

Comment on Recent Decisions

BANKS AND BANKING—INSOLVENCY—RIGHT OF INDORSER TO USE DEPOSIT AS SET-OFF.—A depositor of an insolvent bank had also indorsed a note which was found among the bank's assets. When the maker did not pay the note, the bank sued the depositor on his indorsement. The depositor sought to set-off the amount of his deposit against his liability on the indorsement. *Held*, the indorser must show that the maker is insolvent before he will be allowed to use the deposit to reduce his liability. *Bank of United States v. Braveman* (N. Y. 1932) 181 N. E. 50.

So long as the bank is solvent, the indorser can set-off the amount of his deposit against his liability when the bank sues on the note. 7 C. J. 747. This is obviously just since the depositor could always draw his money out of the bank and use it to meet his liability on the note. There is no reported case in which the insolvency of the bank has supervened between the time suit was brought on the note and judgment was obtained. Under such circumstances, it would seem that the allowance of the set-off should be determined by the conditions which existed at the time when the defendant asked for it.

When the bank is insolvent at the time the suit is brought, the cases are in hopeless conflict whether or not the set-off should be granted. In one of the earliest cases in which this issue was presented, Chancellor Walworth ruled that the indorser was entitled to such a set-off "unless he is indemnified by the real debtor or the latter can be compelled to pay". *Matter of Middle District Bank* (N. Y. 1819) 1 Paige 585. This view has been followed in a number of states. *Lippitt v. Thames Loan & Trust Co.* (1914) 88 Conn. 185, 90 Atl. 368; *Davis v. Industrial Manufacturing Co.* (1894) 114 N. C. 321, 19 S. E. 371; *Edmonson v. Thomasson* (1911) 112 Va. 326, 71 S. E. 536. In view of the difficulty of proving that a person is solvent or insolvent, it is often important to determine who must show the financial condition of the maker of the note. An earlier New York lower court case had imposed the onerous burden of proving the maker's solvency on the receiver of the insolvent bank who was trying to prevent the set-off. *Carnegie Trust Co. v. Kistler* (1915) 152 N. Y. S. 240. The better considered decisions follow the instant case in placing the burden on the defendant. *Bryant v. Williams* (D. C. E. D. N. C. 1926) 16 F. (2d) 159; *New Farmers' Bank's Trustee v. Young* (1897) 100 Ky. 683, 39 S. W. 46. This view as to the burden of proof seems distinctly preferable since the indorser is likely to be more accurately informed than the bank as to the maker's solvency. The other view would make it too easy for an indorser to conspire with the maker to hide the true facts concerning the latter's financial condition and thus realize by way of set-off the full amount of a deposit which he otherwise could not obtain when the bank was finally liquidated.

Several courts have taken the view that the right of set-off is the same whether or not the bank is still solvent. *Yardley v. Clothier* (C. C. A. 3,

1892) 51 F. 506; *In re Shults* (D. C. W. D. N. Y. 1904) 132 F. 573; *Bank of Anderson v. Majeski* (1929) 149 S. C. 178, 146 S. E. 815; but *cf. Bank v. Armstrong* (1893) 146 U. S. 499 (where the set-off was denied because the note did not mature until after the insolvency of the bank). A similar result was reached in an early Missouri case on the ground that the subsequent insolvency of the bank should not be allowed to impair a right which had vested in the indorser prior thereto. *Stephens v. Schumann* (1883) 32 Mo. App. 333. These cases seem largely oblivious of the fact that by allowing the indorser such a right of set-off when the maker is solvent, the indorser can obtain the full value of his deposit while the other depositors may receive liquidating dividends equal to only a small proportion of theirs. It is true that there may be a similar preference even where the maker is insolvent if he pays a greater proportion of his liabilities than the bank, but the amount of the preference involved will probably be much less than if the maker was solvent. However, it would unduly delay the administration of justice to postpone the allowance of the set-off until it could be ascertained exactly what proportion of his debts the maker was able to pay.

It is fair to conclude that the modern and realistic tendency is towards the adoption of the rule laid down by the present case. It may be hoped that when the question is again presented to them the Missouri courts will refuse to follow the undesirable rule of the *Stephens* case. P. R., '34.

DISMISSAL AND NONSUIT—TIME LIMIT FOR A VOLUNTARY DISMISSAL.—During the course of argument on a demurrer to the evidence, the counsel for the plaintiff decided that the trial judge was about to sustain the demurrer to the evidence. The plaintiff then attempted to take a voluntary nonsuit, so as to avoid a ruling which would have been *res adjudicata* and would prevent the bringing of another suit. The Supreme Court of Oklahoma held that this motion was made too late under an Oklahoma statute which restricted the right to take a nonsuit to any time before the case is "finally submitted to the jury, or to the court where the trial is by the court". *Chicago, Rock Island & Pacific Railway Co. v. Reynolds* (Okla. 1932) 12 Pac. (2d.) 208; C. S. Okla. (1921) sec. 664.

At common law the plaintiff could take a nonsuit at any time, even after the jury had reached a verdict against him, but if the plaintiff took a nonsuit he must pay costs and was theoretically liable to be amerced to the King. 3 Bl. Comm. *376-377. This right has been greatly limited by modern statutes, which, however, vary considerably in their terminology. Missouri and many other states have statutes which are substantially identical with the quoted language from the Oklahoma act. R. S. Mo. (1929) sec. 960. In New York the statute is more definite in jury cases, since it allows such a motion at any time before the case is "committed to the jury to consider the verdict". Since all these statutes are in derogation of the common law they should not be extended beyond their express terms. *National Bank v. Butler* (1912) 163 Mo. App. 380. 143 S. W. 1117; *Crane v. Leclere* (1927) 204 Iowa 1037, 216 N. W. 622.