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Banks and Banking - Duties of a Dpositor to His Bank - Statutes Limiting Time Within Such Suits May Be Instituted to Enforce Drawee's Liability on Forged or Altered Checks

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for negligence to bar recovery in one case and merely to reduce damages in the other would be inconsistent. It is necessary to have a harmonious application of the admiralty doctrines of assumption of risk and comparative negligence.

As a practical solution, the Court suggested that "any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it."[17] Assumption of risk may well serve to mitigate damages but must not be used to completely bar recovery. Consequently, the Court applied the rule of comparative negligence and the decision seems to be correct.

J. D. M.

BANKS AND BANKING—DUTIES OF A DEPOSITOR TO HIS BANK—STATUTES LIMITING TIME WITHIN WHICH SUITS MAY BE INSTITUTED TO ENFORCE DRAWEE'S LIABILITY ON FORGED OR ALTERED CHECKS—An employee of the plaintiff, who had full charge of his employer's check book, forged the latter's signature as drawer and forged the indorsements of certain of plaintiff's employees as payees to a number of checks in a skillfully executed series of forgeries extending over a period of three years. Although the plaintiff had not given notice of the forgeries in accordance with the terms of Act 163 of 1934,[1] he brought suit against the drawee bank to recover the amount of the forged checks, which had been paid by the drawee and charged to his account. The trial court held Act 163 of 1934 to be unconstitutional on the ground that the object of its provisions was not sufficiently indicated by its title, but maintained the plea of prescription as to all checks returned more than one year prior to the institution of the suit. On appeal it was *held* that (1) the statute is constitutional, (2) it is applicable to those checks on which both the payee's indorsement and the drawer's signature were forged, and (3) the plaintiff's suit was barred by failure to comply with the

17. Socony-Vacuum Co. v. Smith, 305 U.S. 424, 431, 59 S.Ct. 262, 83 L.Ed. 261 (1939).

1. La. Act 163 of 1934, § 1 [Dart's Stats. (Supp. 1938) § 675.1] limits the time within which the depositor must notify the bank of forged or raised checks and checks payable to fictitious persons, to one year after the return of the paid vouchers or notice that they are ready for delivery, if the bank is to be held liable to the depositor for payment thereof.

terms of the statute. *Barret v. First Nat. Bank of Shreveport,* 191 La. 945, 186 So. 741 (1939).

In receiving ordinary deposits, a bank impliedly undertakes to honor checks only in accordance with the genuine order of the depositor.[2] A drawee bank, although free from negligence in paying an altered check or a forged check purporting to have been signed by a depositor, is not entitled to debit *pro tanto* the depositor's account; it must be considered as making payment out of its own funds, provided that the depositor has not led the bank reasonably to believe that the check is genuine and that he has otherwise acted prudently.[3]

Formerly, great uncertainty existed as to whether any obligation whatever fell upon the depositor to examine the canceled checks returned to him in order to determine if any of them were forged or raised.[4] A number of early cases held that there was no such duty of examination resting upon the depositor,[5] but since he could easily discover a forgery of his signature the reasonableness of a rule imposing some duty upon him soon became apparent.[6] By the later decisions and the great weight of authority,[7] the rendering by a bank to a depositor of a periodi-

2. Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31, 124 Pac. 704, 41 L.R.A. (N.S.) 529 (1912); Frankini v. Bank of America Nat. Trust & Sav. Ass'n, 12 Cal. App. (2d) 298, 55 P. (2d) 232 (1936).

"The duty of a bank in respect of paying out a depositor's money is to pay it out only by his authorization. The bank owes the depositor the amount of his deposit less his authorized payments. . . . Because of their contractual relation the bank is in the first instance absolutely bound to restore to the depositor all amounts paid on forged checks although it was free from negligence in not detecting the forgeries." Wussow v. Badger State Bank, 204 Wis. 467, 469, 234 N.W. 720, 721 (1931).

3. Laborde v. Consolidated Ass'n of Planters, 4 Rob. 190, 39 Am. Dec. 517 (La. 1843); Etting v. Commercial Bank, 7 Rob. 459 (La. 1844); Board of Education v. National Union Bank, 121 N.J. Law 177, 1 A. (2d) 383 (1938); Schenke v. Central Trust Co., 58 Ohio App. 441, 16 N.E. (2d) 700 (1938).

