[5] and have refused to sustain the pledges as an implied or incidental power of the bank.[6]

[2] Pottorff v. El Paso-Hudspeth Counties Road Dist., 62 F. (2d) 498 (C. C. A. 5th, 1933).

[3] Auten v. U. S. Nat. Bk. of N. Y., 174 U. S. 125, 19 Sup. Ct. 628, 43 L. ed. 920 (1899); Citizens Bk. v. Bk. of Waddy, 126 Ky. 169, 103 S. W. 249 (1907); Carter v. Brock, 162 La. 12, 110 So. 71 (1926); Cantley v. Little R. Drainage Dist., 2 S. W. (2d) 607 (Mo. 1928); Schumacker v. Eastern Bk. & Trust Co., 52 F. (2d) 925 (C. C. A. 4th, 1931); Bulton v. Sanguinetti, 11 Pac. (2d) 1085 (Ariz. 1932); 1 MORSE, BANKS AND BANKING (6th ed. 1928) §§48 and 63. Controversy has recently arisen over the power of the receiver of an insolvent bank to borrow from the Reconstruction Finance Corporation by pledging assets. North Carolina, in Bales v. Hood, 203 N. C. 56, 164 S. E. 828 (1932), held that an equity court through its general authority over receivers could authorize such a pledge. Utah, in Riches v. Hadlock, 15 Pac. (2d) 283 (1932), held that the state statute took away from the courts such power in the case of insolvent banks. It will be perceived that neither court bases its decision upon the power of the bank to borrow money, but solely upon the power of an equitable or statutory receiver.

[4] Ward v. Johnson, 95 Ill. 215 (1880); Williams v. Hall, 30 Ariz. 581; 249 Pac. 755 (1926). In Page Trust Co. v. Rose, 192 N. C. 673, 135 S. E. 795 (1926), Connor, J., in a dictum said: "The relation between the bank and its depositor is that of debtor and creditor; we perceive no distinction on principle between one who deposits money with a bank, subject to check, and one who loans money to the bank for a definite time, as regards this question. There is no statute in this State forbidding a transfer or assignment by a bank of its property as security for one who is a depositor in the bank. Whether a sound public policy forbids such transfer or assignment must be determined by the General Assembly and not by this court." At the 1933 Session of the North Carolina General Assembly, House Bill No. 401, providing, "Any bank or banking institution authorized by law to receive deposits, if in the judgment of its board of directors or its executive committee it is advisable and to the best interests of such banking institutions to do so, is authorized to secure and protect its liability to any depositor by pledging for such purpose such of its assets as may be designated by its board of directors or executive committee . . . ," received an unfavorable committee report. Thus, it would seem that the North Carolina General Assembly has indirectly disapproved such a pledge to secure a private deposit.

[5] Hunt v. Hopley, 120 Iowa 695, 95 N. W. 205 (1903); Divide County v. Baird, 55 N. D. 45, 212 N. W. 236 (1926), 51 A. L. R. 296 (1927); State Bank v. School Dist., 174 Minn. 286, 219 N. W. 163 (1928), 65 A. L. R. 1407 (1930); Farmers' & Merchants' Bk. v. School Dist., 174 Minn. 286, 219 N. W. 163 (1928).

[6] Commercial Bk. & Tr. Co. v. Citizens Tr. & G. Co., 153 Ky. 566, 156 S. W. 160 (1913), 45 L. R. A. (n. s.) 950 (1913), Divide County v. Baird, *supra* note 5.

Pledges to secure public deposits are often permitted by statute, either directly by giving the authority to the bank,[7] or indirectly by authorizing the public officials to deposit only upon taking security.[8] In the absence of statute, the decided weight of authority is that a bank, state or national, has the power to pledge its assets to secure a public deposit,[9] or to indemnify the sureties upon a bond given to secure such deposits.[10] Of course, a valid pledge may not be made

[7] City of Portland v. St. Bk. of Portland, 107 Ore. 267, 214 Pac. 813 (1923); Cameron v. Christy, 286 Pa. 405, 113 Atl. 551 (1926); Cameron v. Alleghaney County Home, 287 Pa. 326, 135 Atl. 133 (1926); Schormick v. Butler, 172 N. E. 181 (Ind. 1930); Bliss v. Mason, 237 N. W. 581 (Neb. 1931). As to the power of national banks, see 12 U. S. C. A. §90, as amended June 25, 1930.

