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BANKS AND BANKING-BANK DEPOSITS AND THE N.I.L.

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BANKS AND BANKING—BANK DEPOSITS AND THE N.I.L.—Plaintiff sued *H* and *W* and a writ of garnishment was issued against *B* who filed a disclosure of an indebtedness owing to *H* and *W* as joint credi-

tors. *W* was later dropped from the case by a voluntary non-suit. Shortly after such dismissal, *W* applied to *B* for payment of the debt, but payment was refused because of the outstanding garnishment. *B*, however, expressed to *W* an intention, perhaps even an assurance, to honor such application when freed of the garnishment. That garnishment was dismissed several days later, but in the meantime another writ of garnishment in the pending suit was served upon *B*. Judgment in the main action was rendered against *H*, and on the garnishment hearing[1] it developed that *B* had not paid *W* because at the date of application for payment the first garnishment writ was outstanding and had not made payment upon dismissal of that writ because the second writ had been served before release of the first, but that *B* considered the money as belonging to *W*. The trial court entered judgment for *B*, the garnishee defendant, the fund in *B's* hands being considered as *W's*, on the proofs presented.

Such are the essential facts in a recent case decided by the Michigan Supreme Court.[2] In the case *H* and *W* are husband and wife and *B* is a bank in which they had a "joint deposit." The application by *W* to *B* for payment was made by the presentation of her check for the balance in the account. The bank declined to pay, as stated, but kept the check "for collection,"[3] pinning it to the account. The reviewing court concluded that the trial court erred in holding that the wife "had established right and title to the funds in the joint account and in directing a verdict for the garnishee bank." Wiest and Butzel, J. J., dissented.

It is difficult to state with assurance just what the varying views of the majority and minority really are. Mr. Justice Starr, for the majority, after pointing out that the defendants contended that the check "constituted an assignment" to *W* "of the money in the joint account," stated that the burden was on her to establish her title to the garnisheed fund. He then refers to sections 189, 139 and 141 (1) of the N.I.L.[4] declaring that (1) checks of themselves do not amount to an assignment and no liability on the drawee bank to the holder unless and until it accepts, (2) the classification of acceptances, into general and qualified, and (3) the definition of a qualified acceptance; and he concludes that under these sections the bank's acceptance of *W's* check "was a conditional acceptance and did not operate as present assignment of the funds in the joint account." Since the condition in such acceptance, however, was not fulfilled until a release and dismissal of the original

[1] Under Mich. Acts, 1937, No. 182, p. 275.

[2] Sussex v. Snyder, (Mich. 1943) 11 N.W. (2d) 314.

[3] "Collection" here manifestly is not used in its usual sense, for the debt payment of which was called for by the check was owing by the bank itself.

[4] Mich. Comp. L. (1929), §§ 9438, 9388 and 9390, Stats. Ann., §§ 19.231, 19.181 and 19.183 (1).

writ of garnishment, at which time the bank had been served with the second writ which reached any interest of the husband in the joint account, the bank, it is stated, had not become obligated to make payment. Thus *W* "failed to establish her right and title to the funds in the joint account." The majority opinion then goes on to point out that under an earlier decision[5] the interest of the husband in the joint account, in absence of proof as to amounts contributed thereto by the two joint tenants, was to be taken as one-half and as such severable for purpose of meeting demands of creditors; it was therefore error to hold that *W* "had established right and title to the funds in the joint account and in directing a verdict for the garnishee bank."

For the minority Mr. Justice Butzel took the position that the N.I.L. had no application and that since the bank "'considered the money in said account to belong to said'" *W*, this amounted to "an assignment of the funds" to *W* subject to the garnishment being dismissed—"Although the assignment of the funds to her was conditional, the condition was met. The second garnishment did not release the bank's obligation to pay [*W*] in accordance with its agreement."

Whether the case was correctly decided is, of course, of the utmost importance to the litigants. The readers of this *Review*, however, are interested only in the legal doctrines for which the decision many stand. In so far as the case deals with acceptances, general or qualified, and with assignments, it is respectfully submitted that the case may prove troublesome.

While the legal relationship between a customer and his bank is occasionally that of bailor and bailee, beneficiary and trustee, principal and agent, by far the most common is that of creditor and debtor. In the usual deposit situation the bank becomes a debtor and the customer a creditor.[6] This debtor-creditor relationship varies from the common one between debtor and creditor in that the bank as debtor engages not only to pay its debt, as do all debtors, but in partial payments as ordered by the creditor-depositor by his properly drawn checks. Before the N.I.L. a number of states followed the view that a depositor by issuing a check to another thereby assigned that much of his claim against the bank to the checkholder. By far the greater number of states rejected this assignment theory and the conflict was supposedly set at rest by a section in the N.I.L. declaring that a check of itself does not amount to an assignment. Under the assignment view the checkholder of course had an action against the drawee bank as his debtor, so the section continued with the provision that the bank is not liable to the holder unless and until it accepts or certifies. Even under the line of

[5] Murphy v. Michigan Trust Co., 221 Mich. 243, 190 N.W. 698 (1922).

