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The Privilege on Bank Assets for Collection Items---Louisiana Act 63 of 1926*

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It is common knowledge that banks are universally employed by creditors located in the state and in other states and nations as agents for the purpose of collecting commercial paper. Naturally the facilities of banks readily lend themselves for the purposes of a common collection agency. One who places an item with a bank solely for the purpose of collection does not intend to trust the solvency and financial responsibility of the bank, but wishes only to avail himself of its collection facilities.

Prior to the passage of Act 63 of 1926,¹ when an item was intrusted to a bank as an agent merely for collection and remittance and not for deposit, the owner had no protection against the bank's becoming insolvent and failing to remit or deliver the proceeds so collected. He could recover the funds only if they had been kept separate from the bank's general assets and were susceptible of identification.² Where they had been commingled with the other funds of the bank there was no law in Louisiana which gave any privilege or preference to the one who had employed the bank as a collector. He was treated as an ordinary creditor of the insolvent bank and shared pro rata with other ordinary creditors.³ The legislature evidently deemed this situation to be inequitable; consequently, the statute under consideration was enacted in 1926.⁴ At that time the case of *Sabine Canal Company v.*

* This article was written in collaboration with Dr. Harriet S. Daggett, Professor of Law, Louisiana State University and is to appear soon as a chapter in a book by Dr. Daggett entitled *Louisiana Privileges and Chattes: Mortgages*.

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1. Dart's Stats. (1939) §§ 648-651.

2. *L'Hammedieu v. Penny's Executors*, 6 La. 599 (1834); *Stetson, Avery and Co. v. Gurney*, 17 La. 162 (1841); *Beatty v. McCleod*, 11 La. Ann. 76 (1856); *Young v. Teutonia Bank & Trust Co.*, 134 La. 879, 64 So. 806 (1914); *Sabine Canal Co. v. Crowley Trust & Savings Bank*, 164 La. 33, 113 So. 754 (1927).

3. *Young v. Teutonia Bank & Trust Co.*, 134 La. 879, 64 So. 806 (1914); *Sabine Canal Co. v. Crowley Trust & Savings Bank*, 164 La. 33, 113 So. 754 (1927).

4. La. Act 63 of 1926 [Dart's Stats. (1939) §§ 648-651].

*Crowley Trust & Savings Bank*⁵ was pending in the district court; "and the language of the two sections of the statute applies so precisely and peculiarly, and respectively, to the two propositions of law that were presented in that case that it seems quite certain that the new law was prompted by the happenings in that case."⁶

This brief history shows that the purpose of the act is to protect those whose checks, drafts, bills, notes, et cetera, are collected by a bank as agent, when the proceeds collected are mingled with the money of the bank in violation of the instructions to remit or deliver the proceeds, and when the funds cannot, therefore, be identified as the property of the owner of the instrument. The court has very pertinently said:

"The Legislature, therefore, drew the distinction between the fiduciary relation of principal and agent, and the relation of depositor and depository, which is the relation merely of the ordinary creditor and debtor."⁷

ANALYSIS OF THE STATUTE

Sections 1 and 2 of Act 63 of 1926 create privileges on the assets of banks in certain cases. It is perfectly obvious from a mere reading of the statute that each section was enacted to cover a separate and distinct situation.

Section 1 provides that "when any bank receives as agent (whether as agent of another bank or of any person, firm or corporation) *for collection and remittance or delivery to its principal and not for deposit* any bill, note, check, order, draft, bond, receipt, bill of lading, or other evidence of indebtedness, or other instrument, *and collects or realizes any money on the same, and has not deposited same* to the credit of said principal, the principal shall have a privilege on all of the property and assets of said agent bank for the amount so collected or realized by said agent bank. . . ." (Italics supplied.) An analysis of this section of the statute shows that there are three indispensable requirements

5. 164 La. 33, 113 So. 754 (1927). Act 63 of 1926 was introduced in the legislature by Senator A. M. Smith who was interested in the outcome of that case. Mr. Smith took an active part in the preparation and passage of the act. See the excellent explanation of the history and purpose of the statute prepared by Judge Hugh C. Cage, District Judge, Orleans Parish, quoted in full by the supreme court in *In re Hibernia Bank & Trust Co.* (Pan American Life Ins. Co., Intervener), 185 La. 448, 462, 169 So. 464, 468 (1936).

6. *In re Liquidation of Hibernia Bank & Trust Co.* (Jones County, Intervener), 181 La. 335, 342, 159 So. 576, 578 (1935).

7. 181 La. at 342, 159 So. at 578. See note 5, supra.

which must be complied with before the statute is applicable, viz.:⁸ (1) The holder or owner of the bill, note, check, draft, et cetera, must send it to the bank as agent, for *collection and remittance or delivery to the principal and not for deposit*; (2) there must be an actual collection, or realization by the bank as agent, of the proceeds represented by the instrument; (3) the proceeds must not have been deposited to the credit of the principal. However, a deposit of the proceeds of a paper sent to the bank for collection and remittance, without the consent, either express or implied, of the owner, and which he had not later acquiesced in would not deprive the sender of the privilege.⁹ In the case of *Brock v. Citizens Bank & Trust Company* the court said:

"The privilege established by section 1 of the act arises and attaches to the bank's assets only when it, as agent, receives for 'collection and remittance or delivery to its principal and not for deposit any bill, note, check,' etc., and collects the same. The act further states 'and has not deposited same (the proceeds) to the credit of said principal.' *Of course, this refers to an authorized deposit to the principal's account and not to the one unauthorized. It is essential to defeat the privilege that the deposit be made with the principal's approval.* In re Liquidation of Hibernia Bank & Trust Co., 181 La. 335, 159 So. 576 (1937)."¹⁰ (Italics supplied.)

