Michigan Law Review

Volume 31 | Issue 6

1933

BANKS AND BANKING-SET -- OFF -- DEPOSITS IN FIDUCIARY CAPACITY

BANKS AND BANKING — SET-OFF — DEPOSITS IN FIDUCIARY CAPACITY — Plaintiff, receiver for an insolvent national bank, sued to recover money deposited in defendant bank. The defendant sought to set off a deposit as trustee in the insolvent bank. *Held*, the set-off would be improper. The claims are not mutual. A claim in a fiduciary capacity cannot be set off against an individual debt. *Thomas v. Potter Title & Trust Co.*, (D. C. W. D. Pa. 1932) 2 Fed. Supp. 12.

The rule has been laid down that mutuality is an essential to set-off.[1] Claims

[1] WATERMAN, LAW OF SET-OFF, 2d ed., sec. 164 (1872); 39 YALE L. J. 1204 (1930); Moore & Sussman, "The Current Account and Set-offs Between an Insolvent Bank and its Customer," 41 YALE L. J. 1109 (1932); 80 UNIV. PA. L. REV. 420 (1932); Loyd, "The Development of Set-off," 64 UNIV PA. L. REV. 541 (1916).

owing in different capacities cannot be set off. They must be due and owing in the same right.[2] The rule has been applied in cases involving trustees,[3] executors or administrators,[4] partners,[5] and public officers.[6] Similarly, the bank cannot set off against a deposit for a special purpose.[7] It has been said that if the trustee is personally responsible to the cestui for the money deposited, he will be allowed to set off the trust claim against his personal debt to the bank.[8] When the bank is not on notice of the fiduciary nature of the deposit, set-off has been permitted,[9] but others hold that even in this case a right of set-off will be refused unless the bank has been led to change its position to its detriment, relying on the apparent non-fiduciary nature of the deposit.[10] It has been said that set-off will be allowed

[2] WATERMAN, LAW OF SET-OFF, 2d ed., sec. 189 *et seq.* (1872); 1 MORSE, BANKS AND BANKING, 6th ed., sec. 334 (1928).

[3] Cosmopolitan Trust Co. v. Wasserman, 251 Mass. 514, 146 N. E. 772 (1925); Walters National Bank v. Bantock, 41 Okla. 153, 137 Pac. 717 (1913); American Trust & Banking Co. v. Boone, 102 Ga. 202, 29 S. E. 182 (1897); Wagner v. Citizens' Bank & Trust Co., 122 Tenn. 164, 122 S. W. 245 (1909); McStay Supply Co. v. Stoddard, 35 Nev. 284, 132 Pac. 545 (1912); Rubel v. Hunt, 40 Ohio App. 561, 179 N. E. 367 (1932); Shippee v. Pallotti, Andretta & Co., 114 Conn. 560, 159 Atl. 494 (1932); Miller v. Mickel, 9 Colo. 331, 12 Pac. 240 (1886). Courts in Pennsylvania and New York have shifted to this view. Compare Miller v. Franklin Bank, 1 Paige (N. Y.) 444 (1829), Pendergast v. Greenfield, 40 Hun. (47 N. Y. Sup. Ct.) 494 (1886) and Laubach v. Leibert, 87 Pa. 55 (1878) with People v. German Bank, 116 App. Div. 687, 101 N. Y. S. 917 (1906), aff'd 192 N. Y. 533, 84 N. E. 1117 (1908), Hunter v. Henning, 259 Pa. 347, 103 Atl. 61 (1918), and Gordon v. Union Trust Co., 308 Pa. 493, 162 Atl. 293 (1932). *Cf.* Andrew v. North English Sav. Bank, 211 Iowa 483, 231 N. W. 293 (1930).

[4] Thomas v. Hopper, 5 Ala. 442 (1843); Lovell v. Nelson, 11 Allen (93 Mass.) 101 (1865); Thomas v. Morristown State Bank, 53 S. D. 499, 221 N. W. 257 (1928).

[5] Gregg v. James, 1 Ill. 143 (1825); Austin v. Blair, (Tex. Civ. App. 1928) 2 S. W. (2d) 1017.

[6] Flournoy v. Jeffersonville, 17 Ind. 169 (1861); Clark v. Cook, 14 Pa. Super. Ct. 309 (1900), aff'd 197 Pa. 643, 47 Atl. 851 (1900); Skipwith v. Hurt, 94 Tex. 322, 60 S. W. 423 (1901); Bayliss v. Pearson, 15 Iowa 279 (1863).

[7] Valley Butter Co. v. Minnesota Co-operative Creameries Ass'n, 300 Pa. 102, 150 Atl. 157 (1930); Bollow v. Farmers' Bank, (Mo. App. 1932) 45 S. W. (2d) 882; Wimberley v. Bank of Portia, 158 Ark. 413, 250 S. W. 334 (1923).

