LEGISLATION

Statutory Liability of Bank Stockholders in Iowa

The imposition of "double liability" upon the holders of bank stock has been widely employed by law makers as a means of partially protecting the general public as bank depositors. At an early date a provision for such liability was embodied in the Iowa Constitution,[1] which was soon followed by statutory provisions[2] of similar character and substance. After its enactment the constitutional provision was deprived of its practical efficacy by a concurrence of construction and circumstance. By early judicial construction its application was limited to banks of issue,[3] and the acts creating banks of this nature were repealed in 1870. Since

[1] Iowa Const. art. VIII, § 9, "Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors over and above the amount of stock by him or her held to an amount equal to his or her respective shares so held for all its liabilities, accruing while he or she remains such stockholder."

[2] In Iowa Laws 1858, c. 87, a state bank was created. Section 42 of this chapter imposed double liability on stockholders of the branches of this state bank in substantially the same manner as did the constitution, but concluding: "no transfer shall affect this liability. . . ." Chapter 114 of the laws of the same year provided for the formation of "free banks" and § 30 of that chapter defined the liability of stockholders precisely as it was set out in § 42 of chapter 87. Both banks so created were banks of issue, but the acts creating them were repealed in their entirety in Iowa Laws 1870, c. 25.

Iowa Laws 1874, c. 60, enacted measures for the creation of savings banks which were not banks of issue. Section 12 of that chapter imposed "double liability" as it had previously existed but changed the conclusion to read: "no transfer of stock shall affect such liability for the period of six months thereafter. . . ."

In Iowa Laws 1880, c. 208, provisions were made for the "double liability" of shareholders in general corporations which were engaged in the banking business. Later in Iowa Laws 1886, c. 72, it was provided that such corporations were to be designated "state banks". The provisions for savings and state banks were consolidated and carried into the Iowa code of 1897 as § 1882 which is substantially the same as §§ 9251, 9252 and 9253 of the Iowa Code of 1931.

[3] Allen v. Clayton, 63 Iowa 11, 18 N. W. 663 (1884). See Horack, Banking Clause in the Constitution of Iowa (1928) 13 Iowa L. Rev. 293, which criticizes this case as failing to carry out the intent of the enactors of the constitutional amendment. However, the case has been repeatedly upheld. See Leach v. Arthur Savings Bank, 203 Iowa 1052, 1055, 213 N. W. 772, 773 (1927).

the savings and state banks later created were not banks of issue, liability of the stockholders therein has been measured solely by the statutes which until their recent repeal[4] were in terms substantially the same as the constitutional provision. Pertinent, therefore, in this inquiry to ascertain the bank stockholder's liability, is Section 9251 of the Iowa Code of 1931 which reads:

> "All stockholders of savings and state banks shall be individually liable to the creditors of such corporation of which they are stockholders over and above the amount of stock by them held therein and any amount paid thereon, to an amount equal to their respective shares for all its liabilities accruing while they remained such stockholders."[5]

Here manifested is a true "statutory liability" differing essentially from the responsibility of the shareholder on an assessment to restore the capital stock of the bank.[6] The nature of the stockholders' liability thus created is said to be contractual in that by the voluntary purchase of the stock the stockholder impliedly agrees to be bound by the terms of the statute.[7] Nevertheless unlike other contract rights the courts agree that this right of the creditors is not an asset of the bank, nor is it assignable as is the ordinary chose in action.[8] The proper proceeding by which to enforce this liability and to determine the amount and necessity thereof,[9] is a suit in equity by the receiver with the shareholders as necessary defendants.[10] For the successful prosecution of this suit by the

[4] Repealed by Iowa Laws Ex. Sess. 1933, c. 119, § 5. This, however, is by its terms applicable only to those purchasing after the date upon which the amendment became effective, that date being November 23, 1933. Thus stockholders' double liability is still a fruitful field for litigation as regards those who purchased their stock prior to that date.

[5] This provision is also applicable to trust companies. Iowa Code (1931) § 9259. No decisions under this section seem to have arisen, but presumably all decisions relating to banks would be precedents for the points involved.

[6] Leach v. Arthur Savings Bank, 203 Iowa 1052, 1057, 213 N. W. 773, 774 (1927).

[7] Smith v. Andrew, 209 Iowa 99, 227 N. W. 587 (1929).

[8] Andrew v. State Bank of Swea City, 214 Iowa 1339, 242 N. W. 62 (1932); Roe v. King, 217 Iowa 213, 251 N. W. 81 (1933). In the latter case the court held that even though the claim had been reduced to judgment it was not assignable.

[9] Williams v. McCord, 204 Iowa 851, 214 N. W. 702 (1927).

[10] In State v. Union Stock Yards State Bank, 103 Iowa 549, 70 N. W. 752 (1897), it was held that shareholders were not necessary defendants in a proceeding to determine the amount and necessity of the assessment, but three

receiver there is no requirement that the assets of the bank have been previously exhausted.[11] However, in the distribution among the creditors, the assets of the bank are to be disposed of first, the shareholders retaining an interest in any unexpended balance.[12]

Two natural divisions seem to mark the problem of ascertaining the "double liability" of the stockholder, and this discussion will be so outlined. (1) Who are stockholders within the meaning of the statute? (2) What defenses are available to those ascertained to be stockholders?

