MIROSŁAW PAWEŁCZYK

Bank-Enforceable Title in the system of banking privileges: a study of the institution and its repeal

Abstract

The bank-enforceable title was one of the most significant banking privileges consisting of the power of banks to issue an enforcement title without trial. The bank-enforceable title was one of the most significant banking privileges consisting of the power of banks to issue an enforcement title without trial. The paper addresses the genesis, function and legal construction of the first and most controversial enforcement privilege in the Third Republic of Poland. The paper also discusses the formation of the discourse on the constitutionality of the bank-enforceable title.

KEYWORDS: bank-enforceable title, bank enforcement privileges, banking law, enforcement proceedings

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1 Introduction

The purpose of this paper is to present the genesis, function and legal basis of the bank-enforceable title as an institution of a special enforcement character, which at the beginning of the Third Republic of Poland was an exception to the general rules of civil law claims enforcement. The bank-enforceable title, issued unilaterally by the bank, was characterized by a simplified way of claiming debts, as the bank could assert claims without

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the need for exploratory proceedings. Such a significant strengthening of the position of banks vis-à-vis debtors, and privileging them in relation to other creditors, gave rise to numerous controversies from the beginning of the introduction of this legal institution into the system of banking law in the Third Republic of Poland. Therefore, an important part of the analysis will be to present the evolution of the discussion on the constitutionality of the introduction of the institution of the bank-enforceable title (b.e.t.).

2 Origins of banks enforcement privileges

The prototype of the institution of the bank enforcement order dates back to the law of the Second Republic of Poland[1] and constituted the power to carry out enforcement against real estate on the basis of the creditor's own documents without obtaining a court enforceable title. This power was vested in the State Agricultural Bank and land credit societies, municipal credit societies and mortgage banks.[2] Despite the establishing of this privilege, in general, however, the powers of banks during the Second Republic of Poland can be described as "minor." At the same time, it should be pointed out that the privilege of conducting simplified enforcement proceedings against real estate was the legislature's response to the agricultural crisis of the 1930s[3]. In addition, the right to enforce claims at the bank's option (through administrative or judicial enforcement) was granted in 1933 to the State Agricultural Bank and the National Development Bank.[4] However, this privilege was of a limited nature, since it applied only to undisputed claims, i.e., those recognized by the debtor in substance and amount or established by a court judgment.[5]

1 The judgment of the Constitutional Tribunal of 14.04.2015, ref. P 45/12, LEX no. 1665900.

2 See Rafał Sura, *Bankowy tytuł egzekucyjny* (Lublin: Katolicki Uniwersytet Lubelski, 2008), 124-125.

3 Ibidem, 125.

4 This privilege was granted on the basis of the Law of March 14, 1933 on the transfer to state banks of the management and collection of certain undisputed private-law claims of the Treasury (Journal of Laws. 1933 no. 21 item 147).

5 See Andrzej Janiak, *Przywileje bankowe w prawie polskim* [*Banking privileges in Polish law*] (Kraków: Zakamycze, 2003), 25.

The scattered and sometimes disorganized regulation of the special grounds for enforcement by banks in the interwar period casts doubt on the possibility of stating that we had a systemic solution to the enforcement privileges of banks at that time. However, simplified methods of enforcement could be used mainly by the issuing bank and state banks in connection with the performance of public tasks.[6] The banking law of the Second Republic of Poland did not privilege private banks (merchant banks), which had analogous instruments of extrajudicial enforcement as other creditors.[7]

A further increase in the powers of banks occurred in the Polish People's Republic and was associated with the model of the command-and-distribution economy (planned economy)[8]. Rafał Sura even specifies that in the Decree of 25 October 1948 on the Banking Reform, there was a "total expansion" of banks' enforcement privileges. Central control of the economy and strong state control over the banking sector led, as it were, naturally to the granting of privileges to banks.[9] In 1958, very broad powers were granted to the National Bank of Poland,[10] which included the power to issue bank enforcement orders, the choice of enforcement mode (administrative or civil), and the favorable local jurisdiction of the court. In 1960, analogous powers were granted to state banks, savings and loan cooperatives, as well as banks operating in the form of a joint stock company.[11] Thus, in the socialist economic model, banks became an instrument for

6 Ibidem, 26-27.

7 In particular, the power to sell movable pledges out of court cannot be considered a banking privilege, as other creditors were able to use analogous instruments such as the commercial pledge and the right of retention (see more ibidem, 27-28).

