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BANKS AND BANKING-LIABILITY ON PAYMENT OF INCOMPLETE CHECK

BANKS AND BANKING — LIABILITY ON PAYMENT OF INCOMPLETE CHECK — Plaintiff's agent signed a check in blank, and placed it in a safe. A thief broke into the safe, removed the check and other papers, inserted "Cash" as the payee and $486.50 as the amount, and was paid by the drawee bank. In an action against the bank for charging plaintiff's account with this item, the court *held* that as between the parties, because the bank was negligent in paying the check without sufficient identification, it must bear the loss. *Joseph Heimberg, Inc. v. Lincoln Nat. Bank*, (N. J. L. 1934) 172 Atl. 528.

Section 15 [1] of the Negotiable Instruments Law codified the view of Brett, J., in *Baxendale v. Bennett*,[2] that non-delivery of an incomplete instrument is an absolute defense. However, some courts in this country, leaning toward the views of Bramwell, J., in the same case, find an estoppel against the maker or drawer to set up this section if he has been negligent in the custody of the instrument.[3] The relation between the drawer of a check and his bank differs from that existing between such drawer and possible holders of the instrument.[4] As between drawer and bank, reciprocal duties springing from the contract of deposit exist, upon which are based decisions holding the drawer liable for negligently drawn checks which "invite" alteration, and which, as altered, are paid by the drawee bank.[5] For in paying a check the drawee bank does not take as "holder," [6] but rather responds to the drawer's mandate to honor his check without delay to the extent of his balance.[7] Indeed, the House of Lords has intimated that a drawee bank may refuse to honor a check which as between a holder and the drawer is a valid obligation,[8] tending thus to show that the English codifica-

[1] "Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery."

[2] 3 Q. B. D. 525 (1878).

[3] Northern Pac. Ry. Co. v. Spokane Valley Growers' Union, 132 Wash. 607, 232 Pac. 691 (1925); Allen Grocery Co. v. Bank of Buchanan County, 192 Mo. App. 476, 182 S. W. 777 (1916).

[4] See London Joint Stock Bank v. Macmillan & Arthur, [1918] A. C. 777 at 814, per Viscount Haldane.

[5] Critten v. Chemical Nat. Bank, 171 N. Y. 219, 63 N. E. 969 (1902); Timbel v. Garfield Nat. Bank, 121 App. Div. 870, 106 N. Y. S. 497 (1907); London Joint Stock Bank v. Macmillan & Arthur, [1918] A. C. 777. *Contra*, Commercial Bank of Grayson v. Arden & Fraley, 177 Ky. 520, 197 S. W. 951 (1917).

[6] First Nat. Bank v. United States Nat. Bank, 100 Ore. 264 at 288, 197 Pac. 547 at 555 (1921); Macmillan et al. v. London Joint Stock Bank, [1917] 2 K. B. 439 at 456.

[7] London Joint Stock Bank v. Macmillan & Arthur, [1918] A. C. 777 at 814, per Viscount Haldane.

[8] London Joint Stock Bank v. Macmillan & Arthur, [1918] A. C. 777 at 816.

tion of the law merchant was not intended to apply to the drawer-drawee bank relationship. It would not be unreasonable, therefore, to hold that section 15 [9] of the Negotiable Instruments Law does not apply as between the drawer of a check and his bank. In *Trust Co. of America v. Conklin*,[10] it was held that where a check signed in blank was stolen and filled in, the drawee bank on paying might charge the depositor's account. The drawer was held virtually to insure the bank against such occurrences.[11] In view of the bank's duty to pay and of the mechanics of payment, the extent of the duty does not seem unwarranted. It is true that it has been held that where a drawee bank is negligent in paying altered checks negligently drawn, it must bear the loss.[12] But if the depositor virtually insures the bank that he will not sign a check in blank that might be stolen and filled in, it is difficult to see how negligence, not indicative of bad faith, can deprive the bank of that assurance. The line between bad faith and negligence, where these concepts are significant elsewhere in the law of negotiable instruments, may be hard to draw; but where, as in the instant case, the court has concluded that the bank was merely negligent, it is believed that the result loses sight of the relation and function of a drawee bank.

M. W.

[9] Note 1, supra.

[10] 65 Misc. 1, 119 N. Y. S. 367 (1909).

[11] Lehman, J., said (65 Misc. 1 at 4, 119 N. Y. S. 367 at 369): "but he owed a duty to the bank to put his signature upon a blank check only for the purpose of directing it to pay out the money and, however slight the risk, the depositor is the one who assumed it." See also Robb v. Pennsylvania Co., 186 Pa. 456, 40 Atl. 49 (1898) where the depositor used a rubber stamp for a signature.

[12] Gutfreund v. East River Nat. Bank, 251 N. Y. 58, 167 N. E. 171 (1929).