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Banks and Banking--Set-Off of Deposit of Insolvent Estate Against Bank's Distributive Share of the Estate

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almost identical in the material facts, contrary results were reached. In both cases X was employed to mine coal, and he secured his own workmen, which the employer paid. The employer also furnished the equipment. In *Waldron v. Coal, Company*,¹⁵ X was held a servant. In *Rawson v. Coal Company*,¹⁷ he was called an independent contractor. In an attempt to distinguish the former case, the court said that it was distinguishable because the employer assisted in the work, by drilling holes and otherwise, and that X recognized the authority of the company in the selection of workmen.

In conclusion, it may be said that the principal case is unique in adopting a single conclusive test, and giving minimum consideration to factors that other cases have held more or less significant.

—AUGUST W. PETROPLUS.

BANKS AND BANKING — SET-OFF OF DEPOSIT OF INSOLVENT ESTATE AGAINST BANK'S DISTRIBUTIVE SHARE OF THE ESTATE.— In a recent case,¹ the administrator *de bonis non* of an insolvent estate claimed the right to set-off *pro tanto* a deposit of funds collected from the assets of the insolvent estate against the bank's distributive share of the insolvent estate. An action was pending to determine the claims of the creditors and the amount available for distribution when the bank closed and when this action was brought. The court denied a set-off on the ground that the bank could not have charged the indebtedness against the deposit and the right of a depositor to a set-off is reciprocal to the bank's right to charge the deposit account. The insolvent estate was required to pay the bank its distributive share of the estate and the bank was required to pay the insolvent estate its distributive part of the bank's assets.

In a dissenting opinion, it is agreed that there is no mutuality and no right to set-off the deposit against the intestate's debt to the bank,² but it is contended that upon the insolvency of the intestate,

¹⁵ 59 W. Va. 301, 53 S. E. 713 (1906).

¹⁶ 89 W. Va. 426, 109 S. E. 729 (1921).

¹⁷ 100 W. Va. 263, 130 S. E. 492, 43 A. L. R. 330 (1925).

¹ *Allen v. Holleman*, 156 S. E. 446 (S. C. 1931).

² "A bank to which a depositor owes a matured debt may appropriate a general deposit of the debtor to the payment of the debt; but it has no

all of the creditors were interested in all the assets of the estate and were the beneficiaries of a trust, created by the deposit and accepted by the bank, and that the administrator of the estate should withhold payments of the dividends to the bank until the deposit account had been paid,³ it being said that to hold otherwise would give to the bank a greater percentage of the estate's assets than would go to the other creditors. While rather difficult to reconcile the dissenting opinion with strict trust doctrine,⁴ still the contention of preference seems to be well founded when the problem presented is worked out mathematically.

Assume that both the bank and the estate pay 25% dividends. The bank owed the estate \$25,000; the estate owed the bank \$77,305.38. Under the majority opinion, the administrator would owe the bank \$13,176.34. Under the dissenting opinion, the administrator would have a *pro rata* claim to \$5,673.66 of the bank's assets. Overriding the nominal character of the deposit it may be said that the administrator has already paid the bank \$25,000, the amount of the deposit; therefore, if he pays them an additional \$13,176.34, the bank would receive from the assets of the estate, \$38,176.34, or about 50% of the total indebtedness of \$77,305.38, while the other creditors would receive but 25%.

Had the deposit been that of the intestate set-off would probably have been allowed. It is now generally accepted that a depositor in an insolvent bank may set-off his deposit therein against a bona fide indebtedness of his own to the bank,⁵ even where the debt has not matured.⁶ The reasons given seem to be that the receiver of an insolvent bank takes choses in action subject to any equitable set-offs which might have been set-off in an action by the bank, and that a demand of an insolvent bank against a third person is only an asset in so far as there may be a balance due upon the same after deducting whatever the bank may be owing to the

right to appropriate or apply a deposit made by the depositor for a known special purpose, or under such special agreement that it may be checked out or withdrawn for specific purposes." *Lutz v. Williams*, 79 W. Va. 609, 91 S. E. 460 (1917).

³ See *Gardner v. Chicago Company*, 261 U. S. 453, 43 S. Ct. 424, 29 A. L. R. 622 (1923).

⁴ Thus there is not a definite trust *res*.

⁵ Note (1923) 25 A. L. R. 938.

⁶ *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059, 13 S. Ct. 148 (1892); *Williams v. Burgess*, 74 W. Va. 623, 82 S. E. 507 (1914); *State v. Brobson*, 94 Ga. 95, 21 S. E. 146 (1894); see cases cited and reviewed in note (1923) 25 A. L. R. 938.

depositor. Seemingly, mutual obligations are balanced as of date of insolvency.

In some cases where collateral has been given, the reciprocity rule enunciated in the principal case has been applied to defeat a set-off,⁷ it being said that to allow it would grant a preference. In other cases,⁸ the courts have failed to make any distinction between situations where collateral has been given and where it has not. The United States Bankruptcy Law recognizes the right of set-off in all cases of mutual debts and mutual credits.⁹

—MELVILLE STEWART.

BILLS AND NOTES—SERIAL NOTES—EFFECT OF PART BEING DUE.—The defendant was the maker of a series of notes maturing on successive dates. They arose out of one transaction and were given for one consideration. The court assumed that such fact was inferable from the face of the notes. They did not contain acceleration provisions. The plaintiff purchased all the notes after the first was overdue. *Held*, under statute,² that the plaintiff took all the notes with notice that they had been dishonored and the defense was good as to all the notes. *Beasley Hardware Company v. Stevens.*²

On the question involved in the principal case there is a conflict of authority.³ Several recent cases,⁴ including *Morgan v.*

⁷ *Prudential Realty Company v. Allen*, 241 Mass. 277, 135 N. E. 221, 25 A. L. R. 935 (1922). *Contra*: *Salladin v. Mitchell*, 42 Neb. 859, 61 N. W. 127 (1894).

⁸ *Supra*, n. 4.

⁹ § 68a—“In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.” See 2 COLLIER, BANKRUPTCY (13th ed. 1923) 1612.

¹ GA. CODE ANN. (Michie, 1926) § 4294.

² 155 S. E. 67 (Ga. 1930); Case Comment (1931) 44 HARV. L. REV. 464.

³ *Harrington v. Claffin & Company*, 91 Tex. 294, 42 S. W. 1055 (1897); *Ferguson v. Wiede*, 46 S. W. 392 (Tex. Civ. App. 1898); *Iowa City Bank v. Friar*, 167 S. W. 261 (Tex. Civ. App. 1914); *National State Bank v. Ricketta*, 177 S. W. 528 (Tex. Civ. App. 1915); *Huselby v. Allison*, 25 S. W. (2d) 1108 (Tex. Civ. App. 1930); *Rowe v. Scott*, 28 S. Dak. 145, 132 N. W. 695 (1911). *Contra*: *Boss v. Hewitt*, 15 Wis. 285 (1862); *Patterson v. Wright*, 64 Wis. 289 (1885); *Morgan v. Farmington Coal & Coke Company*, 97 W. Va. 83, 124 S. E. 591 (1924); *Cable Company v. Bruce*, 135 Okla. 170, 274 Pac. 665 (1928); *Mountjoy Parts Company v. Bank*, 12 S. W. (2d) 609, (Tex. Civ. App. 1928).