4. See Atwell v. Mercantile Trust Co., 95 Cal. App. 338, 340, 272 Pac. 799, 800 (1928).

5. (1) Weisser v. Denison, 10 N.Y. 68, 61 Am. Dec. 731 (1854), which has been disapproved by later New York decisions: Stumpp v. Bank of New York, 212 App. Div. 608, 209 N.Y. Supp. 396 (1925); Takenaka v. Bankers' Trust Co., 132 Misc. 322, 229 N.Y. Supp. 459 (1928), affirmed 225 App. Div. 860, 233 N.Y. Supp. 905 (1929), appeal dismissed 251 N.Y. 521, 168 N.E. 412 (1929). (2) Manufacturers' Nat. Bank v. Barnes, 65 Ill. 69, 16 Am. Rep. 576 (1872), which has been followed: Merchants' Nat. Bank v. Nichols & Shepard Co., 223 Ill. 41, 79 N.E. 38, 7 L.R.A. (N.S.) 752 (1906); Rettig v. Southern Illinois Nat. Bank, 147 Ill. App. 193 (1909).

6. See Atwell v. Mercantile Trust Co. of California, 95 Cal. App. 338, 340, 272 Pac. 799, 800 (1928).

7. Cosmopolitan State Bank v. Lake Shore Trust & Sav. Bank, 343 Ill. 347, 175 N.E. 583 (1931); Detroit Piston Ring Co. v. Wayne County & H. Sav. Bank, 252 Mich. 163, 233 N.W. 185, 75 A.L.R. 1273 (1930); Deer Island

cal account (whether in a balanced passbook or in a statement accompanied by the canceled checks) imposes upon the depositor the obligation of examining the account with reasonable care and promptness and of reporting any irregularities within a reasonable time.[8] The depositor's failure to notify his bank after he knows, or should know, that it has paid a forged check and charged it to his account, will under ordinary circumstances result in unfavorable consequences. The theoretical basis and the extent[9] of these consequences are matters about which there is a variety of judicial opinion. Some courts have based their decisions upon the well-known doctrines of ratification,[10] adoption,[11] or estoppel[12]—consequently reaching the result that the bank could quite properly charge the entire amount of the false checks to the account of the depositor.[13] The better considered authorities hold the negligent depositor responsible only to the extent of the damage which is the proximate consequence of his negligence.[14] Regardless of the theory upon which a depositor's respon-

Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 146 So. 116 (1933); Bank of Occoquan v. Bushey, 156 Va. 25, 157 S.E. 764 (1931); Wussow v. Badger State Bank, 204 Wis. 467, 234 N.W. 720 (1931).

8. In Ohio, the conclusion has been reached that it is the duty of a depositor to examine his returned vouchers for the discovery of alterations, but that no duty is imposed on him to examine them to determine whether his own signature has been forged. Notes (1921) 15 A.L.R. 159, 161, citing Cincinnati Nat. Bank v. Creasy, 100 Ohio Dec. Reprint 121, 18 Ohio L.J. 410 (1887).

The duty of the depositor to examine returned vouchers and report errors is a duty to the bank and cannot be invoked in favor of others. Sprague v. West Hudson County Trust Co., 92 N.J. Eq. 639, 114 Atl. 344, 17 A.L.R. 952 (1921).

9. Arant, Forged Checks—The Duty of the Depositor to his Bank (1922) 31 Yale L.J. 598.

10. See Hardy & Bros. v. Chesapeake Bank, 51 Md. 562, 569 (1879). Notice the language of De Feriet v. Bank of America, 23 La. Ann. 310, 311 (1871): "Under these circumstances, it is clear that the plaintiff cannot be heard to disavow the check. . . . So far as was in his power, he condoned this offense of his book-keeper, and made the transaction his own."

11. See Hardy & Bros. v. Chesapeake Bank, 51 Md. 562, 569 (1879). Cf. Dana v. National Bank of the Republic, 132 Mass. 156, 159 (1882).

12. Notes (1921) 15 A.L.R. 159, 169, and authorities there cited.

13. For a discussion of the various theories advanced for holding a depositor liable to his bank when he had neglected to properly examine returned vouchers, see Arant, supra note 9.

