NOTES AND COMMENTS

BANKS AND BANKING

Relationship Between a Depositor and the Depository Bank; Right to a Preference on Insolvency

The plaintiff was a depositor in the Standard Trust Bank of Cleveland. On Saturday morning, December 19, 1931, he deposited checks on local banks, indorsed in blank, to the amount of $1295.60. On the following Monday, before the checks were put through clearance, the Superintendent of Banks took charge of the bank for liquidation purposes. The checks were then sent through clearance and the proceeds were received by the liquidating agent. There was no special agreement, other than the words on the deposit slip, that the checks were deposited for the purpose of collection. The deposit slip read: "In receiving items for deposit or collection, this bank acts only as depositors' collecting agent * * *." The commercial passbook read: "All items payable outside the city are taken with the understanding that this bank acts as your collecting agent * * *." The Superintendent of Banks rejected the plaintiff's claim for a preference, after which this suit was commenced in the Common Pleas Court of Cuyahoga County. The trial court found for the plaintiff and its decision was affirmed by the Court of Appeals. The Ohio Supreme Court, Zimmerman, J., dissenting, held that the plaintiff was not entitled to a preferred claim. *Squire, Supt. of Banks* v. *Goulder,* 131 Ohio St. 106, 2 N.E. (2d) 2, 5 Ohio Op. 465 (1936).

In the absence of statute, the plaintiff's right to a preferred claim depends upon the relationship which the deposit in question created between the plaintiff and the depository bank. If the title to the checks passed to the bank, the relationship of debtor-creditor arose, and the plaintiff can take only as a general creditor. On the other hand, if the depositor retained title to the instruments, the relationship became one of principal and agent, and the plaintiff has a valid right to a preferred claim.

It is well settled that the title to checks or other paper deposited for purposes of collection does not pass to the depository bank. *Jones* v. *Kilbreth,* 49 Ohio St. 401, 31 N.E. 346 (1892); *Helsinger* v. *Trickett,*

86 Ohio St. 286, 99 N.E. 305, Ann. Cas. 1913D 421 (1912); *Pascaganda National Bank* v. *Fed. Reserve Bank*, 3 Fed. (2d) 465 (1921); *Richardson* v. *Louisville Banking Co.*, 94 Fed. 442, 36 C.C.A. 307 (1899); *Yerkes* v. *National Bank*, 69 N.Y. 382, 25 Am. Rep. 208 (1877). Where the instrument has been restrictively indorsed "for collection," it is especially clear that the title was intended to remain in the depositor, and that the bank was to become merely an agent for collection. *First National Bank* v. *First National Bank*, 58 Ohio St. 207, 50 N.E. 723, 65 Am. St. Rep. 748, 41 L.R.A. 584 (1898); *Sweeney* v. *Easter*, 1 Wall. 166, 17 L. Ed. 681 (1863). However, this is true even if the instrument was indorsed in blank, if the parties intended the deposit to be one for collection only. *Richardson* v. *New Orleans Coffee Co.*, 102 Fed. 785, 43 C.C.A. 583 (1900).

But where the instrument is indorsed without restriction and there is no special agreement that it is taken for collection only, there is a distinct conflict of authority as to the relationship which the deposit creates between the depositor and the bank. Two views have been set forth, both of which have found ample support among the reported cases. One view, which seems to represent the weight of authority, is that the title passes to the bank, thus creating the status of debtor-creditor. *Shaw* v. *Bauman*, 34 Ohio St. 25 (1877); *Bank* v. *Brewing Co.*, 50 Ohio St. 151, 33 N.E. 1054, 40 Am. St. Rep. 660 (1893); *The Smith and Setron Printing Co.* v. *The State, ex rel Fulton*, 40 Ohio App. 32 (1931); *Howe* v. *Akron Sav. Bank*, 16 Ohio C.C. (N.S.) 320 (1905); *Heinrich, Ex'r* v. *First National Bank*, 219 N.Y. 1, 113 N.E. 531, L.R.A. 1917A 655 (1916); *Security National Bank* v. *Old National Bank*, 241 Fed. 1, 154 C.C.A. 1 (1917); *Taft* v. *Quinsigamond National Bank*, 172 Mass. 363, 52 N.E. 387 (1899). And the above rule is applicable even though the bank reserves the right to charge the depositor's account with the amount of the checks in case of their dishonor. *The Smith and Setron Printing Co.* v. *Fulton, supra; Noble* v. *Doughten*, 72 Kans. 336, 83 Pac. 1048, 3 L.R.A. (N.S.) 1167 (1905); *Plumas County Bank* v. *Bank of Rideout, Smith & Co.*, 165 Cal. 126, 131 Pac. 360, 47 L.R.A. (N.S.) 552 (1913). The view that the title passes to the bank is strengthened and sometimes based upon the fact that the depositor may draw upon or has drawn upon the deposit. *American Trust & Savings Bank* v. *Gueder, P. Mfg. Co.*, 150 Ill. 336, 37 N.E. 227 (1894); *Security Bank* v. *Northwestern Fuel Co.*, 58 Minn. 141, 59 N.W. 987 (1894). However, the above rule, being based upon the presumed intent of the parties, yields to a manifestation of a contrary intent, and a notice in the bank book or on the

deposit slip that the bank acts only as a collecting agent prevents the passage of title. *South Park Foundry & Mach. Co.* v. *Chicago & G.W.R. Co.*, 75 Minn. 186, 77 N.W. 796 (1899); *People, ex rel Russell* v. *Mich. Ave. Trust Co.*, 242 Ill. App. 579 (1926).

