Michigan Law Review

Volume 32 | Issue 7

1934

BANKS AND BANKING -- RELATION OF BANK TO DEPOSITOR OF CHECKS UNQUALIFIEDLY INDORSED -- SET-OFF AGAINST A FAILING CORRESPONDENT BANK

BANKS AND BANKING — RELATION OF BANK TO DEPOSITOR OF CHECKS UNQUALIFIEDLY INDORSED — SET-OFF AGAINST A FAILING CORRESPONDENT BANK — Checks drawn on the *M* bank of another city were deposited by the holders in the *D* bank pursuant to an agreement that "in receiving and handling items for deposit or collection . . . this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. . . . It may decline to honor or pay checks drawn against conditional credits." The checks were unqualifiedly indorsed. The *D* bank credited each depositor's account and forwarded the checks to *M* bank which charged the accounts of the drawers and sent its draft to *D* bank in payment. The draft was dishonored because of *M* bank's failure before the depositors had drawn upon the credit received. In a suit by the receiver of *M* bank for money which *D* bank owed it, *D* bank pleaded the amount of the draft as a set-off. The court, in allowing the set-off, *held* that the title to the checks passed to *D* bank at the time of deposit. *Bosworth v. Continental Ill. Bank & Trust Co.*, (C. C. A. 7th, 1933) 65 F. (2d) 632.

When a check drawn on one bank is unqualifiedly indorsed to another, and

the latter bank credits the amount of the check to the depositor's account, the title to the check does not necessarily pass to the depositary bank. Its position may be that of owner, or mere agent for collection, depending upon the intent of the parties at the time of the deposit.[1] However, the presumption that the parties intended that the title should pass, arising from the unqualified indorsement and the immediate credit,[2] is rebutted only by a very clear agreement to the contrary. There are instances of rather strong agreements which have been held insufficient to rebut the presumption.[3] But the great weight of authority is that an agreement such as the one in the principal case is sufficient to rebut the presumption of sale and create an agency relationship.[4] This seems to be the better view since the agreement expressly says that the bank is only an agent.[5] Under this view the bank, as agent, is still securely protected against any loss by the agreement itself, especially where, as in this case, the credit given has not been drawn upon.[6] On the other hand, if the bank is held as owner, the favorable position of the depositor as creditor of the solvent depositary bank will depend upon conditions entirely unrelated to the merits of his cause: (1) whether it so happens that the depositary bank was a debtor of the failing bank, and (2) if so, whether the depositary bank wishes to aid the depositor's position by exercising its

[1] First Nat. Bank v. Stengel, (N. Y. Sup. Ct. T. T. 1918) 169 N. Y. S. 217; First Nat. Bank of Eads v. Fleming State Bank, 74 Colo. 309, 221 Pac. 891 (1924). This latter case also stresses the custom and course of dealing between the parties, which is always an important factor in interpreting their intent.

[2] Burton v. United States, 196 U. S. 283, 25 Sup. Ct. 243 (1904); Taft v. Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387 (1899).

[3] "Items may be handled as customer's agent. . . . This Bank, as agent or owner, is not liable for neglect . . . of banks selected as agents. . . . Items not on this bank . . . if credited, are credited conditionally. . . ," Nomland v. First Nat. Bank, (C. C. A. 8th, 1933) 64 F. (2d) 399; "We enclose for collection and credit," Ashley State Bank v. City Nat. Bank, (C. C. A. 8th, 1929) 32 F. (2d) 166. *Contra*, Washington Loan & Banking Co. v. Fourth Nat. Bank, (C. C. A. 5th, 1930) 38 F. (2d) 772, but here the credit immediately given was, by customary dealing, not to be drawn upon until sufficient time for collection had elapsed. Some courts make a distinction between "for collection and credit" and "for collection and return," Nyssa-Arcadia Drainage District v. First Nat. Bank, (D. C. Ore. 1925) 3 F. (2d) 648; "Checks lost in transit or on which payment is refused, will be charged back to the depositor's account, this bank acting only as agent and assuming no responsibility beyond due diligence on its part," held insufficient in Holmes v. Shawnee Milling Co., 5 La. App. 391 (1926).

[4] In re State Bank, 56 Minn. 119, 57 N. W. 336 (1893); Macon Grocery Co. v. Citizens Bank of Fort Valley, 42 Ga. App. 74, 155 S. E. 57 (1930); Gamble v. Sioux Falls Nat. Bank, 51 S. D. 331, 213 N. W. 857 (1927); Kane v. First Nat. Bank of El Paso, (C. C. A. 5th, 1932) 56 F. (2d) 534; Brennan v. Holden, (D. C. Mass. 1933) 4 F. Supp. 285 (though withdrawals allowed); The People v. Michigan Ave. Trust Co., 242 Ill. App. 579 (1926); *contra*, Olinger v. Sanders, 92 Ind. App. 358, 174 N. E. 513 (1931).

[5] "It is needless to suggest that the bank could not be agent for collection and owner of the paper at the same time," Justice Mitchell in In re State Bank, 56 Minn. 119, 57 N. W. 336 (1893).

[6] See comment, "The Uniform Bank Collection Act: Third Tentative Draft," 33 COL. L. REV. 125 (1933).

right of set-off or to charge the check back to the depositor and leave him to fight for a position as a preferred creditor of the insolvent correspondent. The depositor will also be unable to recover from any correspondent bank which has damaged him by its negligence in collection, because there is no privity between these two.[7]

B. A. L.

[7] Downey v. National Exch. Bank, 52 Ind. App. 672, 96 N. E. 403 (1912); City of Douglas v. Federal Reserve Bank of Dallas, 271 U. S. 489, 46 Sup. Ct. 554 (1926).