Fordham Law Review

Volume 35 | Issue 4 Article 5

1967

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ment and acceptance of income treatment for the widow in the light of the overall tax situation.[134]

THE RIGHT OF SET-OFF AGAINST A BRANCH BANK

It is well settled that a bank has a right to set-off[1] general deposits[2] in its possession against a matured obligation owed to it by a depositor.[3] Generally,

134. Assuming the employer is in the 52% tax bracket and that he is assured of a deduction, he may, at the same cost to himself, pay the widow more than twice as much if he takes a deduction as he could have if the payment were a gift. She in turn, ordinarily being in a lower tax bracket than the employer, would realize more after taxes from the double payment than the entire amount of the untaxed gift. And the danger of the widow being involved in litigation or losing part of the "gift" to taxes, or both, are avoided. In addition, since "executive compensation . . . is reviewable by the courts . . . if made retroactive for past services without prior contract, i.e., as a gift," Fogelman, N.Y. Bus. Corp. Law Forms § 3:10.13, at 210 (McKinney 1965), there would be less possibility of liability for waste of corporate assets if benefit were emphasized and a deductible payment made. The benefit of increased employee productivity, while present to some extent in the making of a gift, see Fanning v. Conley, 243 F. Supp. 683, 686 (D. Conn. 1965), aff'd, 357 F.2d 37 (2d Cir. 1966), is more easily shown in the case of deductible payments and is sufficient to justify the use of corporate funds. See Cohn v. Columbia Pictures Corp., 117 N.Y.S.2d 809, 817 (Sup. Ct. 1952).

1. Although commonly referred to as a banker's lien, this right is more precisely denominated a right of set-off. When funds are deposited on general account with a bank, they become the property of the bank, and the relationship of the bank and the depositor is that of debtor and creditor. Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 241 (1944); Straus v. Tradesmen's Nat'l Bank, 122 N.Y. 379, 25 N.E. 372 (1890). This is true of a checking account, Friedman v. First Nat'l Bank, 344 Mass. 593, 183 N.E.2d 722 (1962), as well as a savings account. People v. Hursey, 7 Ill. 2d 537, 131 N.E.2d 483 (1956). Therefore, "the banker's lien . . . is, properly speaking, a lien on the securities such as commercial paper deposited with the bank . . . . The so-called 'lien' of the bank on the depositor's account or funds on deposit is not technically a lien, for the bank is the owner of the funds and the debtor of the depositor, and the bank cannot have a lien on its own property. The right of the bank to charge the depositor's fund with his matured indebtedness is more correctly termed a right of set-off, based upon general principles of equity." Gonsalves v. Bank of America Nat'l Trust & Sav. Ass'n, 16 Cal. 2d 169, 173, 105 P.2d 118, 121 (1940). (Emphasis omitted.) Accord, 38 Harv. L. Rev. 800-01 (1925).

2. A bank's right of set-off does not apply to a particular deposit made for a special purpose. Engleman v. Bank of America Nat'l Trust & Sav. Ass'n, 98 Cal. App. 2d 327, 219 P.2d 868 (2d Dist. 1950); Straus v. Tradesmen's Nat'l Bank, 122 N.Y. 379, 25 N.E. 372 (1890). In this situation the bank is under a duty to apply the deposit to the specified purpose and may not appropriate it to its own use. Id. at 384, 25 N.E. at 372-73; First Nat'l Bank v. State Bank, 110 Ore. 601, 604, 222 Pac. 1079, 1080 (1924). There is disagreement over whether the bank must agree to be bound, or whether notice or knowledge of the depositor's intention is sufficient to establish a special deposit. Compare Straus v. Tradesmen's Nat'l Bank, supra, with Union Properties, Inc. v. Baldwin Bros., 141 Ohio St. 303, 47 N.E.2d 983 (1943).