[8] First Am. Bk. & Tr. Co. v. Palm Beach, 96 Fla. 247, 117 So. 900 (1928); Pixton v. Perry, 269 Pac. 114 (Utah, 1928); Huntsville Tr. Co. v. Noel, 12 S. W. (2d) 751 (Mo. 1928); Tyrrell County v. Holloway, 182 N. C. 64, 108 S. E. 337 (1921); Page Tr. Co. v. Rose, *supra* note 4; Hood v. Board of Financial Control, 203 N. C. 119, 164 S. E. 831 (1932). That the situation in North Carolina for such deposits may shortly be changed can be seen from the following: "A bill to permit member banks of the Federal Reserve System to accept deposits of State, County and Municipal governmental units without having to post depository bonds or other security was passed by the Senate yesterday and sent to the House of Representatives. However, the bill is contingent upon the passage of pending legislation in Congress which would have the Federal Government guarantee 100 per cent. payment of such deposits in member banks." *Raleigh News and Observer,* May 3, 1933, at 2.

[9] Richard v. Osceola Bk., 79 Iowa 707, 45 S. W. 294 (1890); Williams v. Hall, *supra* note 4; Cameron v. Christy, 286 Pa. 405, 113 Atl. 551 (1926); Andrew v. Adebolt Savings Bk., 203 Iowa 1335, 214 N. W. 559 (1927); Austin v. Lamar County, 11 S. W. (2d) 553 (Tex. 1928); Williams v. Earhart, 34 Ariz. 565, 273 Pac. 728 (1929); Application of Broderick, 252 N. Y. Supp. 68 (1931); *In re* Bank of Spencerport, 255 N. Y. Supp. 482 (1932); Sneeden v. City of Marion, 58 F. (2d) 341 (E. D. Pa. 1932). *Contra:* Divide County v. Baird, *supra* note 5; Farmers' & Merchants' Bk. v. School Dist., *supra* note 5; Ark.-La. Highway Co. v. Taylor, 177 Ark. 440, 6 S. W. (2d) 533 (1928), noted in (1928) 42 HARV. L. REV. 272; Foster v. City of Longview, 26 S. W. (2d) 1059) (Tex. 1930); Wood v. Imperial Irr. Dist. 17 Pac. (2d) 28 (Cal. 1933); Bliss v. Pathfinder Irr. Dist., 122 Neb. 303, 240 N. W. 291 (1932).

Since this comment was written, two cases of interest have been decided. In Sneeden, Rec'r., v. City of Marion, 64 F. (2d) 721 (C. C. A. 7th, 1933), it was held that an Illinois national bank did not have power to pledge certain of its assets to secure the deposits of a city operating under the commission form of government. But Mays v. Bd. of Comm'rs., Okla. Sup. Ct. No. 20269, May 16, 1933, (1933) U. S. WEEKLY L. J. 262, held that "national banks are empowered to pledge assets to secure deposits of public funds without specific statutory authority therefor, since such power is incidental to the banking business."

[10] McFerson v. Nat. Surety Co., 72 Colo. 482, 212 Pac. 489 (1923); Page Tr. Co. v. Rose, *supra* note 4; U. S. Fidelity Co. v. Village of Bassfield, 148 Miss. 109, 114 So. 26 (1927); Ainsworth v. Kruger, 80 Mont. 468, 260 Pac. 1055 (1927); Grigsby v. People's Bank, 158 Tenn. 182, 11 S. W. (2d) 673 1928); Melaven v. Hunker, 299 Pac. 1075 (N. M. 1931); *cf.* Mothersead v. U. S. Fidelity & Guaranty Co., 22 F. (2d) 644 (C. C. A. 8th, 1927), certiorari denied, 276 U. S. 637, 48 Sup. Ct. 421, 72 L. ed. 744 (1927). *Contra:* Com-

after the bank has become insolvent, since it would amount to an unlawful preference.[11]

Questions as to the validity of pledges to secure private deposits have not reached the appellate courts nearly so often as have those involving public deposits. Many states prohibit private pledges by statute.[12] Where there are no statutes, most of the early cases uphold private pledges;[13] but later decisions are practically unanimous in holding that such pledges are against public policy and void.[14] The question did not arise as to a national bank until 1931, and then in a strong opinion the court held such a pledge void.[15] The principal case follows and approves that case.

The arguments most often advanced against allowing assets to be pledged by the bank are: (1) to allow pledging gives extra protection to the secured at the expense of the unsecured;[16] (2) the public is deceived by the financial statements which seldom, if ever, state that assets are pledged;[17] (3) the pledgee, if a large depositor, is given a

mercial Bk. & Tr. Co. v. Citizens Tr. & G. Co., *supra* note 6; Schornick v. Butler, 172 N. E. 181 (Ind. 1930).

[11] Rice v. City of Columbia, 143 S. C. 516, 141 S. E. 705 (1928); Farmers Savings Bk. v. Bergin, 52 S. D. 1, 216 N. W. 597 (1927), aff'd on rehearing, 53 S. D. 296, 220 N. W. 859 (1928); Parks v. Knapp, 29 F. (2d) 547 (C. C. A. 8th, 1928), certiorari denied, 278 U. S. 660, 49 Sup. Ct. 250, 73 L. ed. 567 (1929); *cf.* City of Louisville v. Columbia Tr. Co., 245 Ky. 704, 54 S. W. (2d) 40 (1932); Hood v. Board of Financial Control, *supra* note 8 (pledge upheld on ground public officials had no notice).