8 See Article 13(2) of the Banking Reform Decree of October 25, 1948 (consolidated text Journal of Laws of 1951, No. 36, item 279, as amended); Article 21(2) of the Banking Law Act of April 13, 1960 (Journal of Laws No. 20, item 121, as amended); Article 16(2) of the Banking Law Act of June 12, 1975 (Journal of Laws No. 20, item 108, as amended); and Article 94(2) of the Banking Law Act of February 26, 1982 (Journal of Laws No. 7, item 56, as amended).

9 Katarzyna Nowakowska, Paweł Ochmann, "Bankowy tytuł egzekucyjny jako instrument realizacji konstytucyjnie gwarantowanego prawa własności" *Przegląd Prawa Konstytucyjnego*, No. 1 (2016): 104.

10 Act of December 2, 1958 on the National Bank of Poland (journal of Laws of 1958 No. 72 item 356).

11 Accordingly, Articles 21(2), 35, 31 of the Banking Law Act of April 13, 1960.

the implementation of "unified economic and financial policy"[12] and an instrument for the exercise of power.[13] The granting of special powers to banks for the simplified recovery of debts was associated with the protection of state property, characteristic of the socialist system. As a result, there was a "distortion of the functional basis" of the original institution of the bank-enforceable title and the bank enforcement order.[14] It is worth noting that in the discussion on the abolition of the institution of the bank enforcement order, opponents of its removal, pointed to the roots of this institution, claiming that it is admittedly a "relic of the principle of special protection of state property" but it is nevertheless a "useful relic." [15]

3 Bank-enforceable title – the prototype of the bank enforcement order

Paradoxically, the political transformation in Poland led not only to the incorporation into the new legal system of the original b.e.t., but also to an extending of bank's privileges.[16] First of all, it was decided to maintain the

12 Arkadiusz Wróblewski, "Bankowy tytuł egzekucyjny – zarys instytucji na tle wyroku Trybunału Konstytucyjnego z dnia 14 kwietnia 2015 r." *Przegląd Prawa Egzekucyjnego*, No. 12 (2015): 58-59; Sylwia Janas, „Bankowe tytuły egzekucyjne (wybrane zagadnienia procesowe)" *Polski Proces Cywilny*, No. 3 (2013): 353. See also the view of the Ombudsman cited in the grounds of the ruling of the Constitutional Tribunal of 16.05.1995, ref. K 12/93, LEX no. 25548: „all banks acted in a dual role – as a party in contractual relations with their customers and as an organ of the State's financial and economic administration which have power over their customers."

13 Sura, *Bankowy tytuł egzekucyjny*, 127.

14 Wróblewski, "Bankowy tytuł egzekucyjny – zarys instytucji na tle wyroku Trybunału Konstytucyjnego z dnia 14 kwietnia 2015 r.", 59. All citations in this paper, unless otherwise noted, are translations from Polish into English.

15 See Stanisław Sołtysiński, "Zmierzch zasady równego traktowania podmiotów gospodarczych" *Państwo i Prawo*, No. 1 (2015): 95. Rafał Sura also considered the institution of b.e.o. a relic – see Rafał Sura, „Koniec z reliktem z przeszłości. Bankowy tytuł egzekucyjny niezgodny z konstytucją" *Gdańskie Studia Prawnicze. Przegląd Orzecznictwa*, No. 1 (2016): 27-35.

16 See Janiak, *Przywileje bankowe w prawie polskim*, 34; Nowakowska, Ochmann, "Bankowy tytuł egzekucyjny jako instrument realizacji konstytucyjnie gwarantowanego prawa własności," 104.

enforcement privileges of banks in the new Banking Law of 1989,[17] while at the same time expanding the group of debtors against whom b.e.t. can be issued to include units of the socialized economy.[18] Since previously banks could issue enforceable titles against individuals and so-called non-social economy units.[19] The material scope of the definition of a non-socialized economy unit is created in opposition to socialized economy units, by which state, cooperative and social units have been understood in the literature.[20] However, due to the lack of a uniform definition of a socialized economy unit, there have been terminological difficulties in interpreting this concept.[21] In practice all bank customers were involved, including state-owned enterprises and cooperative organizations.[22]