As to the first, the object of the statute is to impose a liability upon the real owner of the stock and, if ascertained, he will be held whether or not his name appears upon the records of the corporation.[13] That another is the owner of record is no defense to the real owner for the record, though raising a presumption of ownership is not conclusive.[14] On the other hand, that another is the real owner will be no defense to the holder of record for, by allowing his name to appear upon the records, he is estopped, as against the creditors, to deny his ownership. The extent to which the courts will go in imposing liability on the owner of record is shown in *Andrew v. People's State Bank of Humboldt*,[16] where the defendant was held liable though he became a stockholder of record solely for the accommodation of the bank, and intended to remain such only temporarily. By virtue of this same doctrine trustees or pledgees who appear on the record as individual owners may be held liable.[17] However, if the fact of the trust is indicated on the record, the creditor being put on notice or inquiry, an estoppel is precluded and no liability can be imposed.[18] While most courts in this situation insist that the nature as well as the

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days after the opinion in this case was filed, the statute was enlarged to read: ". . . all parties interested shall be brought into court. . . ." and relying on this addition to the statute the court in Edson v. Wright, 134 Iowa 634, 112 N. W. 105 (1907) expressly overruled the former decision.

[11] State v. Union Stock Yards State Bank, 103 Iowa 549, 70 N. W. 753 (1897).

[12] *Id.* at 555, 70 N. W. at 753.

[13] Andrew v. Citizen State Bank of Mt. Vernon, 261 N. W. 810 (Iowa 1935); Andrew v. First Trust and Savings Bank of Ida Grove, 260 N. W. 849 (Iowa 1935).

[14] Andrew v. Citizens State Bank of Mt. Vernon, 261 N. W. 810 (Iowa 1935).

[15] See Andrew v. Commercial Savings Bank, 205 Iowa 42, 45, 217 N. W. 431, 433 (1928).

[16] 211 Iowa 649, 234 N. W. 542 (1931).

[17] Andrew v. Commercial Savings Bank, 205 Iowa 42, 217 N. W. 431 (1928).

[18] *Ibid.*

fact of the trust must be revealed,[19] the Iowa court has made no such restriction, holding that the mere word "trustee" appearing after the stockholder's name was sufficient to put the creditor on inquiry and prevent an estoppel.[20]

As the liability is contractual in nature it follows that a transfer to a person without his knowledge or consent would be ineffectual to impose any obligation upon him.[21] Thus one who has the right to take stock either under statutes of descent and distribution, or under a testamentary provision, does not become the owner within the purview of the statute until his consent to be such has been manifested either impliedly or expressly.[22] If under such circumstances the stock ownership is refused, the estate of the deceased stockholder will be held for the statutory liability.[23] But where a legatee, though taking only a life interest in personalty which includes shares of bank stock, has manifested an intent to accept the stock, the legatee could be held to respond for the "double liability" from the other assets of the estate which he received.[24]

No cases have yet arisen in Iowa directly involving the enforcement of this "double liability" in the event of a reorganization, but where the courts have passed upon it they generally have held that even the old stockholders who did not become members of the new organization still remained liable on the debts of the old corporation.[25] In the case of *Andrew v. Dunn*,[26] involving a merger to which the defendants had not consented, the court did not impose upon them the statutory liability. But there the debts sought to be enforced were largely due the officers, had arisen out of the very act of consolidation, and in part were not incidental to the banking business. Relying mainly on these grounds rather than the fact of the merger itself the court refused to hold the defendants liable.

The debts which may be properly incurred by a state or savings bank are restricted by legal limitation to those which are the ordinary incidents of banking business.[27] Any contracts or debts

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[19] Union Savings Bank v. Willard, 4 Cal. App. 690, 88 Pac. 1098 (1907); Flynn v. American Banking & Trust Co., 104 Me. 141, 69 Atl. 771 (1908). Note (1928) 57 A. L. R. 772.

[20] Andrew v. Commercial Savings Bank, 205 Iowa 42, 217 N. W. 431 (1928).

[21] Andrew v. First Trust and Savings Bank of Ida Grove, 261 N. W. 810 (Iowa 1935).

[22] *Ibid.*

[23] *Ibid.*

[24] Andrew v. Peoples Savings Bank, 261 N. W. 815 (Iowa 1935).

[25] Willus v. Mann, 91 Minn. 494, 98 N. W. 341 (1904). Mitchie, Banks and Banking (1931) c. 5, § 111.

[26] 202 Iowa 364, 210 N. W. 425 (1926).

[27] Iowa Code (1935) § 9297: "Trust companies, state or savings banks, may contract indebtedness or liability for the following purpose: For necessary

beyond the scope of this statute are not only *ultra vires* but illegal, and on insolvency, creditors, by virtue of these illegal contracts, cannot enforce their claims against the bank.[28] Thus no liability attaches to the bank upon which the creditor can enforce the statutory liability against the stockholder. The stockholders, then, have a complete defense to all debts not properly within the scope of the statute.[29]

Since by its terms the "double liability" herein created is solely for the benefit of creditors, it is fundamental that their rights cannot be prejudiced by acts of the bank or the receiver. Hence, in the case of fraud on part of the bank officers or the receiver, the shareholder is afforded no defense in a suit by creditors to enforce his statutory liability.[30] Even though his purchase of the stock was fraudulently induced, he is powerless, upon the failure of the bank, to rescind or to set off the loss incurred by him because of the fraud.[31] However, it seems to be assumed that prior to the insolvency of the bank, he would have this right to rescind.[32] Furthermore, neither the bank nor the superintendent of banking can by agreement effectively release the stockholder from the claims of the creditor.[33] Similarly, on the theory that such would be a preference to the rights of general creditors, the stockholder who is also a creditor of the bank, whether his claim be in the form of deposits or otherwise, cannot have the right of set-off against his "double liability."[34] The general creditors have a right to a *pro rata* distribution of this fund created for them by the statute.[35] Thus neither payment nor partial payment by the stockholder to a particular creditor will discharge this obligation.

expenses in managing and transacting their business, for deposits, and to pay depositors, to maintain proper legal reserves and for other corporate purposes, . . ."

[28] State v. Corning State Savings Bank, 136 Iowa 79, 113 N. W. 500 (1906).

