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THE MATURITY OF CERTIFICATES OF DEPOSIT AND PROMISSORY NOTES PAYABLE ON DEMAND*

Orrin B. Evans †

In one form or another a dozen cynics have voiced the sentiment that "speech exists to conceal thoughts." Perhaps because language is too intimately integrated with their livelihood, the lawyers have not generally admitted the assertion. However, in the interpretation of written instruments their brethren on the bench have at times so far disregarded the literal meaning of the words under consideration that one must suspect they secretly approve.

Promissory notes "payable on demand" furnish an illustration. Many cases testify that the true intention of the maker is to create an obligation due immediately and that an action to collect it may be instituted without a prior demand. If the demand is not made, nor action instituted within the statutory period from the date of the instrument, the claim will be barred.

The law of negotiable instruments traditionally reflects business usage. There may at one time have been evidence that the "merchant" who promised to pay "on demand" intended merely to put in negotiable form his acknowledgement of present indebtedness. If so, the evidence has not been preserved and we are reduced to speculation on what functional reason exists for the assumed intent and what reason of social policy exists to protect it.

Where the instrument is not in the most common form of bill or note, the authorities are not so uniform. In cases of bank certificates of deposit, the substantial weight of authority is to the effect that the instruments do not mature until demand has been made; hence no action may be brought without prior demand, and the statute of

*This paper was prepared on a Sterling Fellowship in Law at Yale University. The author wishes to record his indebtedness to Professor Roscoe T. Steffen of that university and to Dr. Friedrich Kessler, now of the University of Chicago, for suggestion and criticism.

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1 N. I. L., § 70, embodies the case law.
2 Cases are collected in note, 44 A. L. R. 397 (1926).
limitations cannot run until a demand has been made. A minority insist that a certificate of deposit is a promissory note and therefore no demand is necessary.

I

NATURE OF CERTIFICATE OF DEPOSIT

It is logical to consider first the form of a certificate of deposit, or C/D, as it is popularly known, to determine whether it is a promissory note. It appears so obvious that a determination of that issue does not necessarily conclude the fundamental question of the maturity date of the instrument that one wonders at the easy assurance of the last mentioned courts. Nevertheless, by comparison we may know whether the instruments can be considered together or must be analyzed separately.

C/Ds are usually framed in curiously stereotyped form, more noticeable because the language is so distinctly that of commerce and the counting house, sacrificing grace and, to a certain extent, clarity for the sake of brevity. The phraseology may be traced to the “running


When the California Civil Code was adopted, in 1872, the rule of Brummagim v. Tallant, supra, was embodied in § 3099. This section, with other provisions on negotiable instruments, was repealed when the N. I. L. was enacted (1917).
cash notes” and the “notes accountable” of the English goldsmiths. None of the former has been preserved, but it seems they corresponded in terms with the amount deposited, passed from hand to hand, and were retired when the deposits were withdrawn. If an amount less than the total was desired, the note was presented and the deduction made on its face. The note accountable was a receipt setting forth the terms of the deposit agreement. It did not circulate. Checks were drawn against it which, when in the goldsmith’s possession, were evidence of repayment pro tanto. However, it would seem to have qualified as a non-negotiable note, at least, as may be seen from the example below, preserved in the files of the Bank of England.

LONDON, ye 10th June 1697
RECEIVED of Cap\(^7\) Bas\(^8\) ( ) Percey a ( ) forty seaven pounds five shillings Current mony for which I promise to be accountable ( ) demand.

The evolution of C/Ds cannot be perfectly traced. They seem to be an American institution, unknown in England. As early as 1842, the New York court felt the terms of a time C/D to be so well known that it did not consider it necessary to set out the terms of the instrument which it held to contravene the statute for the regulation of bank notes. Confusion in the judicial interpretation of these forms has not led to any clarifying change.

6 For fuller discussion of notes accountable and running cash notes, see ROOSEGARDE BISCHOFF, THE RISE OF THE LONDON MONEY MARKET 1640-1826 (1910).
7 Illegible notation.
8 Signature.
9 See the statement of Sir Montague Smith in Richer v. Voyer, L. R. 5 P. C. 461 at 477 (1874), a case arising in Quebec.
10 Bank of Orleans v. Merrill, 2 Hill (N. Y.) 295 (1842). At one time the question there presented was an open one. In Bank of Peru v. Farnsworth, 18 Ill. 563 (1857), a time C/D was held to contravene the Illinois statute, whether or not designed to circulate as money. In Leavitt v. Palmer, 3 N. Y. 19 (1849), the statute was given the same construction, though Judge Bronson pointed out the extent to which they did perform that function and non-negotiable certificates were subsequently held valid. Pelham v. Adams, 17 Barb. (N. Y.) 384 (1853). And see Darden v. Banks, 21 Ga. 297 (1857), where the statute prohibited the issue of paper designed to circulate as money not payable in gold and silver.

The opposing view has, of course, prevailed. Carey v. McDougald, 7 Ga. 84 (1849); Hunt, Appellant, 141 Mass. 515, 6 N. E. 554 (1886); Tripp v. Curtenius, 36 Mich. 494 (1877); Lusk v. Stoughton State Bank, 135 Wis. 311, 115 N. W. 813 (1908). The Wisconsin statute in its earliest form, however, specifically included C/Ds as a form of forbidden paper money.
An instrument called a certificate of deposit and reading, "This certifies that A.B. has deposited in this bank $---------, payable to his order on return of this certificate properly endorsed," bears as much physical resemblance to a simple deposit receipt as to a promissory note, but it is not precisely like either. The express stipulation for the return of the instrument gives the C/D a legal significance foreign to the receipt. The difficulty in assimilating the certificate to a promissory note arises from the absence of an express promise of payment.