3. E.g., National Bank v. Insurance Co., 104 U.S. 54 (1881); Bromberg v. Bank of

the bank may exercise this right without the consent of the depositor[4] and without resorting to any judicial procedure.[5] A recent banking controversy[6] raises the novel question of whether one bank may set-off deposits of branch A of another bank against an obligation owed to it by branch B of the other bank. Although branch banks have been deemed separate business entities for some purposes, it has never been determined whether, for purposes of set-off, a branch bank is a separate entity or a mere agent of the parent, subject to the set-off.[7]

I. The Branch Bank As a Separate Business Entity

As a general rule a branch bank is deemed an agent of the parent, and the normal rules of agency apply to its transactions.[8] Thus, in *Guaranty Bank & Trust Co. v. Town of Amite City*,[9] a parent bank sued to recover interest allegedly due on the defendant's paving certificates.[10] A branch of the bank, the defendant's paying agent for the certificates owned by the parent, had wrong-

America Nat'l Trust & Sav. Ass'n, 58 Cal. App. 2d 1, 135 P.2d 689 (2d Dist. 1943); Forastiere v. Springfield Institution for Sav., 303 Mass. 101, 20 N.E.2d 950 (1939); Jordon v. National Shoe & Leather Bank, 74 N.Y. 467 (1878).

4. Bromberg v. Bank of America Nat'l Trust & Sav. Ass'n, supra note 3, at 4, 135 P.2d at 692 (construing statutory "banker's lien"—Cal. Civ. Proc. Code § 3054); Krinsky v. Pilgrim Trust Co., 337 Mass. 401, 405, 149 N.E.2d 665, 668 (1958) (common law); Straus v. Tradesmen's Nat'l Bank, 122 N.Y. 379, 382-83, 25 N.E. 372 (1890) (common law).

5. Gonsalves v. Bank of America Nat'l Trust & Sav. Ass'n, 16 Cal. 2d 169, 174, 105 P.2d 118, 121 (1940) (construing Cal. Civ. Proc. Code § 3054); Jordon v. National Shoe & Leather Bank, 74 N.Y. 467, 473 (1878) (common law).

6. Last October, the New York State Superintendent of Banks took possession of the business and property of the New York branch of a Lebanese bank. The bulk of the branch's assets were on deposit with a New York City bank, and when the Superintendent demanded these deposits, the bank claimed that they had been set-off against obligations owed to it by other branches of the Lebanese bank. N.Y. Times, Feb. 12, 1967, § 3 (Financial), p. 1, col. 8, at 13, col. 3. See text accompanying notes 52-55 infra.

7. In Garnett v. M'Kewan, L.R. 8 Ex. 10 (1872), branch A of a bank was allowed to apply the plaintiff's deposit balance at branch B to the payment of checks overdrawn on the plaintiff's account at branch A, without notice to or the consent of the plaintiff. This decision, however, antedated the development of the "separate entity" theory of branch banks.

In Engleman v. Bank of America Nat'l Trust & Sav. Ass'n, 98 Cal. App. 2d 327, 219 P.2d 868 (2d Dist. 1950), branch A of a bank attempted to apply a depositor's balance at branch B to overdue notes held by branch A. The court held that the deposits were not susceptible to a set-off for other reasons, and the court did not reach the problem of the separate entity theory. Id. at 332, 219 P.2d at 871. New York and California have statutes dealing with domestic branches of foreign banks, which might prevent an otherwise valid set-off under certain circumstances. See notes 51-55 infra and accompanying text.

8. Guaranty Bank & Trust Co. v. Town of Amite City, 64 So. 2d 502, 506 (La. Ct. App. 1953); Sokoloff v. National City Bank, 250 N.Y. 69, 164 N.E. 745 (1928); Mullinax v. American Trust & Banking Co., 189 Tenn. 220, 225 S.W.2d 38 (1949).

9. 64 So. 2d 502 (La. Ct. App. 1953).

