financial status. Some courts allow such evidence,[26] others refuse it.[27] Whenever such evidence is admitted, it is not for the purpose of enhancing the compensation beyond a reasonable amount, but to ascertain the ability of the client to pay even that sum.[28] Where the client cannot earn more than ordinary wages the charge should be small as compared to the usual fee.[29] Obviously there is often a close relation between the result of the suit and the client's wealth. Even though the result be favorable to the client, it may mean merely relief from a liability, instead of the acquisition of money damages, in which case he is less inclined to pay a large attorney's fee and often less able.

No one of the elements which go to make up a reasonable fee is controlling. All of these factors are to be regarded and each is given such weight as the trier of fact thinks appropriate in the particular case under consideration.[30] Viewing the fee awarded in the instant case in the light of these criteria the decision seems correct.

Banks and Banking—Contracts—Unenforceability of Agreement by Bank To Repurchase Securities Sold—[New York].—The defendant bank, through its vice-president, orally agreed to repurchase at the original sale price, various securities of other corporations sold to the plaintiff by the bank, upon demand by the purchaser at any time during the lifetime of the securities. In an action to recover damages for breach of this contract, *held*, for defendant; the repurchase agreement was unenforceable because contrary to public policy. *Rothschild v. Manufacturers Trust Co.*[1]

This decision, one of first instance in New York, exemplifies the recent tendency further to restrict operations of banks which might endanger their stability,[2] and illustrates that the business dealings of banks, being more affected with the public interest than the transactions of other corporations[3] may be more readily declared void because contrary to public policy.[4]

[26] Walker v. Hill, 90 Mont. 111, 300 Pac. 260 (1931); French v. Abbott Publishing Co., 223 App. Div., 276, 228 N.Y. Supp. 62 (1929).

[27] Winslow v. Atz, 168 Md. 230, 177 Atl. 272 (1935); Nelson v. Auch, 62 N.D. 594, 245 N.W. 819 (1932).

[28] Baruch v. Giblin, 122 Fla. 59, 164 So. 831 (1935); Stevens v. Ellsworth, 95 Iowa 231, 63 N.W. 683 (1895); Ward v. Cohn, 58 Fed. 462 (C.C.A. 8th 1893).

[29] People v. Pio, 308 Ill. 128, 139 N.E. 45 (1923).

[30] Platt v. Shields, 96 Vt. 257, 119 Atl. 520 (1923).

[1] 279 N.Y. 355, 18 N.E. (2d) 527 (1939).

[2] See 1 Univ. Chi. L. Rev. 749 (1934) for the suggestion that the Federal Securities Act, 48 Stat. 74 (1933), the National Banking Act, 48 Stat. 184 (1933), and the Federal Deposit Insurance Corp. Act, 48 Stat. 168 (1933), indicate a growing public policy that security selling should be divorced from the banking business.

[3] Gause v. Commonwealth Trust Co., 196 N.Y. 134, 153, 89 N.E. 476, 482 (1909).

[4] Banks have no general power to purchase their own stock, for example, 1 Zollman, Banks and Banking § 251 (1936); and cannot obligate themselves to do so, Broderick v. Adamson, 265 N.Y. Supp. 804, 148 Misc. 353 (1933). Where a bank brings suit on a promissory note the defendant may not plead an agreement by the bank not to enforce the instrument, because he is charged with knowledge that the note might be used to conceal the actual transaction, Mount Vernon Trust Co. v. Bergoff, 272 N.Y. 192, 5 N.E. (2d) 196 (1936). An assumption clause in a deed conveying property to a state bank obligating the bank to pay the mortgage

Agreements of banks to repurchase securities sold,[5] upon demand of the purchaser, have been widely upheld,[6] but several jurisdictions have recently denied their validity,[7] following the lead of the Minnesota court in holding similar agreements which create a large contingent liability in the bank contrary to public policy.[8] Some courts have held such contracts to be *ultra vires*, without declaring them contrary to public policy,[9] because they felt bound by the estoppel doctrine which denies the bank the privilege of setting up the invalidity of the contract as a defense in a suit by a purchaser who had bought securities in reliance on the bank's agreement.[10]

An agreement by a bank to repurchase securities sold is said to be contrary to public policy because it in effect perpetrates a fraud upon the depositors and other creditors of the bank. It creates a liability contingent upon circumstances over which the bank has little control, without creating a reciprocal asset, since the bank usually does not have the option to repurchase at the sales price if the securities should rise in value. The books of the bank will show that certain securities have been converted into cash or other liquid assets, without revealing the extent of this contingent liability which is never measurable in advance. An apparently "safe" bank, having a large

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indebtedness is *ultra vires*, and unenforceable, Missouri State Life Ins. Co. v. Lakeland Star Tel. Co., 111 Fla. 416, 149 So. 597 (1933); *contra:* Sheley v. Engle, 204 Iowa 1283, 213 N.W. 617 (1927). But a trust company is not to be considered a bank, Meyers v. Heitman Trust Co., 289 Ill. App. 619, 7 N.E. (2d) 509 (1937) (trust company held liable on a repurchase agreement although a bank would not have been).

[5] This note treats only the situation where a bank has agreed to repurchase securities other than its own stock. For a collection of cases holding that a bank cannot purchase its own stock see 1 Zollman, *op. cit. supra* note 4, at § 251. See 3 Univ. Chi. L. Rev. 665 (1936) on agreements by corporations in general to repurchase their own stock.