The cases discussing the note-like character of a certificate of deposit primarily involve the question of negotiability. In Patterson v. Poindexter the promise was not thought sufficiently explicit (though the decision was buttressed by other considerations), and that decision was followed by a few others. Today the authorities are

It is not impossible that the function of certificates of deposit has changed and that at one time they did circulate as money. Bank notes and deposit receipts as well as C/Ds probably developed from the running cash notes and notes accountable of the English goldsmiths, and the obscure history of these instruments does not permit one to say when each took its distinctive form and assumed its unique function. At any rate, it is not believed that C/Ds today pass from hand to hand as money to any substantial extent. There is sufficient currency better suited to the purpose than are these instruments, so often for large and uneven amounts.

Certificates often read "payable on return of this certificate properly endorsed" (italics mine). The meaning and purpose of this requirement is not clear. In so far as it can be interpreted as an attempt to exact a receipt for payment, it might be found to impose a condition not otherwise existing in law. This difficulty is usually obviated by holding the words "properly endorsed" to refer only to endorsement upon negotiation. Kirkwood v. First Nat. Bank, 40 Neb. 484, 58 N. W. 1016 (1894); Hatch v. First Nat. Bank, 94 Me. 348, 47 A. 908 (1900). And it has been held on several occasions that when the title of the person presenting the instrument was apparent on its face (as when presented by the payee), or otherwise unquestionable (as when presented by the payee's administrator who proves his authority), the bank could not require endorsement; that the demand was complete though no endorsement. Cornwall v. McKinney, 12 S. D. 118, 80 N. W. 171 (1899); Emerson v. Thatcher, 6 Kan. App. 325, 51 P. 50 (1897); First Nat. Bank v. Capps, 208 Ala. 235, 94 So. 112 (1922).

In fact, a federal court sitting in Pennsylvania not only disregarded the rule of Patterson v. Poindexter on other points but squarely held that the requirement of endorsement so pertinently referred to negotiation of the instrument that it would supply the necessary words of negotiability not otherwise present. Forrest v. Safety Bkg. & T.
unanimously to the contrary, the word "payable" being thought to imply a promise to pay. Pennsylvania was the last jurisdiction to deny the position it was the foremost in asserting. In *Gordon v. Fifth Avenue Bank* the Pennsylvania court, in explaining the change in its view, referred to the adoption of the Negotiable Instruments Law (which does not in specific terms change the law merchant in this respect, although its enactment might be considered a legislative mandate for uniformity in accordance with the overwhelming weight of authority among the sister states).

However, courts which would distinguish between C/Ds and promissory notes do not rely on the forms of the instruments alone. They depend also upon what they consider essential differences in the nature of the transactions in which they are executed. These judges have argued not merely that C/Ds should be governed by rules other than those applied to ordinary promissory notes, but that C/Ds are not notes at all. In the words of the Iowa court:

“If it be true that a deposit in the usual course of business is a loan to the bank of the money deposited, then it may consistently

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**Certificates of Deposit**

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See 2 Paton's Digest, § 1043a et seq. (1926); 35 Cent. L. J. 126 at 128 (1892); L. R. A. 1918C 691.

16 Among the numerous cases so holding, see especially Bean v. Briggs, 1 Iowa (Clarke) 488 (1855); Merchants' Bank & Trust Co. v. People's Bank, 99 W. Va. 544, 130 S. E. 142 (1925).

308 Pa. 323, 162 A. 825 (1932).

18 Elliot v. Capitol City State Bank, 128 Iowa 275 at 276, 103 N. W. 777 (1905).
be said that a certificate representing such loan is a promissory note; but the fundamental error in the Mereness Case and the cases on which it was based, was the holding that an ordinary deposit of money in a bank is a loan thereof to the bank. . . . The conclusion in the Mereness Case having been predicated on false premises, it follows that it must fall with its foundation, unless there be some other sufficient reason for holding that a demand certificate of deposit should be treated as a demand promissory note, so far as the statute of limitations is involved. We do not believe that any sound reason for so holding exists."

No court has had more difficulty than this one in pigeon-holing banking transactions to its satisfaction. Passing upon the proper disposition of public funds by the treasurer thereof, it first condemned general bank deposits as loans. It then approved deposits on demand account and demand certificates as the equivalent of cash for this purpose, but still disapproved of time C/Ds as representing "a private loan of public money." The reason for this distinction was presently elaborated:

"All intended is that the officer retain control, and keep it subject to the payment of orders when properly signed. That is precisely what is done with money deposited. [a] It cannot again be regained in kind, nor is this essential. Its equivalent answers every purpose, and this is returned on demand. The transaction differs essentially from a loan. [b] That is for the benefit of the depositor. . . . The depository may obtain an incidental advantage but that is seldom the original object contemplated. [c] In a loan the borrower promises to return the money at a future time; in a deposit, whenever the money is demanded. [d] True, the technical relation of creditor and debtor springs from the making of deposits, [e] but few of the many people who daily leave money with banks for safekeeping, and exact the return of an

17 Mereness v. First Nat. Bank, 112 Iowa 11, 83 N. W. 711 (1900).
18 Lowry v. Polk County, 51 Iowa 50, 49 N. W. 1049 (1879).
20 In Hunt v. Hopley, 120 Iowa 695 at 698-699, 95 N. W. 205 (1903).
equivalent amount, ever think of the transaction as a loan, or ever speak of it as such.”

Letters have been interpolated before the several propositions of this quotation in order to facilitate more concise and pertinent comment.

(a) Could the court have confused a deposit with a bailment of fungibles? When money is deposited generally, title to it passes to the bank, which seldom keeps it on hand mixed with the proceeds of other deposits. It reinvests the money for its own benefit.

(b) Loans and deposits may be for the benefit of either or both parties, according to the circumstances of the case. It is common experience that banks solicit deposits and in these days particularly they are eager to lend money to good credit. It would seem that the benefit they expect to derive, as “depository” (the word itself falsifies the bank’s position) and lender, is more motivating than incidental.

It is undoubtedly true that in most non-interest-bearing deposits the benefit the depositor seeks is relief from the multiple and not fully foreseeable hazards of keeping currency on his person, as well as the greater convenience of a checking account for the transmission of credits and funds. He prefers to consolidate and reduce his risks to the simple hazard of a bank’s solvency. The normal intent of the investor, on the other hand, is to derive income or appreciation of capital from the transaction. However, it is hard to see what difference in the relationship or in the rights and liabilities of the parties should flow from any difference in the benefit the depositor-investor desires. And it may be observed that the benefit to the bank, the other essential party to the contract, is the same in both instances.