10. The paving certificates were in the nature of bonds callable at the option of the municipality and payable at par value plus accrued interest to the date called. Id. at 503.

fully applied funds specially deposited[11] to pay the certificates to other obligations owed by defendant to the branch. The interest claimed by the parent accrued as a result. The parent was denied recovery on the ground that the branch was an agent of the parent and its wrongful act was binding on the parent.[12] However, in some situations, courts and statutes have treated a branch bank as an independent business entity. This has occurred when any of the following issues has been involved: (a) rights and liabilities on commercial paper; (b) the situs of an indebtedness arising from a deposit transaction; (c) the attachment of property of a debtor in possession of a bank; or (d) the production of bank records. An examination of the rationale for these exceptions is vital to an evaluation of the status of a branch bank for purposes of set-off.

A. *Commercial Paper*

Section 4-106 of the Uniform Commercial Code provides that "a branch or separate office of a bank [maintaining its own deposit ledgers[13]] is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders shall be given under this Article and under Article 3." The Code Comments explain that "notice to one office of a bank should not affect the status of another office of that bank [as a holder in due course under article 3] except to the extent any duty to communicate exists under Section 1-201(27) . . . ."[14] This section codifies the result reached at common law. In *Chrzanowska v. Corn Exch. Bank*,[15] the leading New York case on the separate entity theory, the court held that a drawee bank was required to pay a check only at the branch where the drawer had his account.[16] The court pointed out that each branch kept separate records

11. See note 2 supra.

12. 64 So. 2d at 505.

13. The states which have adopted the Code have divided almost evenly in including or omitting this optional language. Uniform Laws Ann., U.C.C. § 4-106, at 13 (Supp. 1966).

14. Uniform Laws Ann., U.C.C. § 4-106, at 14 (Supp. 1966). Section 1-201(27) provides that notice to an organization "is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to his attention if the organization had exercised due diligence." Uniform Laws Ann., U.C.C. § 1-201(27) (Supp. 1966). Thus, notice to one part or office of an organization is not constructive notice to other parts or offices of the organization, unless there is some negligence in failing to communicate this notice. To insure this result under articles three and four, New York has added the following sentence to § 4-106: "The receipt of any notice or order by or the knowledge of one branch or separate office of a bank is not actual or constructive notice to or knowledge of any other branch or office of the same bank and does not impair the right of another branch or office to be a holder in due course of an item." Uniform Laws Ann., U.C.C. § 4-106, at 20 (1962). California, Nevada and Oregon have adopted substantially the same language. Uniform Laws Ann., U.C.C. § 4-106, at 13 (Supp. 1966).

15. 173 App. Div. 285, 159 N.Y. Supp. 385 (1st Dep't 1916), aff'd mem., 225 N.Y. 728, 124 N.E. 877 (1919).

16. Id. at 290-91, 159 N.Y. Supp. at 388. In dictum the court also indicated that this rule applied to the payment of savings deposits. Ibid.

and expenses would be greatly increased if each branch had to maintain records of every other branch. Furthermore, a bank would be subjected to a risk of double liability if payment of a check could be demanded at any branch. The confusion and inconvenience that would result if the branches were not deemed autonomous for the purpose of dealing in commercial paper was viewed by the court as inconsistent with the intent of the legislature in authorizing branch banking.[17]

If a single branch of a bank is to be considered the drawee of an item, what is the status of another branch of the bank which becomes the owner or holder of the item? In *Dean v. Eastern Shore Trust Co.*,[18] branch A of a bank became the holder of a check drawn on branch B. The drawer issued a stop order to branch B before branch A presented the check for payment. The court held that branch A could recover against the drawer, as its status as a holder in due course was not affected by the stop order directed to branch B. As in *Chrzanowska*, the court concluded that a contrary result would lead to intolerable confusion and inconvenience, and would virtually deprive the privilege of branch banking of its value.[19] This approach also has been applied to a foreign branch of a national bank.[20]

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17. Ibid. "The Legislature did not intend, we think, to either authorize or require a bank having branches to cash checks and make loans to a depositor at any branch at which he may see fit to call, for to do so would produce endless confusion . . . ." Id. at 291, 159 N.Y. Supp. at 388.

18. 159 Md. 213, 150 Atl. 797 (1930).