[12] IDAHO CODE (1932) §25-507; MINN. STAT. (Mason, 1929) §7699-14; N. D. COMP. LAWS ANN. (Supp. 1925) §5191A 1; S. D. Laws 1919, c. 124, p. 109; ORE. CODE ANN. (1930) §22-801; UTAH COMP. LAWS (1917) §1006; KAN. REV. STAT. ANN. (1923), c. 9, §142.

[13] Ahl v. Rhoads, 84 Pac. 319 (1877); Ward v. Johnson, 95 Ill. 215 (1880); Bank of Chautauqua v. First National Bank of Sedan, 98 Kan. 109, 157 Pac. 392 (1916); *Ex parte* Dist. Grand Lodge, 147 S. C. 103, 144 S. E. 841 (1928); Peurifoy v. Westminster Loan Co., 148 S. C. 100, 145 S. E. 706 (1928) (question of power was apparently not raised in either of the South Carolina cases).

[14] Porter v. Canyon County Farmers' Mut. Fire Ins. Co., 45 Idaho 522, 263 Pac. 632 (1928); Balt. & O. Ry. v. Smith, 48 F. (2d) 861 (W. D. Pa. 1931), aff'd, 56 F. (2d) 799 (C. C. A. 3rd, 1932). See Carter v. Brocks, 162 La. 12, 110 So. 71, 73 (1926).

[15] Balt. & O. Ry. Co. v. Smith, *supra* note 14, with comment (1932) 41 YALE L. J. 1076.

[16] Commercial Bk. & Tr. Co. v. Citizens Tr. & G. Co., *supra* note 6.

[17] Divide County v. Baird, *supra* note 5; Grigsby v. People's Bank, *supra* note 10, where the court suggested that it was the duty of the banking department to require such pledges to be stated in reports. However, unless published, the depositing public might still be deceived, and, if published, such a statement might prove disastrous to the bank, as suggested in Commercial Bk. & Tr. Co. v. Citizens Tr. & T. Co., *supra* note 6.

power over the bank which is undesirable.[18] It is believed that the courts are increasingly accepting these reasons as outweighing the rather vague notion of "superior public rights" under which such pledges to the public have been sustained, and that there is even less reason for sustaining the pledges to secure private depositors. Expressions of doubt, and often of open disapproval, are coming from the courts, as well as from commentators, as to the validity of allowing assets to be pledged whether to secure a public depositor or a private depositor.[19]

The banks themselves are becoming increasingly interested. At the recent meeting of the executive council of the American Bankers' Association the following was placed in the program for banking reform: "Deposits of public funds in banks should have the same status as private deposits, and should not be accorded special and additional security."[20] It is submitted that such a plan is desirable from the standpoint of sound banking, and would benefit the banks, the depositors, and the public.

HERMAN S. MERRELL.

Bankruptcy—Compositions—A Suggestion for Federal Legislation.

In these days of economic stress it has become highly desirable to find some method, less disastrous to the debtor than bankruptcy, of relieving the insolvent debtor of his excessive debts. On first appearance it would seem that the common law composition with creditors might go a long way toward meeting this demand.

A common law composition with creditors is an agreement between an insolvent debtor and two or more of his creditors,[1] whereby

[18] Commercial Bk. & Tr. Co. v. Citizens Tr. and G. Co., *supra* note 6. The courts seldom mention this reason. However, it is believed to be a material one, since a large depositor, heavily secured, would be in a position largely to dictate to the bank. On the other hand, large corporations doing business in numerous localities may refuse to patronize the smaller local banks unless given security. The best remedy for this situation, under present banking laws, seems to be to permit surety bonds without a pledge, which only decrease the amount of the bank's profits instead of actually taking away general assets upon which all depositors have a right to rely equally. See Coöp. Ass'n v. First State Bank, 168 Minn. 28, 209 N. W. 631 (1926).

[19] See Balt. & O. Ry. v. Smith, *supra* note 14, at 867; Schumacker v. Eastern Bk. & Tr. Co., *supra* note 3 at 927. Note (1931) 79 U. OF PA. L. REV. 608; (1929) 77 U. OF PA. L. REV. 916; (1932) 41 YALE L. J. 1076; (1932) 10 NEB. L. BULL. 327; (1928) 2 DAK. L. REV. 68.

[20] THE TARHEEL BANKER, May, 1933, at 30; TIME, April 24, 1933, at 47.

[1] Schroeder v. Pissis, 128 Cal. 209, 60 Pac. 758 (1900) ("It is not necessary that all the creditors of a debtor should sign a composition agreement in order