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BILLS AND NOTES - EXCUSE OF PRESENTMENT FOR PAYMENT

RECENT DECISIONS

BILLS AND NOTES — EXCUSE OF PRESENTMENT FOR PAYMENT — The *X* bank at which a certificate of deposit was payable was in the hands of a receiver at the time of maturity of the certificate. Plaintiff, holder, sued defendant on his liability as an indorser. Defendant claimed a discharge of his liability because of plaintiff's failure to present for payment to the maker (*X* bank) at maturity. *Held*, plaintiff was excused from presenting for payment. *O'Neal v. Clark*, (Ala. 1934) 155 So. 562.

A negotiable instrument must be presented for payment by the holder in order to charge the drawer and indorsers.[1] Where the instrument is payable at a particular place, the holder must present for payment at the place specified.[2] In certain instances presentment for payment is dispensed with as a necessary step in charging the drawer and indorsers; [3] such an instance arises, by virtue of the Law Merchant and section 82-1 of the Uniform Negotiable Instruments Law, "where after the exercise of reasonable diligence presentment [for payment] . . . cannot be made." Under this rule, where it is physically impossible to present for payment because the stipulated place of payment or the place of the corporate maker or drawee is either closed or cannot be found after a reasonably diligent search, presentment is dispensed with.[4] Under the same rule, where

[1] Uniform Negotiable Instruments Law, sec. 70.

[2] Uniform Negotiable Instruments Law, secs. 73-1, 72-3; BIGELOW, BILLS, NOTES AND CHECKS, 3d ed., sec. 336 (1928), where it is said that "where the instrument is on its face payable at a specified *place*, it must be *presented there, and may not be presented elsewhere*"; Eagle Lumber Co. v. Oil States Lumber Co., 154 La. 854, 98 So. 270 (1923); Iron Clad Mfg. Co. v. Sackin, 129 App. Div. 555, 114 N. Y. S. 43 (1908) ;Shaw v. Reed, 12 Pick. (29 Mass.) 132 (1831); Roberts v. Mason, 1 Ala. 373 (1840); 3 R. C. L. 1198-1200 (1914); 8 C. J. 549-551 (1916).

[3] For complete discussions of all the instances in which presentment is excused, see BIGELOW, BILLS, NOTES AND CHECKS, 3d ed., secs. 363-365a (1928); 2 DANIEL, NEGOTIABLE INSTRUMENTS, 7th ed., c's. 30-35 (1933).

[4] Engle v. Shepherd, 100 Okla. 200, 229 Pac. 208 (1924); Roberts v. Mason, 1 Ala. 373 (1840); Calkins v. Vaughan, 217 Ala. 56, 114 So. 570 (1927); Hutchison v. Crutcher, 98 Tenn. 421, 39 S. W. 725, 37 L. R. A. 89 (1897); Brown v. Jones, 125 Ind. 375, 25 N. E. 452 (1890); Berg & Co. v. Abbott, 83 Pa. 177, 24 Am. Rep. 158 (1876); Niblack v. Park Nat. Bank of Chicago, 169 Ill. 517, 48 N. E. 438 (1897); Wood v. Roe, 205 Iowa 399, 218 N. W. 51 (1928); Faulkner v. Faulkner, 73 Mo. 327 (1880); Spann v. Baltzell, 1 Fla. 301, 44 Am. Dec. 346 (1847); Waring v. Betts, 90 Va. 46, 17 S. E. 739 (1893); 8 C. J. 549-551 (1916). 2 DANIEL, NEGOTIABLE INSTRUMENTS, 7th ed., sec. 1289, n. 65 (1933), lists some of the above cases and other cases as holding that where a bank, the place of payment, has ceased to exist or has dissolved, it "will certainly be sufficient to make presentment to the bank which has succeeded the former institution." Only one case [Central Bank v. Allen, 16 Me. 41 (1839)] of all those listed by the writer of the book supports his statement. The others either hold that presentment for payment is excused entirely, which is in line with all the authority cited in this present footnote, or are not in point at all. The recent case of Lucas v. Swan, (C. C. A. 4th, 1933) 67 F. (2d) 106, although its facts seem to indicate that there was no place to which the holder might go to present for payment, the maker corporation having disposed of all its assets and gone out of business,