Section 2 provides that "whenever any bank shall send for *collection* to any other bank, *domiciled in a different place*, a check or draft drawn on the latter bank by a depositor of such drawee bank and such drawee bank shall have charged or debited the account of said depositor with said check or draft and shall have drawn a check or draft on any bank in representation of the

8. See the dissenting opinion of Justice Higgins in *In re Liquidation of Hibernia Bank & Trust Co. (Jones County, Intervener)*, 181 La. 335, 346, 159 So. 576, 580 (1935). The decision was later expressly overruled and the view of the dissenting justice adopted by a majority of the court. *In re Hibernia Bank & Trust Co. (Pan American Life Ins. Co., Intervener)*, 185 La. 448, 169 So. 464 (1936).

9. See *S. E. Hall, Inc. v. Farmers' Trust & Savings Bank of Lockport*, 177 La. 659, 148 So. 909 (1933); *In re Canal Bank & Trust Co. (Ferguson, Intervener)*, 182 La. 45, 161 So. 15 (1935), affirming the judgment of the court of appeal, 155 So. 266 (1934); *Brock v. Citizens State Bank & Trust Co.*, 172 So. 546 (La. App. 1937). See also *In re Liquidation of Hibernia Bank & Trust Co. (Jones County, Intervener)*, 181 La. 335, 159 So. 576 (1935), overruled on another point by *In re Hibernia Bank & Trust Co. (Pan American Life Insurance Co., Intervener)*, 185 La. 448, 169 So. 464 (1936).

10. 172 So. 546, 548 (La. App. 1937). See *Brock v. Citizens Bank & Trust Co.*, 180 So. 650 (La. App. 1938), reversed on another point, 190 La. 572, 182 So. 679 (1938).

amount thereof, then the bank hereinabove first mentioned in this section shall have a privilege on all the property and assets of the bank hereinabove secondly mentioned in this section to secure the payment of the amount of said check or draft hereinabove first mentioned. . . ."¹¹ (*Italics supplied.*)

An analysis of this section of the statute shows that there are also three indispensable requirements which must be complied with before the privilege created thereby comes into existence, viz: (1) A bank must send for collection to another bank, domiciled in another place, a check or draft on the latter bank by one of its depositors; (2) such drawee bank must have charged or debited the account of the depositor with said check or draft; (3) such drawee must have drawn its own check or draft on another bank in favor of the forwarding bank in representation of the amount thereof.

Section 3 of the statute clearly expresses the intention of the legislature to make the act applicable to national banks¹² as well as state banks by providing that "the word 'bank,' shall, for the purposes of this act be considered to include bank, 'National Bank,' 'banker,' 'banking association,' 'saving bank,' and 'trust company.'"¹³

11. Section 2 of La. Act 63 of 1926 does not purport to deal with the authority of a bank taking commercial paper for collection to appoint sub-agents for the purpose of effecting the collection and the resulting liability of the bank for the default of sub-agents under those circumstances. In that question there seems to be two conflicting rules. One rule, known as the Massachusetts rule, is to the effect that the contract for collection, impliedly authorizes the bank accepting the paper for collection to appoint a proper and suitable subagent and if the bank has done this, it is not responsible for the default of the corresponding bank. The other rule, known as the New York rule, is to the effect that the bank accepting an item for collection undertakes to perform the whole service required and the bank is held responsible for the neglect, default, omission or other misconduct of a correspondent bank or other agent to whom the paper is entrusted for collection. *Blackfeet Live Stock Co. v. Northwestern National Bank*, 138 Ore. 530, 5 P. (2d) 702, 80 A.L.R. 805 (1931). The cases are collected in a Note (1931) 80 A.L.R. 815. Louisiana first adopted the Massachusetts rule. *Hum v. Union Bank of Louisiana*, 4 Rob. 109 (La. 1843). Later, without referring to the earlier case, the court changed to the New York rule. *Martin v. Hibernia Bank & Trust Co.*, 127 La. 301, 53 So. 572 (1910). In 1926 Louisiana reverted to the Massachusetts rule by the passage of La. Act 86 of 1926 [*Dart's Stats.* (1939) § 653]. See *Joffrion-Woods v. St. James Bank & Trust Co.*, 171 La. 172, 129 So. 808 (1930).

12. See *Calcasieu National Bank in Lake Charles v. Bank of Abbeville & Trust Co.*, 83 F.(2d) 742 (C.C.A. 5th, 1935), wherein it was held that the Act 63 of 1926 was not applicable insofar as it purported to apply to national banks because it is incompatible with the national scheme of equal distribution of the assets of a national bank to all its unsecured creditors. See *Louisiana & N.W.Ry. v. Wylie*, 157 So. 804, 807 (La. App. 1934) for dictum to the contrary.

13. Section 4 of Act 63 of 1926 repeals all laws or parts of laws contrary to or inconsistent with the provisions of this act.

OPERATION OF THE STATUTE

The privilege granted by Act 63 of 1926 is not conditional upon insolvency, nor is it a preference arising upon liquidation of a bank, but it arises immediately upon the happening of certain events prescribed by the statute. However, in practical operation, so long as the bank is solvent, the privilege would probably be dormant. Immediately upon insolvency or at a time when the bank becomes unable to pay its debts, it may be invoked for the benefit of those favored.

As has been pointed out, Section 3 expresses the intention of the legislature to make this statute applicable to national banks as well as state banks. In the case of *Louisiana & Northwest Railway Company v. Wylie*¹⁴ it was argued that the preference created by Act 63 of 1926 was inoperative because the authority of the federal government pertaining to the operation and liquidation of national banks is paramount, and that under that law the assets of an insolvent bank must be delivered ratably to the creditors. The court of appeals held the statute inapplicable because the relationship of debtor and creditor and not principal and agent existed. However, the court by way of dictum answered the argument advanced by saying that since the preference or privilege created by Act 63 of 1926 existed or attached before the insolvency, such preference would not be inoperative because of federal legislation. In so holding, the court followed the well recognized rule that privileges arising by state laws prior to the failure of a national bank are not invalidated by receivership proceedings. The facts in the case of *Calcasieu National Bank in Lake Charles v. Bank of Abbeville & Trust Company*¹⁵ brought the issue squarely within the provision of Section 2. The Circuit Court of Appeals for the Fifth Circuit held that, as sought to be applied to national banks, Act 63 of 1926 is inoperative because it is incompatible with the national scheme of equal distribution of the assets of a national bank to all its unsecured creditors in case of insolvency. The court said:

"It is true that, as applied to state banks (where the Legislature has paramount authority), the statute by its term is not conditioned upon insolvency and the privilege arises immediately upon the happening of the contingencies which are intended to give it life, but in practical operation the privilege

14. 157 So. 804 (La. App. 1934).