14. Critten v. Chemical Nat. Bank, 171 N.Y. 219, 63 N.E. 969 (1902), approved in Note (1902) 2 Col. L. Rev. 490.

Notice the language of First Nat. Bank v. Allen, 100 Ala. 476, 480, 14 So. 335, 337 (1893): "The extent of the liability of the depositor is commensurate with the loss sustained in consequence of his neglect of duty; no more, no less. It would be unjust, unfair to the depositor, not sanctioned by any correct principle of law, to permit the bank to invoke the doctrine of ratification or estoppel which would exempt the bank from all liability incurred by its own neglect in the payment of the forged check, and in many cases inflict upon the depositor a greater loss than that caused to the bank by his neglect of duty."

sibility is said to be based, the courts are substantially agreed that the bank would have a good defense as to other false checks the negotiation of which proximately resulted from the depositor's failure to give prompt notice of prior forgeries or alterations.[15]

A depositor is not presumed to know the signature of a payee or other indorser and is therefore under no duty to examine their indorsements.[16] This rule is applicable even where an agent in the employ of the depositor has forged the payee's indorsement.[17] Under certain exceptional circumstances, however, it may become the duty of the depositor to examine returned statements and canceled checks to determine the genuineness of indorsements.[18] *A fortiori,* if the depositor actually discovers the forged indorsements, failure to notify the bank within a reasonable time will render him responsible for any loss which might have been averted by a prompt notification.[19] A bank which is itself guilty of negligence in failing to discover an alteration or forgery cannot avoid responsibility on the ground of the depositor's negligence.[20]

If a depositor examines returned checks with due diligence but the forgery or alteration is so skillful that he does not discover it, his failure will not shift to him the loss which had fallen upon the bank in the first instance.[21] In the absence of statute,

15. Sommer v. Bank of Italy Nat. Trust & Savings Ass'n, 190 Cal. App. 370, 293 Pac. 98 (1930). See also Glassel Development Co. v. Citizens' Nat. Bank, 191 Cal. 375, 216 Pac. 1012 (1923); Deer Island Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 146 So. 116 (1933).

16. Cosmopolitan State Bank v. Lake Shore Trust & Sav. Bank, 343 Ill. 347, 175 N.E. 583 (1931); New Amsterdam Casualty Co. v. Albia State Bank, 214 Iowa 541, 239 N.W. 4 (1931); American Sash & Door Co. v. Commerce Trust Co., 332 Mo. 98, 56 S.W. (2d) 1034 (1932); National Surety Co. v. Manhattan Co., 252 N.Y. 247, 169 N.E. 372 (1929); Guardian Sav. & L. Ass'n v. Liberty State Bank, 60 S.W. (2d) 823 (Tex. Civ. App. 1933).

17. Detroit Piston Ring Co. v. Wayne County & H. Sav. Bank, 252 Mich. 163, 233 N.W. 185, 75 A.L.R. 1273 (1930).

18. C. E. Erickson Co. v. Iowa Nat. Bank, 211 Iowa 495, 230 N.W. 342 (1930), where the plaintiff's treasurer failed to compare checks submitted to him by the payroll clerk with the work cards and clock cards as required by plaintiff's checking system; McLaughlin v. National City Bank, 228 App. Div. 337, 239 N.Y. Supp. 598 (1930), where the stubs in the checkbook showed payments to certain creditors were greatly in excess of the amount shown in the bills payable book to be due, and checks were in some instances duplications of previous checks to the same payee.

19. National Surety Co. v. Manhattan Co., 252 N.Y. 247, 169 N.E. 372, 67 A.L.R. 1113 (1929).

20. Leather Mfrs.' Nat. Bank v. Morgan, 117 U.S. 96, 6 S.Ct. 657, 29 L.Ed. 811 (1886); Union Tool Co. v. Farmers' & Merchants' Nat. Bank, 192 Cal. 40, 218 Pac. 424, 28 A.L.R. 1417 (1923); Wussow v. Badger State Bank, 204 Wis. 467, 234 N.W. 720 (1931).

