THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA

DEPARTMENT OF LAW.

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

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BILLS AND NOTES; IMPLIED AUTHORITY TO FILL UP BLANKS.—*Moore* v. *Henshaw*, 55 N. E. 236 (1899). This was a suit on a note of which one Elwood Moore was the maker. The appellant (defendant) was Moore's surety on the note; the appellee (plaintiff) was the payee. The note in question was given to satisfy three other notes, which Moore was unable to meet. All the parties to the instrument, including the appellant, agreed that the note should bear 8 per cent interest; but after the note was executed it was discovered that the rate of interest had not been specified. Then Moore, the maker, inserted the figure "8," being requested to do so by the appellee. This insertion was made without consulting the appellant (surety), but it was apparently in pursuance of the previous agreement, to which he was a party. The lower court did not believe that, under these circumstances, the surety had a good defence; but he appealed, and in the present case the lower court was reversed and judgment given for the appellant. The ground of the decision was that there had been material alteration of the note, which released the appellant from liability.

The case does not seem reconcilable with the authorities. The court cites a number of cases in support of its decision, but upon examination it is found they do not support. They are all in affirmance of a proposition which, while it is undeniably good law, is not applicable to the point in question; because prior to the application, it presumes a state of facts which is not present here. That is, that the alteration be made without authority. After saying that a material alteration will avoid a note, the court says: "It is a material alteration to add an interest clause . . . " and proceeds to cite cases.

Hart v. *Oehler*, 80 Ind. 83 (1881), held that crossing out the words, "Interest on this note has been paid to maturity," discharged the defendant upon his previously made contract of indorsement. There was no express or implied consent to the alteration.

In *Shanks* v. *Albert*, 47 Ind. 461 (1874), *Schwind* v. *Hacket*, 54 Ind. 248 (1876), and *Brown* v. *Mitchell*, 79 Ind. 84 (1881), the facts were the same, even as to the rate of interest inserted. In each case the holder inserted the words "at 10 per cent int.," which would seem to be a popular proceeding in Indiana. The judges held very unanimously and very properly that this innocent pleasantry upon the part of the holder released the maker from all liability upon his instrument.

With a pleasant sense of variety we note that in the case of *Boustead* v. *Cuyler*, 116 Pa. 551 (1887), the rate inserted was 6 per cent ("with interest at six per cent until paid"), while in *Hart* v. *Clouser*, 30 Ind. 210 (1868), the holder decided upon the rate of 8 per cent. It was decided in both cases that the notes were avoided, releasing, in the former case, the maker, in the latter, the surety.

In citing these cases the court apparently lost sight of a great distinguishing feature between them and the case under its consideration, *i. e.*, the previous agreement. In no one of the cases cited was there any authority to make the alteration, either express or implied. But what was done in the present case, Moore had authority to do, implied from the previous agreement to which the appellant was a party. By filling in the blank, Moore made instrument conform to the true intention of all the parties as evidenced by the agreement. His right to do this is supported by many cases.

Without more than mentioning the distinction to be taken between making an alteration—in the cases cited, inserting an entire interest clause—and merely filling in a blank—here inserting the figure "8" in an already existing clause,—although the distinction is by no means unimportant (*Vosher* v. *Webster*, 8 Cal. 109), we pass to the consideration of two other cases cited by the court, which although open to the same objection as those already mentioned, as far as their bearing upon the present case is concerned, yet deserve more than mere mention because of the suggestion in each, of the principle upon which *Moore* v. *Henshaw* should have been decided.

In *Palmer* v. *Poor*, 121 Ind. 136 (1889), the insertion of the figure "8," "*without the knowledge or consent of the maker*," was held to be such a material alteration that no recovery could be had. It is quite plain from the opinion of the court that if there had been any such prior agreement as in *Moore* v. *Henshaw*, the decision would have been different. Says the court in speaking of the case of *Marshall* v. *Drescher*, 68 Ind. 359, and distinguishing it from the case then deciding, ". . . there the circumstances were such as to create the implication that the holder of the note had authority to fill the blank left in the instrument, and it was upon this ground that the note there under consideration was held valid." Thus clearly showing that if any such implied authority had been present in *Palmer* v. *Poor* the result would have been different.