19. Id. at 217-18, 150 Atl. at 799. United States Nat'l Bank v. Stonebrink, 200 Ore. 176, 265 P.2d 238 (1954), approved the reasoning of the Dean court and conjectured that such a rationale underlay the enactment of an Oregon statute in which a branch bank was deemed a separate bank for purposes of bank deposits and collections. Id. at 183-84, 265 P.2d at 241. But see Mullinax v. American Trust & Banking Co., 189 Tenn. 220, 225 S.W.2d 38 (1949), where a drawee branch paid a check after a stop order had been communicated to a vice president at the main office. The bank argued that the branch had no notice of the stop order when it paid the check and should be allowed to charge the drawer's account. Although recognizing the separate entity theory for certain situations, the court held that the vice president was negligent in failing to communicate the notice to the branch and refused to treat the branch as a separate entity. The vice president's negligence was binding on the branch. Id. at 224, 225 S.W.2d at 40. This result also might be reached under Uniform Commercial Code §§ 1-201(27), 4-106. See note 14 supra and accompanying text. The thrust of the Code, however, does not appear to place any duty on one branch to communicate such notice to another branch. The duty appears to lie with the drawer to notify the drawee branch.

20. Pan-American Bank & Trust Co. v. National City Bank, 6 F.2d 762 (2d Cir.), cert. denied, 269 U.S. 554 (1925). Here a foreign branch, as holder of a draft, was deemed a separate business entity whose rights and liabilities were independent of those of the home office to which the draft was forwarded for collection. The court relied on the Chrzanowska case and a federal statute authorizing foreign branch banking by national banks. Id. at 766-67. The statute provides that a bank "shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office . . . ." 39 Stat. 755 (1916), 12 U.S.C. § 604 (1964).

B. *Deposit Transactions*

The problem of the place at which savings deposits must be demanded and paid occurs less frequently. Suppose a depositor with an account at branch A demands payment at branch B. If payment is refused, he may proceed to make demand on branch A and, usually, no third party rights will have intervened. The problem has arisen only where the country of deposit has been invaded in wartime[21] or a foreign branch has been nationalized by an unfriendly government.[22]

In *Sokoloff v. National City Bank*,[23] a depositor recovered funds deposited in a Russian branch bank from the New York City home office of a national bank. The branch had been seized by the Soviet government. The court held that there is an implied contract whereby a bank agrees to hold deposits until demand for payment is made, and the bank is not in default until such demand is made on the branch of deposit.[24] There was some dispute as to whether Sokoloff had made a demand in Russia before the seizure. However, the court held that "the fact that the bank had gone out of business . . . made a demand useless and unnecessary; the law by reason of the contract between the parties will consider the case as if a demand had been made. In other words, that which becomes impossible and useless ceases to be required by the law in cases like this."[25] The court did not say why the implied contract limited the place of demand to the branch of deposit, but it did cite *Chrzanowska*, and apparently adopted its rule and rationale.[26]

C. *Attachment of Debtor's Property*[27]

Frequently a creditor will know or suspect that his debtor has funds or other property on deposit with a particular bank, but he may not be certain

21. Van der Veen v. Amsterdamsche Bank, 178 Misc. 668, 35 N.Y.S.2d 945 (Sup. Ct. 1942). The plaintiff had a claim against a branch bank in Holland. The German occupation government refused to issue a license approving a transfer of funds to the plaintiff in the United States.

22. Thornton v. National City Bank, 45 F.2d 127 (2d Cir. 1930); Sokoloff v. National City Bank, 250 N.Y. 69, 164 N.E. 745 (1928).

23. Ibid.

24. Id. at 80, 164 N.E. at 749.

25. Ibid. Thornton v. National City Bank, 45 F.2d 127 (2d Cir. 1930), involved a depositor in the same Russian branch attempting to set-off his deposits there against a loan made to him by the London branch of the bank. The court held that the seizure of the branch neither excused a demand nor placed the bank in default. The court based this conclusion on the fact that the depositor treated the deposit contract as in existence after the seizure by requesting further advances from the London branch on the security of these deposits. Since there was no default by the Russian branch, the indebtedness was localized to the Russian branch under the rule of Sokoloff, and was not available against the London branch. Id. at 129-30.