Especially in view of the choice of deposits that is possible—non-interest bearing demand accounts, interest bearing demand accounts, accounts bearing interest if left a given period, accounts which may not be withdrawn before a future date, checking accounts, saving accounts, accounts evidenced by negotiable certificates—it is virtually impossible to tell what special benefit a given depositor sought. Undoubtedly it is often a combination of factors which impel him to the teller’s window.

One motive may be more legitimate than another in a public fiduciary; neither motive should affect the rule determining the maturity of the demand certificate which is issued.

(c) For our purpose, if not for that of the case before the court, this states the issue as a reason for the decision. The statement is consistent with the holding of the case that a time deposit is a loan; it does not explain why a demand deposit is not. And one must wonder why a demand note does not represent a loan.
(d) When is a debtor-creditor relationship substantial and when is it technical?

(e) This is a valid reason for holding the statute on public fiduciaries inapplicable to bank deposits, but as an argument that they are distinguishable from loans, it is demurrable. Incidentally, the public does not speak or think of time deposits as loans, either. One might observe that this kind of language is not best calculated to awaken the public to the true state of the relationship, with its implications of greater or less security.

For one purpose or another several of the distinctions here suggested were abandoned, but the ancient bailment conception of a bank deposit is not completely obliterated. It may make a difference whether a draft or book credit is exchanged for the certificate, whether there is cash in the till to be handed back and forth (though

21 In State v. Corning State Savings Bank, 136 Iowa 79, 113 N.W. 500 (1907), an offer by a correspondent bank to a savings bank to deposit money on time was held to have initiated a true deposit. A request by the savings bank in need of cash to the correspondent for a similar “deposit” was held the first step in borrowing money. As both parties were banks, it can be seen that the first transaction is a clear case of a bank seeking to invest money profitably. (It could hardly be depositing for safe keeping!) Whatever you call it, from the standpoint of the correspondent, the first “deposit” was an investment.

The second transaction was condemned because primarily for benefit of the Savings Bank. It may never be good banking practice to solicit deposits directly. Certainly it is undesirable to do so when in special need of cash to conceal the true status of the bank’s condition. But it is hard to see why such solicitation more clearly indicates a loan than the not uncommon practice of advertising and soliciting to increase deposits for purpose of reinvestment.

Here, and in Re Olson’s Estate, 206 Iowa 706, 219 N. W. 401 (1928), pretense of a distinction between time and demand C/Ds seems to have been dropped. In the latter case parol evidence was admitted to show the intent and understanding of an executor who had deposited funds in his care on time. Contra: Baer’s Appeal, 127 Pa. 360, 18 A. 1 (1889). The case assumes there can be a fundamental legal difference in intent.


23 Henderson v. Farmers’ Savings Bank, 199 Iowa 496, 202 N. W. 259 (1925); People’s Savings Bank v. Smith, 210 Iowa 136, 230 N. W. 565 (1930). The cases represent situations frequently recurring, in which a dubious function of C/Ds may be discerned. Promoters fraudulently induce corporate stock subscribers to execute notes in payment of their subscriptions. These notes are assigned to local banks, which recognize the maker’s credit, for their negotiable C/Ds. The promoters get their money through subsequent negotiation of the certificates, which are readily salable. See: Frink v. Commercial Bank, 195 Iowa 1011, 191 N. W. 513 (1923); Wegener v. Emmetsburg Nat. Bank, 195 Iowa 1267, 193 N. W. 627 (1923); Central State Bank v. People’s Savings Bank, 196 Iowa 43, 194 N. W. 233 (1923); Proctor v. Carolina Fertilizer & Phosphate Co., 189 N. C. 243, 126 S. E. 608 (1925); Gypsum Valley
it is generally held that it need not actually make its appearance\textsuperscript{24}). And the bailment notion persists most doggedly where the deposit is evidenced by a certificate whose form may be traced to the receipts issued by seventeenth century goldsmiths for plate left with them for safekeeping.

As has been seen, this judicial conception of the fundamental character of a deposit transaction has been influential in determining the maturity date of demand certificates. Thus, in \textit{Elliot v. Capitol City State Bank},\textsuperscript{25} already quoted on that issue, the court continues in language reminiscent of the cases just considered (and which were concerned with different questions):

"The transaction is in reality for the benefit and convenience of the depositor,\textsuperscript{26} and while the relationship of debtor and creditor exists, and the bank has the use of the money for commercial gain, it assumes no further obligations than to pay the amount received when it shall be demanded at its banking house."

(To the writer it is not clear what greater obligation any debtor assumes unless it is to pay without demand, and that is the very issue of the case, here resolved by simple restatement.)

There can be no doubt that regulatory legislation of the type already discussed must be applied with nice discrimination. Statutes which require the promissory notes of banks to be countersigned by president or board of directors could not have been intended to apply to certificates of deposit, requiring the constant attendance of those officers at every teller’s window,\textsuperscript{27} any more than statutes prohibiting the private loan of public funds are intended to prevent their deposit in banks, forcing public treasurers to keep their collection in bullion

\textsuperscript{24} See McCormick v. Hopkins, 287 Ill. 66, 122 N. E. 151 (1919); State v. Shove, 96 Wis. 1, 70 N. W. 312 (1897); State v. American State Bank, 112 Neb. 272, 199 N. W. 501 (1924); People’s Savings Bank v. Smith, 210 Iowa 136, 230 N. W. 565 (1930).

\textsuperscript{25} 128 Iowa 275 at 277, 103 N. W. 777 (1905).

\textsuperscript{26} In the next paragraph, the court continued, "If no actual demand be necessary to mature the debt created by a deposit, then depositors may sue at once upon leaving the bank, and a transaction intended to be for the mutual benefit of both may become one of oppression and wrong to the bank, and this the law should not tolerate." (Italics mine.)

