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## BANKS AND BANKING - COUNTERMAND OF BANK DRAFTS

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BANKS AND BANKING — COUNTERMAND OF BANK DRAFTS — Plaintiff purchased of defendant bank its draft on a correspondent bank, made payable to the order of the plaintiff, who indorsed it to a third party in part payment on a contract. Six days later, deciding that the contract was tainted with illegality, plaintiff requested defendant bank to stop payment on the draft. Defendant refused to do so unless the plaintiff posted a bond. A few days later the draft was paid. Plaintiff sought damages for defendant's refusal. *Held*, that although defendant bank could have countermanded the draft if it so chose, it was under no duty to do so, and the decision of the lower court in defendant's favor should be affirmed. *Polotsky v. Artisans Savings Bank*, (Del. 1936) 188 A. 63.

A check drawn by an individual is a bill of exchange upon a bank.<sup>1</sup> Such an instrument is merely an order to the bank,<sup>2</sup> and as such, can be countermanded at any time before acceptance by the drawee bank.<sup>3</sup> A bank draft is a bill of exchange drawn by a bank on its own correspondent bank, usually at the solicitation of the purchaser.<sup>4</sup> It has been held that such a transaction is an executed purchase and sale, and not subject to countermand.<sup>5</sup> But the transaction would logically seem to be executed only as between the drawer and the purchaser, and not as between the drawer and drawee until accepted by the drawee, and therefore capable of countermand by the drawer before that time. It has been said that there is no legal difference between a certified check, a cashier's check, and a bank draft.<sup>6</sup> But where a bank has certified a check at the holder's request, the bank becomes the debtor, and the drawer no longer

<sup>1</sup> N. I. L., § 185; *Thomas v. Berger*, 118 Pa. Super. 422, 180 A. 32 (1935); 5 R. C. L. 479 (1914).

<sup>2</sup> N. I. L., § 189; *Hurley v. Union Trust Co. of Rochester*, 244 App. Div. 590, 280 N. Y. S. 474 (1935).

<sup>3</sup> *Missouri-Pacific R. R. v. North Arkansas Highway Imp. Dist.*, 168 Ark. 141, 269 S. W. 569 (1925); *Tremont Trust Co. v. Burack*, 235 Mass. 398, 126 N. E. 782 (1920); *Kellogg v. Citizens' Bank of Ava*, 176 Mo. App. 288, 162 S. W. 643 (1914).

<sup>4</sup> *Holland v. Mutual Fertilizer Co.*, 8 Ga. App. 714, 70 S. E. 151 (1911); *Kohler v. First Nat. Bank*, 157 Wash. 417, 289 P. 47 (1930).

<sup>5</sup> *Bobrick v. Second Nat. Bank*, 175 App. Div. 550, 162 N. Y. S. 147, affd. mem. 224 N. Y. 637, 121 N. E. 856 (1918); *Kohler v. First Nat. Bank*, 157 Wash. 417, 289 P. 47 (1930).

<sup>6</sup> *Montana-Wyoming Assn. of Creditmen v. Commercial Nat. Bank*, 80 Mont. 174, 259 P. 1060 (1927); *Cochrane v. Florida East Coast R. R.*, 107 Fla. 431, 145 So. 217 (1932); *Polotsky v. Artisans Sav. Bank*, (Del. 1935) 180 A. 791; *People v. Miller*, 278 Ill. 490, 116 N. E. 131 (1917).

has the power to stop payment thereon.<sup>7</sup> A cashier's check is a bill of exchange drawn by the bank upon itself and accepted by the act of issuance; thus the transaction is fully executed, and the obligation becomes similar to that upon a promissory note.<sup>8</sup> But, in the situation at hand, unlike the transactions just seen, the bank has merely drawn a bill of exchange, which has not yet been accepted, and until then, it would logically seem that the drawer bank would have the power to countermand its order. A further reason given for holding that a bank draft is not subject to countermand is that it would unsettle the commercial world.<sup>9</sup> But more business is done with checks drawn by individuals than by banks, and the fact that the former may be countermanded has never been regarded as disturbing the confidence of commercial intercourse.<sup>10</sup> Then the view followed in the instant case would seem to be more logical.<sup>11</sup> Assuming that the bank can stop payments on its drafts before they are accepted, the question still remains whether the purchaser, here the payee, can require the bank to do so. It is difficult to see the desirability of such right. It is rather incongruous to suppose that a payee can countermand a drawer's order, and no case has been found so holding. If the drawee bank dishonors the draft in accordance with the stop payment order, the indorsee of the draft can sue the drawer bank on its secondary liability.<sup>12</sup> Thus, whether the bank could successfully defend or not, it would still be subject to the inconvenience and expense of a suit. Even though the purchaser is roughly in the position of a drawer,<sup>13</sup> and, in the type situation where he wishes to stop payment, he will usually be asserting a defense, yet he has placed himself in his awkward position by his own laxness, and it is doubtful whether the bank should be required to take the risk of being forced to defend a suit at the purchaser's instance, at least without the requirement that the purchaser give a bond. It is, therefore, thought that upon both points involved in the instant case, a correct decision was reached. It should be noted that although the final result was that the draft was not countermanded, the case proceeds upon the theory not that the draft is incapable of countermand, but that the purchaser of the draft cannot require the drawer to countermand if the bank does not wish to take the risk of so doing.

<sup>7</sup> *Sutter v. Security Trust Co.*, 96 N. J. Eq. 644, 126 A. 435 (1924); 5 R. C. L. 528 (1914).

<sup>8</sup> *Drinkall v. Movius State Bank*, 11 N. D. 10, 88 N. W. 724 (1901); *Causey v. Eiland*, 175 Ark. 929, 1 S. W. (2d) 1008 (1928); 5 R. C. L. 529 (1914).

<sup>9</sup> *Kohler v. First Nat. Bank*, 157 Wash. 417, 289 P. 47 at 50 (1930).

<sup>10</sup> See instant case, 188 A. 63 at 66.

<sup>11</sup> *Accord: Western Union Tel. Co. v. Louissell*, 11 Ala. App. 563, 66 So. 839 (1914); where purchaser had given no consideration for the draft—*Wagle v. Farmers' State Bank*, (Mo. App. 1926) 280 S. W. 62. Where the draft was issued on a mistake and still in hands of purchaser—*Missouri Pacific R. R. v. North Arkansas Highway Improvement Dist.*, 168 Ark. 141, 269 S. W. 569 (1925).

<sup>12</sup> *Bobrick v. Second Nat. Bank*, 175 App. Div. 550, 162 N. Y. S. 147, affd. mem. 224 N. Y. 637, 121 N. E. 856 (1918).

<sup>13</sup> See *Commercial Investment Trust Co. v. Lundgren-Wittensten Co.*, 173 Minn. 83, 216 N. W. 531 (1927).