**Statute of Limitations—Limitations—Banks and Banking—Liquidation—Stockholders.**

The liability of a stockholder in a bank in the process of voluntary liquidation is never barred by limitations.

Jay G. Larson, Esq., December 14, 1926.
Superintendent of Banks,
Helena, Montana.

My dear Mr. Larson:

You have requested my opinion as to when the double liability of stockholders in a bank in process of liquidation is barred by the statute of limitations.

The double liability of stockholders of banks is imposed by chapter 9, laws of 1923, and is an obligation or liability created by law. (Muri v. Young, 75 Mont. 213, 245 Pac. 956).

The cases are in conflict as to when such a cause of action is barred by limitation, and particularly as to when the cause of action accrues. The supreme court of this state has not passed on the question. It has decided, however, that the obligation is secondary and not primary. (Muri v. Young, supra.).

To illustrate the conflict among the adjudicated cases, your attention is called to the following decisions:

In California it has been held that the cause of action accrues the moment the indebtedness of the bank is created, or, in other words, from the time the deposit is made. (Jones v. Goldtree Bros. Co., 77 Pac. 939).

In Mississippi it has been held that the liability accrues when the bank is put in liquidation and it is reasonably apparent that the assets of the bank will not be sufficient to pay the depositors. (Board of Bank Examiners v. Grenada Bank, 99 So. 903).

In Idaho, where the liability is held to be secondary, it has been held, by way of dictum, that the assets of the corporation must first be exhausted before the creditor's cause of action accrues against the stockholder. (Weil v. Defenbach, 170 Pac. 103).

In Pennsylvania it has been held that the receiver's action under a statute similar to chapter 9, laws of 1923, does not accrue until it has been judicially ascertained that the bank's collectable assets are insufficient to pay its debts. (Kirschler v. Wainright, 100 Atl. 484).

To the same effect is Miller v. Connor (Mo.) 160 S.W. 582.

In Washington it has been held that the cause of action accrues immediately upon the insolvency, or like default, of the corporation. (Bennett v. Thorne, 78 Pac. 936). Many cases are there cited from other jurisdictions to support the conclusion of the court.

In West Virginia the cause has been held to accrue when it has been ascertained that the payment of the stockholder's liability is necessary, and the stockholder so notified. (Pyles v. Carney, 101 S. E. 174).

In this state we have three statutory provisions that may be held to have a bearing on this question. They are sections 9033, 9046 and 9061.

Section 9033 limits to two years "An action upon a liability created by statute other than a penalty or forfeiture."

But if section 9061 has application to an action against stockholders of a bank, then it, to that extent, supersedes section 9033. Section 9061 provides:

> "Sections 9011 to 9066 of this code do not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years

after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability was created."

Section 9046 provides, in part, as follows:

"To actions brought to recover money or other property deposited with any bank, banker, trust company, or savings and loan corporation, association, or society, there are no limitations."

It is my opinion that section 9046 governs a cause of action against stockholders of a bank on behalf of depositors, and that there is no limitation to such an action.

California has a similar statutory provision, the same being section 348 of the code of civil procedure of that state. The supreme court of that state intimated quite strongly that it applied to actions against stockholders. Its decision was based on other grounds, but the court said:

"In what has been said on this point we are not to be regarded as deciding that the cause before us, as to the bar of the statute, is not within the terms of section 348, Code Civil Proc., passed in 1874, and that there is really no limitation of this action. We do not decide it, because we think it better to rest the conclusion reached herein on the grounds above expressed." (Mitchell v. Beckman, 28 Pac. 110, 112.)

Section 9046 makes the deposits continuing obligations of the bank.

Chapter 9, laws of 1923, makes the stockholders liable "for all contracts, debts, and engagements of the bank.

By section 9046 the lapse of time is no obstacle to the enforcement of the obligation of the bank. It continues indefinitely.

It has been held that the liability of a stockholder continues so long as the debt is a subsisting obligation against the bank. (Fleischer v. Rentchler, 17 Ill. App. 402). In that case the court seemed to take the view that the obligation of the stockholder was primary and not secondary.

If in this state the obligation of the stockholder is only secondary, then, a fortiori, is the obligation of the stockholder coextensive in point of time with that of the bank.

It is therefore my opinion that by section 9046, R. C. M. 1921 there are no limitations to an action to recover from stockholders of a bank on their obligation to pay the debts of the bank represented by money or property deposited with the bank.

You are aware, however, that if the supreme court of this state were not to agree with my conclusions, its opinion prevails over that of mine. Hence, were I advising a client on this question I should eliminate all contentions possible by instituting action at the earliest possible moment, because, until the supreme court rules upon the precise question it is a matter of speculation as to when the cause of action will be held

to have accrued, in view of the contrariety of judicial opinions on the subject.

Very truly yours,

L. A. FOOT,
Attorney General.