21. Deer Island Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 146 So. 116 (1933).

the question of the depositor's diligence is one of fact rather than of law.[22] What is a reasonably prompt notice of a forgery or an alteration depends upon the circumstances of the case,[23] among which may be enumerated: the nature of the transaction, the relation of the parties, their distance from each other and the means of communication between them, and the usual course of business.[24]

The examination of the bank statement and canceled checks may be made by the depositor himself or may be entrusted to an employee whom he believes to be honest and competent,[25] even though the examination by the latter fails to disclose irregularities which would have been apparent to the depositor.[26] However, such agent must use ordinary diligence, and if he himself commits forgeries which mislead the bank, the depositor is not protected, in the absence of at least reasonable diligence in supervising the agent's conduct.[27]

In accordance with the recommendation of the American Bankers Association,[28] many jurisdictions have passed statutes expressly limiting the time within which the depositor must notify the bank of forged or altered checks.[29] The time limits thus imposed range from thirty days to two years after the return to the depositor of the paid vouchers or notice that they are ready for delivery.[30] Since these statutes do not in any way affect the duties of the depositor existing before their passage, a depositor who fails to give prompt notice of discovered irregularities[31] is not protected merely because the limitation period has not run.

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22. Frankini v. Bank of America Nat. Trust & Sav. Ass'n, 12 Cal. App. (2d) 298, 55 P. (2d) 232 (1936).

23. United States v. National Bank of the Republic, 2 Mackey 289 (D.C. 1883).

24. 7 Am. Jur. (1937) 369, §514.

25. Leather Mfrs.' Nat. Bank v. Morgan, 117 U.S. 96, 6 S.Ct. 657, 29 L.Ed. 811 (1886); Kenneth Invest. Co. v. National Bank, 103 Mo. App. 613, 77 S.W. 1002 (1903); Clark v. National Shoe & Leather Bank, 32 App. Div. 316, 52 N.Y. Supp. 1064 (1898).

26. Shipman v. Bank of State, 126 N.Y. 318, 27 N.E. 371, 22 Am. St. Rep. 821, 12 L.R.A. 791 (1891).

27. Whitney Trust & Sav. Bank v. Jurgens-Fowler Co., 180 La. 445, 156 So. 460 (1934); Frederick A. Potts & Co. v. Lafayette Nat. Bank, 269 N.Y. 181, 199 N.E. 50 (1935). Cf. Deer Island Fish & Oyster Co. v. First Nat. Bank, 166 Miss. 162, 146 So. 116 (1933).

28. 1 Paton, Digest (1926) 342, § 2013.

29. 5 Michie, Banks and Banking (1932) 543, §283; Arant, supra note 9, at 616, n. 42.

30. 1 Paton, Digest (1926) 342, §2013. Such statutes, of course, are prospective and not retroactive. Pratt v. Union Nat. Bank, 79 N.J. Law 117, 75 Atl. 313 (1909).

31. Ward v. First Nat. Bank, 224 Mo. App. 472, 27 S.W. (2d) 1066 (1930).

In conformity with the rule of statutory construction that an express exception is not to be extended beyond the fair import of its terms,[32] such statutory enactments, being in derogation of the general commercial law,[33] are strictly constructed.[34] These enactments have been held to relate exclusively to the liability of the drawee bank and not to afford a defense to a collecting bank sued by the drawee.[35] They are not applicable to actions by a depositor against a drawee who has paid a genuine check under a forged indorsement;[36] but, under the strict terms of the statute, they apply only to actions involving forgeries peculiarly within the knowledge of the depositor (i. e., forgeries of his own signature) and alterations upon the face of the instrument.[37]

Some statutory enactments requiring notice of forged or altered checks within a certain period, such as those of New York, Iowa, and apparently Louisiana,[38] deal with substantive rights and terminate liability unless notice is given within the period required.[39] Others, such as the California statute, do not deal with substantive rights but merely affect the remedy by limiting the time within which actions may be commenced.[40] Where the statute is considered a statute of limitations, it begins to run from the

32. Merchants' Nat. Bank v. Continental Nat. Bank, 98 Cal. App. 523, 277 Pac. 354 (1929).

33. A statute limiting the liability of the drawee bank has been held to control the general rule of the California law that there is no limitation statute for actions to recover money deposited in a bank. Union Tool Co. v. Farmers' & Merchants' Nat. Bank, 192 Cal. 40, 218 Pac. 424, 28 A.L.R. 1417 (1923).