[29] Pete v. Des Moines Savings Bank, 190 Iowa 1020, 181 N. W. 503 (1921). It has been held under this section that where an insolvent bank transfers its assets to another bank which assumes the transferor's deposit liabilities, a contract by the insolvent bank to pay any deficit is one for the benefit of the depositors and enforceable against the shareholders. Andrew v. Farmers State Bank of Fairfield, 215 Iowa 627, 246 N. W. 618 (1933).

[30] Stewart v. Lay, 45 Iowa 604 (1877).

[31] See Andrew v. Peoples State Bank of Humboldt, 211 Iowa 649, 654, 234 N. W. 542, 545 (1931).

[32] *Ibid.*

[33] Bates v. Clarion Savings Bank, 217 Iowa 741, 252 N. W. 138 (1934); Andrew v. Farmers Trust & Savings Bank, 204 Iowa 243, 213 N. W. 925 (1927).

[34] *Id.* at 249, 213 N. W. at 927.

[35] *Id.* at 249, 213 N. W. at 927.

With the liability thus imposed upon the stockholder a strict one, the question arises as to what extent he can escape this liability by a transfer of the stock. In most jurisdictions a transfer in good faith while the bank is solvent, if properly recorded, is sufficient to relieve the transferor from further liability.[36] But even in these jurisdictions if the transfer is not recorded the transferor remains liable on a theory of estoppel. In Iowa, contrary to the general rule, it would seem that under no circumstances can a shareholder relieve himself of this liability by the mere transfer of his stock.[37] This conclusion has not become established, however, without occasioning some confusion and inconsistency among the Iowa cases. To determine the essence of the problem which has confronted the court a reference to the wording of the Iowa statute is necessary. Under this provision the stockholders are responsible for "all its [the bank's] liabilities *accruing* while they remained such stockholders."[38] No designation is made of a time at which such liability is to cease. However, the court in *Andrew v. Commercial State Bank*[39] clearly decided that the burden of responding to the statutory double liability was upon those stockholders who held the stock at the time of insolvency. This conclusion was based primarily upon a peculiar construction of the word *accruing*. The meaning attributed thereto was that of any liability, properly within the statute, *existing* at the time the stockholder was owner. The court further reasoned that the creditors had a right to look to the stockholders who were such at the time the debt existed *and* the bank became insolvent, for not until then did the right of an assessment accrue.

In the later case of *Andrew v. American Savings Bank*,[40] this reasoning was entirely rejected, and debts *accruing* was held to mean those *incurred* (as distinguished from maturing) while the stockholder remained owner of the stock. This interpretation was based upon the intent of the lawmakers as evidenced by an historical review of both the constitution and the statutes. It was shown that this meaning was attached to the language when used at the constitutional convention prior to the enactment of the

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36 Austin v. Pool, 299 S. W. 935 (Tex. Civ. App. 1927); see also Germania National Bank v. Case, 99 U. S. 628 (1878). Mitchie, *op. cit. supra* note 25, c. 5, § 127.

37 Andrew v. American Savings Bank, 217 Iowa 447, 252 N. W. 245 (1934).

38 Similar language is found in Ill. Const. art. XI § 6; Ill. Rev. Stat. (Smith-Hurd 1935) c.16½, § 6; Neb. Const. art XII, § 7; Neb. Comp. Stat. (1929) c. 8, § 154; Wash. Const. art. XII, § 11; Wash. Rev. Stat. Ann. (Remington 1932) § 3242; W. Va. Const. art. XI, § 6; W. Va. Code (1931) c. 31, art. 4, §16.

39 206 Iowa 1070, 221 N. W. 809 (1928).

40 217 Iowa 447, 252 N. W. 245 (1934).

constitutional provision for "double liability"; and as identical language has been used in all the statutes since that date it was presumed that the intent with which it was used remained the same. Thus, having found that accruing meant incurred, the court without hesitancy assumed that a transferor remained liable after transfer for those debts so incurred while he owned the stock.

Notwithstanding the court's failure to distinguish them, it would seem clear that this decision involves two distinct propositions. The first of these is as to the meaning of the word "accruing"; this the court discusses to the exclusion of the second, which is whether or not a transfer should be deemed to discharge the stockholder's liability. The first of these seems merely to involve the mode of determining the particular debts for which the stockholder is to be held liable. The court reached the conclusion that he was "doubly liable" but only if and to the extent that losses resulted from debts "incurred" while he remained a stockholder. However, this by no means necessitated the further ruling by the court that the liability, thus limited, continued after the transfer of the stock, and such an assumption without discussion seems rather surprising. True, if it did not continue no one would be "doubly liable" as regards those particular debts, for the liability of each successive transferor is related to those debts only which were "incurred" while *he* continued owner of the stock. Thus complete protection of the creditors would require that the liability be not defeasible, but whether the legislature so intended is an independent problem of equal importance into which the court should have inquired. A proper inquiry might well have led to a different conclusion. On re-examining[41] these statutes for this purpose it is to be noted that the first statute imposing "double liability" remained the same as the constitutional provision in all but one respect. It provided further, that ". . . no transfer shall affect this liability." With the constitutional provision before them it seems strange that the legislature would expressly prevent a transfer from discharging liability if they thought the constitution had already accomplished that purpose. It may thus be inferred that they believed that the constitution, as it then stood, would permit a stockholder to relieve himself of liability by transfer. When later they modified this clause to read, "No transfer of stock shall affect such liability for the period of six months thereafter", it would seem to indicate an intention that the stockholder have a qualified right to release himself by transfer. Still later this clause was dropped entirely from the "double liability" statute, so that it read substantially the same as the original constitutional provision and as does the present code. When the legislature dropped this clause is it reasonable to suppose that they meant this to have the same effect as if they had expressly provided that no transfer should affect this liability at all? It is

[41] See note 2, *supra*.

urged that a more reasonable assumption would be that they intended to change the qualified right, as it formerly existed, into an unqualified right of the stockholder to terminate his liability by a proper transfer of his stock.