[6] Farmer's State Bank v. Coutoure, 45 N.D. 401, 178 N.W. 138 (1920); Jenkins v. Nicolas, 63 Utah 329, 226 Pac. 177 (1924); Slaton State Bank v. Amarillo Nat'l Bank, 288 S.W. 639 (Tex. Civ. App. 1926); Merchant's Bank v. Hanna, 73 F. (2d) 818 (C.C.A. 8th 1934); Enid Bank and Trust Co. v. Yandell, 178 Okla. 550, 56 P. (2d) 835 (1936).

[7] Hawkins Realty Co. v. Hawkins State Bank, 205 Wis. 406, 236 N.W. 657 (1931); Knass v. Madison & Kedzie State Bank, 354 Ill. 554, 188 N.E. 836 (1934); German Baptist Orphan Home v. Union Banking Co., 13 F. Supp. 814 (Mich. 1935); Brown v. Union Banking Co., 274 Mich. 499, 265 N.W. 447 (1936). *Cf.* Awotin v. Atlas Exchange Nat'l Bank of Chicago, 295 U.S. 209 (1935) (federal statute which limits national bank's buying and selling of investment securities to buying and selling "without recourse" held applicable to repurchase agreements as well as indorsements and guaranties of investment securities).

[8] Farmers and Mechanics Savings Bank v. Crookston State Bank, 169 Minn. 249, 210 N.W. 998 (1926) (bank cannot contract to retake loans which it has negotiated for a commission); Greene v. First Nat'l Bank, 172 Minn. 310, 215 N.W. 213 (1927) (national bank cannot make valid real estate mortgage repurchase agreement); Federal Land Bank of St. Paul v. Crookston Trust Co., 180 Minn., 319, 230 N.W. 797 (1930) (Minnesota trust companies have no power to guarantee paper in which they have no beneficial interest).

[9] England v. Commercial Bank, 242 Fed. 813 (C.C.A. 8th 1917); First State Bank of Odessa v. First State Bank of Correll, 165 Minn. 285, 206 N.W. 459 (1925); Docking v. Rife, 129 Kan. 812, 284 Pac. 391 (1930).

[10] In Westchester Trust Co. v. Harrison, 249 App. Div. 828, 292 N.Y. Supp. 209 (1937) it was expressly stated that although the bank was estopped from pleading that the repurchase agreement was *ultra vires*, it could successfully plead public policy.

number of these agreements, could become insolvent in a very short time, as the purchasers would enforce their contracts almost simultaneously if the securities market became seriously affected by adverse business conditions.

The only justification for repurchase agreements is that they may aid the bank in making advantageous sales, like the "money back guarantee" or "thirty day free trial" special inducements to buy.[11] If agreements to repurchase were limited to a reasonably short term they might not be objectionable,[12] but a person cannot "try out" a mortgage bond. If the agreement is to be of value to him he must have the privilege of exercising his option whenever he sees the market price for his securities falling, usually during a business depression which is the worst possible time for a bank to invest in securities at a loss.

Any analogy between repurchase agreements and guaranteeing indorsements in the sale of bills and notes[13] is incomplete, as is pointed out in the instant opinion, because endorsements on negotiable instruments have become common business practice, like selling real estate by deed of general warranty, and are necessary to make ordinary sales, whereas repurchase agreements are used only as added inducements in exceptional cases. Furthermore, under an endorsement, liability arises only upon default by the debtor and is primarily a function of his financial stability, which the bank has passed upon before making the guaranties; but in agreements to repurchase, the loss suffered by the bank depends not so directly upon the solvency of the debtor as upon general market conditions and the determination of the purchaser to exercise his option.

Contracts—Agreements Preliminary to a More Formal Writing—[Washington].—The defendant had made previous contracts to sell strawberries to the plaintiff through the defendant's broker, which had always culminated in written formal agreements. After negotiations, the defendant made an offer to sell, which was accepted orally by the plaintiff, whereupon the broker mailed a sales memorandum to both parties referring to a preceding year's contract for minor details, which specified "This memo becomes void when sale is covered by contract." A formal contract, "not to be binding until signed by both parties," containing only those terms specified or referred to in the sales memorandum, was drawn up by the defendant and mailed to the plaintiff. This formal contract was never executed, the defendant repudiating the contract before the signature of either party was attached thereto. The court *held*, that the sales memorandum was not a contract since both parties contemplated a formal agreement. *Pacific Food Products Co. v. Mukai.*[1]

[11] *Cf.* Went v. Duluth Coffee and Spice Co., 64 Minn. 307, 67 N.W. 70 (1896) (agreement by a corporation to repurchase its own stock at purchaser's option held "merely a conditional sale with option to revoke or rescind in the purchaser," so that it did not amount to an agreement by the corporation to purchase its own stock within the statute controlling such purchases); Ophir Consol. Mines Co. v. Brynteson, 143 Fed. 829 (C.C.A. 7th 1906) (agreement by a corporation to repurchase shares of its own stock if the buyer was not satisfied held valid as a "sale or return" contract).

[12] But see People *ex rel.* Barrett v. First State Bank and Trust Co., 364 Ill. 294, 4 N.E. (2d) 385 (1936) for a holding that setting a definite time limit would not make a repurchase agreement enforceable.

[13] See Farmer's State Bank v. Couture, 45 N.D. 401, 178 N.W. 138 (1920).

[1] 84 P. (2d) 131 (Wash. 1938).