15. 83 F.(2d) 742 (1936).

will be of benefit only in cases of insolvency of the bank; and the intent of the state statute must be judged by its practical operation and effect when the object is to ascertain whether it conflicts with a federal statute providing for the ratable distribution of the assets of an insolvent bank."¹⁶

By this decision the act is operative only insofar as it applies to state banks over which the state legislature has paramount authority.

In the application of this statute the courts have consistently kept before them the well established rule of the jurisprudence of this state that statutes conferring a privilege must be strictly construed and cannot be extended by implication or analogy.¹⁷ Another elementary rule which the court has applied is that the burden rests upon the party asserting the privilege to prove that his case comes within the protection of the act.¹⁸

In the case of the *Bank of White Castle*¹⁹ the liquidator listed the claims of Joffrion-Woods, Incorporated, and L. L. Butler as privileged under Act 63 of 1926, but did not allow any interest upon the items. Both claimants filed an opposition praying that the provisional account be amended so as to include legal interest and costs on their respective claims. The court allowed interest on the claim of Joffrion-Woods and then *only* because that claimant had a judgment recognizing his claim with interest as a privileged debt under Act 63 of 1926. As to the other claim, the court refused to allow the privilege for interest, saying:

"There are two reasons which suggest themselves to us why as a matter of law interest cannot be allowed on the claims of the nature of those here presented. The first and most important we think arises from the fact that we are here dealing with a privileged claim, and under the well-known rule of construction, any law relating to and regulating privileges must be strictly applied."²⁰

The court then pointed out that the statute grants the privilege

16. *Id.* at 745-746.

17. See *Boylan's Detective Agency & Protection Police v. Brown & Co.*, 157 La. 325, 102 So. 417 (1924); *Red River Constr. Co. v. Pierce Petroleum Corp.*, 165 La. 565, 115 So. 752 (1928); *In re Hibernia Bank & Trust Co.* (Pan American Life Ins. Co., Intervener), 185 La. 448, 169 So. 464 (1936).

18. *In re Liquidation of Hibernia Bank & Trust Co.* (Intervention of Progressive Inv. Co.), 182 La. 856, 162 So. 644 (1935); *In re Liquidation of Canal Bank & Trust Co.* (Ross & Heyn, Intervener), 186 La. 229, 172 So. 1 (1937).

19. *In re Bank of White Castle*, 168 So. 735 (La. App. 1936).

20. *Id.* at 737.

for the "amount collected" by an insolvent bank as agent and not deposited to principal's credit and does *not* grant the principal a privilege for interest on the amount so collected.

The other reason advanced was that in the liquidation of an insolvent institution, and especially one in which the public at large is interested, it is contrary to the policy of the law to allow interest on the claims against such insolvent institutions. Although the point was not raised by counsel, the supreme court reached a contrary result in the case of *Brock v. Citizens State Bank & Trust Company*.²¹ In view of the express words of the statute granting the privilege for "the amount collected" by the bank and nothing more, and the well established rule demanding a strict construction of statutes creating privileges, it would seem that the latter decision is erroneous in this respect.

The proper criterion for determining whether or not Act 63 of 1926 is applicable has become definitely crystallized as a result of judicial interpretation. If the relation of depositor and depository, which is merely the relation of ordinary creditor and debtor, is created, then no privilege is granted; but if the fiduciary relationship of principal and agent is created, then the privilege is accorded. The mere statement of the rule will not suffice to give a working knowledge to the practitioner. It, therefore, becomes necessary to give a somewhat lengthy resume of the cases which depict the evolution of the rule as well as the practical operation of the statute. In following this evolution, it would be helpful to bear in mind the general business conditions existing since the date of the enactment of this statute.

In the first two cases²² to arise under this statute, the transactions fell squarely within the terms of Section 1, and the owner was granted a privilege on the assets of the collecting bank. In the *Joffrion-Woods* case²³ plaintiff sought to recover \$1,740.32 from the Bank of White Castle, in liquidation, with recognition of a privilege on the assets of the defunct bank, under the provision of Act 63 of 1926. The facts were that one Babin had sent plaintiff his check for \$1,740.32 drawn on the Bank of White Castle. On January 26, 1927, plaintiff endorsed the check and deposited it

21. 190 La. 572, 182 So. 679 (1938), reversing the court of appeal on other grounds. See *Brock v. Citizens State Bank & Trust Co.*, 172 So. 546 (La. App. 1937) and 180 So. 650 (La. App. 1938).

22. *Joffrion-Woods v. Brock*, 180 La. 771, 157 So. 589 (1934), affirming the decision of the court of appeal, 154 So. 660 (La. App. 1934); *Vivian State Bank v. Satterwhite*, 180 La. 856, 157 So. 788 (1934).

