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THE STANDARD OF CARE REQUIRED OF SAVINGS BANK DIRECTORS

The directors of a savings bank occupy a fiduciary relation toward their depositors.[1] Two views are held, however, as to the technical conception of this office. One is that a trust is implied in fact from the acts of the parties in assuming their respective positions. The other view holds that the director in taking this office has thrust upon him by law, as if by specific stipulation, responsibilities as exacting as those of an express trustee. Whether one agrees with the majority opinion in the case of *Lippett v. Ashley*[2] in sustaining the former conception, or that of dissenting Judge Wheeler, supported by the decision in *Greenfield Savings Bank v. Abercrombie,*[3] it is undeniable that in either case certain fundamental duties are involved in the

[1] *Dickson v. Baker,* 77 N. W. 820; 75 Minn. 168.
[2] *Lippett v. Ashley,* 94 Atl. (Conn.) 995.
[3] *Greenfield Savings Bank v. Abercrombie,* 211 Mass. 252.

office. In caring for and investing funds of the depositors he is bound to exercise at least that degree of diligence and good faith which should govern the conduct of agents generally;[4] he may be sued by depositor or assignee for misappropriation of funds,[5] and will be held personally liable for wilfully coöperating with other directors in declaring dividends where there are no surplus profits.[6]

As to the question of negligence and a director's liability therefor, the judges in the principal case did not agree. The lower court held that a failure of the directors to require a trial balance, by which the embezzlement might readily have been discovered, did not constitute negligence. The majority of the Supreme Court of Errors reversed this decision, holding that due performance of the duty of reasonable care involved at least a compliance with the statutes of the State, the by-laws of the corporation, and the usages of the business. Accordingly, it decided that the omission of an ordinary precaution, such as this trial balance, is *prima facie* evidence of a want of reasonable care. *Williams v. McKay*[7] goes even further in holding the directors liable for money secretly withdrawn by others and covered by false entries, in spite of their having examined the books.

The dissenting opinion holds that bank directors acting *bona fide* need use only ordinary care and are liable to stockholders only for gross neglect. Such is the explicit rule of *Jones v. Johnson.*[8] Though this distinction, like all involving degrees of negligence, is unsatisfactory, it furnishes a real point of difference, as may be seen in the decisions which tend to follow the latter view. The case of *Wallace v. Lincoln Savings Bank*[9] asserts that this ordinary diligence required of bank directors is that exercised by prudent men about their own affairs. In fact, the English case of *Turquand v. Marshall*[10] authorizes the holding that directors, however indiscreet, are not personally liable for their official acts so long as not fraudulent.

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[4] *Greenfield Savings Bank v. Simons,* 133 Mass. 415.

[5] *Rice v. Howard,* 136 Cal. 432; 69 P. 77.

[6] *Van Dyck v. McQuade,* 57 How. Prac. 62; 45 N. Y. Super. Ct. 620; *N. H. Trust Co. v. Doherty,* 75 Conn. 555.

[7] *Williams v. McKay,* 46 N. J. E. 25; 18 Atl. 824.

[8] *Jones v. Johnson,* 86 Ky. 530; *Brinkerhof v. Bostwick,* 88 N. Y. 52.

[9] *Wallace v. Lincoln Savings Bank,* 89 Tenn. 630.

[10] *Turquand v. Marshall,* L. R. 4 Ch. 386. *Overend and G. Co. v. Gibb,* L. R. 5 H. L. 494.

The rule that the standard of care required of bank directors is that which a reasonably prudent man would exercise under similar circumstances has much to recommend it. First, it is the rule in other cases involving negligence. Secondly, it gives the jury a proper reminder of the relation of circumstances to the degree of prudence required. Finally, any other rule would necessarily be misleading. For instance, "that care exercised by a reasonably prudent man in the conduct of his own business" would imply to a jury that they should judge the liability of bank directors by a standard which is arbitrary and inflexible. It seems to take no account of the self-evident truth that different kinds of business vary in the degree of care required to constitute reasonable prudence on the part of those conducting them.

On the other hand this very arbitrary standard has a distinct advantage in that it gives the jury a definite starting point. To say that the standard of care required of a bank director is that of a reasonably prudent bank director leads us nowhere. It begs the whole question at issue. But a start from the degree of care exercised by a reasonably prudent man in the conduct of his own business is a start from a comparatively settled point and takes at least a step toward defining his duty. Note that this does not require him to take the same concrete precautions as a bank manager that he would, *e. g.*, in his private coal business. But it does clearly require him to have the interests of his directorship as much at heart as if it were his own concern, and thus exercise the same degree of care along bankers' lines that he does as an individual in his own affairs.

