St. John's Law Review

Volume 7
Number 1 *Volume 7, December 1932, Number 1*

Article 14

Set-Off--Right of Depositor-Indorser in Insolvent Bank

Rubin Baron

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

certificate of stock, and thus of his only *reasonable* method of disposing of his property in the open market, should be recompensed for whatever harm he has suffered through the wrongdoer. Of course if juries were gifted with a godlike intuition, it might be well to adopt a rule, allowing the plaintiff damages for the depreciation of the stock from the time he lost dominion until he regained control (by the issuance of the new certificate), plus an award for whatever additional inconvenience he suffered as a result of the defendant's action. But we are living in a fallible age with jurymen whose opinion as to the pecuniary value of trouble, arising from the same source, might range from the infinitesimal to the infinite. Thus such a calculation might well work an injustice on either party to the action. Moreover, in these troublous times of panic markets, it might be extremely difficult to dispose of the new certificate, whereas at the time of the conversion it might have been readily sold. In such case we would be putting the burden on the person harmed rather than on the wrongdoer. We think the fairer rule is the one adopted by the courts that he who handles the property of another does so at his peril.

GEORGE F. L. HENTZ.

SET-OFF—RIGHT OF DEPOSITOR-INDORSER IN INSOLVENT BANK.

The general rule followed by the great weight of authority is that a depositor of an insolvent bank may set off his deposit therein against a bona fide indebtedness of his own to the bank.[1] The fact that the indebtedness of the depositor to the bank has not yet matured at the time of insolvency does not interfere with this right of set-off.[2] However, the question arises whether a depositor may set off against a note upon which he is indorser his deposit in an insolvent bank, where the solvency of the maker is conclusively proven.

That issue was raised in the recent case of *Bank of United States* v. *Braveman*.[3] There the defendant, indorser of a note held by the

[1] Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148 (1892); Yardley v. Clothier, 49 Fed. 337, *aff'd,* 51 Fed. 506 (C. C. E. D. Pa. 1892); Smith v. Fenton, 43 N. Y. 419 (1871); Clute v. Warner, 8 App. Div. 40, 40 N. Y. Supp. 392 (3rd Dept. 1896); Van Wagoner v. Paterson Gas Light Co., 23 N. J. L. 283 (1852); Lippitt v. Thames Loan & Trust Co., 88 Conn. 185, 90 Atl. 369 (1914); Upham v. Bramwell, 105 Ore. 597, 209 Pac. 100 (1922).

[2] Scott v. Armstrong, *ibid.;* Adams v. Spokane Drug Co., 57 Fed. 888 (E. C. D. Wash., E. D. 1892); Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371 (1894). In Clute v. Warner, *ibid.,* the Court said: "that while the note was not due when the bank became insolvent, and its collection could not be enforced before maturity, the plaintiff had the right to waive the additional time and elect to have it become due at that time, and to make payment thereof by applying the amount of his money in the possession of the bank to such payment."

[3] 259 N. Y. 65, 181 N. E. 50 (1932).

plaintiff bank, was a depositor in said bank. Before maturity of said note, a receiver was appointed for the plaintiff bank. In an action on the note by the receiver against the defendant-indorser, the latter sought to set off the amount of her deposit against the note. The solvency of the maker and its ability to indemnify and repay to the defendant any sum that she might be required to pay on account of her liability as indorser of said note, was conceded. The Appellate Division [4] unanimously granted defendant's claim for a set-off, rendering judgment for the plaintiff for the amount of the note less the amount of the deposit. On appeal, the Court of Appeals, voting unanimously, reversed the holding of the Appellate Division, and disallowed the set-off.

If only the rights of the litigants were here involved, justice and equity would require a set-off to be allowed. But because of the insolvency of the plaintiff, the rights of the general creditors must be considered, and equity requires that the assets of the insolvent party be equally distributed among those general creditors.[5] Therefore, when the indorser can turn to the maker, who is concededly solvent, and be indemnified for the full unpaid amount on the note, he would, in effect, be receiving a larger amount of his deposit than other depositors. It is upon this theory that the Court of Appeals proceeded in disallowing the set-off. The case, therefore, turns on the question of the solvency of the maker.

The Court below quoted at length and based its ruling entirely upon the decision of Seabury, *J.*, in *Curtis* v. *Davidson*.[6] While it is true that portions of the opinion taken out of their context would seem to indicate that the indorser is entitled to a set-off regardless of the maker's solvency, that case only decides that the answer was sufficient against a demurrer, neither the complaint nor the answer disclosing whether the maker was solvent or insolvent.[7]

The earliest utterances by the Courts of this state of this principle were by Chancellor Walworth in the *Matter of the Receiver of the Middle District Bank*.[8] The rule was there laid down that "If the real debtor is unable to pay, and the receiver is compelled to resort to the endorser who is eventually to be the loser, he has some equitable claim to offset bills which he had at the time the bank stopped payment. But no such offset should be allowed to an indorser where he

---

[4] 232 App. Div. 640, 257 N. Y. Supp. 160 (1st Dept. 1931).

[5] Gerseta Corp. v. Equitable Trust Co., 241 N. Y. 418, 150 N. E. 501 (1926).

[6] 215 N. Y. 395, 109 N. E. 481 (1915).

[7] At p. 398, the Court said: "In order to defeat the indorser's right of set-off it must appear that he has more than a speculative or uncertain chance of indemnity from the maker. When the indorser seeks * * * to have the indebtedness of the holder to him set off against his obligation to the holder, it may be that a court of equity would require that he give some satisfactory assurance that he will not be indemnified by the maker." The Court thus seems to recognize the rule that whether a set-off will be allowed depends upon the solvency of the maker.

