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BILLS AND NOTES—PRESENTMENT OF A DOMICILED NOTE—PAYMENT TO ONE OTHER THAN THE HOLDER AS CONSTITUTING DISCHARGE.—Defendant company

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[21] Mirich v. T. J. Forschner Contracting Co. (1924), 312 Ill. 343, 143 N. E. 846.

[22] Donohue v. Conley (1927), 85 Cal. App. 15, 258 P. 985; In Hebert v. New Orleans Public Service (1929), 10 La. App. 341, 119 So. 575, the Louisiana court held that it is the appellate court's duty to render such judgment as, in its opinion, should have been rendered by the court in the first instance, whether the case turns upon an issue of fact or of law.

[23] See note 21.

[24] 1933 Burns 2-3229.

[25] Mills v. Thomas (1924), 194 Ind. 648, 144 N. E. 412. See note in 1933 Burns 2-2502; 2-2503; 2-3234. 8 Indiana L. Jl. 195, concerning the inherent power of appellate courts to make final disposition of equitable actions.

[27] Bedford Quarries Co. v. Thomas (1902), 29 Ind. App. 85, 63 N. E. 880.

[28] Haskell & Barbour Car Co. v. Prezezdziankowski (1908), 170 Ind. 1, 83 N. E. 626. In Sherrod v. Lawrenceburg School City (Ind., 1938), 12 N. E. (2d) 944, the Supreme Court reversed judgment for $648, with instructions to enter judgment for appellant for $855, and costs, the facts not being in dispute.

[29] G. W. Conwell Bank v. Kessler (1932), 94 Ind. App. 256, 180 N. E. 625.

[30] Catterson v. Hall (1906), 37 Ind. App. 341, 76 N. E. 889.

made certain bearer notes specifying on their face that they were "payable at the City Trust Co." and were secured by collateral deposited with the trust company "under the provisions of a certain trust indenture between the maker hereof and the trustee." The trust agreement provided that the maker "will pay to the trustee, for the holders of the notes" the obligation in six monthly installments. Defendant delivered the notes to the trust company which in turn sold them. Plaintiff's decedent purchased one, but as no record was kept of the purchasers, defendant had no knowledge that the note was held by the decedent. Defendant paid over the amount of the notes to the trust company at maturity and the collateral was released, but plaintiff never collected from the trust company. Thirty-six days thereafter the trust company went into receivership. Defendant pleads payment as a defense to the present action and appeals from an adverse judgment. Held, reversed. Plaintiff was charged with notice of the terms of the trust deed, the language thereof being sufficient to establish the trust company agent of plaintiff to receive payment. *Commercial Credit Co. v. Seymour Nat'l Bank* (Ind. App. 1938), 15 N. E. (2d) 118.

The court was silent as to the applicability of the Negotiable Instrument Law,[1] but there would appear to be little question but that the note in suit met all the formal requirements of the act and should have been governed by its relevant provisions.[2]

Several significant and interesting problems are suggested by the case, although not very fully discussed by the court. There are two of particular importance: first, what are the legal consequences occasioned by making an instrument payable at a specified place; and second, when can a note be discharged by payment to one not in possession thereof?

The literal application by most courts of the provision that presentment is not necessary to charge the primary party[3] has preponderated over the plausible analogizing of the domiciled note to the ordinary check. Section 87 of the act, providing that making an instrument "payable at a bank is equivalent to an order to the bank to pay the same," would have made the analogy seem rational, but the courts have said this was "only intended to settle the vexed question of the bank's right, without specific authority to pay such an instrument and charge the same to the principal debtor."[4] Also it might have been argued as a matter of commercial policy, there should be no difference in treatment of domiciled notes and checks. Neither was functionally designed

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[1] Burns 1933, Section 19-101 ff.

[2] The only factor which possibly might destroy the negotiability of the instrument is the reference on its face to the extrinsic trust deed. Did this make the promise conditional within the meaning of Section 1 (2)? It is almost unanimously ruled that such language as this is not strong enough to qualify the absolute promise to pay. See Aigler, Conditions in Bills and Notes (1928), 26 Mich. L. Rev. 471, where the author states that only where the promise is *expressly* made conditional on the face of the instrument or the instrument itself is *expressly* made subject to another writing should the instrument be held non-negotiable. See Titlow v. Hubbard (1878) 63 Ind. 6, where a "subject to another contract" provision made the note non-negotiable.

[3] N. I. L. Sec. 70.

[4] Binghampton Pharmacy v. First National Bank (1915), 131 Tenn. 711; 176 S. W. 1038; Federal Intermediate Credit Bank v. Epstin (1929), 151 S. C. 67, 48 S. E. 713; Bedford Bank v. Acoam (1890), 125 Ind. 584, 25 N. E. 713.

to be a circulating medium, and, perhaps, the same legal consequences should be imposed on the holder of a domiciled note who fails to make a diligent presentment as on the dilatory check-holder.[5] However, it is the almost universal rule that payment to the bank or other place at which a note is made payable does not of itself constitute a discharge and the risk of future solvency of the recipient is on the maker and not on the procrastinating holder.[6]

Conceding that the letter of the law and possibly some phase of business policy supports this principle when no special factors are present, except that the note is made payable at a specified place, should the same result obtain under circumstances similar to those in the instant case? Even though the maker was technically the primary party, the plaintiff here, in all probability, actually looked primarily to the credit and financial responsibility of the trust company, the same as a check-holder who has delayed an unreasonable time in making presentment is compelled to look to the financial stability of the drawee bank.[7] It is submitted that nothing in the Negotiable Instruments Law would have precluded the decision from being put on the ground that the plaintiff was obligated to make a diligent presentment.[8] However, no mention was made of this possibility, the court apparently being content with the agency rationale.

