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BILLS AND NOTES - DOMICILED NOTE AS A CHECK - INCIDENCE OF LOSS FROM THE FAILURE OF THE BANK OF DOMICILE AFTER MATURITY

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BILLS AND NOTES — DOMICILED NOTE AS A CHECK — INCIDENCE OF LOSS FROM THE FAILURE OF THE BANK OF DOMICILE AFTER MATURITY — Bonds of *D* County gave the holder the option of demanding payment at the office of the county treasurer or at a designated New York bank. At maturity, funds were available at the bank for payment, but the holder, *P*, made no presentment until eighteen days later, five days after the bank had failed, when demand was made on the county treasurer and payment refused. *P* sued. *Held*, the holder should recover the face of the bond regardless of the loss through the failure of the bank of domicile. *Employers Mutual Insurance Co. v. Board of County Commissioners*, 102 Colo. 177, 78 P. (2d) 380 (1938).

The extent to which a note payable at a designated bank assumes the attributes of a check is a problem not finally resolved by either statute or case law.[1] The N. I. L. terminated much controversy by discharging the maker

[1] BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 6th ed., 871 (1938); Bigelow, BILLS, NOTES, AND CHECKS, 3d ed., § 341 (1928); 18 CAL. L. REV. 56 (1929). In some states (e.g., Georgia, Minnesota, Missouri, New Jersey), the N. I. L. has been

from liability for interest and costs after maturity if money for payment is kept available at the bank.[2] Further, it gives the note the force of an order on the bank, in that payment may then be made on account of the maker without additional authorization.[3] In these respects at least, the domiciled note operates as a check. On the other hand, reported cases leave no doubt that demand at the bank is not a formal condition to the holder's recovery.[4] Between these settled positions is the comparatively narrow question whether the note is enough like a check that the risk of loss from failure of the bank during delay in presentment must be borne by the holder. The great weight of authority places this risk on the maker,[5] assigning as the reasons therefor either of two propositions: first, that since presentment does not condition the maker's liability, the holder can be under no obligation to make demand at maturity, but may at any time demand full payment regardless of the maker's losses; [6] second, that since the bank of domicile is selected by the maker, it must be considered as his agent for payment, and any loss occasioned by the agent must fall to the maker.[7] A few cases and a respectable body of dicta and comment show dissatisfaction with the reasons assigned for the rule.[8] First, the fact that the maker cannot

modified to leave little doubt as to the position of domiciled notes. See 5 UNIFORM LAWS ANNOTATED, § 87 (1936).

[2] N. I. L., § 70: Presentment is not necessary to charge the party primarily liable, "but if the instrument is . . . payable at a special place and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part." This is the view that was settled authoritatively in Wallace v. McConnell, 13 Pet. (38 U. S.) 136 (1839).

[3] N. I. L., § 87: "Where the instrument is made payable at a bank it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon." For an interpretation of the clause, see Brown v. First National Bank of Boston, 216 Mass. 298, 103 N. E. 780 (1914).

[4] See 8 AM. JUR. 372 (1937); Binghamton Pharmacy v. Memphis First National Bank, 131 Tenn. 711, 176 S. W. 1038 (1915). Cf. the English view in Sands v. Clarke, 8 C. B. 751, 137 Eng. Rep. 703 (1849); and after the Bills of Exchange Act of 1882 requiring presentment as a condition, Josolyne v. Roberts, [1908] 2 K. B. 349.

[5] 2 A. L. R. 1381 (1919); Adams v. Hackensack Improvement Commission, 44 N. J. L. 638 (1882); Bank of Montreal v. Ingerson, 105 Iowa 349, 75 N. W. 351 (1898); Binghamton Pharmacy v. Memphis First Nat. Bank, 131 Tenn. 711, 176 S. W. 1038 (1915); Federal Intermediate Credit Bank v. Epstein, 151 S. C. 67, 148 S. E. 713 (1929); Mullen Benevolent Corp. v. School District, 99 Mont. 388, 43 P. (2d) 902 (1935).

[6] Binghamton Pharmacy v. Memphis First Nat. Bank, 131 Tenn. 711, 176 S. W. 1038 (1915).

[7] Mullen Benevolent Corp. v. School District, 99 Mont. 388, 43 P. (2d) 902 (1935); Adams v. Hackensack Improvement Commission, 44 N. J. L. 638 (1882).