[8] 1 Paige Chancery Reports 585 (1829).

is indemnified by the real debtor, or where the latter can be compelled to pay."

This rule was adopted and followed in *Borough Bank of Brooklyn* v. *Mulqueen*,[9] wherein the facts were identical to the case under consideration. The Court in refusing to allow a set-off by the indorser, said, through Crane, *J.*: "The insolvency of the maker is a prerequisite to offset for the indorser."

The principle as thus laid down has been recognized in other jurisdictions.[10] In *Knaffle* v. *Knoxville Banking & Trust Co.*,[11] during insolvency proceedings against the defendant bank, the plaintiff, a surety co-maker of a promissory note payable to the bank, filed a petition to have her deposit set off in payment of the note. The principal maker of the note was solvent and the petition was therefore denied.

In the case of *Lippitt* v. *Thames Loan & Trust Co.*,[12] where the facts were similar, the Court, following the general rule, held, "An indorser upon a note before insolvency may, after insolvency, set off his deposit in a bank against the bank's demands upon him under his indorsement of the note provided the maker of the note is not able to pay, and he himself has not been indemnified against loss."

In *Edmonson* v. *Thomasson et al.*,[13] the plaintiff brought an action in equity to set off his deposit against a firm note indorsed by him as a partner, and discounted by the defendant bank, the proceeds being placed to the credit of the firm. The Court there held that upon the insolvency of the defendant and of the firm, he would be entitled to a set-off, but where he could resort to the assets of the firm, he would not be entitled to set off his deposit.[14]

A peculiar situation arose in *Davis* v. *Industrial Mfg. Co.*[15] The receiver of the insolvent bank brought an action against the maker

---

[9] 70 Misc. 137, 125 N. Y. Supp. 1034 (1910).

[10] Matter of Garfunkel, 8 F. (2d) 790 (D. C. S. D., N. Y., 1924); Bryant v. Williams, 16 F. (2d) 159 (D. C. E. D., N. C., 1926); Davis v. Industrial Mfg. Co., *supra* note 2; New Farmers' Bank v. Young, 100 Ky. 583, 30 S. W. 46 (1897); Edmonson & Reekes v. Thomasson, 112 Va. 326, 71 S. E. 536 (1911); Knaffle v. Knoxville Banking & Trust Co., 128 Tenn. 181, 159 S. W. 838) (1913); Lippitt v. Thames Loan & Trust Co., *supra* note 1; see also Prudential Realty Co. v. Allen, Commissioner of Banks, 241 Mass. 277, 135 N. E. 221 (1922).

[11] *Ibid.*

[12] *Supra* note 1.

[13] *Supra* note 10.

[14] A distinction has been recognized in many cases between actions at law by the receiver of the insolvent bank to enforce the indorser's liability on the note, and an action by the indorser in equity to procure a set-off. Bryant v. Williams, *supra* note 10; Curtis v. Davidson, *supra* note 6; Hubbs, *J.*, in Bank of United States v. Braveman (*supra* note 3) points out that the same general doctrines on the subject of set-off are followed by both courts of law and equity. (Duncan v. Lyons, 3 Johns. Ch. 351, 358 (N. Y. 1818); see also Beecher v. Vogt Mfg. Co., 227 N. Y. 468, 125 N. E. 831, 833 (1920)). The distinction, if any, turns on the burden of proving the solvency or insolvency of the maker.

[15] *Supra* note 10.

and eight individuals who had indorsed the note for the accommodation of the maker. Two of these co-sureties sought to set off their deposits against their liability as indorsers. The Court there held that if the maker is insolvent and all the co-sureties were solvent, these depositors could offset one-eighth of their liability with their deposit in the bank. If any one or more of the indorsers are insolvent, the right of set-off will be allowed only to the proportion that they are required to pay.[16]

The conclusion to be reached from a consideration of these cases is that this state has fallen in line with the majority of the states in adopting what we believe to be the more logical and just rule. While it is true that at first glance a denial of the right of set-off would seem to work a hardship, a consideration of the facts shows that the adoption of any view contrary to that of the Court of Appeals would have that effect. As was said by the Court in *Lippitt* v. *Thames Loan & Trust Co.*,[17] "This rule would seem to be based on sound reason. The indorser cannot lose if the maker be good, while if the set-off be allowed, the estate of the insolvent may be diminished for the sole benefit of the debtor. He will thus pay less of his debt than any other debtor, or the indorser would get a larger percentage of his deposit than other depositors. This result would be inequitable."

RUBIN BARON.

STATUTE OF LIMITATIONS—PLEADING BY NON-RESIDENT.

By the Statute 4 and 5 Anne (1705) c. 16, if at the date of the accrual of the action, the person liable to be sued is absent, "beyond the seas," the period of limitation does not begin to run in favor of such person until his return into the realm.[1] That statute was construed "to include both residents and non-residents, subjects and foreigners alike."[2] Practically all of the states of the United States have adopted that statute in some form, and have,

---

[16] Of course, where the note is made for the accommodation of one who appears thereon as indorser, and the bank discounts the same and credits the proceeds to his account with knowledge of its accommodation character, the indorser in such cases, not having any recourse to the maker, a set-off will be allowed, for any question of an inequitable preference does not then arise. Building & Engineering Co. v. Northern Bank, 206 N. Y. 400, 99 N. E. 1044 (1912).

[17] *Supra* note 1.

[1] 3 STEPHENS, COMM. ON LAWS OF ENGLAND (18th ed. 1925) p. 481.

[2] Ruggles v. Keeler, 3 Johns. 263, 267 (N. Y. 1808); Mason, Chapin & Co. v. Union Mills Paper Mfg. Co., 81 Md. 446, 32 Atl. 311 (1895).