However this may be, the court's construction of the word "accruing" leaves open for future decision several important questions which are worthy of attention. The first and most striking of these is whether, if the occasion demands it, each of the successive transferors of the stock can be held for the maximum liability imposed by the statute, though the aggregate collected from them exceeds the par value of the stock. The Illinois court, similarly defining the word "accruing", has answered this question in the affirmative.[42] However, that it is not a necessary result of this interpretation of the word "accruing" is shown by the West Virginia court.[43] There, though holding that the transferor remains liable, they answer the above question in the negative, on the theory that it was not the intent of the legislature to create a total liability exceeding the par value of the stock. Although it is difficult to predict which of these views would be followed by the Iowa court should circumstances occasion a decision on this point, policy and reason would seem to favor the West Virginia view.[44]

Another question, raised by implication from this decision, is whether or not the transferor, having been held liable, is entitled to reimbursement from the transferee. Most jurisdictions answer this question affirmatively,[45] but it must be remembered that according to the general view the transferor is held only in case he fails to record the transfer, his liability being based upon estoppel. In Iowa, however, the transferor is held upon his own substantive obligation to pay for debts incurred while he owned the stock. The transferee is not responsible for these debts for they are, as to him, debts previously incurred; he is concerned only with debts incurred subsequent to his acquisition of the stock. From this it would seem to be a necessary conclusion that in Iowa the transferor would have no right of reimbursement.

Any discussion of this "double liability" would indeed be incomplete without a consideration of those sections of the code which provide for an assessment upon stockholders to restore impaired capital.

> Section 9246: "Should the capital stock of any state or savings bank become impaired by losses or otherwise the

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[42] Sanders v. Merchants State Bank, 349 Ill. 547, 182 N. E. 897 (1932).

[43] Pyles v. Carney, 85 W. Va. 159, 101 S. E. 174 (1919); *cf.* Duke v. Johnson, 123 Wash. 43, 211 Pac. 710 (1923). In the latter case still a different meaning was given to the word "accruing", under which the transferor was not held liable.

[44] Comment (1933) 27 Ill. L. Rev. 807.

[45] Pace v. Shaw, 29 S. W. (2d) 965 (Comm. Tex. App. 1930).

> superintendent of banking may require an assessment upon the stockholders, and shall address an order to the several members of the board of directors of such bank, fixing the amount of the assessment required."[46]

This section is not a "double liability" statute in the ordinary sense for the purpose to be served under it differs substantially from that of the section previously considered.[47] The beneficiaries of the assessment are not only the creditors but the stockholders as well, the object being to maintain the bank as a going, solvent concern; indeed, it has no application whatsoever to an insolvent bank.[48]

A series of Iowa decisions has well established the proposition that payments made by the stockholder under an assessment to restore the bank's impaired capital cannot, in liquidation proceedings, be set off in a suit against the stockholder to enforce his "double liability".[49] The theory supporting this rule is that each statute contemplates a separate and distinct liability; the assessment being incident to operation, the other, incident to liquidation, and each section creating a different group of beneficiaries. A number of cases involving this situation, but with additional factors,

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[46] See also § 9248, which provides for the sale of the stockholder's stock if he fails to make good the assessment, and § 9248-a1, which creates personal liability for deficiency following the sale.

It has been held that § 9248-a1 applies to stockholders who purchased their stock prior to its enactment as well as to those who purchased stock subsequently, for its effect was merely to provide a more adequate remedy and it was not an unconstitutional impairment of contract. Woodbine Savings Bank v. Shrivers, 212 Iowa 196, 236 N.W. 10, *aff'd*, 285 U. S. 467 (1931).

[47] Leach v. Arthur Savings Bank, 203 Iowa 1052, 213 N. W. 772 (1927).

[48] Home Savings Bank of Slater v. Berggren, 211 Iowa 697, 234 N. W. 573 (1931).

[49] In Leach v. Arthur Savings Bank, 203 Iowa 1052, 213 N. W. 772 (1927) and Andrew v. Farmers Trust and Savings Bank, 204 Iowa 243, 213 N. W. 925 (1927) the assessments sought to be set off were voluntarily made by the stockholders themselves and the court in both cases went no further than the facts required, merely ruling that a voluntary assessment could not be set off, and leaving open the question of whether or not the same result would ensue in the case of an involuntary assessment. In Andrew v. Bevington State Bank, 206 Iowa 869, 221 N. W. 668 (1928), the court by implication held that an involuntary assessment could not be set off, but this was apparently overlooked by the court in Andrew v. Peoples State Bank of Humboldt, 211 Iowa 649, 234 N. W. 542 (1931), for the court expressly purported to leave the question open. The matter was finally settled when in Bates v. Clarion Savings Bank, 217 Iowa 741, 252 N. W. 138 (1934) the court expressly declared that the stockholder could not set off an involuntary assessment.

have arisen in which the stockholders have attempted to turn to their advantage these additional circumstances and escape the force of the general proposition. For the most part these attempts have been unsuccessful. Though the order for assessment is tinged by circumstances tending to show lack of good faith on the part of the banking superintendent, still the stockholder would seem to have no defense or right of set-off against his statutory double liability if in fact the capital was impaired.[50] Nor are the results changed by the fact that little business was done between the time of the assessment and the time of liquidation.[51] Even where the assessment has been paid under an agreement with the state banking department that no liability is to be imposed upon liquidation, the stockholder is afforded no relief from recovery by the creditors.[52] Too, though the bank's officers received the assessment under such circumstances as to make it a trust fund in their hands, still their misapplication of it prior to insolvency is not a fact which can be pleaded by the unfortunate stockholder as a bar to the imposition of "double liability".[53] The liabilities created by the two statutes remain separate and distinct. Whether an assessment, paid under a trust agreement or otherwise, would constitute *pro tanto* a good defense if actually used in liquidation does not definitely appear in the Iowa cases. Other jurisdictions have found that it does, and both reason and principle would seem to sustain their finding.[54]