a receiver has taken over the corporation at whose place payment was to be had, or has taken over the corporate maker or drawee, presentment has been dispensed with.[5] In the present case, the maker bank being in the hands of a receiver, the principal court, too, held that presentment was excused.[6] In any event, presentment to the *receiver* ought not be required, and so it has been held.[7] He is not a representative of the corporation,[8] but merely an officer appointed by the court to preserve and distribute the assets of the corporation.[9] It is also true that if place of the corporation were closed at maturity, presentment would be excused.[10] But if open, although under a receivership, could not presentment be made? The principal court answers in the negative, arguing that the corporation has ceased to exist for the purpose of presenting an instrument for payment to it.[11] Although the court's "argument" begs the question, it is submitted that, in favor of its conclusion, there are weighty reasons, to wit: (a) The reason why presentment for payment has been set up as a necessary step in charging the drawer or indorsers is so that there will be an objective demonstration that the party primarily liable will not pay. It is submitted that receivership of the corporation is as objective a demonstration that it will not pay as if the holder had presented to the corporation and been refused. Therefore the superfluity of pre-

held that presentment for payment was not excused. In Sunlite Co. v. Justice, (Tex. Civ. App. 1923) 257 S. W. 579, presentment for payment was excused on the grounds of insolvency, but BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 5th ed., 796 (1932), submits that the decision must rest on the impossibility of presentment (the corporation having virtually disappeared) or waiver.

[5] Engle v. Shepherd, 100 Okla. 200, 229 Pac. 204 (1924); Calkins v. Vaughan, 217 Ala. 56, 114 So. 570 (1927). Sunlite Co. v. Justice, (Tex. Civ. App. 1923) 257 S. W. 579, might have been decided upon these grounds, although it went off on erroneous reason of insolvency as an excuse of presentment. In Haynes Automobile Co. v. Shepherd, 220 Mich. 231, 189 N. W. 841, 25 A. L. R. 960 (1922), the intimation derivable from the decision is that presentment for payment was excused.

[6] Mere insolvency, however, will not excuse presentment. See Lucas v. Swan, (C. C. A. 4th, 1933) 67 F. (2d) 106; annotation, 87 A. L. R. 1396 (1933).

[7] Jackson v. McInnis, 33 Ore. 529, 54 Pac. 884, 55 Pac. 535 (1898), on facts similar to those in principal case; Engle v. Shepherd, 100 Okla. 200, 229 Pac. 204 (1924), on facts similar to those in principal case; Armstrong v. Thruston, 11 Md. 148 (1857); Calkins v. Vaughan, 217 Ala. 56, 114 So. 570 (1927). *Contra*, Hutchison v. Crutcher, 98 Tenn. 421, 39 S. W. 725 (1897), 37 L. R. A. 89 (1897).

[8] 3 MICHIE, BANKS AND BANKING, secs. 101, 88 (1931). In the second sentence and footnote 2 of this present note, it was developed that presentment must be made to the corporation. That that duty does not extend to others than proper representatives of the corporation is a self-evident proposition, e.g., a holder would have no duty to present to a stockholder or a truck driver of the corporation.

[9] Farmers' Loan & Trust Co. v. Oregon Pacific R. R., 31 Ore. 237, 48 Pac. 706 (1897); State Bank of Gothenburg v. Carroll, 81 Neb. 484, 116 N. W. 276 (1908); 3 MICHIE, BANKS AND BANKING, secs. 84-124 (1931).

[10] See note 5, supra.

[11] It cannot be denied that for some purposes the corporation still has existence. 5 Cyc. 602 (1902); Decker v. Gardner, 124 N. Y. 334, 26 N. E. 814 (1891); Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1, 16 Sup. Ct. 439 (1895). If one agrees that the bank has ceased to exist for the purpose of presentment, then presentment ought to be excused by virtue of section 82-1 of the N.I.L.

senting for payment ought to be dispensed with. So it has been held that where the party primarily liable is restrained by court order from paying, presentment is excused.[12] (b) To refuse to dispense with presentment here would be to make excuse of presentment turn upon the absurd point of whether the receiver has the doors of the corporation open or closed at the time of maturity of the instrument. It is submitted, therefore, that the principal court was correct in its decision, the Oregon court to the contrary notwithstanding.[13]

M. J. M.

[12] EDWARDS, BILLS AND NOTES, 2d ed., 377 (1863); Lovett v. Cornwell, 6 Wend. (N. Y.) 369 (1831).

[13] Jackson v. McInnis, 33 Ore. 529, 54 Pac. 884, 55 Pac. 535 (1898), citing as authority for its position the case of Armstrong v. Thruston, 11 Md. 148 (1857). This latter case is not in point, however, since the maker in the case was a partnership, and, consequently, altogether different principles apply.