The other case is *De Pauw* v. *Bank*, 126 Ind. 553, 25 N. E. 705 (1890). There the note was complete in all its terms. It was indorsed in blank by the defendant. The decision was that the maker had no authority, implied from the fact that the indorsement was in blank, to agree with the payee that the indorser should be liable as surety. How this case supports the decision in *Moore* v. *Henshaw*, it is somewhat difficult to see. Indeed, in one part of the opinion it is said, "It is undoubtedly the law, that where one . . . leaves blanks in a note necessary to be filled . . . . he thereby clothes the holder with implied authority to fill those blanks."

There was stated the principle of law which should govern *Moore* v. *Henshaw*. In *Hervey* v. *Hervey*, 15 Maine 357 (1839), it was said that the holder of a bill has the right to alter it and correct mistakes if he thereby makes the instrument conform to what all parties to it agreed or intended it should have been. *McCraven* v. *Chisler*, 53 Miss. 542 (1876). "Where an alteration in a promissory note conforms to true intention of the parties and is honestly made . . . it will not viatiate the note. The law will presume assent." *Duker* v. *Franz*, 7 Bush 273 (1870). Holder of a note may make an alteration to correct a mistake if he make the instrument conform, etc. See also *Fisher* v. *Webster*, 8 Cal. 109 (1857), and *Cole* v. *Hills*, 44 N. H. 227 (1862). *Connor* v. *Routh*, 8 Miss. 176 (1843). The insertion of words and figures which have been left out is no defence. This note was payable "24 ——— after date." Holder was allowed to insert the word "months." *Ames* v. *Colburn*, 11 Gray 390 (1865). Alteration was made in date of a note which had been antedated. This was allowed as making the note conform to the true intention of the parties. *Boyd* v. *Brotherson*, 10 Wendell 93 (1832). A note was for "eight———dollars." The holder was allowed to insert "hundred," on proof that that was intent of parties. *Hansom* v. *Hansom*, 41 Ga. 303 (1869). Maker of a note upon which the defendant was surety, introduced a clause making it payable in gold. Whether this invalidated the note was said to depend upon whether such was the original understanding. "A mere reduction to writing by the principle of what was in fact the agreement of the parties, would not be a change of contract." See also *Clute* v. *Small*, 17 Wendell 238; *Hunt* v. *Adams*, 6 Mass. 519; Am. and Eng. Enc. of Law, 1 Ed. Vol. 2, p. 339; 2 Ed. Vol. 4, p. 153 N. 1; *Lownes* v. *Freer*, 4 Ill. App. 547. Parsons on Bills and Notes, p. 569: "Mistakes in a bill or note may be corrected, and the alteration will not vitiate . . . The insertion of either words or figures left out by mistake is no defence."

CORPORATIONS; NATURE OF LIABILITY FOR ASSESSMENT ON STOCK.—*De Weese* v. *Smith*, 97 Fed. R. 309—1899. (Circ. Ct. W. D. Mo.) This was an action at law by the receiver of an insolvent national bank to *enforce* an assessment imposed by the Comptroller of the Currency upon the stockholders. He had previously in an action at law enforced an assessment of 75 per cent. The Circuit Court, per Phillips, J., held that the recovery in the first action precluded any further proceedings. The subscribers for bank stock under Sec. 5151, Rev. St. U. S., enter into an agreement that they will be liable severally to an assessment to the amount of the face value of their stock in case of a deficit. But, to the mind of the court, this contract is indivisible, and when once recovered upon can no longer be made the basis of any action. They see nothing in the statute to defeat the common law rule that a contract once recovered upon cannot be again employed.

There are grave objections to such a view of the statute from the standpoint of public policy. Furthermore, we do not believe that the stockholder's liability is conformable to the strict rules of the common law. The comptroller in his report for 1898 (vol. i, p. xxxvi) speaks of the difficulties in discovering the exact deficit. When the assessment is made after all the assets have been disposed of there is little danger of mistake, but the assessment is generally made before the liquidation of the assets. In these cases mistakes are sure to arise. How can the receiver know whether all the debtors will be solvent? In the meantime, must the creditors wait before any assessment will be declared? Again, during such delay many of the stockholders are liable to become bankrupt. Should any creditor be subjected to such a disadvantage? It seems only just that the creditor should be entitled to a speedy assessment with the privilege of a further one if the funds prove insufficient.