The institution of the bank-enforceable title was established in Article 53 (2) of the Banking Law of 1989 which states: "Abstracts from the books of banks, referred to in Article 49 (1), as well as other documents related to the performance of banking operations, stating obligations in favor of these banks and accompanied by a statement that the claims based on them are due, have the force of enforceable titles, without the need to grant court enforceability clauses for them. Enforcement of receivables stated in such documents shall be carried out at the choice of the bank, in accordance with the procedure set forth in the Code of Civil Procedure or in the regulations on enforcement proceedings in administration." Originally, enforcement privileges were granted to all banks in existence on the effective date of the Banking Law of 1989, and such a possibility was generally excluded for new banks.[23] Privileging only one group of banks in

17 Hereinafter referred to: "the Banking Law of 1989".

18 Article 53(2) of the Law of the Banking Law of 1989.

19 Wróblewski, "Bankowy tytuł egzekucyjny – zarys instytucji na tle wyroku Trybunału Konstytucyjnego z dnia 14 kwietnia 2015 r.," 60. See also Article 94(3) of the Law of February 26, 1982 – the Banking Law, which states: A bank can't use the rights set forth in clause 2 to assert claims against entities whose disputes with the bank fall within the jurisdiction of state economic arbitration" and Article 3 of the Law of October 23, 1975 on State Economic Arbitration (Journal of Laws No. 34, item 183, as amended), which sets forth the jurisdiction of the State Economic Arbitration.

20 Józef Górski, "Prawo gospodarcze w systemach prawnych niektórych krajów socjalistycznych" *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, No. 3 (1967): 3.

21 See Anna Dawidowicz, "Pojęcie «jednostka gospodarki uspołecznionej» a ustawodawstwo dotyczące reformy gospodarczej" *Palestra*, No. 31 (1987): 19 et seq.

22 Janiak, *Przywileje bankowe w prawie polskim*, 34.

23 Banks entitled to issue b.t.e. were those which, among other things, enjoyed a State Treasury guarantee for accumulated deposits, which was the case for all

the era of political transition was a compromise solution that did not fully satisfy both the banking sector and supporters of basing the free market economy on the principle of equality of parties, in which there was no place for banking privileges. Eventually, the powerful banking lobby led to the extension of the power to issue b.t.e. to all banks,[24] which sparked a dispute before the Constitutional Tribunal, which will be discussed in more detail in the next section of the paper.

Bank-enforceable titles constituted a significant privilege for banks, as the court did not grant an enforceability clause to the title issued by the bank, as a result of which the bank could carry out enforcement on the basis of the b.e.t. without court proceedings[25]. The procedure for issuing a bank-enforceable title was also not subject to any judicial review, including formal review, since the regulations did not require the court to grant an enforceability clause to the title issued by the bank. Consequently, the bank was able to enforce the claim bypassing the examination proceedings[26] and solely on the basis of its own documents and a statement that the claim was due. Documents issued, signed by banks and bearing their seal, as indicated in the provisions of the former Banking Law, also had the force of official documents.[27] Granting the books and documents of banks the power of official documents was considered in the literature as one of the principles of Polish banking law.[28] In addition, the bank was allowed to choose the legal regime of its enforcement, i.e. according to the provisions of the Code of Civil Procedure[29] or the provisions on enfor-

banks established before the effective date of the Banking Law of 1989. The new legislation adopted as a principle that the Treasury was not liable for the banks' liabilities, so the new banks were not covered by enforcement privileges (ibidem, 35).

24 See Janiak, *Przywileje bankowe w prawie polskim*, 36.

25 See Łukasz Hawrylak i Mirosław Pawełczyk, „Prowadzenie egzekucji na podstawie dalszego bankowego tytułu egzekucyjnego na mocy przepisów przejściowych" *Prawo i Więź*, nr 3 (2023): 300. https://doi.org/10.36128/PRIW.VI46.651

26 See the judgment of the Supreme Court of 30.07.2003, ref. II CKN 363/01, LEX nr 82280, in which it was indicated that it could be considered that the issuance of b.e.o. "allowed to omission examination proceedings".