23. 180 La. 771, 157 So. 589 (1934).

for collection in the St. James Bank at Litcher. The St. James Bank sent it to the Hibernia Bank of New Orleans, its correspondent, who upon receipt of the check sent it to the Bank of White Castle for collection and payment. The Bank of White Castle received the check on January 29, 1927, marked it paid and debited the account of the drawer, Babin. In payment of the amount the Bank of White Castle drew its draft on the Hibernia Bank of New Orleans and forwarded the check to the drawee bank, who received it on January 31, 1927, but refused to honor it. On February 1, 1927, the Bank of White Castle was closed by the State Bank Commissioner without this draft having been paid. Plaintiff then brought this suit, resulting in the recognition of the privilege. In the *Vivian State Bank* case²⁴ the only difference was that certain notes, instead of checks, were deposited for collection. The decision in the case of *S. E. Hall, Incorporated v. Farmers' Trust & Savings Bank of Lockport*,²⁵ has been the source of a great deal of the trouble in subsequent attempts to apply the statute. This was a suit to have it decreed that the proceeds of four drafts were the property of plaintiff and for recognition and enforcement of a privilege on the assets of the bank as provided by Act 63 of 1926. These drafts were deposited as checks on January 10th and 16th, 1931, since no provision was made for listing drafts. Printed on each deposit slip was, "All checks & drafts, except on us, credited subject to final payment." The forwarding bank was closed on January 20, 1931, after which the four drafts were collected. In awarding judgment for plaintiff with recognition of the privilege, the court said:

"As to whether the drafts were sold to the Farmers' Trust & Savings Bank, or were placed there for collection, the proceeds to be deposited to plaintiff's account when collected, or were deposited for collection and remittance, *depends wholly upon the intention of the parties, to be determined from the facts surrounding the transactions.*"²⁶ (Italics supplied.)

Giving considerable weight to the statement on the deposit slip, "All checks & drafts, except on us, credited subject to final payment," the court said:

"This statement indicates that it was not the intention of the parties that title to the drafts should pass to the bank, for the

24. 180 La. 856, 157 So. 788 (1934).

25. 177 La. 659, 148 So. 909 (1933).

26. 177 La. at 662, 148 So. at 909.

credit to be given was conditional in character, and this fact is inconsistent with ownership [citing cases]."²⁷

"When plaintiff deposited the drafts, it did so, we think, for collection and deposit to its credit, it being implied, as a matter of course, that, if the proceeds were not received by the bank while it was a going concern, that they would be remitted to plaintiff and not put into the mass of the assets of the bank, for no one, it may be presumed, would deposit money in a defunct and insolvent bank, and the bank no longer being a going concern, could not receive and credit the deposit. All that it could do in such a case as the present would be to remit the proceeds to the owner of the drafts, for the bank had ceased to have power and right to make a conditional credit an absolute one."²⁸

"The act, in making it a condition to the existence of the privilege that the proceeds of the instrument be not deposited by the bank to the credit of its principal, means that the *money must not be deposited unconditionally to the credit of the principal with his authority*. This occurs where the credit given the principal is conditional and made in anticipation, and the proceeds are not received until the bank ceases to operate as a going concern. Plaintiff comes within the statute and is entitled to the privilege."²⁹ (Italics supplied.)

The three statements last quoted have been discredited in subsequent opinions, and the courts have maintained the correctness of the decision upon the following reasoning:

"While it is disputed as to whether plaintiff had a right to draw against the amounts so deposited, the unmistakable weight of the evidence shows that it did not have the right to draw against the amounts until the drafts were paid and the proceeds received by the bank, and it does not admit of question that no draft or check was honored against these amounts. These are additional facts showing that the bank did not purchase the drafts, and we conclude that it did not."³⁰

In another controversy,³¹ involving the liquidation of the

27. 177 La. at 661, 148 So. at 909.

28. 177 La. at 663, 148 So. at 910.

29. 177 La. at 663, 148 So. at 909.

30. 177 La. at 662, 148 So. at 910.

31. In re Canal Bank & Trust Co. (Ferguson, Intervener), 182 La. 45, 161 So. 15 (1935), affirming the judgment of the court of appeal, 155 So. 266 (La. App. 1934).

Canal Bank and Trust Company, an intervener, on February 19, 1932, had deposited certain coupons with the bank "for collection." They were payable on March 1, 1933, but the account was not credited until March 21, 1933, when the bank was operating on a restricted payment basis. There was judgment for the intervener with recognition of a privilege on all the bank's assets for the amount collected. The court said:

"The only evidence offered in connection with the deposit of the coupons is the deposit slip, which plainly shows that, *at the time the coupons were placed with the bank, both parties considered them as items for collection*, not only because of the printed provisions on the deposit slip, but also because they were plainly stamped in large red letters with the notation 'For Collection.' There is not a scintilla of evidence that the intervener, expressly or impliedly, authorized the bank to deposit the proceeds of the coupons to his account. Even if it could be said that the bank, in the absence of express instructions to the contrary, had the implied authority to deposit the proceeds to the intervener's account, certainly this implied authority came to an end when the bank on March 2d went on a restricted basis. It is inconceivable that anyone would authorize the bank to deposit his funds under these circumstances. If the bank had continued to act in its full normal capacity as it was doing at the time the deposit was made, then it might be reasonable to say that the alleged implied authority continued. In any event, the deposit of the proceeds was not made until March 21st. This deposit certainly was not with the consent, express or implied, of the intervener."³²

Again in the liquidation of Canal Bank & Trust Company, an intervention was filed by Clark & Company³³ claiming the proceeds of three drafts, drawn on out-of-town banks, by preference and priority over all other creditors, and a privilege on all the assets of the bank by virtue of Section 1 of Act 63 of 1926. The facts show that the interveners had a checking account with the Canal Bank and had deposited these three drafts on unrestricted endorsements on March 1, 1933. Credit was immediately given to their account. The customary deposit slip (stating that the bank acted only as agent for collection, reserving the right to charge

32. In re Canal Bank & Trust Co. (Ferguson, Intervener), 182 La. 45, 48-49, 161 So. 15, 16 (1935).

33. In re Liquidation of Canal Bank & Trust Co. (Intervention of Clark & Co.), 181 La. 856, 160 So. 609 (1935).

back any check not paid, et cetera) was used. These drafts were duly collected, but in the meantime, the bank had been placed on a restricted basis and on May 20, 1933, had been placed in liquidation. The liquidators defended on the ground that the drafts were deposited on an unrestricted endorsement; that the amount was immediately credited to interveners' checking account, thereby creating the relation of ordinary creditor and debtor between the parties, and not the relationship of principal and agent; and that, in consequence, Act 63 of 1926 was inapplicable. Judgment was rendered recognizing plaintiff as an ordinary creditor of the bank and denying the privilege claimed. The court said:

"The solution of the issues presented depends upon whether or not the transaction between the intervener and the bank resulted in a debtor and creditor relationship, or that of principal and agent."³⁴

The court again reiterated the rule that the intentions of the parties must be determined as of the date the drafts are deposited and not in the light of events that subsequently take place.³⁵ In applying that rule, the court said:

"The drafts having been deposited without a restrictive indorsement by the depositor and at once, with its consent, credited to its checking account by the bank, in order to give the depositor the right to check against the funds immediately, *the depositor became a creditor of the bank and the bank the owner of the paper*, notwithstanding the fact that the bank had the right under the law to debit the depositor's account in the event the drafts were not honored, and, notwithstanding the printed statement on the deposit slip that the bank was receiving the drafts as agent for collection, because that statement yields to and is governed by the implied intention of the

34. 181 La. at 862-863, 160 So. at 611.

35. Accord: In re Canal Bank & Trust Co. (Intervention of Goodman & Beer Co.) 170 So. 420 (La. App. 1936), reversing the original opinion, 167 So. 485 (La. App. 1936). The court said: "As we read that section, [referring to Section 1] the existence of the privilege is made to depend on the nature of the agreement which exists between the bank and the customer when the draft, or check, or other item, is placed with the bank. It is only where it is left with the bank for collection and remittance, or delivery, that the privilege is granted and the privilege is made to depend in no way and to no extent upon whether the principal receives knowledge of the fact that the collection has been made." (170 So. at 422.) In re Canal Bank & Trust Co. (Midlo, Intervener), 172 So. 48 (La. App. 1937). See also Investors Syndicate v. Deposit Guaranty Bank & Trust Co., 172 So. 59 (La. App. 1937).

parties, in the absence of an express agreement between them to the contrary."⁸⁶

Since a creditor and debtor relationship existed, Act 63 of 1926 was inapplicable.⁸⁷ To fortify its decision the court gave an elaborate review of the authorities showing that "the weight of authority supports the view that upon the deposit of paper unrestrictedly indorsed, and credit of the amount to the depositor's account, the bank becomes the owner of the paper, notwithstanding a custom or agreement to charge the paper back to the depositor in the event of dishonor."⁸⁸ The holdings in the cases of

36. *In re Liquidation of Canal Bank & Trust Co. (Intervention of Clark & Co.)*, 181 La. 856, 880, 160 So. 609, 616 (1935). Accord: *In re Canal Bank & Trust Co. (Goodman & Beer, Interveners)*, 167 So. 213 (La. App. 1936). Expressly following *In re Liquidation of Canal Bank & Trust Co. (Intervention of Clark & Co.)*, 181 La. 856, 160 So. 609 (1935), the court held that "in spite of the provisions of the deposit slip giving the right to the bank to 'charge back' any items not ultimately collected, the relationship of principal and agent terminated with the deposit of the items, since they were not taken 'for collection,' and that, although the bank would have had the right to 'charge back' the items if they had not been collected, nevertheless, since they were collected, in order to determine the relationship between the parties, it was necessary to consider the status of the parties at the time of the deposit and not at the time of the ultimate collection." (167 So. at 214.) Also in accord: *In re Interstate Trust & Banking Co.*, 188 La. 211, 176 So. 1 (1937). But see the case of *State v. Hart*, 195 La. 184, 196 So. 62 (1940) where the court held the rule inapplicable and said: "But that doctrine should not have application to a case where the object or purpose of the depositor, in undertaking to contradict the stipulation on the deposit slip or receipt, is to make it appear that the bank acted only for its own account and benefit, and not at the instance or for the benefit of the depositor, in the consummation of a fraudulent transaction on his part and for his benefit." (195 La. at 204, 196 So. at 69.)

37. Accord: *Louisiana & N. W. Ry. v. Wylie*, 157 So. 804 (La. App. 1934); *In re Canal Bank & Trust Co. (Intervention of E. C. Palmer & Co.)*, 182 So. 83 (La. App. 1935), wherein the facts were similar to the ones in *In re Liquidation of Canal Bank & Trust Co. (Intervention of Clark & Co.)* (The court of appeal annulled and reversed its original decree [154 So. 498 (La. App. 1934)] and rendered judgment in accordance with the *Clark* case.); *In re Liquidation of Hibernia Bank & Trust Co. (Intervention of Progressive Inv. Co.)*, 182 La. 856, 162 So. 644 (1935) (dealing with deposit of a check in the regular course of business as had been the custom for a number of years and holding Act 63 of 1926 inapplicable because the check was not for collection and remittance but for collection and deposit); *In re Canal Bank & Trust Co. (Intervention of Grand Consistory of Louisiana)*, 161 So. 640 (La. App. 1935) (expressly following the *Clark* case and holding that the provisions on the deposit slip must yield to the intention of the parties); *First National Bank v. Commercial Bank*, 164 So. 664 (La. App. 1935); *In re Canal Bank & Trust Co. (Guaranty Bank & Trust Co., Intervener)*, 170 So. 427 (La. App. 1936), affirmed on rehearing, 173 So. 222 (La. App. 1937); *In re Liquidation of Canal Bank & Trust Co. (Ross & Heyn, Intervener)*, 186 La. 229, 172 So. 1 (1937); *In re Canal Bank & Trust Co. (Midlo, Intervener)*, 172 So. 48 (La. App. 1937). The federal courts apply the same rule. Cf. *Federal Reserve Bank v Malloy*, 264 U.S. 160, 44 S.Ct. 296, 68 L.Ed. 617, 31 A.L.R. 1261 (1924); *City of Douglas v. Federal Reserve Bank of Dallas*, 271 U.S. 489, 46 S.Ct. 554, 70 L.Ed. 1051 (1926); *First National Bank of Rigby, Idaho v. First Utah National Bank of Ogden, Utah*, 15 F.(2d) 913 (C.C.A. 8th, 1936).

38. 181 La. 856, 868, 160 So. 609, 612 (1935).