C. B.
S. B.

DELIVERY OF A CHECK AS A GIFT FOLLOWED BY THE DEATH OF DONOR BEFORE PRESENTMENT AT THE BANK

Decedent, intending to make a gift, drew his check for twenty thousand dollars to the order of his daughter and delivered it to her. She delivered it to her bank, which collected it, after her father's death, from the trust company on which it was drawn, and paid the proceeds to her. The court held that by delivery of the check the daughter became the testator's agent to withdraw the amount called for by the check and that her authority was revoked by his death and consequently she must restore

the amount thereof to the estate.[1] As it seems unjust to deprive the daughter of what her father intended to give her, it becomes important to ascertain whether the decision in this case is well grounded in principle.

While it is generally true that equity will not aid a volunteer, this doctrine applies only when the volunteer is invoking the court's aid as *against the donor* or one holding for value. This is illustrated in the case of *McMechan v. Warburton*,[2] where *after the death of the donor,* equity rectified a voluntary deed so as to make it include certain property that the donor intended to give to the donee and which the donor up to her death supposed to have been transferred by the deed. And so here, the father supposed that the delivery of the check would fully carry out his intention of making his daughter the recipient of this money and no change of intention was indicated prior to his death. Is not the daughter in a stronger position than the donee in *McMechan v. Warburton?* For the daughter had received the money from the bank, thus getting legal title. The estate, in seeking to recover this, does so on the theory that she has money to which it is *ex aequo et bono* entitled. But inasmuch as she has an equitable claim in addition to legal title, she should be allowed to retain it.

Apparently this view was not presented, for the court decided against the daughter on the ground that the death of the drawer revokes the agency of the payee. It is submitted that this view of a check is erroneous. The payee, in withdrawing money by means of the check, acts entirely for himself and not for another. There is no agreement requiring the payee to do anything for the drawer. The check does amount to an authorization to the bank to pay out the sum indicated and thereby extinguish its indebtedness to the depositor *pro tanto.* Death revokes this authority and the payment made in this case after the father's death was unauthorized. Notwithstanding this, the bank, not knowing of the death, is protected on the ground of practical convenience, because it is impossible for the bank to ascertain whenever a check is presented to it whether the drawer is still alive.[3] So that if the giving of the check in this case was only an authority to the bank, though the bank would be protected, the estate would be entitled to the money received by the donee as money paid under mistake of fact by the agent of the drawer.

[1] *In re Mead,* 154 N. Y. S. 667.

[2] L. R. Ireland, 1 Ch. Div. 435.

[3] *Glennan v. Rochester Trust Co.,* 209 N. Y. 12.

We are now confronted by the problem as to whether the giving of a check may constitute more than a mere authority to the bank to pay. A deposit of money in the bank creates a debt against the bank. Has the depositor power to divest himself gratuitously of a part of this claim in favor of a third party? He can of course cash his own check and make a gift of the money, or the bank may pay it pursuant to his authority. But are these the only methods by which he can give away part of his interest in the claim due from the bank? Can it not be done by the delivery of a check?

At early common law a chose in action could not be assigned, even for value. Later, courts of law permitted the assignee to sue in the assignor's name. In Coke's time an assignment of a chose in action was deemed valid only when made to a creditor and providing an express power of attorney was given. But later a power of attorney was implied in favor of the assignee even in the case of a donee.[4] So that now a gift may be made by mere delivery of the instrument without a witness; as for example a bond,[5] a life insurance policy,[6] a promissory note of a third person,[7] shares of stocks,[8] and savings bank deposits.[9] And a gift of a claim not evidenced by a writing may also be made by means of a sealed instrument.[10]

The power to give being now as clearly recognized as an incident to the enjoyment of property rights as is the power to sell, there can be no sound reason for holding that a man cannot make an irrevocable gift of a part of a claim against a bank which will be valid as between the donor and donee. But how shall the gift be made? The intention to give is alone inoperative to create a gift. A delivery must be made so as to constitute a present transfer of the thing to be given. But the delivery of a chose in action is necessarily different from the delivery of a corporeal thing, where the *res* may be physically transferred. In all cases the delivery must be as complete and perfect as the nature of the property will permit. The check drawn by the donor is evidence created by him of the bank's liability. This is a means

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[4] Kenneson's Cases on the Law of Trusts, p. 71 (note).

[5] *Elam v. Keene*, 4 Leigh (Va.) 333.