27 See Article 53 of the former Banking Law.

28 Jolanta Gliniecka, Jerzy Harasimowicz, Robert Krasnodębski, *Polskie prawo bankowe (1918–1996)* (Warszawa: Konieczny i Kruszewski, 1996), 70.

29 Act of November 17, 1964 – the Code of Civil Procedure (consolidated text Journal of Laws of 2021, item 1805, as amended, also referred to as "the Code of Civil Procedure").

cement proceedings in administration.[30] This privilege was therefore an expression of the legislature's confidence in banks.[31]

Having outlined the issues related to the institution of b.e.t., for further consideration, it is necessary to refer to historical interpretation. This is because it has been accepted in the jurisprudence of the Supreme Court has stated that the provisions of the Code of Civil Procedure regulating the issuing of enforceable titles apply *mutatis mutandis* to bank-enforceable titles, with the result that it is inadmissible to issue a bank-enforceable title in the event of the loss of the original title without the permission of the court referred to in Article 794 of the Code of Civil Procedure.[32] This means that despite the fact that banks were, under the former Banking Law were entitled to issue bank-enforceable titles without even formal judicial review, the Supreme Court concluded that this privilege was limited only to a one-time act, i.e. the issuance of the original b.e.t.[33] It is worth noting here that the interpretation presented by the Supreme Court is not based on the literal wording of Article 53 of the former Banking Law, but is the result of, among other things, the application of strict interpretation in view of the exceptional nature of the privilege of conducting enforcement on the basis of the b.e.t. Instead, the power to issue further b.e.t. stems from the analogous application of Article 793 of the Code of Civil Procedure.[34] In the case of the need to issue further b.e.t., in order to direct enforcement only to a part of the debtor's property, the Supreme Court also held that the court's authorization referred to in Article 793 of the Code of Civil Procedure is necessary.[35] The historical interpretation of the institution

30 Act of June 17, 1966 on Enforcement Proceedings in Administration (consolidated text Journal of Laws of 2022, item 479, as amended, also referred to as: "Act on Enforcement Proceedings in Administration").

31 See the judgment of the Supreme Court of 08.11.2002, ref. III CKN 2/01, LEX no. 75287.

32 The judgment of the Supreme Court of 07.11.2003, ref. I CK 197/02, LEX no. 82239.

33 See ibidem: "A strict interpretation of the provision based on its wording indicates that the legislator – in granting banks the privilege of issuing a document equivalent in its force to an enofrceable title – limited it to a one-time act. The opposite view cannot be taken into account, as it would lead to uncontrolled circulation of enforceable titles."

34 The judgment of the Appeal Court in Warsaw of 30.01.2013, ref. I ACa 916/12, LEX no. 1322795; the judgment of the Appeal Court in Poznan of 29.05.2014, ref. I ACa 305/14, LEX no. 1489127.

35 The judgment of the Supreme Court of 15.10.2015, ref. II CSK 716/14, LEX no. 1820396. According to the wording of the cited Article 793 of the Code of Civil

of b.e.t. therefore leads to the conclusion that the "issuance" of b.e.t. should be understood as the issuance by the authorized bank of only the original title, which is the basis for enforcement, while the issuance of further bank-enforceable titles, e.g. in the event of loss of the original title or the need to carry out enforcement from several components of the property of the same debtor, follows the general rules set forth in the Code of Civil Procedure.

4 Constitutional-legal evaluation of the bank-enforceable title

The Ombudsman strongly reacted to the extension of enforcement privileges to all banks, requesting the Constitutional Tribunal to declare the amending law incompatible with the principle of equality before the law and the right to a court. According to the Ombudsman, the power to issue b.t.e. was related to the dual role of banks under the previous regime, when banks acted as a private entity on the one hand and a financial and economic administration body on the other. He argued that enforcement privileges should be an exception limited to public banks, and not an entitlement of all banks, including private ones.[36] The Prosecutor General and the President of the National Bank of Poland disagreed with the ombudsman's position. The President of the National Bank of Poland stated that the extension of the power to issue b.t.e. is due to the provision of special security rules for banks and is aimed at equalizing the legal position of the creditor against the privileged position of debtors. The President of the National Bank of Poland also pointed to systemic considerations, as it is possible to conduct simplified enforcement on the basis of a notarized enforcement order, which would be used by banks if the provisions on b.t.e. were eliminated. In addition, the bank's client, when deciding to conclude a contract, agrees

Procedure: "If it is necessary to carry out enforcement for or against several persons or from several components of the property of the same debtor, the court, in addition to the first enforceable title, may issue further titles, indicating the purpose for which they are to serve and their serial number."