The economic aspects of banking is not a subject properly within the scope of this article, yet, to the extent that these aspects have influenced recent legislation in regard to "double liability", a few observations might well be made. The recent (if not present) economic depression, attended with its numerous bank failures, has demonstrated that "double liability" statutes are in large measure inadequate as a means of protecting the depositing public. Not only do they fail substantially to stay loss to the creditors but they effectually bankrupt many innocent stockholders who have taken no part in the active management and control of the bank. Two recent statutes, showing an entire change of policy toward the bank stockholder, evidence the fact that these considerations have made themselves felt in the law. The first of these made it possible for banks to issue non-assessable stock under certain

[50] See Leach v. Arthur Savings Bank, 203 Iowa 1052, 213 N. W. 772 (1927), where the question is raised but not decided.

[51] Andrew v. Bevington State Bank, 206 Iowa 869, 221 N. W. 668 (1928).

[52] Andrew v. Farmers State Bank of Logan, 212 Iowa 329, 236 N. W. 392 (1931).

[53] Bates v. Clarion Savings Bank, 217 Iowa 741, 252 N. W. 138 (1934).

[54] Mosler Safe Co. v. Guardian Trust Co., 208 N. Y. 524, 101 N. E. 786 (1913).

circumstances;[55] by the second, both the double liability statute and the assesment statute were repealed as to those who purchased their stock after the date upon which the act became effective. Furthermore, the liability of prior stockholders is limited to those debts only which were incurred prior to the enactment.[56] Thus the problems to face the court in the future will be concerned with but prior stockholders and prior liabilities. Though the stockholder cannot escape this liability by a mere transfer, it is likely that his ingenuity will find some new way of accomplishing the same result.

GRATUITOUS PROMISES AND THE UNIFORM WRITTEN OBLIGATIONS ACT

Throughout the development of the common law concept of contracts both court and commentator have had occasion to urge the adoption of some principle by which gratuitous, informal promises could be enforced. A century and a half ago Lord Mansfield gave expression to such desire by advocating the acceptance of a doctrine of "moral", as distinguished from orthodox, consideration.[1] This desire has found further expression in the judicial invention of new devices such as waiver[2] and promissory estoppel.[3] Abolition in many states of the common law seal as a badge determinative of the enforceability of contracts has in recent years given emphasis to the urge to find some method to supplement the doctrine of consideration.[4] In commenting on these statutes, Mr. Williston stated: "It is most unfortunate if no method be left in a system

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[55] Iowa Laws 1933, c. 156, § 3.

[56] Iowa Laws Ex. Sess. 1933, c. 119, § 5.

[1] Atkins v. Hill, Cowper 284 (K. B. 1775). As to the survival of the doctrine of moral consideration in the United States see, 1 Williston, Contracts (1924) § 149.

[2] 1 Williston, Contracts (1924) § 203.

[3] Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927). And see *infra* note 27.

[4] The following are typical examples of such statutes: Cal. Civ. Code (Deering, 1931) § 1629, "All distinctions between sealed and unsealed instruments are abolished"; Iowa Code (1931) § 9439, "The use of private seals in written contracts, or other instruments in writing, by individuals, firms, or corporations that have not adopted a corporate seal, is hereby abolished; but the addition of a seal to any such instrument shall not affect its character or validity in any respect"; Ala. Code Ann. (Michie, 1928) § 9461, "The defendant may by plea impeach or inquire into the consideration of a sealed instrument in the same manner as if it had not been sealed". For a discussion of these statutory changes and their varying effects see, 1 Williston, Contracts (1924) § 218.

of law by which a confessedly voluntary promise may be binding".[5] Others in the legal profession have recognized the desire for the enforceability of some promises otherwise invalid for want of that nebulous concept, consideration.[6] The attempts to enforce gratuitous promises have led to much litigation resulting in confusion and uncertainty in the law. Recognizing that ". . . it is desirable that if a man really wants to make a gratuitous promise that he ought to be allowed to do so, that the law ought to give effect to his intent",[7] the National Conference of Commissioners on Uniform State Laws approved and adopted the Uniform Written Obligations Act in 1925.[8]

The conclusion that such a desire does exist demands a consideration of the adequacy of the means provided by law for the enforcement of gratuitous promises. The usual basis of enforcing such promises in the early common law was the sealed writing, which derived its validity from the formality of the instrument rather than from the existence of consideration.[9] The seal, placed after a signature, gave the instrument a certain sanctity and the promise was enforced because of the form in which it was made; this, on the theory that it must have been made for good cause.[10]

[5] 1 Williston, Contracts (1924) § 219.

[6] The American Bar Association approved the Uniform Written Obligations Act thereby recognizing this desire. 50 A. B. A. Rep. (1925) 162.

[7] Handbook of National Conference of Commissioners on Uniform State Laws (1925) 197.

[8] *Id.* at 214.

[9] See the opinion of Lumpkin, J., in Lowe v. Morris, 13 Ga. 147, 153 (1853). The use of the seal was common long before the recognition of simple contracts. 1 Williston, Contracts (1924) § 205.

[10] "As the law of covenants long antedates the law requiring consideration for the formation of contracts, it is necessarily true that, in the early law, no consideration in the modern sense was required to support a covenant, and though Pollock and Maitland 'doubt whether in the thirteenth century a purely gratuitous promise made in a sealed instrument would have been enforced if its gratuitous character was quite clear', certainly long before the origin of the action of assumpsit such an instrument must have been binding. After the action of assumpsit had been developed, the somewhat unfortunate mode of expression became usual that a sealed instrument "imported" a consideration. It would have been more accurate to have said that no consideration was needed for such a document. But however expressed, the law has always been clear that apart from changes made by statute, a sealed promise, whether absolute or in the form of an offer, is binding without consideration." 1 Williston, Contracts (1924) § 217.