[6] *Traveler's Ins. Co. v. Grant's Adm.*, 54 N. J. Eq. 208.

[7] *Wing v. Merchant*, 57 Me. 383.

[8] *First Nat. Bank of Richmond v. Holland*, 99 Va. 495.

[9] Camp's Appeal, 36 Conn. 88.

[10] *Matson v. Abbey*, 141 N. Y. 179.

by which the donee may obtain possession of the ultimate object intended for him,[11] and a physical tradition of the check is the best delivery of which the property represented by it is capable.

It is true that in the cases above enumerated, an action at law is permitted in the assignor's name. The payee of a check not being able to sue the bank which refuses to pay, the inference is drawn that this is due to the fact that a check cannot constitute an assignment. But this conclusion does not necessarily follow. A check is ordinarily drawn for part of the claim, so that if an assignment at all were possible, it would be a partial assignment. In the case of a partial assignment, the assignee would have no claim in a court of law because a debtor owing one debt should be subject to only one action therefor and cannot without his consent be subjected to the splitting up of that indebtedness so as to be liable to several actions. Is not the situation of the bank here analogous to the case where, as part of the contract between the creditor and debtor, it is stipulated that the creditor shall not have the power to assign? There the assignee has no rights as against the debtor but the assignment is not void to all intents and purposes, for equity holds the assignor to be a constructive trustee of the claim in favor of the assignee.[12] So that the immunity of the bank from suit by the payee does not preclude the possibility of a good assignment as between assignor and assignee.

But it may be said that the giving of a check has not deprived the donor of dominion over the money in the bank, for he could immediately countermand payment and so the gift is incomplete. This may be answered by saying that control over the claim to the exclusion of the donor is not necessary. For example, where a deed of gift of a promissory note of a third party was delivered to the donee, the latter could recover from the estate of the donor, which had collected the note.[13] Similarly where a rule of a bank requires withdrawal by the depositor or upon his order, a delivery of a bank book without any writing is a good gift as between the parties.[14]

[11] *Marsh v. Fuller,* 18 N. H. 360 (key to chest constituted good delivery of contents on the theory that it gave the means to obtain property).

[12] 24 Yale Law Journal 590; *Devlin v. Mayor,* 63 N. Y. 8, 17; *Staples v. Somerville,* 176 Mass. 237; *Mueller v. N. W. Univ.,* 195 Ill. 236.

[13] *Walker v. Crews,* 73 Ala. 412.

[14] *Hall v. Stevenson,* 63 Me. 364.

If the father declared himself a trustee of part of his claim against the bank in favor of his daughter, equity would enforce the trust, and it is worthy of notice that this method has the net force and effect of a gift. What magic, however, is there in this declaration of trust that gives the beneficiary a better right than in the case where there is an unequivocal intention of making a gift and, pursuant to that intention, a check is executed and delivered with the purpose of passing a present interest, just as if so much money was actually delivered? The moment it is conceded that a present interest can be transferred by the delivery of a check, the death of the donor can have no more effect on this gift than in the case of the declaration of trust.[15]

M. H. L.

ARE SECONDARY CONTRACTUAL OBLIGATIONS GOVERNED BY THE LAW OF THE CONTRACT?

A contract was made in Mexico for the shipment of goods thence to New York. By the Mexican law rights of action under such contracts are extinguished six months after completion of the carriage. Action was brought in New York after the lapse of such period. *Held,* that the New York law, and not that of Mexico, governed as to the survival of the right of action.[1]

Such a limitation is universally held to destroy the right, and not merely, as a matter of procedure, to bar the remedy.[2] The law of the forum, as such, has therefore no application to the case. By the decisive weight of authority, a contract of carriage contemplating performance in more than one jurisdiction, is governed, as to its primary obligation, by the law of the place of making.[3] The principal case must therefore be taken as deciding that secondary contractural obligations are governed by the law of the place of breach as such, and not by the "proper law of the contract."

If the "law of the contract" be taken in the sense of the law creating the primary obligations, it is impossible to conceive how

[15] *May v. Jones,* 87 Iowa 188.

[1] *N. Y. & Cuba Mail S. S. Co. v. Maldonado & Co.,* 225 Fed., 353. Rogers, J. *dissenting.*

[2] *Neganbauer v. Ry.,* 92 Minn. 184; *Baker v. Stonebraker's Adm'r.,* 36 Mo. 338.