[6] Customers occasionally borrow from the bank, in which situation again the relationship is debtor-creditor with the parties reversed.

authority thus rejected by the N.I.L. it was never thought that a check drawn by a depositor in favor of himself was an assignment. An assignment necessarily contemplates not only a debtor and a creditor but also a third party to whom the creditor makes the assignment.[7] Of course Mr. Justice Butzel is familiar with this, so he must have been using "assignment" in some other sense, perhaps as an appropriation or setting aside of the fund by the bank for the wife, to be delivered or paid when the then outstanding writ should be discharged.[8] This in turn is suggestive of a trust. But surely there was here no trust *res*.

One may well wonder whether this approach by the learned justice was not prompted by a desire not to speak of the bank's action in terms of promise because of difficulties of consideration and possibly the requirement of the N.I.L. that certifications, which are promises by the drawee to pay, must be in writing.[9] He probably was not troubled by the latter, for he distinctly takes the position that the N.I.L. had no application to the case.

That the N.I.L. had no application to the facts seems reasonably clear. That statute is a codification, in the interest of uniformity, of the law of negotiable instruments, not of the law of debtor and creditor generally or even of customer and banker. Certifications are dealt with by the N.I.L. because they are placed on checks only when there is an intent to circulate them or when they are requested by holders of checks already in circulation.[10] They thus bear upon the *negotiable* or circulating quality of the instrument. In the case under discussion *W* drew her check and presented it to the bank *for payment*, not for further circulability. She could have had no interest in a promise by the bank

[7] The dissenting opinion predicates its conclusion of an assignment upon the fact that the bank "considered the money in said account to belong to" the wife. Surely, an assignment is accomplished by action of the creditor. The only creditor involved in this transaction with the bank was the wife herself. There would be no point in her making an assignment to herself as to her part of the joint account, and she was not in position to assign her husband's part.

[8] The two opinions differ sharply as to what the bank's undertaking, if any, really was. The majority clearly are of opinion that the bank's undertaking was to pay when the account was freed. The minority equally clearly deem the bank's undertaking was to pay the check when the then pending writ was discharged. As between these two views the former seems the more likely. Only a careless or thoughtless banker would obligate his bank to pay except as the account might be truly free of hampering writs.

[9] Such writing is required by the N.I.L.

[10] Checks are certified in two classes of situations. In the first the certification is at the request of the holder who obviously wants the credit of the bank behind the paper instead of the secondary liability of the drawer and perhaps of indorsers. Such certifications are in effect payments of the checks (the bank at once charges the amount to the drawer's account) with a redeposit of the money in the bank. In the second situation the certification is at the drawer's request and is desired because he wants to use the check perhaps in making a payment somewhere or in making a deposit as a bidder.

as certifier, for she already had the bank's full liability as debtor to herself as depositor. To the extent, then, to which the bank made any promise to *W* upon her presentation of the check it was merely a promise by a debtor to pay an existing debt if and when certain difficulties were removed. Such promise was not a certification and the N.I.L. had nothing to do with it.[11]

The view of the majority that the transaction between the bank and *W* on presentation of the check amounted to a "conditional acceptance" though not to a present assignment seems subject to similar criticism. Indeed what has been said above to the effect that any promise made by the bank at that time should not be viewed as a certification is applicable here, for "acceptance" in connection with checks is simply another way of saying "certification." Perhaps it would state the situation correctly to say that the bank found the check acceptable for payment if and when the bank was free to pay it. Courts unfortunately have occasionally used "accept" in that sense, for example, when it is said that every payment by a drawee must necessarily have been preceded by acceptance.[12]

So far as the rights of *W* against the bank are concerned, at least so far as her claim to the entire balance was concerned, the questions would seem to be: (1) was any legally enforceable promise made by the bank to *W*? (2) if there was such a promise, was it to pay when the then outstanding writ was discharged, or to pay when the bank was free of all restraints, whether by that writ or by later ones?[13]

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[11] It has been held many times that the provisions of the N.I.L. are not applicable to non-negotiable paper though it may be a promissory note or bill of exchange. Only negotiable paper is covered.

[12] See First N. Bank v. Whitmore, (C.C.A. 8th, 1910) 177 F. 397; National Bank of Commerce v. Seattle N. Bank, 109 Wash. 312, 187 P. 342 (1920).

[13] In the hearing on the garnishment writ, affidavit and disclosures, apparently there was no proof entered as to the respective shares of the husband and wife in the joint account. The trial judge then ruled that the plaintiff had failed to show that the account belonged to the husband, the principal defendant, and he ordered a verdict for the bank. It is a bit puzzling why at that point no application was made of Murphy v. Michigan Trust Co. (supra note 4) holding at p. 246 that in absence of proof "the presumption prevails that plaintiffs were equal contributors" to the account.