26. 250 N.Y. at 81, 164 N.E. at 749.

27. For a more detailed analysis of this specific problem see Comment, 56 Mich. L. Rev. 90 (1957); 48 Cornell L.Q. 333 (1963).

which branch possesses the property, or the branch in possession may be outside the jurisdiction of the court issuing the warrant of attachment. The question then arises whether attachment levied on one branch will reach funds of the debtor in other branches within or without the jurisdiction.

In *Bluebird Undergarment Corp. v. Gomez*,[28] plaintiff sought an order in aid of attachment directing a New York City bank to provide information as to a debtor's account in the bank's foreign branch. Relying on *Sokoloff* and *Chrzanowska, inter alia*, the court held that the foreign branch was a separate entity and stated that, "although the branch deposit be the ultimate debt of the parent bank, the obligation to its customer, however, is localized so as to be confined primarily to the branch where it originated."[29] The debtor could not sue the bank in New York unless a demand was made on the foreign branch, or was excused as in *Sokoloff*. Thus, there was no indebtedness subject to attachment within the New York jurisdiction, so that an order in aid of attachment would not issue.[30]

In *Cronan v. Schilling*,[31] the basis of this rule was shifted from one of jurisdiction to one of policy. The jurisdictional ground of the rule was attacked on the basis of section 916 of the New York Civil Practice Act as amended in 1940 —nine years after *Bluebird*. The New York court of appeals had construed the statute as allowing attachment of the debt of a non-resident, owing to a resident or non-resident, if valid service could be made on the non-resident debtor within the jurisdiction.[32] In *Cronan*, it was argued that service upon a New York agency of a foreign bank conferred jurisdiction over the foreign bank, so that attachment could be levied on the New York office. Although recognizing this argument as valid as to corporations in general, the court refused to apply such a rule to banks.

> Although the language of Section 916 . . . construed literally, is broad enough to permit attachment of a debt due from a foreign branch or the home office abroad, if service may be made here on a domestic branch, there is nothing either in the statute or in the opinion in Morris Plan Industrial Bank of New York v. Gunning . . . to suggest that the doctrine that each branch of a bank is to be treated as a separate entity for attachment purposes is no longer the law.[33]

In support of this position, the court relied on the confusion and inconvenience

28. 139 Misc. 742, 249 N.Y. Supp. 319 (N.Y. City Ct. 1931).

29. Id. at 744, 249 N.Y. Supp. at 322.

30. Id. at 745, 249 N.Y. Supp. at 322-23; accord, Philipp v. Chase Nat'l Bank, 34 N.Y.S.2d 465 (Sup. Ct. 1942) (New York home office of foreign branch); Clinton Trust Co. v. Compania Azucarera Central Mabay S.A., 172 Misc. 148, 14 N.Y.S.2d 743 (Sup. Ct. 1939) (attempt to reach Havana branch of Canadian bank by service on New York agency); Walsh v. Bustos, 46 N.Y.S.2d 240 (N.Y. City Ct. 1943) (New York agency of foreign bank).

31. 100 N.Y.S.2d 474 (Sup. Ct. 1950).

32. Morris Plan Industrial Bank v. Gunning, 295 N.Y. 324, 67 N.E.2d 510 (1946).

33. 100 N.Y.S.2d at 477. Accord, McCloskey v. Chase Manhattan Bank, 11 N.Y.2d 936, 183 N.E.2d 227, 228 N.Y.S.2d 825 (1962) (memorandum decision), 48 Cornell L.Q. 333 (1963).

rationale of *Chrzanowska*[34] and the considerable danger of double liability.[35] On this basis, the court refused to order production of records pertaining to property held by the foreign branch. The same result has been reached in other states by statute.[36]

All of the New York cases have involved either a foreign branch of a domestic bank or a New York branch of a foreign bank. In an admiralty proceeding in a federal court,[37] libelants argued that these decisions did not apply to attachment levied on a Brooklyn branch (Eastern District) to reach funds in a Manhattan branch (Southern District). The court rejected this argument because of the policy of the *Cronan* decision and its reliance on *Chrzanowska*, which involved two New York City branches.[38]

D. *Production of Records*[39]

In re Harris,[40] apparently the earliest case to consider the question, held that a trustee in bankruptcy could not compel the home office of a New York bank to produce a transcript of the bankrupt's account in its London branch. In support of its conclusion that the London branch was a separate entity for this purpose, the court relied upon a federal statute which provided that foreign branches of national banks should maintain independent accounts[41] and upon

34. 100 N.Y.S.2d at 476.