"The seal imports a consideration or renders proof of consideration unnecessary; because the instrument binds the parties by force of the natural presumption that an instrument executed with so much deliberation and solemnity

The seal has been said to be objectionable for these several reasons:[11] first, the legal effect of affixing a seal after a signature generally is not known to the ordinary person; second, the fraudulent placing of a seal after a signature by one other than the signer may be difficult to detect and prove; third, the question as to what constitutes a seal has caused much litigation;[12] fourth, a seal no longer gives greater dignity to a writing since its use has ceased to evidence greater deliberation on the part of the obligor.[13] Although the power of a seal, in so far as it makes a promise enforceable at law, remains unchanged in some states,[14] others have by statute abolished the distinction between sealed and unsealed written instruments or abolished the use of private seals entirely.[15] The result is that, though the use of the common law seal did serve as a convenient means for making enforceable gratuitous promises, that device is no longer available in most states.[16]

The question next arises, do the statutes which provide that consideration is imported or presumed in all written contracts (including those under seal) fill the gap left by the abolition of seals? Those statutes vary in effect according to the interpretations which the courts have placed upon the words "presumed" or "im-

is founded upon some sufficient cause." Storm v. United States, 94 U. S. 76, 84 (1876).

[11] Handbook of National Conference of Commissioners on Uniform State Laws (1925) 197.

[12] See Hackers Appeal, 121 Pa. 192, 15 Atl. 500 (1888) holding that a dash one-eighth of an inch long constitutes a good seal. For a discussion of what has been held sufficient to constitute a seal see also, 1 Williston, Contracts (1924) § 207.

[13] See the opinion of Lumpkin, J., *supra* note 9.

[14] The common law doctrine that contracts under seal import a consideration conclusively prevails in Florida unmodified by statute. Florida Asphalt Pavement Mfg. Co. v. Federal Reserve Bank of Atlanta, 76 F. (2d) 326 (C. C. A. 5th, 1935). See dictum to the effect that want of consideration is not a valid defense to an action upon a sealed instrument. Clymer v. Groff, 220 Pa. 580, 583, 69 Atl. 1119, 1120 (1908). It should be noted that the original theory of enforceability of promises under seal was not that it imported consideration, because sealed instruments were enforced as covenants before the doctrine of consideration was introduced in the law. See 1 Williston, Contracts (1924) § 217.

[15] *Supra* note 4.

[16] Referring to Ala. Code Ann. (Michie, 1928) § 9461, the Alabama court remarked that this section makes obsolete the rule which obtained at common law with regard to the sanctity of a seal. Counts v. Harlan, 78 Ala. 551 (1885). "The consideration of any writing, with or without seal, may be impeached or denied by pleading verified by oath." Ky. Stat. (Carroll, 1930) § 472. See also, 1 Williston, Contracts (1924) § 219.

ported".[17] In all states the presumption so created is held to be a rebuttable one,[18] and some courts rule that it does not shift to the defendant the burden of proving the absence of consideration. If the burden of proof is not shifted, such statutes can give but little assistance. But even where the defendant is compelled to establish the absence of consideration by a preponderance of the evidence, the protection afforded such promises is none too great, for, if the promise is actually gratuitous, such fact should, generally speaking, be comparatively simple to establish.[19] On the whole these statutory presumptions of consideration give no real assurance that gratuitous promises will be enforced.

A further consideration of this problem raises the question as to whether gratuitous promises, unsealed and unenforceable under the statutes previously discussed, can be enforced by resort to that device of the courts which has been called the doctrine of promissory estoppel or justifiable reliance.[20] Although Mr. Justice Cardozo found what he regarded as orthodox consideration in the *Allegheny College* case,[21] he approved the principle by which a charitable subscription would be enforced if the promisee had been led to rely thereon, and having so relied, had substantially changed his position to his detriment.[22] The extent to which the courts

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[17] For typical statutes see: Ariz. Rev. Code Ann. (Struckmeyer, 1928) § 3048, "A written instrument is presumptive evidence of a consideration"; Idaho Code Ann. (1932) § 28-103, "A written instrument is presumptive evidence of a consideration"; Iowa Code (1931) § 9440, "All contracts in writing signed by the party to be bound or by his authorized agent or attorney, shall import a consideration".

[18] See Globe & Rutgers Fire Ins. Co. v. Hensley, 206 Ky. 202, 266 S. W. 1074 (1924); Porter v. Title Guaranty & Surety Co., 17 Idaho 364, 106 Pac. 299 (1909); McCormick Machine Co. v. Jacobson, 77 Iowa 582. 42 N. W. 499 (1889); Cone v. Cone, 118 Iowa 458, 92 N. W. 665 (1902). But see dictum in Heacock v. Heacock, 108 Iowa 540, 547, 79 N. W. 353 (1899) to the effect that "this statute [now Iowa Code (1931) § 9440] was enacted for the purpose of giving to instruments in writing the same effect as instruments under seal had at common law. . . ."

[19] McCormick Machine Co. v. Jacobson, 77 Iowa 582, 42 N. W. 499 (1889); Cone v. Cone, 118 Iowa 458, 92 N. W. 665 (1902); Bronston's Administrator v. Lakes, 135 Ky. 173, 121 S. W. 1021 (1909).

[20] The Restatement of Contracts defines this doctrine at § 90 as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does so induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

[21] Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 159 N. E. 173 (1927).