*Hall v. Farmers' Trust and Savings Bank*³⁹ and *In re Canal Bank & Trust Company, In Liquidation (Intervention of Palmer)*⁴⁰ that such provisions prevented the passage of title to the instrument were discredited as being in the minority. Furthermore, Louisiana has two statutes, Act 85 of 1916 and Act 86 of 1926, which could be interpreted to cover this situation.⁴¹ In conclusion the court said:

"Intervener's funds, having become commingled with the bank's general deposits, and therefore incapable of identification, cannot be claimed in specie as where the funds of a special deposit are segregated [citing cases]."⁴²

A similar situation was presented in the liquidation of the Canal Bank & Trust Company, when an intervention was filed by Goodman & Beer Company⁴³ invoking the provisions of Act 63 of 1926 and claiming the right to be paid the sum of \$810 with privilege and priority out of the assets of the bank. Intervener on November 29, 1932, placed with the Canal Bank for "collection" a draft on Boero Napoli & Cia., Rosario, Argentina. The Canal Bank forwarded the draft to its Argentina correspondent for collection, with instructions to remit the proceeds to the National City Bank of New York to the credit of the Canal Bank & Trust Company. The draft was collected, and on March 1, 1933, when the Canal Bank & Trust Company received notice of the credit, intervener's account was credited and notice was sent. The notice was not received until March 2, 1933, but the bank did not open for business on that day or at any time thereafter. The evidence showed that the intervener had previously dealt with the Canal Bank & Trust Company and that it had been the established custom of the bank to credit the sums collected to intervener's deposit account as soon as collected. The court of appeals, on rehearing, annulled and reversed its decision rendered on the

39. 177 La. 659, 148 So. 909 (1933).

40. 154 So. 498 (La. App. 1934), subsequently reversed on the reasoning in the *Clark* case. See 162 So. 83 (La. App. 1935).

41. See concurring opinion by O'Niell, C. J., 181 La. 856, 885, 160 So. 609, 618 (1935), where he says: "There are two statutes, Act No. 85 of 1916 and Act No. 86 of 1926, which declare, substantially, that, when a bank receives from a customer an out-of-town check or draft for collection or deposit, the bank may immediately give the customer credit for the amount without becoming irrevocably the owner of the instrument, or forfeiting the right to charge the amount back to the customer if the bank fails to make the collection."

42. Concurring opinion of O'Niell, C. J., 181 La. at 885, 160 So. at 618.

43. 170 So. 420 (La. App. 1936), annulling former decree, 167 So. 485 (La. App. 1936).

first hearing,⁴⁴ and held Act 63 of 1926 inapplicable. It was pointed out that the implied authority of the bank to deposit the funds collected resulted from the established custom of such dealing between the parties.⁴⁵ The court said:

“As we read that section, [referring to Section 1] the existence of the privilege is made to depend on the nature of the agreement which exists between the bank and the customer when the draft, or check, or other item, is placed with the bank. It is only where it is left with the bank for collection and remittance, or delivery, that the privilege is granted and the privilege is made to depend in no way and to no extent upon whether the principal receives knowledge of the fact that the collection has been made. . . .

“Therefore, when a person leaves with a bank an item for collection, with instructions to collect it and to deposit the proceeds to his credit as a general depositor, the act of 1926 has no application whatever.”⁴⁶

In such a contract the depositor has the right to withdraw the funds the moment they are credited to his account, and the fact that he did not have knowledge of the collection and deposit is immaterial.

In the case of *Owen v. Tangipahoa Bank & Trust Company*⁴⁷ plaintiff sought to recover the proceeds of a check alleged to have been deposited for collection, claiming also the privilege conferred by Section 1 of Act 63 of 1926. The court found that the check had been deposited for collection, but upon collection it was deposited to plaintiff's account with his knowledge and consent, thereby giving rise to a creditor and debtor relationship and precluding the application of the statute.

A somewhat different situation was presented by one of the opponents in the case of *In re Interstate Trust & Banking Company*.⁴⁸ An importer caused the bank to issue an irrevocable letter of credit in favor of a coffee exporter in Brazil, who was authorized to draw drafts to represent the purchase price of coffee. The importer was obligated to provide the bank with funds to

44. 167 So. 485 (La. App. 1936).

45. Accord: *In re Liquidation of Hibernia Bank & Trust Co. (Intervention of Progressive Co.)*, 182 La. 856, 162 So. 644 (1935); *In re Liquidation of Canal Bank & Trust Co. (Intervention of Grand Consistory of Louisiana)*, 161 So. 640 (La. App. 1935).

46. 170 So. 420, 422 (La. App. 1936).

47. 182 La. 347, 162 So. 8 (1935).

48. *In re Interstate Trust & Banking Co.*, 188 La. 211, 176 So. 1 (1937).

cover the drafts at least one day prior to maturity. In fact, the drafts in question were by check drawn against his account some two months prior to maturity. In the meantime and before the maturity date of the drafts the bank failed. Both the importer and the Brazilian exporter intervened, asking for a preference or privilege under the provisions of Act 63 of 1926. The court refused to grant either party a preference. The payment by the importer was to satisfy his obligations to the bank under the irrevocable letter of credit and was not the deposit of an item for collection and remittance to the Brazilian exporter. The bank was obligated to the exporter whether it collected from the importer or not. The Brazilian exporter was properly classified as an ordinary creditor because he had shipped the coffee solely on the credit of the bank. He relied on the ability of the bank to pay the draft and did not rely upon the success of the bank in collecting the proceeds of the draft from the importer and remitting them to him. In adopting that method of procedure, he became a creditor of the bank and not of the importer.