35. Before a "branch could safely pay a check . . . [in order] to make sure that no warrant of attachment had been served upon any of [the branch banks] . . . . each time a warrant of attachment is served upon one branch, every other branch . . . would have to be notified." Ibid. Although the decided cases have concerned a particular named branch involving a single communication, the court is probably correct in assessing the problem that would ensue if the rule were relaxed.

36. E.g., Cal. Civ. Proc. Code § 542(6) (Supp. 1966). As of 1957, five states were reported to have such statutory provisions: Arizona, California, Idaho, Oregon and Washington. 56 Mich. L. Rev. 90, 98 n.48 (1957). One early case, Bank of Montreal v. Clark, 108 Ill. App. 163 (1st Dist. 1903), reached a contrary result. The debtor withdrew his funds from a Toronto branch after attachment was levied on a Chicago branch. The court held the manager of the Chicago branch was negligent in failing to advise the Toronto branch of the attachment, id. at 166, and rejected the jurisdictional argument later adopted in the New York cases. Id. at 167-68.

37. Det Bergenske Dampskibsselskab v. Sabre Shipping Corp., 341 F.2d 50 (2d Cir. 1965).

38. Id. at 53. Accord, Hohenstein Shipping Co. v. Feliz Compania Naviera S.A., 236 F. Supp. 216 (E.D.N.Y. 1964); Cal. Civ. Proc. Code § 542(6) (Supp. 1966).

39. This problem usually arises in connection with matters other than attachment. E.g., In re Harris, 27 F. Supp. 480 (S.D.N.Y. 1939). Of course, if it is clear that there is no property subject to attachment within the jurisdiction, the court will not compel production of records. Cronan v. Schilling, 100 N.Y.S.2d 474, 477 (Sup. Ct. 1950). However, in a case where it is uncertain whether there is any property subject to attachment in the jurisdiction, a court would probably be guided by the principles to be discussed as to the production of records.

40. 27 F. Supp. 480 (S.D.N.Y. 1939).

41. Id. at 481. For the pertinent text of § 604 see note 20 supra.

decisions in other areas where a branch had been deemed a separate entity.[42] However, the court did not indicate why the reasoning of these decisions applied to this problem.

More recent decisions have indicated that a branch will not be deemed a separate entity for this purpose. In *First Nat'l City Bank v. Internal Revenue Serv.*,[43] the Service sought production of the records of a Panamanian branch of a New York bank in New York. The court stated that a corporation, including a bank, is presumed to be in control of its records, and that that presumption is not rebutted by the federal legislation in the case of a foreign branch.[44] After reviewing the history of the federal statute, the court concluded that it was merely a bookkeeping device designed to facilitate the examination of the financial condition of a foreign branch by having the branch maintain separate books.[45] The court expressly overruled *Harris* insofar as it was inconsistent with this position.[46] Therefore, a bank may be compelled to produce the records of its foreign branch unless it would violate the laws of the foreign country to send the records out of the country.[47]

In *Ings v. Ferguson*,[48] the court refused to order production of a foreign branch's records on the ground that it might violate foreign law. In dictum, the court made reference to other factors which might affect the outcome of a case in this area where there was no violation of foreign law. There is some doubt whether a manager of a domestic branch of a foreign bank would have the power to direct the officers of the foreign bank to produce records of foreign branches.[49] This, however, would seem to be a problem of enforcement which could be made a condition to the privilege of doing business here. The bank also argued that there would be a problem of confusion where the records

42. 27 F. Supp. at 481. Accord, United States v. Kyle, 21 F.R.D. 163 (E.D.N.Y. 1957), aff'd, 257 F.2d 559 (1958), cert. denied, 358 U.S. 937 (1959) (subpoena duces tecum served on New York branch of Canadian bank pursuant to Fed. R. Crim. P. 17(c)).