34. Kleinman v. Chase Nat. Bank, 124 Misc. Rep. 173, 207 N.Y. Supp. 191 (1924).

La. Act 163 of 1934 apparently applies also to savings banks and trust companies. See La. Act 45 of 1902, § 7, as amended by Act 238 of 1910, § 1, and Act 146 of 1926, § 1 [Dart's Stats. (1932) § 588].

35. American Exch. Nat. Bank v. Yorkville Bank, 122 Misc. Rep. 616, 204 N. Y. Supp. 621 (1924).

36. Merchants' Nat. Bank v. Continental Nat. Bank, 98 Cal. App. 523, 277 Pac. 354 (1929); McCornack v. Central State Bank, 203 Iowa 833, 211 N.W. 542, 52 A.L.R. 1297 (1926); First Nat. Bank v. United States Nat. Bank, 100 Ore. 264, 197 Pac. 547, 14 A.L.R. 479 (1921).

37. Detroit Piston Ring Co. v. Wayne County & H. Sav. Bank, 252 Mich. 163, 233 N.W. 185, 75 A.L.R. 1273 (1930).

38. "It is to be observed that the statute is not strictly a statute of prescription. It is more in the nature of a statute of peremption. It does not declare that all causes of actions upon forged checks shall be prescribed after one year, but it declares that all such actions shall be brought within one year. Under the statute, the depositor has a right of action for one year to enforce liability of a bank on a forged check. After the lapse of that period, his right of action is gone." Barret v. First Nat. Bank, 191 La. 945, 956-957, 186 So. 741, 745 (1939).

39. See Atwell v. Mercantile Trust Co., 95 Cal. App. 338, 340, 272 Pac. 799, 800 (1928).

40. Atwell v. Mercantile Trust Co., 95 Cal. App. 338, 272 Pac. 799 (1928).

time the false checks are delivered to the depositor or notice is given him that they are ready for delivery,[41] rather than from the time the forgery is discovered or the time when the depositor demands payment.[42]

The modern tendency of Louisiana courts is to maintain that the object of a statute is sufficiently indicated by its title when such title directs attention to the general subject so that all persons in interest are placed upon notice to make inquiry into the statute itself.[43] In keeping with this tendency, the court in the instant case properly held Act 163 of 1934[44] to be constitutional. The court was also correct in holding that checks, on which both the payee's indorsement and the drawer's signature were forged, are within the intendment of Act 163 of 1934. Such statutes are logically applicable to those instruments which are void at their inception regardless of whether the indorsement of the payee is subsequently forged or not.[45] The result is in complete accord with sound commercial policy.

F. H. O'N.

CONSTITUTIONAL LAW—DENIAL OF THE EQUAL PROTECTION OF THE LAWS—EXCLUSION OF NEGROES FROM JURIES—Defendant, a negro, based a motion to quash an indictment for murder on an alleged denial of the equal protection of the laws by a systematic exclusion of negroes from the jury venire box because of their race or color. The trial judge ordered a new petit jury panel; but he refused to quash the indictment on the ground that the constitutional rights of the defendant were not affected since the mere presentment of an indictment is not evidence of guilt. On appeal,

41. Intimidation by a drunkard husband may incline the courts to be lenient toward a wife for her delay in notification and to allow her to recover against the drawee bank even though the period of limitations has run. Samples v. Milton County Bank, 34 Ga. App. 248, 129 S.E. 170 (1925). However, where the wife failed to give notice of forgeries for more than 60 days after her husband abandoned her and for more than three years after the forgeries occurred, a Georgia court very properly held that such laches rendered the defense of duress unavailable. Ponsell v. Citizens' & Southern Bank, 35 Ga. App. 460, 133 S.E. 351 (1926).

42. California Vegetable Union v. Crocker Nat. Bank, 37 Cal. App. 743, 174 Pac. 920 (1918).

43. State v. Thrift Oil & Gas Co., 162 La. 165, 110 So. 188 (1926); State v. Terrell, 181 La. 974, 160 So. 781 (1935).

44. Dart's Stats. (Supp. 1938) § 675.1.

45. See Uniform Negotiable Instruments Law, § 124, La. Act 64 of 1904, § 124 [Dart's Stats. (1932) § 914].