\textsuperscript{27} That the statutes do not apply to C/Ds: Barnes v. Ontario Bank, 19 N. Y. 152 (1859); State ex rel. Cole v. Trimble, 307 Mo. 57, 269 S. W. 959 (1925); Smiley v. Fry, 100 N. Y. 262, 3 N. E. 186 (1885).
in their strong box or on their person. It does not follow that the bank's negotiable promise to repay the deposit is not a promissory note, nor that the cogent reasons for requiring a demand before action on a C/D are not applicable to all promissory notes.

II

CONSTRUCTION OF INSTRUMENTS WITH RESPECT TO MATURITY PROBLEMS

A. Language of the Instrument

With delightful singlemindedness many judges have said that certificates of deposit are not payable until a demand has been made because the language of the instrument forbids any other conclusion. The writer agrees that the literal meaning of the common C/D is to this effect and, except for possible difficulties with section 70 of the Negotiable Instruments Law, it seems a perfect reason for the holding. However, it does not so readily appear in what respect the terminology of the ordinary C/D is more forcible than that of what is generally distinguished as a promissory note. The latter says "on demand." 28 Many, if not most, of the certificates of deposit contain no mention of demand. The courts properly rely on the promise to pay when the certificate is returned, but it must be remembered that the same condition of return of the instrument upon payment is implied by law in the promise of the note. 29 (Even a note in terms payable "when called for" is within the general rule applied to "demand" notes. 30) The further limitation of liability to return of the certificate properly endorsed has been consistently held to be only an insistence that the holder of the paper should be able to show his title to it; not to refer at all, in the standard form, to the formalities of demand and surrender of the instrument. 31

28 It is possible to frame a note which will not mature until a demand has been made, though inasmuch as the expression of intention inherent in the express words "on demand" will not suffice, there can be no assurance that any given stipulation will be effective. In general, the courts appear to have relied upon expressions, in the notes themselves, of reasons why actual demand should be necessary. See Daugherty v. Wheeler, 125 Ind. 421, 25 N. E. 542 (1890); Blick v. Cockins, 131 Md. 625, 102 A. 1022 (1917); Sullivan v. Ellis, (C. C. A. 8th, 1915) 219 F. 694.
29 See note 12, supra.
31 Note 12, supra.
It was settled very early\(^{32}\) that a promissory note payable “on demand” was due immediately, though no one rationalization of the rule has ever completely satisfied all courts.\(^{33}\) Unwilling at first to disregard completely the language the parties themselves had used, it was said, where the issue was whether a demand for payment was a condition precedent to action on the note, that an action was itself a demand and that the terms of the agreement were satisfied.\(^{34}\) Such interpretation tacitly admits the necessity of some demand, a position which presents two difficulties. In the first place, by this construction the statute of limitations should not run until a demand has been made or action begun. In the second, it is an anomaly in the law to impose contractual liability upon one before his obligation has matured, and to say that the imposition of liability (i.e., upon determination of the action) matures the obligation is patently circuitous.\(^{35}\)

These difficulties were met by the assertion that the obligation lay upon the promisor to seek out the holder of the note and to take it up, and that he was in default for not having done so. Nowhere is this rationalization advanced more frequently or with greater contentment than in the cases distinguishing the rules of certificates of deposit and promissory notes. The obligation is upon the depositor to come to the bank to get his money. Now the mere statement that the obligation to “seek” rests upon one party rather than the other is no more satisfying than the bald assertion that a demand is or is not necessary. A priori, it would seem that it was the contract, and the necessity (or lack of it) for demand, which determined who must take the first step.

B. Commercial Considerations

Assuming an ambiguous expression of the intent of the parties, on whom should the obligation to “seek” lie? It immediately occurs to mind that in cases of negotiable instruments it would be more practical to put the burden on the holder, for he knows the party he must find. The maker of the note must, at best, trace the paper through the payee and subsequent transferees. At worst, if the memory of any


\(^{33}\) The knot was cut rather than untied in New York. In McMullen v. Rafferty, 89 N. Y. 456 (1882), the words “on demand” were said not to be a part of the contract. Courts are not usually willing to pick and choose among the coherent words of a single written sentence to make out a contract for the parties.


\(^{35}\) See the vigorous criticism by Judge Peckham in Wheeler v. Warner, 47 N. Y. 519 (1872).
negotiating party fails, it is impossible for him to find the instrument.

It may be conceded that the burden of "seeking" rests somewhat more heavily on a bank than a private individual, since a bank issues negotiable certificates by the thousand, and that this furnishes additional reason for requiring a demand as a condition precedent to action on a C/D. However, if a bank draws a "true promissory note" its liability is immediately perfected, while if a private individual issues a C/D the obligation to demand payment is on the holder. 86

If, as has been suggested, the statement that the maker must find the holder of his note means nothing more than that the holder may sue without prior demand, we must consider the conclusion of law on which both theses rest; namely, that the note is due immediately. How this could be true of an obligation voluntarily assumed is a little hard to grasp. Where the basis of the duty to pay is unjust enrichment, it is logical to hold that the duty arises instantly as the enrichment occurs, but why parties should go through the motions of executing a negotiable instrument and transferring the consideration therefor in order to redeem it the instant there was a transfer of possession is beyond explanation. The obligation matures the moment it arises, which is another way of saying that it is physically impossible for you to take up your demand note fast enough to avoid breaking your promise.

The ridiculous picture of a bank teller pursuing a depositor up the street, forcing back upon him the money he has just pushed across the counter, has impressed a number of courts. Even those which hold that certificates of deposit are subject to the rules of promissory notes have required a demand in cases of deposit on open account. 87 The conception of the honest borrower on a promissory note frantically attempting to preserve his credit is equally absurd.