The court, in support of its contention, quotes the declaration of the comptroller that it has been the practice of the comptroller to regard such levy as irrevocable and unchangeable, although further development may demonstrate error in the assessment. But it is quite evident that the comptroller does not regard himself as bound by any such precedent. He speaks of the inconvenience and injustice of the method, and feels that there is nothing in the decisions of the Supreme Court to hold him to it.

Probably the most authoritative exposition of the law is the decision of J. Swayne in *Kennedy* v. *Gibson*, 8 Wall. 505 (1869).

He says: "Where the whole amount is sought to be recovered the proceeding *must be* at law. Where less is required the proceeding *may be* in equity, and in such cases an interlocutory decree may be taken for contribution and the case may stand over for the further action of the court—if such action should subsequently prove to be necessary—until the full amount of the liability is exhausted." Despite what the court, in the case under review, said, we cannot see what there is in the opinion to prevent the comptroller from making a provisional assessment and enforcing its collection in an action at law. The Supreme Court did recommend the action in equity, but they evidently regarded the stockholder as liable up to par value of his stock, although the first contributions desired were for only part thereof.

The words of the same judge in a later case, *U. S.* v. *Knox*, 102 U. S., 422 (1880), are even more conclusive, viz: "Although assessments made by the comptroller under the circumstances of the first assessment in this case *and all other assessments, successive or otherwise*, not exceeding the par value of all the stock of the bank, are conclusive upon stockholders, yet if he were to attempt to enforce one made clearly and palpably contrary to the views expressed, it cannot be doubted that a court of equity, if its aid were invoked, would promptly restrain him by injunction." Although the case did not hinge upon this point, we feel that in the absence of any express decision to the contrary, that the provisional assessment can be justified.

The difficulties of the case may be solved to a great extent by ascertaining the exact nature of the receiver's position. He is "the statutory assignee of the association and is the proper party to institute all suits." *Kennedy* v. *Gibson* (supra) page 506. Under the common law, the stockholder would have been liable directly to the creditor, but under statute law and judicial construction the stockholder's liability has been turned into an asset of the bank: *State* v. *Union Stock Yards Bank* (Ia.) 70 N. W., 752 (1897); *Wilson* v. *Book* (Wash.) 43 Pac. (1896); *Farmer's Loan Co.* v. *Funk*, 68 N.W. (Neb.) 520 (1896).

Now, of this trust fund, the comptroller and, under him, the receiver is the trustee, acting for the protection of the interests involved. Comptroller's Rep. (supra). It is true that the court in *Kennedy* v. *Gibson* (supra) held the comptroller's decision final as to stockholders, under proper circumstances; still there is nothing to lead us to agree with Judge Phillips in the present case that that decision exhausts the comptroller's power. There seems to be nothing in all the decisions to prevent the comptroller from either laying a further assessment where such is needed or repaying such sum to the stockholders as is not needed.

It is on this point of rebate to stockholders that we find an irreconcileable difference between the common law contract and the stockholder's liability. The fact that there ever is a rebate shows that the assessment is not enforced by the receiver by any absolute right. He has collected more than was needed; he had a right to only so much as was needed. The assessment, so far from being final, is always—due to the uncertainties in realizing the assets—provisional, subject to a rebate or an increase as the case may demand.

The rule contended for by the comptroller will be more equitable to the stockholder than that laid down in the present case. If the comptroller as trustee can enforce but one assessment, is it not his duty to the creditors to make that levy sufficiently large? Where any great uncertainty prevails would he not be justified in making an assessment of 100 per cent where there may finally be a need for only 50 per cent? In the meantime, the stockholder would be deprived of the use of his money. It would be more convenient for the stockholder to meet his liabilities as they are ascertained. In a recent Minnesota case, the court has adopted the novel method of granting judgment for the full liability of the stockholder; but the creditor can enter up judgment only from time to time under the sanction of the court. When all the debts are met, the judgment is satisfied upon the records. *Harper* v. *Carroll*, 69 N. W. (Minn.) 611 (1896). But there are grave objections to allowing a judgment to hang over a man's head in this manner. The method advocated by the treasury authorities is more equitable, and, in the absence of any decisions forbidding it, should be adopted.