36 The order of the Constitutional Tribunal of 16.05.1995, ref. K 12/93, LEX no. 25548, paragraph 1.

to use the simplified procedure for the enforcement of claims provided by the law. Particularly interesting was the statement of the President of the National Bank of Poland, that "the special powers of banks in the sphere of enforcement and set-off should be a transitional phenomenon, valid until the appropriate development of collateral institutions in the civil process, as well as the creation of the institution of the pledge registry and appropriate regulation of the form of registered pledges."[37]

At a hearing on 14 February 1995, the Ombudsman modified his position by changing the subject of the claim – from the amendment act to Articles 52 and 53 of the Banking Law of 1989. He expanded his argument, stating that shifting the burden of proof to the debtor and depriving him of the opportunity to defend his rights in the process is incompatible with many acts of international law. Given the intensity of violations of the debtor's rights, b.t.e. cannot be applied even temporarily. The ombudsman also pointed out in other European countries banks do not have privileges similar to b.t.e.[38]

The Constitutional Tribunal considered the triad of banks' enforcement privileges, which consisted of: (i) the deduction by banks from their debt of debts whose due date has not yet arrived[39], (ii) the granting of bank books the force of official documents,[40] and (iii) the granting of bank statements the force of enforcement titles without the need to obtain court enforcement clauses for them.[41] Due to the purpose of the paper, only arguments relating to the compliance of the b.t.e. with constitutional provisions will be presented.[42] First of all, the Tribunal differentiated the legal assessment due to the jurisprudence expressed in the jurisprudence on the permissibility of enforcement by the bank on the basis of the b.t.e. in the event of an assignment of claims.[43] The Tribunal in this regard stated, with which it should be fully agreed, that it is impermissible for a creditor to

37 Ibidem.
38 Ibidem, paragraph 2.
39 Article 52 of the Banking Law of 1989.
40 Article 53 (1) of the Banking Law of 1989.
41 Article 53 (2) of the Banking Law of 1989.
42 The Tribunal's assessment included the compatibility of Articles 52 and 53 of the Banking Law of 1989 with the constitutional provisions upheld under the so-called "Little Constitution" (Constitutional Law of October 17, 1992 on Mutual Relationships between the Legislative and Executive Powers of the Republic of Poland and on Local Self-Government – Journal of Laws No. 84, item 426, as amended).
43 Such a stance was adopted by the Supreme Court in its resolution of March 25, 1992, ref. III CZP 20/92, LEX no. 3777.

aggravate the legal position of the debtor without his consent.[44] In fact, allowing simplified enforcement of bank-acquired claims by assignment would lead to an extreme pathologization of the enforcement of claims and would deprive debtors of elementary protection and legal certainty.

In a legal assessment of the conduct of enforcement under the b.t.e. in cases unrelated to the assignment of claims, the Constitutional Tribunal referred to three categories of assessment: (i) the principle of citizens' trust in the state and the laws it enacts, (ii) the right to a court, and (iii) equality before the law. First, the Tribunal pointed out that all the conditions of bank enforcement are regulated by law and, as such, are known to the debtor before the conclusion of the contract. Therefore, the debtor can discern whether he or she agrees to the initiation of summary execution by the bank, which, in the Tribunal's view, does not violate the principle of citizens' trust in the state and the laws it enacts. Regarding the allegation of a violation of the right to a court, the Tribunal stated that the debtor can bring an anti-enforcement action under Article 52(3) of the Banking Law of 1989. According to the Tribunal, while banks can initiate enforcement without judicial review, the debtor can challenge the bank's claim and its amount in court, as well as request a stay of enforcement.[45] Regarding the final allegation, the Tribunal found that there had been no violation of the principle of equality, since the legal system treats all citizens who have entered into contracts with banks equally, regardless of their legal status.

