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BANKS AND BANKING — STOP-PAYMENT ORDERS RELEASING BANK FROM LIABILITY FOR "INADVERTENT" PAYMENT — In an action by a depositor against his bank for money paid out on a check in violation of a stop-payment order, the bank interposed the defense that the terms of the order excused it if it should pay through "inadvertence or accident," and that the check was so paid. It was *held* that the bank was not liable. *Hodnick v. Fidelity Trust Co.*, (Ind. App. 1932) 183 N. E. 488.

A depositor has the privilege of unqualifiedly ordering payment stopped on checks, and the bank is absolutely liable if it pays in disobedience of instructions.[1] This countermand is often qualified by the bank and couched in terms of an "agreement" that the depositor will not hold the bank liable for payment of the check through "inadvertence." The contractual tenor of the writing has led some courts into holding that there is no consideration[2] for a release from absolute liability, since the bank is already under a duty to obey an unqualified order. Really consideration is not needed,[3] as nothing of a contractual nature takes place. In the fullest exercise of his privilege the depositor may order the bank not to pay under any circumstances, but since the greater includes the less, he may exercise less than the full privilege and merely order the bank not to pay in a certain way, for example not to pay intentionally. Ordering it not to pay intentionally is, by the principal case, merely another way of telling the bank that it will not be liable for inadvertent payment. If he wishes to give a less extensive order than he is privileged to give, there seems to be no reason why consideration is needed to bind him to that choice. Without any stop-payment order, the check stands and the bank is protected in paying. The instant case is logically insupportable, both in requiring a consideration, and in saying that a consideration is present.[4] The order given, however, should be construed most strongly

[1] 1 MORSE, BANKS AND BANKING, 6th ed., secs. 397, 398 (1928); Hewitt v. First Nat. Bank, 113 Tex. 100, 252 S. W. 161 (1923); American Defense Society v. Sherman Nat. Bank, 225 N. Y. 506, 122 N. E. 695 (1919).

[2] Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 Pac. 947 (1926); Levine v. Bank of United States, 132 Misc. 130, 229 N. Y. S. 108 (1928). *Contra*, Tremont Trust Co. v. Burack, 235 Mass. 398, 126 N. E. 782 (1920).

[3] It is not mentioned in Gaita v. Windsor Bank, 251 N. Y. 152, 167 N. E. 203 (1929); 39 YALE L. J. 542 (1930).

[4] See 29 COL. L. REV. 1150 (1929).

against the bank, since it furnishes the printed form[5] and politely insists that it be used. The order is as a general rule carefully worded to convey the idea that the bank is conferring a courtesy; in fine print it is said to be excused for "inadvertence." This word is chosen rather than "negligence," for the latter carries with it an ugly connotation which might cause the customer to hesitate. As a consequence, ignorant of his rights, the depositor signs with the feeling that the bank is doing him a favor and he is getting more than he is entitled to as a matter of right. Every doubt should be resolved in his favor; hence, "inadvertence" should not be construed to include negligence.[6] A result opposite to that arrived at in the principal case is more just and in accord with sound principles of construction. Theoretically the parties may be dealing on an equal basis, but actually the depositor is at a great disadvantage.[7]

N. F.

[5] Illustrated in an analogous situation in Appleby v. Erie County Savings Bank, 62 N. Y. 12 (1875); Kummel v. Germania Savings Bank, 127 N. Y. 488, 28 N. E. 398 (1891); Elder v. Franklin Nat. Bank, 25 Misc. 716, 55 N. Y. S. 576 (1899).

[6] The court in the principal case cited with approval Gaita v. Windsor Bank which so construed the word "inadvertence."

[7] In Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 Pac. 947 (1926), it was said that there was a contract in this situation, but that it was contrary to public policy on the basis of a code provision. Followed by Grisinger v. Golden State Bank, 92 Cal. App. 443, 268 Pac. 425 (1928). See 15 CAL. L. REV. 46 (1926); 14 MINN. L. REV. 172 (1929).