No court has ever held that the mere fact an instrument is made payable at a specified bank makes the bank agent to receive payment for the holder.[9] Of course, it is clear that payment to an agent of the holder is effective, but the burden of proving the agency relationship is upon the one who asserts its existence.[10] A debtor who makes payment to one not in possession of the instrument evidencing the debt acts at his peril,[11] but the fact of non-possession is not conclusive as to the lack of authority in the party receiving said payments.[12]

The court in the instant case concedes the soundness and controlling effect

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[5] Section 186 provides that a check must be presented within a reasonable time or the drawer will be discharged to the extent of the loss caused by the delay.

[6] Glatt v. Fortman (1899), 120 Ind. 384, 22 N. E. 300.

[7] Probably the plaintiff was a customer of the trust company and had never heard of the maker when he bought the note. He knew that the trust company held the security for the note; he knew the obligation would be paid to the trust company, and it would be the trust company who would be his immediate payor. Surely it was the stability of the trust company that loomed brightest in the mind of the plaintiff, and that is perhaps the reason he delayed three years in making presentment for payment.

[8] Sec. 70 is probably intended only to control the allegations and defenses of the pleadings.

[9] Dillingham v. Parks (1902), 30 Ind. App. 61.

[10] Tappan v. Morseman (1865), 19 Iowa 499; Hull v. Smith (1896), 3 Kans. App. 685, 44 Pac. 908; Rhodes v. Belcher (1899), 36 Oregon 141, 59 Pac. 117; Hoffmosten v. Black (1908), 78 Ohio St. 1, 84 N. E. 423.

[11] Mindet Cork Corp. v. Geipp (1935), 278 N. Y. S. 231, 154 Misc. 798; Springfield National Bank v. Jeffers (1929), 266 Mass. 248, 165 N. E. 474.

[12] See Antioch College v. Carroll (1890), 11 Ohio Dec. Rep. 220, where Taft, J. said, "If express authority be given to collect, the absence of the note cannot affect it and any circumstances tending to show express authority to collect might, if strong enough, overcome the presumption of a want of authority from the absence of the note."

of these principles, but it proceeds to announce the proposition that an agency is created between the trust company and the holder as a matter of law if a note contains a reference to a trust deed (sufficient to charge the holder with notice thereof)[13] wherein it is provided that the "maker will pay to the trustee for the holder of the notes."

The most obvious ground on which one could reasonably dissent from the court's conclusion concerns how precise and specific the terms of the trust deed should be as respects the designation of the trustee as agent of the holder. In view of the vague and indefinite wording of the deed in the instant case, one eminent authority would probably doubt the correctness of the court's decision on this point.[14] That writer points out that this is especially true when consideration is given to the fact that the language of the trust deed is more truly that of the one relying on the agency because he was primarily instrumental in the drafting of the deed. He had ample opportunity to insist on the insertion of provisions that would have clearly and unequivocally established an agency and thereby allowed him to pay in safety.

It must be admitted that the court in saying that the trust company was agent for the holder was merely stating a legal conclusion, but the difficulty arises as to whether there could be selected from the great mass of agency rules and principles any which would even give the conclusion a logical form.[15] Nevertheless, can the result by the court be championed as one conducive to the facilitation and security of business transactions? It is submitted that it can.

The regal position of the holder in due course pervades the entire field of the law of commercial paper. It is the constant reiteration of the courts that good business policy demands that he be protected. Isn't it just as supportable a theory that the needs of commerce would be subserved if the payor in due course also received the blessings of the courts? It is a reasonable assumption that, if the courts adopt a policy favorable to security of payment transactions, debtors will be encouraged to pay more promptly; holders, pleased by the prompt payment, will be ready to buy more paper; the payor having greater assurance that he is quit of his obligation, will be less hesitant about entering new transactions; in short, commercial machinery would be greatly expedited.

Taking cognizance of the particular credit machinery involved in the principal case, one of the important factors on which the successful operation

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[13] The holder was charged with notice in the instant case apparently under the doctrine stated in National City Bank v. Kirk (1922), 85 Ind. App. 120; 134 N. E. 772, to the effect that a note and a contemporaneous written instrument intended to control it, made between the same parties, should be read and considered together as if one in form, where a controversy arises between the original parties or those standing in their place or chargeable with notice of such contemporaneous agreement.

The trust deed in the instant case may have been recorded thousands of miles from where the plaintiff purchased his note, but plaintiff is still chargeable with notice.

[14] See Aigler, 32 Mich. L. Rev. 232. In Connell v. Kankamma (1917), 164 Wisc. 471, 159 N. W. 927, the court stated that the trustee must be specially authorized to receive payment "by clear and satisfactory evidence."

[15] Seavey, *The Rationale of Agency*, 29 Yale L. J. 859. Neither does there appear any element of estoppel in the case as there were in Noble Co. Bank v. De Pew (1918), 68 Ind. App. 406, 120 N. E. 605.

of it depended was that payment to the trustee should constitute a discharge. Obviously, the primary function for which the set-up was designed was the making available of more credit at lower costs, and the shifting of financing risks to those organizations better equipped to handle them. Assuming that the attainment of these objectives is promotive of general economic welfare, the decision seems to be a desirable one inasmuch as it brings the law into conformity with business needs. J. M. C.