5 Removal of the institution of the bank-enforceable tile

The institution of the bank-enforceable title was repealed as of 1 January 1998.[46] Transitional provisions, however, were included in Article 51(1) of the Act of 6 December 1996 on the registered pledge and the pledge

44 The order of the Constitutional Tribunal of 16.05.1995, ref. K 12/93, LEX no. 25548, paragraph IV.3.

45 Article 52(4) of the Banking Law of 1989.

46 The repeal of these provisions was based on Article 193 of the Banking Law.

register,[47] which states: "To enforcement proceedings initiated before the date of entry into force of this Act, on the basis of abstracts from the books of banks and other documents related to the performance of banking operations, stating obligations in favor of these banks and accompanied by a statement that the claims based on them are due, having the force of enforceable titles without the need to grant court enforceability clauses for them, the current provisions shall apply."[48] The conduct of enforcement proceedings by banks on the basis of b.e.t. institutions under the intertemporal provisions caused interpretative doubts, which were the subject of literature and jurisprudence statements.[49]

6 Conclusions

The evolution of the system of enforcement privileges of banks was inextricably linked to socio-economic changes and the changing perception of the role of banks in the economy. During the communist period, banks were institutions that guarded the interests of the state, and as a result were entitled to significant powers of authority. The change in Poland's economic model as a result of the systemic transformation should lead to a redefinition of the meaning of banks and, consequently, deprive them of their enforcement privileges. The solution of granting all banks the right to carry out enforcement without court proceedings strongly violated the rights of debtors. The significant strengthening of the position of banks in relation to debtors, as well as other creditors, found no justification in the economic realities of the time. Faced with the challenges of transforming a socialist economy into a market economy, consumers were in the weakest position, and it is they who should be protected from abuse by entities with a stronger contractual position. The priority for financial regulators

47 Consolidated text of the Journal of Laws of 2018, item 2017.

48 On the conduct of enforcement proceedings by the bank under the b.e.t. after the repeal of the provisions of the former Bank Law see especially: resolution of the Supreme Court of 11.10.2001, ref. III CZP 45/01, LEX no. 49098 and the judgment of the Supreme Court of 03.02.1999 r., ref. III CKN 155/98, LEX no. 36458.

49 See jurisprudence cited in note no. 32 and Edward Kryński, "Bankowy tytuł egzekucyjny w orzecznictwie Trybunału Konstytucyjnego i Sądu Najwyższego" *Prawo Bankowe*, No. 3 (2007): 86-88.

should be to mitigate the position of banks, introduce good contractual practices and standardize new forms of security for claims by banks.

The view of the Constitutional Tribunal is most formalistic and abstracts from balancing values or even seeking their actual content. The very essence of the b.t.e. involved depriving debtors of their right to a court of law, since the issuance of the b.t.e. was not controlled by the court at all, not even by granting an enforcement clause. Debtors' awareness of their rights and ability to protect themselves was arguably illusory, and the costs of anti-enforcement proceedings further hampered an effective defense against enforcement. It is difficult not to get the impression that the entire argumentation of the Court is based on the thesis of the special role of banks in the market economy and the need to guarantee special protection of deposits.[50] In this way, the Tribunal constructs the overriding values of stability of the banking system and protection of deposits. In the realities of the 90s, also in the literature there was a widespread position on the unique role of banks related to their status as institutions of public trust.[51]

In my opinion, granting banks such significant enforcement privileges as b.t.e., grossly violated the right to a court and the principle of equality. The realization of values related to the protection of the banking system, even if there is an important public interest involved, cannot consist in challenging the essence of the right to a court. Therefore, it is not surprising that the growing criticism of solutions dating back to the previous economic system ultimately led to the repeal of the b.t.e. institution, and this despite the Tribunal's recognition of its constitutionality. However, banks' enforcement privileges have not been completely abolished, and due to strong pressure from the banking sector, the b.t.e. has been replaced by the bank enforcement order which opened a new chapter in the history of banks' enforcement privileges.[52] The difference was that in the new state of the law, the bank issued the enforcement order and could only initiate execution after the court granted an enforcement clause.

50 This also seems to be the view of Eugenia Fojcik-Mastalska, „Konstytucyjność artykułów 52 i 53 Prawa bankowego" *Glosa*, No. 3 (1996): 10.

51 See Janiak, *Przywileje bankowe w prawie polskim*, 40 and literature referenced therein.

52 See Sura, *Bankowy tytuł egzekucyjny*, 235.

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