Mr. Paton, counsel for the American Bankers' Association, says that the chief consideration in phrasing the language of demand C/Ds was the protection of a bank, willing and able to pay, against the annoyance and expense of suits by depositors who had made no demand and given no indication they wished to be paid. The words "payable on return of this certificate" were intended to accomplish this purpose. 88

86 Smiley v. Fry, 100 N. Y. 262, 3 N. E. 186 (1885); Smith v. Steen, 38 S. C. 361, 16 S. E. 1003 (1892); Luna v. Montoya, 25 N. M. 430, 184 P. 533 (1919); Campbell v. Whoriskey, 170 Mass. 63, 48 N. E. 1070 (1898).
87 Branch v. Dawson, 33 Minn. 399, 23 N. W. 552 (1885).
88 2 Paton's Digest, § 1056a (1926).
The contention that demand should be a condition precedent to action undeniably has merit, and the issue assumes special significance in those states where a disgruntled depositor could begin his action by attachment. It has already been pointed out that the words emphasized by Mr. Paton are no stronger than those of an ordinary promissory note and that the instrument would seem to be within section 70 of the Negotiable Instruments Law, but the substantial weight of authority requires the demand in cases of C/Ds.  

Why this discrimination in favor of certificates of deposit? It has been suggested that unnecessary lawsuits might impair the credit of a bank, "delicate as the honor of a lady." On the other hand, it has been said that a bank need not accept all customers, can maintain a select clientele, and that a bank is sufficiently protected by the public knowledge that one who sued without demand would never again be accepted as a depositor or other client. It is not satisfactory to place the distinction upon the character of the debtor, for the promissory notes of banks are due immediately, while a demand is necessary to mature the C/D of a natural person. It seems rather to rest upon a combination of the conception of a deposit as a peculiar transaction and the characteristic form of the instrument.  

Whether in the long

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39 See cases cited supra, notes 3, 4, and 5.
40 Dougherty v. Western Bank of Georgia, 13 Ga. 287 at 296 (1853). The case involved a bank note.

Others maintain that the instrument is not due until properly presented; that whereas a time note contains an absolute promise to pay upon the designated future date (fairly assuming the burden of finding the holder), the certificate only acknowledges that it will then be payable upon return of the instrument. Riddle v. First Nat. Bank, (C. C. Pa. 1886) 27 F. 503 (this C/D provided that if not returned at end
run the banks, who constitute the largest class of holders of notes as well as of makers of C/Ds, actually benefit by the operation of the two rules of maturity is a question which can only be answered by consideration of their effect on other legal and commercial problems.

III

Special Aspects of the Maturity Problem

A. Payment of Interest

Business men do not make and discharge contracts merely as a form of entertainment, nor do they, either as promisor or promisee, customarily enter into contracts "tainted at . . . inception with the mark of dishonor." Since there could be no benefit to anyone in handing money back and forth, it is a poor construction which reads into the literal requirement of demand an intent that the debt should be due of year, a renewal should be assumed); Baxley Banking Co. v. Gaskins, 145 Ga. 508, 89 S. E. 516 (1916); Chandler v. Smith, 147 Ga. 637, 95 S. E. 223 (1918); Wells v. Citizens' Bank, 264 Ky. 233, 94 S. W. (2d) 608 (1936) (this C/D provided that if it were not returned at maturity, the bank could require 30 days notice of the time when payment would be required); Bank of Commerce v. Harrison, 11 N. M. 50, 66 P. 460 (1894); Gardner's Estate, 228 Pa. 282, 77 A. 509, 29 L. R. A. (N. S.) 685 (1910) (emphasizing the condition of return of instrument). But it will be recalled that "payable on return of the instrument" is elsewhere considered an absolute promise, imposing no condition not implied by law in a promissory note. See text and notes 12 and 13, supra. In Baxley Bank v. Gaskins, supra, the court found an expectation that the money might remain on deposit after twelve months in the stipulation that interest should cease then, but it was said by way of dictum in Wells v. Citizens' Bank, supra, that such a provision would fix immutably the time when the cause of action would arise. (In the latter case a provision for interest "for the time specified" was found to promise interest until the certificate was presented.) The diverse authority on the length of time such instruments remain negotiable is considered in note 52, infra.

A certificate "payable 6 or 12 months after date" was considered absolutely due at the expiration of 12 months in Songer v. Peterson, 114 Kan. 900, 220 P. 1060 (1923), but see Esponda v. Ogden State Bank, 75 Utah 117, 283 P. 729 (1929). In Barsness v. Burkee, 176 Minn. 355, 223 N. W. 298 (1929), it was held that the paper could be presented at either six or twelve months but that no liability accrued through demand at eight months. On the other hand, in Montana it is regarded as a demand instrument after six months. Re Welch's Estate, 100 Mont. 47, 45 P. (2d) 681 (1935). Cf. Songer v. Peterson, supra.

It must be noticed that it is about as impractical for a bank to seek out its time depositors as its demand depositors, and it is equally vexing to be sued without prior demand by the one as by the other. Furthermore, it is not possible to reconcile and correlate the decisions, even of a single jurisdiction, by classifying the instrument on the basis of investment or deposit intent (assuming the possibility of such classification and disregarding the fundamental inquiry of whether such a distinction can be justified).

43 20 St. Louis L. Rev. 333 at 344 (1935).
immediately. The very common provision for interest not only calls to attention a commercial factor of conductive importance in these transactions, but fairly suggests that the debt was not expected to be paid immediately.\footnote{In Pierce v. State Nat. Bank, 215 Mass. 18, 101 N. E. 1060 (1913), an attempt was made to distinguish C/Ds bearing interest from those which did not. It was said the statute of limitations would not run until demand had been made on the former. As to the latter, a demand was necessary but it had to be made within the statutory period. It was the latter type of instrument which was before the court. Demand had been made 36 years after execution and action instituted 11 years after demand. The issue was raised whether a 20 year or a 6 year statute of limitations was applicable. Judge Loring, speaking for the court, said a demand 36 years after execution of the instrument was too late under either statute. Because the action was instituted 47 years after the date of the certificate, the holding is consistent either with the rule that recovery will be barred by running of the statutory period or by the expiration of twice the statutory period. It is hard to see how an instrument can be due immediately, so that an action on it will be barred at the end of the statutory period from the date of its execution, and yet not be due so as to be actionable until a demand has been made (a condition precedent), though as Judge Learned Hand once remarked of another problem, “the whole doctrine is so anomalous, one may be prepared for anything.” Consistency would seem to require that if the demand must be made within the statutory period, the instrument could not be matured without demand until the end of that term, at which date the statute would first begin to run. However, there is nothing in the opinion to suggest that an action could be maintained without previous demand during the second period, a necessary corollary to this analysis. Indeed, the emphasis was entirely on the length of time which had elapsed before demand, not before the bringing of the action.}