[3] *Liverpool Steam Co. v. Phoenix Ins. Co.,* 129 U. S. 397; *Brockway v. Am. Express Co.,* 171 Mass. 158. *Contra, Barter v. Wheeler,* 49 N. H. 9.

that law can give legal effect to the acts of the parties without simultaneously creating the secondary legal relation. Without the latter no contract is formed, for without them the so-called primary obligation would be undistinguishable from purely moral duties. Both classes of obligations, therefore, clearly originate from the same law.[4]

By what law, then, should the secondary obligation be construed? In the absence of an actual or presumed intention of the parties to the contrary, no other law than that which creates the duties, primary and secondary, can be held to determine of what they consist. Given, however, a presumed intention of the parties in favor of either the law of the place of making or the law of the place of performance as decisive of the primary incidents of a contract, the same presumption ought in reason to be extended to the secondary obligation. A very real presumption supports the proposition that no party would intend the two classes of obligations to be governed by different laws.[5] Parties seldom have in mind the distinction between the primary and secondary rights and duties. Moreover, sound business considerations favor a uniformity of rule, as minimizing the field of possible misunderstanding and litigation. In addition, grave practical difficulties would ensue from a contrary treatment. Many contracts, consisting of negative undertakings not localized, admit of no predetermination of the place of breach, and consequently, under the view here criticized, of the nature of the secondary obligation. Still others, consisting of affirmative undertakings not localized, would admit of no localization of the breach even after occurrence.

We must conclude that the secondary obligation of a contract should be governed either by the *lex loci contractus* or by the *lex loci solutionis,* according as the former or the latter governs the primary obligation.

Several direct decisions support these contentions.[6] In numerous other cases where the law of the contract in fact coincided with the law of the place of breach the same rule of decision was

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[4] See *Pritchard v. Norton,* 102 U. S. 124, 129; *Atwood v. Walker,* 179 Mass. 514, 518-9.

[5] For a recognition of this presumption see cases cited in re 2 *supra.*

[6] *Davis v. Mills,* 194 U. S. 451, 454 (survival of right of action governed by law of place of making); *Ry. Co. v. Gebhard,* 109 U. S. 527 (discharge); *Morgan v. Ry. Co.* 2 Woods (Circuit) 244 (right to rescind).

followed.[7] "Whatever goes to the substance of the obligation and affects the rights of the parties, as *growing out of* the contract itself, or *inhering in it*, or *attaching to it*, is governed by the law of the contract."[8] "All the incidents pertaining to the validity and construction (of contracts) . . . and the *rule of damages for failure to perform* such contract, will be governed by the *lex loci contractus*."[9] "The general rule as to the law which governs a contract is that the law of the country either where the contract was made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such a contract; not merely with regard to its construction but with regard to all the conditions applicable to it as a contract. I say 'applicable to it as a contract' to exclude mere matters of procedure which do not affect the contract as such, but relate merely to the procedure of the court in which litigation may take place upon the contract."[10]

A few judicial utterances support the principal cases.[11] All, however, have reference to damages for the non-payment of negotiable instruments, a class of cases in which the law of the place of performance is generally held to control the construction of the primary obligation itself.

Both on principle and on authority, therefore, the same law should be held to govern "(1) as to the primary obligation of the contract, (2) as to the secondary obligation of the contract, (3) and as to the discharge of the secondary obligation."[12]

C. R. W.

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[7] *Pritchard v. Norton, supra; Atwood v. Walker, supra; Gibbs v. Société Industrielle*, 22 Q. B. D. 399, 405; *Coghlan v. Ry. Co.*, 142 U. S. 101, 110 ff.; *Slater v. Ry. Co.*, 194 U. S. 120, 126; *Ry. Co. v. Babcock*, 31 Minn. 11, 13; *Meyer v. Ester*, 164 Mass. 457, 465; *Greenwald v. Kaster*, 86 Pa. 45, 47; *Pecks v. Mayo*, 14 Vt. 33, 36; *Gibbs v. Fremont*, 9 Ex. 25, 28.

[8] *Pritchard v. Norton, supra*, 129.

[9] *Atwood v. Walker, supra*, 518-9.

[10] *Gibbs v. Société Industrielle, supra*, 405.

[11] *Cooper v. Waldegrave*, 2 Beav. 282, 284; *Healey v. Gorman*, 15 N. J. L. 328, 329; *Ex parte Heidelbach*, 2 Low. (U. S. Circuit) 526, 536. See also Beale, J. H., in 10 Harv. Law Rev. 168, 171, 173-4, and Summary in Cases on Conflict of Laws, III, § 54, §§ 96-97.

[12] Prin. case, dissenting opinion of Rogers, Circuit J., 358.