The opposing view is that, even though there is no special agreement that the deposit is for collection purposes, still there is a presumption to that effect and title remains in the depositor. *Baldwin State Bank* v. *National Bank*, 144 Ga. 181, 86 S.E. 538 (1915); *La. Ice Co.* v. *State National Bank*, McGlain (La) 181 (1881); *Gulf State Lumber Co.* v. *Citizens' First National Bank*, 30 Ga. App. 709, 119 S.E. 426 (1923). Even though credit is given the depositor, title remains in him. *Beal* v. *Somerville*, 50 Fed. 647, 1 C.C.A. 598, 5 U. S. App. 14, 17 L.R.A. 291 (1892); *U. S. National Bank* v. *Geer*, 53 Nebr. 67, 73 N.W. 266, 41 L.R.A. 439 (1897). However, if the depositor has actually drawn upon the deposit, title has passed to the bank. *Standard Trust Co.* v. *Commercial National Bank*, 166 N. C. 112, 81 S.E. 1074 (1914); *W. J. Barton Seed, Feed, & Implement Co.* v. *Mercantile National Bank*, 128 Tenn. 320, 160 S.W. 848 (1913); *Fourth National Bank* v. *Mayer*, 89 Ga. 108, 14 S.E. 891 (1892); and see *Re Jarmarlousky*, 249 Fed. 319, 161 C.C.A. 327, L.R.A. 1918E 634 (1918).

Ohio cases have accepted the doctrine that in the absence of special circumstances the deposit is a general one and the depositor becomes a creditor of the bank. *Bank* v. *Brewing Co., supra; Shaw* v. *Bauman, supra; Fulton* v. *Univ. of Dayton*, 129 Ohio St. 90, 193 N.E. 758, 1 Ohio Op. 408, 16 Ohio L. Abs. 427 (1934); *Fulton* v. *Main*, 128 Ohio St. 457, 191 N.E. 742, 40 Ohio L. Rep. 650 (1934). But if the bank accepts the deposit for a specific purpose, it becomes only an agent of the depositor. *Kopp Clay Co.* v. *Fulton*, 125 Ohio St. 512, 182 N.E. 494, 36 Ohio L. Rep. 421 (1932).

The majority opinion in the principal case approved the rule that in the absence of a special agreement, title passes to the bank. It held that the notice on the deposit slip, once clarified by the statement on the pass book, clearly applied only to checks on banks outside the city. The dissent was based mainly on a contrary interpretation of this notice and also on the fact that the plaintiff did not draw upon the deposit, nor had he been in the habit of drawing on such depositts, before collection. Although the general rule that title presumedly passes to the bank seems to be supported by sound reason and authority, yet it is submitted that on the facts of the instant case the court might well have found, with the dissenting judge, that the intention of the parties was otherwise.

Section 714, Ohio Gen. Code, provides that "In any case where any bank * * * shall have in its possession the proceeds realized from the collection of any negotiable instrument by it or by any other collecting agency, at the time that such bank is closed by the superintendent of banks of Ohio * * * the assets of such bank so closed shall be impressed with a trust in behalf of the owner of the instrument the proceeds of which are held by such bank so closed * * * and the owner of the negotiable instrument shall be entitled to payment upon liquidation of the assets of such bank as a preferred claim."

Both the majority and the dissenting opinions in the instant case failed to mention this statutory provision. But in *Fulton* v. *Baker-Toledo Co.*, 128 Ohio St. 226, 190 N.E. 459, 40 Ohio L. Rep. 647, 93 A.L.R. 933, 14 Ohio L. Abs. 473 (1934), the Supreme Court took the view that Section 714 does not extend to those cases where formerly a debtor-creditor relationship existed. In the light of the express wording of the statute that "the *owner* * * * shall be entitled to a preferred claim," it would seem that the court was correct and that the statute presupposes an agency relationship. Therefore, having determined that the status between the parties was that of debtor-creditor, the court was justified, on the basis of its holding in *Fulton* v. *Baker-Toledo Co.*, *supra*, in disregarding the above statute.

Had the facts in the principal case shown that the bank on the receipt of the deposit in question was insolvent to the knowledge of its officers, there would have been such fraud as to prevent the passage of title to the bank, and to entitle the plaintiff to have a trust for his benefit imposed upon the funds in the hands of the superintendent. *Orme* v. *Baker*, 74 Ohio St. 337, 78 N.E. 439, 113 Am. St. Rep. 968 (1906). Generally, under such circumstances, the courts have established a trust or preference, provided the requirements of tracing or augmentation of assets, whichever the forum requires, have been met. *Beal* v. *Somerville*, *supra*; *St. Louis & Santa Fe Ry. Co.* v. *Johnston*, 133 U. S. 566, 33 L. Ed. 683, 10 S. Ct. 390 (1890); *Cragie* v. *Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N.E. 537 (1885). And see 20 A.L.R. 1206, 25 A.L.R. 728, 37 A.L.R. 620. In Ohio, though the depositor must be able to trace the funds into the bank's assets to entitle him to a trust or preference, it is not essential that he trace the particular dollars in specie. *Orme* v. *Baker*, *supra*; *Fulton* v. *Univ. of Dayton*, *supra*.

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