But suppose there is no provision for interest. Should legal interest accrue from the date of execution, in accordance with the general rule that interest runs from the maturity of the obligation? The large gulp necessary to swallow the notion that parties not specifying in-

Either interpretation of the case has certain virtues and it seems unfortunate that it has not been extended to promissory notes, where the general rule applies in Massachusetts as elsewhere. Little v. Blunt, 9 Pick. (26 Mass.) 488 (1830); Fletcher v. Sturtevant, 235 Mass. 249, 126 N. E. 428 (1920). And the attempted distinction between interest bearing and non-interest bearing certificates is most unsatisfactory. Having asserted, without reciting evidence, and, it is submitted, contrary to the fact, that the function of certificates of deposit was the transmission of funds, in the manner of a cashier's check, the court dismissed interest-bearing C/Ds, obviously not calculated for that purpose, as not true certificates of deposit.

The presence or absence of provision for interest in a demand note does not, by the great weight of authority, affect the rule. See cases collected, 44 A. L. R. 397 at 399 (1926). And cf. Newman v. Kettle, 13 Pick. (30 Mass.) 418 (1833), where the demand note was not to draw interest during the life of the maker. A few cases have held that interest provisions bring the note within the recognized exception where the parties more clearly express their intent that a demand must precede an action. Baxter v. Beckwith, 25 Colo. App. 322, 137 P. 901 (1913); Shapleigh Hardware Co. v. Spiro, 141 Miss. 38, 106 So. 209 (1925).
interest intended that it should accrue before demand for repayment stumped the New Jersey court, which declared there was nothing inconsistent in rules that the statute of limitation ran from date, but interest only from demand. Probably the majority of decisions are more consistent if less compassionate.

If provision for interest is made, does it accrue at the stipulated or legal rate? In cases of time notes, there is considerable diversity of opinion, some authorities holding that the contract rate controls until judgment is had, others contending that interest runs at the contract rate only until the due date and legal interest thereafter. But in cases of "demand" notes, which are said to be due immediately, even the courts of the latter group refuse to calculate interest at the legal rate from the date of the instrument. To do so would be to disregard the contract stipulations altogether. To provide for "interest from maturity" merely poses the question, but as the phrase suggests a future maturity, interest has been held to run only from demand. Cases holding that provision for interest evinces an intent that "demand notes" shall not mature until demand of course avoid this problem. The decision of Gay v. Rooke, that interest does not run on a debt evidenced by a receipt until demand, is consistent with the Massachusetts requirement of a demand to mature certificates of deposits and open accounts; but it might seem that a debt acknowledged in the words, "I. O. U., E. A. Gay, the sum of seventeen dollars $5/100, for value received," was quite as due as one evidenced, "On demand, I promise to pay."

B. Holder in Due Course

The fact is that no one expects demand paper to be paid immediately. One who acquires it within a reasonable time is not precluded from becoming a holder in due course because it is overdue. In this

47 Cases are collected in note, 75 A. L. R. 399 (1931).
48 State Bank v. Dunn, 325 Mo. 709, 29 S. W. (2d) 79 (1930). The court said interest ran from demand because it was a "demand" note. There was no intimation, however, that the statute of limitations would not run from date. Easton v. McAllister, 1 Mo. 662 (1826), and St. Charles Savings Bank v. Thompson, 284 Mo. 72, 223 S. W. 734 (1920), hold that it would.
50 151 Mass. 115, 23 N. E. 835 (1890).
51 N. Y. L., § 53. See note, 60 A. L. R. 649 (1929).
connection it may be noted that even jurisdictions in which a demand is necessary to mature a demand certificate of deposit usually deny the rights of a holder in due course to one who takes the instrument an "unreasonable" time after execution. The reason advanced is that if such an instrument is still in circulation at that time it is because it is uncollectible, that it gives fair warning on its face to one who takes it that it has probably been dishonored. Undoubtedly it facilitates negotiability to employ a test of this character rather than to expose the transferee to the hidden danger of a practically undiscoverable demand and default; but the application of this rule to demand C/Ds to that extent repudiates the asserted expectation that deposit transactions are to run indefinitely. One is reminded of the practical, if illogical, Massachusetts rule on non-interest-bearing demand C/Ds.

C. Presentment and Discharge of Indorsers

If the reason for distinguishing promissory notes and certificates of deposit is this conception of the latter as a continuing loan, if this distinction exempts demand C/Ds from the general rules of maturity of demand instruments (to such an extent that no court has considered the applicability of section 70 of the Negotiable Instruments Law


Where the certificate reads, "with interest at ___% if left 12 months. No interest after 12 months," negotiation during the 12 months has been held to have been within a reasonable time. White v. Wadhams, 204 Mich. 381, 170 N. W. 60 (1918); Kirkwood v. First Nat. Bank, 40 Neb. 484, 58 N. W. 1016 (1894). But one who took thereafter was not a holder. Easley v. East Tennessee Nat. Bank, 138 Tenn. 369, 198 S. W. 66 (1917).

A true time certificate—one which reads "payable to his order one year after date," for example—presents a stronger case. It was held in First Nat. Bank v. Security Nat. Bank, 34 Neb. 71, 51 N. W. 305 (1892), that the year given was the limit of negotiability, but the indecision as to whether a demand is necessary to mature these instruments (see note 42) has suggested a contrary view. See Wolf v. American Trust & Savings Bank, (C. C. A. 7th, 1914) 214 F. 761.