[8] Coburn v. Carstarphen, 194 N. C. 368, 139 S. E. 596 (1927); Funk v. Young, 138 Ark. 38, 210 S. W. 143 (1919); Hanson v. Bank of LaGrange, 39 Ga. App. 380, 147 S. E. 124 (1930), explained in Wilbur v. Mortgage Loan Co., 153 S. C. 14, 149 S. E. 262 (1929); 76 UNIV. PA. L. REV. 314 (1928); 14 VA. L. REV. 567 (1928); 5 A. L. R. 83 (1920); 55 A. L. R. 819 (1928).

[9] Shuman v. Citizens' State Bank, 27 N. D. 599, 147 N. W. 388 (1914); Sparrow v. State Exchange Bank, 103 Mo. App. 338, 77 S. W. 168 (1903); Smith v. Crawford County State Bank, 99 Iowa 282, 61 N. W. 378 (1896); Arnold v. San Ramon Valley Bank, 184 Cal. 632, 194 Pac. 1012 (1921); Wood v. Boylston Nat. Bank, 129 Mass. 358 (1880); see 38 HARV. L. REV. 800 (1925); 5 MINN. L. REV. 487 (1921).

[10] This is the so-called federal rule. 38 HARV. L. REV. 800 (1925); 5 MINN. L. REV. 487 (1921), and cases cited. Platts v. Metropolitan Nat. Bank, 130 Minn. 219, 153 N. W. 514 (1915).

in favor of the real party in interest, to the extent of the cestui's deposit in the insolvent bank.[11] While this might involve considerable administrative difficulty, in it lies the beneficiary's only real chance to salvage something from the wreckage, as his possibility of recovering from the trustee for negligent selection of a depositary[12] is usually rather slim. Courts have held that, if a person opens an account as "*X*, trustee" or "*Y*, administrator," the additional words are merely *descriptio personae* and the bank can deal with it as a personal deposit, subject to set-off.[13] Set-off has been allowed and the strict requirements of mutuality have been waived in situations where the real beneficial owners of the claim which their representative seeks to set off would not be hurt by such action.[14] In the rather analogous fields of interdepartmental set-off[15] and set-off of a deposit against the owner's stockholder's liability,[16] courts have refused to allow set-off on similar grounds of want of mutuality because of the fact that the bank is acting in a different capacity in each of the transactions sought to be set off. Perhaps a court which is lenient in allowing set-off in these situations would approach the problem represented by the depositor's double capacity with equal liberality. However, the rule of the instant case is undoubtedly that of the federal courts[17] and would control when the insolvent bank in the controversy is a national bank.[18]

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[11] Rubey v. Watson, 22 Mo. App. 428 (1886); Arnold v. San Ramon Valley Bank, 184 Cal. 632, 194 Pac. 1012 (1921); Advance Exchange Bank v. Baldwin, 224 Mo. App. 616, 31 S. W. (2d) 96 (1930); Hovey v. Morrill, 61 N. H. 9 (1881); Jump v. Leon, 192 Mass. 511, 78 N. E. 532 (1906).

[12] 1 PERRY, TRUSTS AND TRUSTEES, 7th ed., 739 (1929); Whitehead v. Whitehead, 85 Va. 870, 9 S. E. 10 (1889); Chancellor v. Chancellor, 177 Ala. 44, 58 So. 423 (1912).

[13] Forrester v. Cantley, (Mo. App. 1932) 51 S. W. (2d) 550; Farris v. Houston, 78 Ala. 250 (1884). In these cases the facts often show that the trustee has mingled his own funds with the trust funds so that the rule expressed in the cases in note 10, supra, might well be applied. See Sparrow v. State Exchange Bank, supra, note 10.

[14] People v. California Safe Deposit & Trust Co., 168 Cal. 241, 141 Pac. 1181 (1914); Thomas v. Morristown State Bank, 53 S. D. 499, 221 N. W. 257 (1928); Blood v. Kane, 130 N. Y. 514, 29 N. E. 994 (1892). While in this situation the objection that the trustee is wrongfully paying his own debt with the money of another cannot be raised, the other objection that, in the case of an insolvent bank, the rights of the other depositors are prejudiced remains unanswered. But in any case of set-off against an insolvent bank the rights of the other depositors are prejudiced. Hence, the allowing of set-off would seem to be based on factors of convenience rather than equity.

[15] See 24 COL. L. REV. 424 (1924); 6 MINN. L. REV. 67 (1921); 42 YALE L. J. 143 (1932); 41 YALE L. J. 881 (1932); 81 A. L. R. 1508 (1932); 81 A. L. R. 1479 (1932).

[16] Andrews v. State, 124 Ohio 348, 178 N. E. 581 (1932); Ex Parte Rizer, (S. C. 1932) 164 S. E. 131. See 40 A. L. R. 1183 (1926), note, and cases cited.

[17] United States v. Butterworth-Judson Corp., 267 U. S. 387, 45 Sup. Ct. 338, 69 L. ed. 672 (1925); Cook County Nat. Bank v. United States, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. ed. 537 (1883); Newhouse v. First Nat. Bank, (D. C. N. D. Ill. 1926) 13 F. (2d) 887.

[18] Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865 (1842); McCandless v. Dyar, (D. C. S. D. S. D. 1928) 34 F. (2d) 989.