43. 271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960).

44. 271 F.2d at 618-19.

45. Ibid. The court recognized that Pan-American Bank & Trust Co. v. National City Bank, which is discussed in note 20 supra, had relied in part on the forerunner of § 604 in deeming a foreign branch to be a separate entity as the holder of a draft. However, the court characterized that situation "as though the branch was acting at arm's length as an independent entity. . . . [I]t does not follow that in other situations not involving an arm's length relationship the manager of a foreign branch . . . is beyond the control of the Board of Directors who appointed him." Id. at 619.

46. Ibid.

47. Ibid. Accord, Application of Chase Manhattan Bank, 297 F.2d 611 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149 (2d Cir. 1960).

48. Ibid.

49. Id. at 152. Without discussing this problem, the court in Cronan v. Schilling, 100 N.Y.S.2d 474 (Sup. Ct. 1950), granted an order in aid of attachment as to records kept abroad which concerned property within the jurisdiction subject to attachment. "After all, it is the Swiss Bank Corporation which is doing business in this state. The New York Agency is not a separate legal entity generally, but only for certain limited purposes." Id. at 477.

sought were not identified as to a particular branch and that foreign countries might enact retaliatory laws detrimental to American business. "Without minimizing the force of these arguments,"[50] the court deemed it unnecessary to consider them in the case before it.

II. Special Statutory Provisions

New York and California have statutory provisions which treat domestic branches of foreign banks as separate entities for certain purposes other than those already discussed. Under appropriate circumstances, these statutes could prevent an otherwise valid set-off.

California provides that a foreign banking corporation doing business in the state must keep the assets of its "California business" completely separate from the assets of its business outside of California. "The creditors of such corporation's California business shall be entitled to priority with respect to the assets of [the bank's] . . . California business before such assets may be used or applied for the benefit of its other creditors or transferred to its general business."[51] Thus, an attempted set-off of a branch's California assets against an obligation not arising out of the branch's California business would be invalid if it rendered the California assets insufficient to satisfy the claims of those California creditors entitled to priority under the statute.

New York empowers the Superintendent of Banks to take possession of the business or property of a New York branch of a foreign bank under certain circumstances.[52] He is required to provide for the claims of certain preferred creditors and then to turn over the balance of the assets to the parent bank or its liquidator or receiver at its domicile.[53] A preferred creditor is one whose claim arises out of a transaction with the New York branch which would represent an enforceable legal obligation against the branch if it were a separate and independent legal entity.[54] Furthermore, "a cause of action upon which an action cannot be maintained, as prescribed in this article, cannot be effectually interposed [against the Superintendent] as a defense, set-off or counterclaim."[55] Therefore, if the Superintendent demands payment of the assets of a seized branch, a claimed set-off would appear to be invalid unless it met the requirements of a preferred claim as defined in the statute.

III. Conclusion

The various arguments which have been used to support the separate entity theory in areas other than set-off are the expense of maintaining duplicate records of each branch at every other branch, the endless confusion that would result from attempting to communicate to each other branch the latest status

50. 282 F.2d at 153.
51. Cal. Fin. Code § 1753.
52. N.Y. Banking Law § 606(4)(a).
53. N.Y. Banking Law § 606(4)(b).
54. N.Y. Banking Law § 606(4)(a).
55. N.Y. Banking Law § 619(3).

of each account, the great risk of double liability, the federal statute,[56] the implied contract theory of *Sokoloff* as to deposit transactions, and the resultant jurisdictional theory that the situs of an indebtedness lies only at the branch of deposit.