68 See discussion, supra note 44.

64 The adoption of the N. I. L. was the occasion for the Pennsylvania court to change its position on the negotiability of C/Ds. See text and note 15, supra. May it
despite the concern of several commentators\textsuperscript{65}, it is surprising to discover that the holder of such a demand certificate cannot continue the liability of an endorser forever by this failure to make demand, and that the case is governed by section 71 of the Negotiable Instruments Law requiring presentment within a reasonable time.\textsuperscript{66} If a certificate of deposit represents a continuing loan, an endorser must have agreed to a continuing secondary liability; the fact that the liability is contingent is no ground for differentiation in this respect. On the contrary, it is the fact that the endorser's liability is contingent; his promise is to pay if, and only if, the maker does not. This supports the well-settled rule, embodied in section 70 of the Negotiable Instruments Law, that no action lies against the endorser of even a promissory note until an unsuccessful demand has been made upon the maker.\textsuperscript{67} 

also be the occasion for a change of rule on the necessity of a demand? In Patterson v. Poindexter, 6 Watts & Serg. (Pa.) 227 (1843), it was thought “payable on return properly endorsed” was a more forcible expression than “on demand,” but § 7 of the N. I. L. apparently obliterates the distinction.

\textsuperscript{65} In their memorable controversy over the N. I. L., Dean Ames expressed the opinion that § 71 should be amended to except C/Ds, Professor Brewster answered that it would not be practical to do so. Dean Ames’ colleagues and successors at Harvard have supported him. This series of articles was reprinted in the appendices to the first, second and third editions of Brannan, Negotiable Instruments, published in 1908, 1911, and 1919, respectively. The fourth edition retains the summaries under the proper section of the N. I. L. and cites the original sources. BRANNAN, NEGOTIABLE INSTRUMENTS, 4th ed., iv, note 1 (1926). See also Turner, “Revision of the Negotiable Instruments Law,” 38 YALE L. J. 25 at 42 (1928).

\textsuperscript{66} Anderson v. First Nat. Bank, 144 Iowa 251, 122 N. W. 918 (1909). The same result was reached in Towle v. Starz, 67 Minn. 370, 69 N. W. 1098 (1897), but the case involved a time rather than demand certificate, and in any event, the latter instrument would be due immediately in Minnesota. Mitchell v. Eastin, 37 Minn. 335, 33 N. W. 910 (1887). But see Pardee v. Fish, 60 N. Y. 265 (1875), where the certificate, dated May 11, 1872, was negotiated June 5th, the maker bank adjudged bankrupt September 12th, and the certificate presented December 21st following. Judgment against the endorser was affirmed on the ground that he was liable “until an actual demand was made and the holder is not chargeable with neglect for omitting to make such demand within any particular time.” The language was weakened by the further observation that “it is by no means clear upon the facts that the time was unreasonable.” The case rested in part upon the authority of Merritt v. Todd, 23 N. Y. 28 (1861), which, in so far as it applied to promissory notes, has been modified by the enactment of § 71 of the N. I. L. Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020 (1906) (a case which also appears to disapprove of any distinction between the several types of negotiable demand instruments).

\textsuperscript{67} Lynch v. Goldsmith, 64 Ga. 42 (1879), sustained a judgment against the endorser of a demand certificate which had never been presented to the maker bank for payment. The court proceeded in part upon the basis that the instrument was overdue when endorsed, in part upon the theory that no demand is necessary to hold maker or endorser of a demand note. Granting that C/Ds are to be treated as notes, and
The limitation on this continuing liability imposed by section 71 should not be applied if the liability of the maker has not matured. The obligation of the endorser is still contingent upon the refusal of the maker to pay when a demand has been made.

D. Statute of Limitations

The application of the statute of limitations to actions on demand notes and C/Ds illustrates as forcibly as possible the difference in the rules of maturity and paucity of evidence which has been presented to justify both rules and distinctions. It has been said that the purpose of the statute is to put an end to the possibilities of litigation after evidence on the disputed facts has become unreliable from passage of time, and it may be that the facts about which controversies might arise are most apt to be those surrounding the execution of the instrument. However, the observation, if true at all, is equally true both as to C/Ds and promissory notes. The situation is the same in any case where performance is not immediately to follow the making of the contract, so that the cause of action does not accrue at once.

If the parties stipulate that the cause of action shall not arise until a demand, as they undeniably may, it is hardly for the courts to object on the ground of the statute of limitations; it is equally unsatisfactory to “interpret” the language to reach the same result. Such rationalizations as that of High v. Board of Commissioners, “that if the rule was otherwise, a party, by his own act or failure to act, could preclude the running of the statute of limitations until such time as might suit his interest, convenience or pleasure to put it in motion” would assuming for purposes of argument that they are due immediately, this failure to recognize the contingent nature of the endorser's liability cannot be supported.

It must be apparent that if presentment to the person primarily liable within a reasonable time is a condition precedent to action against an endorser, the question of the bar of the statute of limitations on such action can seldom arise. § 71 of the N. I. L. is, in effect, a virtual statute of limitations itself, German-American Bank v. Mills, 99 App. Div. 312, 91 N. Y. S. 142 (1904), though the burden of pleading and proof is on the holder. Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020 (1906); Merritt v. Jackson, 181 Mass. 69, 62 N. E. 987 (1902).

This is, of course, virtually what was done in Pierce v. State Nat. Bank, 215 Mass. 18, 101 N. E. 1060 (1913). It has been done in bailment transactions. Wright v. Paine, 62 Ala. 340 (1878). Semble, High v. Board of Commissioners, 92 Ind. 580 (1883). It was suggested, as an alternative ground for decision, in Kraft v. Thomas, 123 Ind. 513, 24 N. E. 346 (1890), that even if demand were necessary prior to an action on a demand note, it would have to be made within a reasonable (i.e., the statutory) time.

60 92 Ind. 580 at 588 (1883).
apply equally to certificates of deposit and other contracts. The purpose of the statute may, indeed, not be the assurance of evidence but merely the discharge of incumbrances on credit and property a reasonable time after such liabilities have accrued.