[22] *Id.* at 374, 159 N. E. at 175.

will apply this theory, however, is subject to no little uncertainty. The American Law Institute in its Restatement of the Law of Contracts made an effort to define the limits of this principle.[23] In discussing the scope of the Institute's definition, the Pennsylvania Supreme Court declared:

> "We do not mean to state that in all cases where a gratuitous promise is made, and one relies upon it, the promisee can recover, but, if a detriment of a definite and substantial character has been incurred by the promisee, then the court may enforce it."[24]

There are situations involving gratuitous promises to which no court would properly attempt to apply this doctrine, there being no change of position in reliance on the promise.[25] On the other hand, there are instances where promises have been held unenforceable though, under the circumstances of the particular case, the doctrine might have been applied.[26] Thus, useful as the estoppel device has been in preventing injustices, it has been adopted but to a limited extent[27] and has not provided a means whereby one is assured that his gratuitous promise will be given the legal effect that is intended at the time it is made.

It was in an effort to provide a more comprehensive method for the enforcement of agreements not supported by orthodox consideration that the National Conference of Commissioners on Uniform State Laws adopted the Uniform Written Obligations

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[23] *Supra* note 20.

[24] Langer v. Superior Steel Corp., 105 Pa. Super. Ct. 579, 161 Atl. 571 (1932). See also Mr. Williston's discussion of § 90 before the American Law Institute. A. L. I. Proceedings (April 29, 1926) IV, appendix, 97.

[25] Mills v. Wyman, 3 Pick. 207 (Mass. 1825).

[26] For cases in which a gratuitous promise was held unenforceable though the promisee relied thereon to his detriment see, Kirksey v. Kirksey, 8 Ala. 131 (1845); Morris v. Orient Ins. Co., 106 Ga. 472, 33 S. E. 430 (1899); Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379 (1903).

[27] "In the United States, the decisions which have enforced promises, confessedly because of the promisee's action in reliance thereon have generally been cases of charitable subscriptions where courts dissatisfied with the prevailing theories by which consideration is found for such agreements, but nevertheless disposed to follow the weight of American authority in sustaining the subscriber's promise, have explained the liability on the ground of estoppel." 1 Williston, Contracts (1924) § 139. See Pillans v. Van Mierop, 3 Burr. 1663 (K. B. 1765); Allegheny College v. National Chautauqua County Bank, 246 N. Y. 369, 374, 159 N. E. 173, 175 (1927); and dictum in Port Huron Machinery Co. v. Wohlers, 207 Iowa 826, 829, 221 N. W. 843, 844 (1929). See also, Patton, Enforceable Promises in Iowa (1929) 15 Iowa L. Rev. 42.

Act,[28] and recommended the Act to the legislatures of the several states. The first and most important section of the measure reads as follows:

> "A written release or promise hereafter made and signed by the person releasing or promising shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional[29] express statement, in any form of language, that the signer intends to be legally bound."

It is to be noted that there is no implication of consideration involved here; in that respect it is like the common law promise under seal. According to Mr. Williston, draftsman and chief advocate of the Act,

> "The purpose of it, [is] to make uniform the law in regard to that sort of voluntary promise[30] and to make as a substitute for the very technical and easily substituted wafer[31] an expression which nobody can misunderstand, which clearly indicates that it is intended to create a legal obligation."[32]

The commissioners intended that the Act require two written statements: a promise to perform, and an additional express statement of an intention to be legally bound. For that reason the words "also" and "additional" are both used in the Act to make its meaning clear and unmistakable. From this it is apparent that a promise standing alone, no matter how clearly it embodies within itself the expression of an intention to be legally bound, is not sufficient.[33]

Just what the potentialities of the Act are and what difficulties will arise under it cannot as yet be clearly determined. Although it was approved a decade ago, but two states[34] have adopted it. One of them, Pennsylvania, still retains the seal with all its common law significance,[35] and has also adopted the doctrine of promissory

[28] Handbook of National Conference of Commissioners on Uniform State Laws (1925) 214.

[29] See 9 Uniform Laws Ann. (1932) 431, where the act as set out omits the word "additional." That word is contained in the act as adopted by both Pennsylvania and Utah.

[30] Referring to a gratuitous promise.

[31] Referring to a seal in the form of a wafer.

[32] Handbook of National Conference of Commissioners on Uniform State Laws (1925) 196.

[33] *Id.* at 208-210.

[34] Penn. Laws 1927, p. 985, no. 475; Utah Laws 1929, 662.

[35] See Note (1928) 76 U. of Pa. L. Rev. 580, 581.

estoppel.[36] That the necessity of resorting to the Act is thereby lessened seems obvious. If attorneys there have taken advantage of it in drawing written agreements, they likely have taken the further precaution of adding a seal thereto.[37] The only point which has been definitely established is its constitutionality,[38] although there has been one decision by a lower court involving the interpretation of the "additional statement" clause.[39]

Because of the paucity of court decisions, any presentation of the problem must be limited largely to prediction. It is apparent that oral gratuitous promises are in no way benefited by the Act. Support for them can be found only in the doctrine of promissory estoppel. Neither will it do away with seals where they still retain their common law effect, nor does it purport to do so. Nor will it abolish the defenses of fraud, misrepresentation, and failure of consideration with respect to the performance of contracts.[40] According to some opinion, it will sweep away the long established doctrine of consideration.[41] It must be observed, however, that the Act does not purport to abolish the doctrine. It provides but an alternative method for creating an enforceable promise. The majority of contracts, even if this method is used, will continue to be based in fact upon something which falls within the definition of consideration. The virtue of the Act lies in the fact that it makes legally possible the creation of a binding, gratuitous promise.[42]

Undoubtedly the most serious problem presented is the meaning of its requirement of "an additional express statement, in any form of language, that the signer intends to be legally bound." It has been predicted that this clause will, if the Act be generally adopted,

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36 Langer v. Superior Steel Corporation, 105 Pa. Super. Ct. 579, 161 Atl. 571 (1932).

