

1935

BILLS AND NOTES-BONDS PAYABLE AT OFFICE OF TRUSTEE WHICH BECOMES INSOLVENT AFTER DEPOSIT ACCORDING TO AGREEMENT BUT BEFORE BONDS PRESENTED

Ralph W. Aigler
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Banking and Finance Law Commons](#), and the [Bankruptcy Law Commons](#)

Recommended Citation

Ralph W. Aigler, *BILLS AND NOTES-BONDS PAYABLE AT OFFICE OF TRUSTEE WHICH BECOMES INSOLVENT AFTER DEPOSIT ACCORDING TO AGREEMENT BUT BEFORE BONDS PRESENTED*, 33 MICH. L. REV. 432 (1935).

Available at: <https://repository.law.umich.edu/mlr/vol33/iss3/10>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

BILLS AND NOTES — BONDS PAYABLE AT OFFICE OF TRUSTEE WHICH BECOMES INSOLVENT AFTER DEPOSIT ACCORDING TO AGREEMENT BUT BEFORE BONDS PRESENTED — By the terms of a trust mortgage securing a large bond issue the debtor agreed that it would punctually pay the principal and interest of every bond according to the terms of the bond and coupons and would "deposit the necessary funds for such purpose with the trustee at least five days prior to the respective due dates." For the maturities of March 1st and September 1st, 1931, the requisite funds were deposited. Plaintiff's coupons of March and his bonds and coupons of September were not presented on the due dates and not until after the trustee had failed and closed its doors in October. In an action to recover judgment against the debtor for the amounts of such coupons and bonds, *held*, the obligations had been discharged by payment to the trustee as agent of the bondholders. *Morley v. University of Detroit*, 269 Mich. 216, 256 N. W. 861 (1934).

In *Morley v. University of Detroit*¹ the court affirmed a ruling denying plaintiff a summary judgment on the pleadings. The consideration in the principal case is in the nature of a rehearing, for the trial on the merits following the earlier affirmance with its positive declaration of the applicable law was a mere

¹ 263 Mich. 126, 248 N. W. 970, 90 A. L. R. 464 (1933). The case is fully discussed in 32 MICH. L. REV. 232 (1933).

formality.² Meticulous care was exercised in the part of the mortgage providing for redemption of bonds before their stated maturity to declare that deposit of the necessary funds therefor with the trustee should be "deemed full payment of such bond and the coupons belonging thereto as between the mortgagor and the holder thereof." The more significant, then, is the fact that as to bonds and coupons maturing normally no such language is used.³ The court finds the agency of the trustee to receive payment for the bondholders in the promise to deposit, quoted above. It is said that "Such deposit was made for the very purpose of payment, and constituted payment." That it is highly desirable from the point of view of the obligor that there be an accessible agent to whom he may look as the representative of the indefinite and unknown bondholders may be admitted, and carefully drawn bonds with their securing mortgages and trust deeds contain language appropriate to create such agency. The skilled attorneys who drew the mortgage in the principal case showed in the redemption clause that they knew how to provide unmistakably for payment by deposit with the trustee.⁴ To fasten upon bond purchasers an agency provided for in an indenture of many pages which few, if any, ever see is going a considerable distance, however clear the language creating the agency may be, but it is carrying the doctrine to inexcusable lengths to find such agency in terms merely promising to make deposit of the necessary funds. In the earlier opinion no authority was cited for its agency conclusion. In the principal case the court points out that it has been impressed with the reasoning in *Manchester v. Sullivan*,⁵ *Masonic*

² The great pains to which Mr. Justice Potter went in his dissenting opinion to establish that the court was not bound by its earlier pronouncements in the same case inevitably suggests that members of the court felt an overwhelming reluctance to repudiate what had been declared with such seeming finality in the earlier opinion.

³ In this connection *Andrews v. Missouri State Life Ins. Co.*, (C. C. A. 5th, 1932) 61 F. (2d) 452, is of especial significance, for the court there heavily relied on the variance in terms in the various parts of the trust deed. See 32 MICH. L. REV. 232 at 238 (1933).

⁴ As the case arose it was obvious that someone, either the bondholder or the obligor, would have to suffer a loss caused by the insolvency of the trustee. Superficially, some reason to throw the loss upon the bondholder may be found in his neglect to present his bonds and coupons in time. But under the applicable law, it is clear that presentment of a negotiable instrument at the specified place at the due date is not necessary in order to hold the parties primarily liable. This much was admitted by the court on the first hearing. See 32 MICH. L. REV. 232 at 235 (1933). To escape the inevitable result dictated by these principles, it was necessary to find language in the documents by which the deposit with the trustee could be treated as payment.

In the earlier discussion of this case [32 MICH. L. REV. 232 (1933)] it was suggested that it should be incumbent upon the obligor to see to it that unmistakably clear language is used in the creation of agency, that doubts of construction should be resolved against the obligor; for, after all, the language of the documents is his, at least by adoption, and the trustee is his selection rather than that of the bondholders. On these points Mr. Justice Butzel, in the principal case, observes merely that the record is silent as to how the trustee in this instance was selected and that it may be that it is chosen by the underwriter who thus is protecting the interests of the future investors. The well-known tender care for the investing public manifested by underwriters of bond and note issues in recent years is thus reflected in judicial action.

⁵ 112 Conn. 223, 152 Atl. 134 (1930).

Widows' & Orphans' Home and Infirmary v. Title Ins. & Trust Co.,⁶ *Fidelity & Columbia Trust Co. v. Schmidt*,⁷ *McCormick v. Johnson*,⁸ *Hall v. Goldsworthy*,⁹ *The Inn at South Palm Beach, Inc. v. Jacobs*.¹⁰ Of these cases the ones from Florida and Kansas fairly support the court's conclusion. The others, because of varying terms and factors, are of very little persuasive force.

RALPH W. AIGLER

⁶ 248 Ky. 787, 59 S. W. (2d) 987 (1933).

⁷ 245 Ky. 432, 53 S. W. (2d) 713 (1932).

⁸ 134 Kan. 153, 4 Pac. (2d) 421 (1931).

⁹ 136 Kan. 247, 14 Pac. (2d) 659 at 662 (1932).

¹⁰ (Fla., June 19, 1934) 155 So. 835.