In so far as the statute of limitations is concerned, the issue of the maturity of bank C/Ds has been rendered academic in several jurisdictions by legislation which provides that there shall be no limitation to action on bank deposits. The undeniable habit of depositors to postpone demand for repayment indefinitely, resulting in forgotten and "lost" accounts, however, seems to have induced some legislative action of another kind. Thus it has been provided in New York that after the lapse of a given period, the length depending on the character of the account, the deposit "escheats" to the state.

E. Set-off

One further consequence of the rule, that a demand note is due immediately should be noticed. If our general rule is that only matured debts may be offset against each other, consistency would require the conclusion that demand notes in the hands of a bank indebted by way of deposit to the maker of the note could be deducted from the deposit instantly, but that the holder of a demand certificate who was indebted to the bank could not make the set-off without prior demand for payment.

61 For example, Utah Code of Civil Procedure, Rev. Stat. (1933), § 104-2-34: "To actions brought to recover money or other property deposited with any bank, trust company or savings or loan corporation, association or society there is no limitation."

This applied to C/Ds, see Verdi v. Helper State Bank, 57 Utah 502, 196 P. 225 (1921), though it might seem, by the comparison of money with other property, to refer only to special deposits. Or else it reflects the old idea of a deposit being a bailment.

Also Cal. Rev. Stat. (1927), c. 12, § 92 (2) [re-enacted in Stat. (1934), c. 24, § 92 (2): "The liability of the bank under any law, custom or agreement to repay moneys ... deposited with it and interest, if any, shall continue, notwithstanding any statute of limitations, or any enactment or law relating to prescription."

It should be observed that these statutes do not apply to certificates of deposit issued by private individuals.

Early Wisconsin and Michigan statutes excepted "bills, notes, and evidence of indebtedness" of banks from the operation of the statute of limitations. They were held applicable only to instruments designed to circulate as money, which C/Ds did not. Tripp v. Curtenius, 36 Mich. 494 (1877); Lusk v. Stoughton State Bank, 135 Wis. 311, 115 N. W. 813 (1908).

Two lines of inquiry suggest themselves. (a) Is the logical result practically desirable? Is any social purpose served by giving to demand notes the logical effect suggested above? Is there any reason for distinguishing between the possibilities of set-off of demand notes and demand C/Ds? (b) Are the authorities logically consistent?

On both issues unanimity and consistency of opinion ends as soon as the simplest situation has been solved. So, while it seems settled that a bank may not set-off an immature time note against an open deposit account where the maker-depositor is solvent, the majority permit the set-off immediately the party becomes insolvent. Likewise, if the bank becomes insolvent, the apparent weight of authority is to the effect that the holder of a certificate not due by its terms may set it off against his obligation to the bank. It makes no difference whether the immaturity of the certificate followed from its being a time instrument or simply from lack of demand. It should be observed in both instances that (a) the bank's right of set-off is not affected by the failure of the insolvent depositor to have matured his claim by demand and (b) the depositor's right is not lost because his own obligation is not due.

Set-off being an equitable doctrine, the courts which are at times consciously inconsistent justify themselves on the grounds of "equitableness," "fairness," "substantial justice," etc. If a given situation would seem to demand the application of the principles of set-off, it would appear that the courts could achieve the necessary result without laying down any arbitrary and general rule that all demand notes are

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63 Brown, Personal Property 519 at 520, special note (1936).
64 The cases are collected in Notes, 43 A. L. R. 1325 (1926); 51 A. L. R. 1477 (1927). There is a substantial minority view.
65 See generally, note, 97 A. L. R. 588 (1935) and annotations cited in preceding note.
67 Stadler v. First Nat. Bank, 22 Mont. 190, 56 P. 111 (1898); Seymour v. Dunham, 24 Hun. 93 (1881) (containing language reminiscent of Massachusetts, that the debt is presently payable, though a demand is condition precedent to action). Contrary: Taylor v. Weir, 63 Ill. App. 82 (1896). And see Munger v. Albany City Nat. Bank, 85 N. Y. 580 (1881).
68 Caveat: If the deposit is evidenced by a C/D on which no demand has been made, no set-off is possible unless the certificate is still in the hands of the debtor. Shute v. Pacific Nat. Bank, 136 Mass. 487 (1884); National Surety Co. v. Commissioner, 243 Mass. 218, 137 N. E. 533 (1922).
due immediately. Furthermore, the implication of the decisions denies that there is anything in a deposit transaction which should require different rules for set-off of C/Ds and promissory notes. Consideration of the problem is complicated by the fact that rights of set-off are very limited at common law, and that the banker's right is probably a development of the banker's lien. For comparable fact situations, it is necessary to find the rare cases in which banks are both the holders and the makers of the notes and C/Ds.

A study of the problem of the maturity of demand notes and certificates of deposit tempts one to philosophize with respect to the judicial process. The courts say they must give effect to the intent of the parties, though the best evidence of any intent at all has little weight. Intent is found by assuming a business custom or usage concerning which there is no evidence. The only certain usage is that imposed by law in conformity with the interpretation previously given similar words by the same court. The tautological nature of the process is self-evident.

It may be impossible to find the beginning of a perfect circle. Which is cause and which effect, the laymen who are participating seem to be as uncertain as the courts. There is not the slightest reason to suppose that business usage in Michigan and Wisconsin differs substantially from that in Illinois and Iowa. The law in each of those states has been settled in what seems to be permanent conflict for many years, but certificates of deposit are issued in identical form in them all, and no attempt has been made in any state to secure uniformity by changing the form of the instrument. Persistent adherence to the ancient phraseology, obviously inadaptable to the different rules of the several states, must be laid to three factors: (a) lack of any clear intention whatsoever, (b) ignorance of the law, and (c) the weight of custom, "heavy as frost and deep, almost, as life."

However, it is easier to criticize than to create. The courts have a real problem, perhaps too difficult for rational solution by our present methods of administering justice. One who can sympathize with their predicament would nevertheless be happier if they seemed to recognize it themselves.