Most of these arguments would appear to have little or no application to the problem of set-off. Since the bank can exercise the right of set-off without the intervention of a court,[57] the jurisdictional problem as to the situs of the indebtedness being set-off would be avoided. The bank could merely assert the set-off as a defense in an action to recover the money by the creditor branch.[58] In any event, the jurisdictional question arises only where the branches have been deemed separate entities and that is the question for decision.[59] The implied contract theory as expressed in *Sokoloff* would be relevant only to determine whether there was a matured indebtedness owing from one branch. Once there was a default in the case of a deposit transaction or a matured indebtedness of some other sort, the question arises whether another implied contract arises whereby this obligation may not be satisfied by the appropriation of property of another branch. Thus the implied contract theory of *Sokoloff* and the original jurisdictional argument in the attachment cases appear to have been devices employed by the courts to implement a policy. This policy in turn was based on the inconvenience to the banking business and the danger of double liability.

Similarly, the provisions of the federal statute would not appear to compel a separate entity theory for purposes of set-off. The statute, of course, does not apply to state banks or branches of foreign banks. Even in the case of national banks, however, the records cases demonstrate that the statute does not mandate a separate and independent status for a foreign branch in the absence of other circumstances. This interpretation was recently affirmed by the Supreme Court.[60]

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56. 39 Stat. 755 (1916), 12 U.S.C. § 604 (1964).

57. Cases cited note 5 supra.

58. Bromberg v. Bank of America Nat'l Trust & Sav. Ass'n, 58 Cal. App. 2d 1, 7-8, 135 P.2d 689, 692-93 (2d Dist. 1943); Kress v. Central Trust Co., 246 App. Div. 76, 79-80, 283 N.Y. Supp. 467, 471-72 (4th Dep't 1935), aff'd, 272 N.Y. 629, 5 N.E.2d 365 (1936).

59. It must be remembered that the jurisdictional argument (advanced in Bluebird) for attachment purposes was based on the Sokoloff theory of an implied contract limiting the indebtedness of the bank to the branch of deposit, until default. See text accompanying notes 23-26 supra. Thus, for purposes of set-off, unless there is some basis for applying a similar contract, there would be no peg on which to hang a jurisdictional argument.

60. United States v. First Nat'l City Bank, 379 U.S. 378 (1965). The Court held that the Internal Revenue Service was entitled to an injunction against a New York City bank requiring the bank's foreign branch to freeze a defaulting taxpayer's account. The property was not subject to attachment under the decisions discussed supra. However, the Court found that personal service was still possible, and, if it were obtained, the debtor could be compelled to bring the property into the jurisdiction. Therefore, the injunction should issue to prevent dissipation of the property. Id. at 383-84. The Court pointed out that the bank had practical control of the branch and that there was no problem of double liability. Id. at 384-85.

This leaves for consideration the arguments of double liability and "endless confusion." The former would not appear to be relevant on the question of set-off. For example, in the case of attachment, the debtor may have withdrawn his funds from branch A after the levy on branch B. Here, but for the separate entity theory, the bank may be left without recourse or be forced to institute legal action to avoid double payment. Similar problems could occur in the cases of commercial paper and, to a lesser extent, deposit transactions. Suppose, however, that branch A of First Bank has funds on general deposit with Second Bank, and Second Bank obtains a matured obligation of branch B of First Bank. If the funds of branch A are applied to the obligation of branch B, B's obligation is thereby satisfied, and branch B or First Bank (as a single entity) has the defense of payment in any future action. There is no danger that First Bank will be liable to anyone else on this obligation.

Thus, confusion and inconvenience must sustain the full burden of carving another niche for the separate entity theory in the area of set-off. First, it should be pointed out that this argument is based largely on the problem of constant communication to avoid the danger of double liability in the other areas.[61] In the case of set-off, the branches concerned would be clearly identified. The bank asserting the set-off could be required to notify each branch concerned. Thus the only problem would seem to be the adverse affect on the branch whose funds were appropriated. Unless very large sums were involved, this would be minimal. Admittedly, this situation does not occur frequently. However, when it becomes uncertain whether a bank will be able to meet its obligations, there seems little reason for denying an otherwise valid set-off in the absence of special statutory provisions.

61. See, e.g., note 35 supra.