Assessment—Banks and Banking — Bank Examiner—Stockholders.

The payment of an assessment of 50% of the value of stock for the purpose of restoring the capital of a bank does not relieve the stockholders from the double liability to the extent of the assessment.

L. Q. Skelton, Esq.,
Superintendent of Banks,
Helena, Montana.

My dear Mr. Skelton:

You have submitted to this office the question whether an assessment of 50% on stock called under the provisions of Section 6109d of Chapter 90 of the Laws of 1923, will be considered as discharging one-half of the statutory liability imposed upon bank stock. In other words, does the 50% assessment, when paid, relieve the stockholder of that much of the double liability attaching to his bank stock?

Section 6109d is, in part, as follows:

> "Whenever the Superintendent of Banks shall determine that an impairment of capital exists in any bank, and his decision shall be concurred in by the Governor and the Attorney General, he shall notify the Board of Directors of such bank * * * that such impairment exists, * * * and order such Board to make good such impairment within ninety days from date of such notice.
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> "The Board of Directors shall upon receipt of notice convene and pass a resolution reciting the receipt of such notice of impairment and calling a special meeting of the stockholders * * *.
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> "The stockholders, when assembled as herein provided, shall pass a resolution reciting the facts of receipt of notice from the Superintendent, notice of impairment and notice of meeting, and assessing themselves by assessing the stock of record, * * *
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> "If the assessment is not paid on any of the stock, such part of the stock as is necessary to pay the assessment is required to be sold at public or private sale, and a certificate issued to the purchaser for the amount of stock purchased, and another issued to the original holder of the amount of shares to which he is still entitled. If the stock does not sell for sufficient to pay the assessment, the Board of Directors may proceed by suit in the name of the corporation to collect the deficiency from the record holders whose stock has been sold and against whom the deficiency exists."

It is to be noted that under this section the assessment is made for the purpose of making good the impairment of the capital.

Section 6032, Revised Codes of 1921, as amended by Chapter 9 of the Laws of 1923, provides in part as follows:

> "The stockholders of every bank shall be severally and individually liable, equally and ratably, and not one for the and maintain appropriate suits or actions of the bank against other, for all contracts, debts, and engagements of such corporation, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares. * * *
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> "In cases where a bank is liquidated by a court through a receiver, the receiver may by order of the court institute and maintain appropriate suits or actions in the courts of this state on behalf of the creditors of the bank against stockholders for the recovery and collection of stockholders' liability. Any money paid to the receiver by a stockholder, in whole or partial satisfaction of his liability, shall not be deemed paid voluntarily, but shall give the stockholder the same protection, to the extent of the amount paid, as if the payment were made after suit brought by the receiver. The receiver * * * shall from time to time, under order of the court, distribute the amounts so collected without diminution to the creditors of the bank in this section enumerated."

It is to be observed that there are two proceedings under which an assessment may be made and collected.

The Supreme Court of this state has not construed these sections, nor have I been able to find a case in which any court has construed exactly similar statutes upon the question of payment under one releasing from liability under the other.

In the case of Delano v. Butler, 118 U. S. 634, 30 Law Ed. 260, the Supreme Court of the United States had under consideration the same question applied to somewhat similar statutory provisions. The Court in that case said:

> "The second ground of defense to the action at law is, in our opinion, equally untenable. The assessment imposed upon the stockholders by their own vote, for the purpose of restoring their lost capital, as a consideration for the privilege of continuing business, and to avoid liquidation under Section 5205 of the Revised Statutes, is not the assessment contemplated by Section 5151, by which the shareholders of every national banking association may be compelled to discharge their individual responsibility for the contracts, debts, and engagements of the association. The assessment as made under Section 5205 is voluntary, made by the stockholders themselves, paid into the general funds of the bank as a further investment in the capital stock, and disposed of by its officers in the ordinary course of its business. It may

> or may not be applied by them to the payment of creditors; and in the ordinary course of business, certainly would not be applied, as in cases of liquidation, to the payment of creditors ratably; whereas under Section 5151 the individual liability does not arise, except in case of liquidation and for the purpose of winding up the affairs of the bank. The assessment under that section is made by authority of the Comptroller of the Currency, is not voluntary, and can be applied only to the satisfaction of the creditors equally and ratably. If the claim in the present case were allowed, it would follow that in every case payments made by stockholders, for the purpose of restoring the impaired capital, would be considered as credits on the ultimate individual responsibility of shareholders, and the whole efficiency of the provisions of Section 5151 for the protection of the creditors of the company at the time of liquidation would be destroyed. The obligations of the shareholders under the two sections are entirely diverse and payment made under Section 5205 cannot be applied to the satisfaction of the individual responsibility secured by Section 5151. Scovill v. Thayer, 105 U. S. 143 (Bk. 26, L. ed. 968)."

The Court here calls attention to the fact that the assessment there made on account of impairment of capital, for the purpose of attempting to restore the bank to a sound financial condition, was voluntarily made.

This would hardly seem to be the case with our Section 6109d. It is to be observed that under this section a suit may be maintained against a stockholder for the deficiency, should there be a deficiency after the stock is sold. It is apparent, however, that the two provisions are intended to cover different situations: one to restore impaired capital, and the other to pay the creditors of the bank.

It is, therefore, my opinion that the payment of 50% liability for the purpose of restoring the capital does not relieve the stockholders from the double liability to that extent.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.