Another phase of the problem is presented in the controversy entitled *In re Liquidation of Hibernia Bank & Trust Company (Jones County, Intervener)*.⁴⁹ In order to provide funds for the payment of bonds and coupons to become due and payable, Jones County sent to the Hibernia Bank & Trust Company a check drawn on another bank. In accordance with the established custom of dealings between these parties, the proceeds of this check were credited to the "Jones County Bond Payment Account" and the "Jones County 6 per cent Road Bond Coupon Account." These funds, awaiting the maturity of the bonds and coupons and their presentation for payment, were not segregated from the general funds of the bank except by the booking entry. Before any disbursement of these funds the bank was placed in liquidation. Jones County brought this suit by intervention, claiming a privilege under Act 63 of 1926, Section 1. Relying chiefly upon the decision of *Hall v. Farmers' Trust & Savings Bank*,⁵⁰ the court held⁵¹ that the check had been sent to the bank for collection and remittance, and not for deposit; that, therefore, Jones County was entitled to a general privilege on the assets of the bank.⁵² It

49. 181 La. 335, 159 So. 576 (1934). See Comment (1935) 9 Tulane L. Rev. 301.

50. 177 La. 659, 148 So. 909 (1933).

51. Higgins, J., dissenting, 181 La. 335, 346, 159 So. 576, 580 (1934).

52. Accord: *Interstate Trust & Banking Co. v. Jones County*, 77 F.(2d) 806 (1935).

was argued that the instrument was sent for collection and remittance or delivery to the bondholders and not for "remittance on delivery to its principal"; therefore, that one of the stipulations in the statute was lacking. In overruling this contention, the court said:

"Our opinion, on the contrary, is that the expression means for remittance or delivery *to the principal or order*. It is true that statutes conferring a lien must be construed literally, not liberally; but that does not mean that such statutes shall be construed so literally and strictly according to their words as to deprive them of their application to cases which they are manifestly intended to apply to. It is not a liberal construction, but only a reasonable construction, of this statute, to say that a remittance or delivery of a sum of money to a *person designated by the owner to receive the money constitutes a remittance or delivery to the owner of the money.*"⁵³ (Italics supplied.)

Justice Higgins registered a vigorous dissent⁵⁴ on the grounds that the court placed a liberal rather than a strict construction on a statute creating a privilege; that the deposit was not for collection and remittance to the principal, but for collection and deposit in a special account; and that no distinction was made by the act between a deposit for the primary purpose of establishing credit and a deposit for a special account. He said:

"It is clear that the statute does not create in favor of a special depositor a lien and privilege on the assets of the bank, to secure the deposit in the event the bank fails to carry out the purpose for which the special deposit was made, or return the money to the depositor.

"If a person makes a special deposit of cash with a bank for the purpose of liquidating future maturing obligations, and the bank fails to pay out the money in accordance with the agreement of deposit, or to return the money to the depositor, the act does not give the depositor a lien and privilege on the assets of the bank. Practically speaking that is exactly what was done in the instant case. Intervener never sent the check for the purposes of collection, remittance or delivery, but for the purpose of furnishing cash to be deposited and from which

⁵³ 181 La. 335, 345, 159 So. 576, 579 (1934).

⁵⁴ 181 La. at 346, 159 So. at 580. The same position is taken by the Comment (1935) 9 Tulane L. Rev. 301.

deposit the future maturing obligations, i.e., the bonds and coupons, were to be paid."⁵⁵

A similar situation arose again upon the intervention by the Pan American Life Insurance Company in the liquidation proceedings of the Hibernia Bank & Trust Company,⁵⁶ wherein a privilege was claimed on the assets of the bank under Section 1 of Act 63 of 1926. The only difference in the facts was that the bondholders were the claimants in this case instead of the depositors, which is immaterial insofar as the point of law involved is concerned. The court, speaking through Justice Higgins, after giving an elaborate history of the statute and its purpose, expressly overruled the decision of *In re Liquidation of Hibernia Bank & Trust Company (Jones County, Intervener)*⁵⁷ and held that since the funds were collected, not for remittance by a collecting agent to his principal, but for deposit in order to pay bondholders, the relationship was that of ordinary debtor and creditor, and Act 63 of 1926 was inapplicable.⁵⁸ The intervener was recognized as an ordinary creditor only.⁵⁹ In regard to the purpose of the terms "collection and remittance" and "delivery," the court, quoting from an opinion rendered in the district court,⁶⁰ said:

"The term 'delivery' was not intended by the framers of the act to contemplate delivery to a third person, nor was the word 'remittance' used in the sense of remitting to some third person. Every situation presented by the Sabine case and thought of by Senator Smith and Mr. North contemplated the proceeds of the collection item going back into the hands of the original party who owned the item and who gave it to the bank to collect. The entire basis and trend of thought in the discussion at the time the Act was prepared was to take care of collection items.

"It will be seen too that the act provides in Section 1 that

55. 181 La. at 354, 159 So. at 582.

56. 185 La. 448, 169 So. 464 (1936). Cf. Note (1936) 10 Tulane L. Rev. 641.

57. 181 La. 335, 159 So. 576 (1934).

58. Accord: *In re Interstate Trust & Banking Co.*, 188 La. 211, 176 So. 1 (1937). (See comment on this case in *The Work of the Louisiana Supreme Court for the 1937-1938 Term (1939)* 1 LOUISIANA LAW REVIEW 314, 398); *Brock v. Citizens Bank & Trust Co.*, 190 La. 572, 182 So. 679 (1938), reversing the court of appeal, 172 So. 546 (La. App. 1937) and 180 So. 650 (La. App. 1938).

59. *Rogers and Odom, J.J.*, dissented, being of the opinion that the court should adhere to the interpretation which it placed on Act 63 of 1926 in the case of *In re Liquidation of Hibernia Bank & Trust Co. (Jones County, Intervener)*, 181 La. 335, 159 So. 576 (1934).