37 See Note (1928) 76 U. of Pa. L. Rev., 580, 584.

38 Ballick v. Fetter, 314 Pa. 284, 171 Atl. 466 (1934).

39 Gilmore v. Kessler, 22 D. & C. 274 (Pa. 1934).

40 Handbook of National Conference of Commissioners on Uniform State Laws (1925) 201–204.

41 Steele, The Uniform Written Obligations Act—A Criticism (1926) 21 Ill. L. Rev. 185. It is further suggested that the Act may be used to defraud and to impose hardships upon promisors.

42 The question has arisen whether it is possible to make an enforceable written promise which does not contain a statement of consideration, for the Statute of Frauds in many states requires such. See, for example, Ala. Code Ann. (Michie, 1928) § 8034. But, in answer, it can be argued either that the Uniform Written Obligations Act impliedly repeals such provision to the extent that the one conflicts with the other, see generally Jefferson County v. Hewitt, 206 Ala. 405, 90 So. 781 (1921), or that the Statute of Frauds must be regarded as requiring this statement of consideration only when consideration is an essential element of the promise.

create as much confusion as does the term "writing" or "written memorandum" in the Statute of Frauds.[43] The purpose of the clause is obvious. It is to exact a certain formality which will serve as a guaranty of the serious intentions of the promisor. But courts will differ as to how clearly or distinctly this additional element must appear. There will be present a tendency to permit slight indications of an "additional statement" to suffice. Expressions not intended for that purpose at the time will be seized upon as fulfilling the requirement. A decision of a lower court of Pennsylvania[44] indicates the possibilities of the last suggestion. The negotiable instrument sued upon contained, in addition to the promise to pay, a pledge of certain securities and an authorization to sell them at the maturity of the obligation. It stated that, "should any balance remain unpaid, I further promise and agree to pay the same to the holder hereof on demand." While this additional promise by its own terms referred only to any balance owing, it was construed to apply to the entire undertaking and to fulfill the requirement of the "additional statement." There are several typical situations where such a construction will become important. For example, it is generally said that an accord without satisfaction is inoperative;[45] but if in a written accord the court is able to find some expression constitutive of the "additional statement", it will become binding. There are numerous cases where a contract is unenforceable because the performance given or promised by one party is something which in law he is already bound to do. Typical are the "building contracts", where additional compensation is promised in exchange for a promise not to breach the contract.[46] Here again the promise may become operative should the court succeed in finding something which falls within its definition of the required "additional statement." Consider as well the situation where the full release of a liquidated claim is given in exchange for part payment or the promise of such. Generally such releases are not valid,[47] yet by virtue of the "additional statement" they may well become so. Questions of interpretation arising under the key clause of this Act should not, of course, be overemphasized. Perplexing problems of construction surround all

[43] 1 Williston, Contracts (1924) §568.

[44] Gilmore v. Kessler, 22 D. & C. 274 (Pa. 1934).

[45] Lynn v. Bruce, 2 H. Bl. 317 (C. P. 1794); Singer v. General Accident, Fire & Life Assur. Corp., 262 N. W. 702 (Wis. 1935).

[46] Lingenfelder v. Wainwright Brewing Co., 103 Mo. 578, 15 S. W. 844 (1891). And see Blakeslee v. Board of Water Comm'rs, 106 Conn. 642, 139 Atl. 106 (1927) for the interesting inference that such contracts might be brought within the doctrine of promissory estoppel.

[47] Buel v. Kansas City Life Ins. Co., 32 N. M. 34, 250 Pac. 635 (1926). But see the recent case of Holmes v. Bankers Life Co., 271 Mich. 460, 260 N. W. 747 (1935) which is discussed in this issue at page 642, *infra*.

statutory enactments and perhaps those occasioned by this measure are not unduly involved.

Yet it does seem clear that if the "additional statement" clause be entirely construed away, as was done by the Pennsylvania court, it will have the effect of including within the protection of the Act many promises not intended to be protected. The precaution taken by the drafters of the Act in requiring two express statements will be largely nullified. When made, such promises as these are generally not thought of by the parties as being gratuitous. Likely they will not consciously be drafted in compliance with the Act so that only by some accident of construction will they contain an expression resembling an "additional statement." Thus the result reached in the case of *Kirksey v. Kirksey*[48] probably would be the same under the Act since the promise written in the letter involved in the case, although it shows an intention to carry out the promise, contains nothing which could fairly be termed an additional express statement of an intention to be legally bound. The fact that the promisor furnished the promised home to the promisee for a period of two years may indicate that he intended to be bound by his gratuitous undertaking, but that conduct does not supply the deficiency of the writing. In the *Good Samaritan*[49] case the court refused the plaintiff recovery though the defendant had promised in writing to pay the plaintiff the expenses he had incurred in caring for the defendant's adult son while ill. From the report it may be inferred that the writer intended to carry out his promise and possibly to be bound by it, yet here again there is no express statement of an intention to be legally bound.

The Uniform Act does not purport to serve as a means for enforcing all gratuitous promises which were intended to be binding when made, but it does furnish an adequate and convenient means whereby enforceable, gratuitous, written promises *can* be made. The formality required by the Act can be used to serve the same desirable purposes as did the seal without incurring many of its objectionable features. The remarks of its chief advocate point to the conclusion that it was intended to accomplish only this.[50] The question naturally arises, however, whether it would not be desirable to have a measure sufficiently broad to include certain of those agreements and understandings proverbial for the hardship which they impose upon promisees. Perhaps the Act does not represent ultimate perfection in legislative reform but its adoption will serve a real need in the law. It should be given weighty consideration by the various state legislatures for it has met with the approval of many of the best legal minds in the nation.

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[48] 8 Ala. 131 (1845).

[49] Mills v. Wyman, 3 Pick. 207 (Mass. 1825).

[50] See Williston's comments appearing in Handbook of National Conference of Commissioners on Uniform State Laws (1925) 196.