[8] Baldwin's Bank of Penn Yan v. Smith, 215 N. Y. 76, 109 N. E. 138 (1915), noted 29 HARV. L. REV. 204 (1915); dissent in Mullen Benevolent Corp. v. School District, 99 Mont. 388 at 399, 43 P. (2d) 902 (1935); Lazier v. Horan, 55 Iowa 75, 7 N. W. 457 (1880), since overruled in Bank of Montreal v. Ingerson, 105 Iowa 349, 75 N. W. 351 (1898). Cf. New England Nat. Bank v. Dick, 84 Kan. 252, 114 P. 378 (1911).

require a demand as a formal condition is not conclusive of the right of the holder to prolong an unnecessary risk for the maker who has appropriated credit for payment.[9] Whether termed negligence or laches, the defence of the maker is the breach of a duty, not non-performance of a condition. Second, the definition of the position of the bank in terms of agency seems unsatisfactory.[10] When the deposit is for the special purpose of retiring the note or bond, the bank is in the position of a trustee.[11] When the deposit is to the maker's general account, still the bank is no more the agent of the maker than in the case of a check.[12] It seems that if the rule of the majority has a sound basis it must be found in considerations of commercial expediency. It is often expeditious to select banks as instrumentalities in retiring notes and bonds; if the maker has the unrestricted privilege to withdraw retirement funds after maturity, a great deal of the advantage in the arrangement is lost; if this privilege is not accorded the maker, the majority rule gives the holder the unusual right to extend without prejudice the risk of the debtor.[13] Over against these considerations is the proposition that unlike the check, which is a substitute for currency, a note is an investment, and all risks of handling the investment until repaid must fall to the borrower.[14] It cannot reasonably be said of a note as of a check that

[9] Baldwin's Bank of Penn Yan v. Smith, 215 N. Y. 76 at 80, 109 N. E. 138 (1915), where the court said, "It is incumbent on the holder [of a check] to secure payment, and loss resulting from his neglect should fall on him, not on the drawer, who has no further duty to perform. I am unable to perceive why the same reason does not hold good in the case of a note payable at a bank. . . . To the extent that he [the maker] has appropriated his credit, he is not called upon to look after it, but discharges his duty by keeping his account good."

[10] "The relation between a bank and its depositor is that of debtor and creditor, not of agent and principal. The money deposited becomes part of the bank's general funds, and it impliedly contracts to pay the depositor's checks, acceptances, notes payable at the bank and the like to the amount of his credit, but in discharging its implied obligation it pays its own money as a debtor, not its depositor's money as an agent." General Fire Assur. Co. v. State Bank, 177 App. Div. 745 at 750, 164 N. Y. S. 871 (1917). See also Baldwin's Bank of Penn Yan v. Smith, 215 N. Y. 76 at 82, 109 N. E. 138 (1915).

[11] 1 MORSE, BANKS AND BANKING, 6th ed., § 185 and note (1928); 5 MICHIE, BANKS AND BANKING, perm. ed., 634, 636, note 68 (1932). Cf. 4 ibid., p. 44, note 66. In Re Interborough Consolidated Corp., (C. C. A. 2d, 1923) 288 F. 334 at 347, the court seems to use the terms of trusteeship and agency as applied to a bank almost interchangeably when funds are held for special payment.

[12] See note 10, supra. 5 MICHIE, BANKS AND BANKING, perm. ed., 15 (1932), gives a collection of cases; see also ibid., p. 18, note 5.

[13] Cf. Commercial Investment Trust Co. v. Lundgren-Wittensten Co., 173 Minn. 83, 216 N. W. 531 (1927), where the holder of a draft was not allowed to recover from the purchaser when the drawer-bank had failed after a reasonable time for the holder to make presentment. The holder was not at liberty to risk the funds of the party back of the transaction by his delay. For the view that the maker is under no obligation to keep funds in the bank, see BIGELOW, BILLS, NOTES, AND CHECKS, 3d ed., 258, note 1 (1928).

[14] 18 CAL. L. REV. 56 (1929).

after maturity the instrument itself is adopted as payment.[15] These divergent considerations may account for the willingness of the New York court to treat a short term, personal note as a check.[16] But the general character of notes and bonds as investments seems to require the majority rule of the instant case, placing the risk of failure of the bank of domicile on the maker, unless facts show that the holder has agreed to make the bank his agent for collection.[17] It is to be noted that in the case of bonds secured by a trust mortgage the courts seem ready to find such an agreement almost by implication, practically making exception to the majority rule.[18]

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[15] If the holder of a check "is guilty of laches in presenting it . . . and the bank in the mean time suspends payment, he thereby makes it his own, and it shall operate as a payment of his debt. . . ." Lowell Co-Operative Bank v. Sheridan, 284 Mass. 594 at 601, 188 N. E. 636 (1934), quoting Taylor v. Wilson, 11 Metc. (52 Mass.) 44 at 51 (1846).

[16] Baldwin's Bank of Penn Yan v. Smith, 215 N. Y. 76, 109 N. E. 138 (1915). The note was a personal one for four months. The case is not conclusive of the New York position, as an alternative ground was assigned for the determination of the case. See 29 HARV. L. REV. 204 (1916).

[17] New England Nat. Bank v. Dick, 84 Kan. 252, 114 P. 378 (1911); First Nat. Bank v. Hessel, 133 Wash. 643, 234 P. 662 (1925).

[18] McCormick v. Jounson, 134 Kan. 153, 4 P. (2d) 421 (1931); Morley v. University of Detroit, 263 Mich. 126, 248 N. W. 570 (1933), criticized in 32 MICH. L. REV. 232 (1933). Contra, Andrews v. Missouri State Life Ins. Co., (C. C. A. 5th, 1932) 61 F. (2d) 452.