60. *In re Interstate Trust & Banking Co.*, 188 La. 211, 176 So. 1 (1937), Hon. Hugh C. Cage, Trial Judge.

the 'principal' shall have a privilege for the amount collected. There is no clear explanation given to the term 'principal.' The reason for the failure to explain it is that the parties framing the act contemplated no ambiguity, believing that only one principal could exist, namely the one giving the item to the bank for collection. I might point out in the connection that it seems to me to be preposterous to contend that the act intended to apply to trust situations of which the country banks in 1926 were entirely ignorant.⁶¹

In regard to the *Jones County* case, the court said:

"In order to grant the privilege claimed by Jones County, the majority opinion placed a liberal rather than a strict construction upon the provisions of the act in favor of the claimant of the privilege, contrary to the established jurisprudence."⁶²

A somewhat different angle was presented in the recent case of *Brock v. Citizens State Bank & Trust Company*.⁶³ The defendant bank was acting as financial tutor for two minors who were beneficiaries of deceased ex-service men. Under an agreement with the Veterans' Bureau, it was required to receive and invest in sound securities the funds coming to the minors. The bank received the funds but instead of investing them deposited and credited them to the account of the minors. The bank became insolvent and was placed in liquidation. The minors through their duly qualified representatives claimed a preference and privilege upon the bank's assets under the provisions of Act 63 of 1926, Section 1. In denying the asserted privilege, the court said:

"In the case of *In re Hibernia Bank & Trust Company, Pan American Life Insurance Company, Intervener*, 185 La. 448, 169 So. 464, this court held that the privilege referred to in the statute arises only where the bank against whose assets the privilege is sought to be exercised receives the instrument of indebtedness solely for the purpose of collection. The addition of any other fiduciary relationship places the transaction beyond the scope of the statute. Thus, in that case, the court quoted with approval the following statement of the law contained in the written opinion of the judge of the district court

61. 185 La. 448, 469, 169 So. 464, 471 (1936).

62. 185 La. at 483, 169 So. at 476.

63. 190 La. 572, 182 So. 679 (1938), reversing the court of appeal, 172 So. 546 (La. App. 1937) and 180 So. 650 (La. App. 1938).

in the case of the Liquidation of the Interstate Trust & Banking Company, viz:

“The proper criterion should be whether the one who gave the item to the bank was trusting its solvency and financial responsibility or whether he was availing himself solely and only of the collection facilities provided by that institution. If he did not intend to trust the solvency and financial responsibility of the bank, but intended solely and only to avail himself of its collection facilities, then he should be accorded the privilege, but in cases where he relies upon its responsibility or places it in a fiduciary relationship to himself, in which, reliance upon its solvency is involved, then and in that event no privilege should be granted because then his position is too similar to that of an ordinary depositor who also relies upon the bank’s financial responsibility.’ 185 La. 448, 480, 481, 169 So. 464, 475.

“The decision in the Pan American Life Insurance Company Case was approved by this court in the later case of *In re Interstate Trust & Banking Company*, 188 La. 211, 176 So. 1.

“The limitations placed by the decisions in those cases on the application of Section 1 of Act No. 63 of 1926 precludes recognition of any privilege in favor of the minor claimants because the defunct bank first received the funds of the minors as their tutor. Paragraph V of each agreement between the bank and the Veterans Bureau provides that “The functions of the bank as tutor shall consist solely of receiving and investing the funds paid to it as tutor***.’ This fact was recognized by the Court of Appeal for in its decision on rehearing it states that ‘as such tutor, it [the bank] received the checks from the United States Veterans’ Bureau, and was charged with the duty of investing the proceeds thereof in accordance with the laws of this state.’”⁶⁴

That the courts intend to adhere to this limitation of application in all such cases is evidenced by a very recent decision⁶⁵ in which the court prefaced its opinion with the following concise statement of the question involved:

“The question in all cases of this kind is whether the rela-

64. 190 La. 572, 578, 182 So. 679, 681 (1938).

65. *In re Liquidation of Canal Bank & Trust Co.* (Ross & Heyn, Interveners), 186 La. 229, 172 So. 1 (1937).

tionship between the bank and the claimant is that of principal and agent or that of debtor and creditor."

The foregoing review of the jurisprudence shows that the courts have twice redirected their course; once, by changing the law of this state in regard to negotiable instruments from the minority to the majority rules; a second time, by expressly overruling their decision. The effect of these changes has been to delimit the use of the statute for the purpose of obtaining preferences. The final interpretation is in accord with the established jurisprudence of the state to the effect that statutes conferring a privilege must be strictly construed.

In conclusion, the rules which have been crystallized by the jurisprudence will be stated in the form of a short summary. The proper criterion to be applied in determining whether Act 63 of 1926 is applicable or not should be whether the one who gave the item to the bank was trusting its solvency and financial responsibility so as to create the relationship of debtor and creditor, in which case, the act is not applicable; or whether he was availing himself solely and only of the collection facilities provided by the bank, so as to create the relationship of principal and agent, in which case, he should be accorded the privilege. In order to sustain the claim of privilege, the party claimant must show that he appointed the bank as his agent for the sole purpose of *collecting a check, draft, et cetera, and remitting the proceeds to him*. If the claimant allows the bank to deposit the proceeds collected in his account or to the account of third persons for his benefit, then the privilege does not attach.

RECORDATION

There is no necessity for recordation to preserve the privileges created by this statute.

RANK OF PRIVILEGES

The respective ranks to which the privileges created by this act are entitled are established by the act itself. In regard to the privilege created by Section 1, the act provides that such "privilege shall be superior to the claims of all *depositors of said agent bank*, the claims of all creditors of said agent bank *having no privilege* and to all other general privileges on the property and assets of said agent bank, *except those for law and judicial charges.*" (Italics supplied.) In regard to the privilege created by Section 2, the act provides that such "privilege shall be superior

to the *claims of all depositors* of said secondly mentioned bank [referring to the drawee bank], the claims of all creditors of said *secondly mentioned bank having no privilege*, and to all other *general privileges* on the property and assets of said secondly mentioned bank, *except the privilege created by Section 1 of this act and those for law and judicial charges.*" (Italics supplied.)

It will be noted that the act lays down no rule of priority in case of a conflict with a special privilege. The jurisprudence thus far has been concerned only with the liquidator of the bank who represents the depositors and creditors, and the person claiming the privilege under the act. The dispute has not been in regard to priority but as to whether the claimant was entitled to the benefit of the privileges created by the statute.