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Negotiable Instruments: Drawer's Negligence as Estoppel to Assert Nondelivery Against Drawee Bank

William B. Mesmer

NEGOTIABLE INSTRUMENTS: DRAWER'S NEGLIGENCE AS ESTOPPEL TO ASSERT NONDELIVERY AGAINST DRAWEE BANK

Concordia Lutheran Evangelical Church v. United States Cas. Co., 115 A.2d 307 (D.C. 1955)

The treasurer of plaintiff church signed twelve blank checks and left them in a desk drawer in the pastor's study. Neither the desk nor the study was locked. A thief stole two of the checks, filled in his name as payee of one of them, and cashed it at the drawee bank. Plaintiff sued the bank for negligence in not demanding sufficient identification of the payee. The trial court directed a verdict for defendant. On appeal, HELD, a drawer who negligently allows an incomplete check to fall into the hands of a thief is estopped to assert nondelivery as an infirmity of the check when the drawee bank charges his account for its value. Judgment affirmed.

Section 15 of the Negotiable Instruments Law provides:[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."

Courts have arrived at three divergent views of the applicability of Section 15 to cases in which a negligent drawer neither completes nor delivers a check that later is cashed by the drawee.

The first view, on the pretext of strict compliance with the section, holds the bank liable for cashing the check.[2] A holding under this theory necessitates classifying the drawee bank as a holder; this is a misnomer, because a drawee bank takes a check at the time of payment, while a holder takes prior to presentment for payment.[3] Many courts reject this view on the rationale that a drawee bank occupies a position superior to that of a holder in due course,[4] since it may be

[1] FLA. STAT. §674.17 (1955).

[2] *E.g.*, Joseph Heimberg, Inc. v. Lincoln Nat'l Bank, 113 N.J.L. 76, 80, 172 Atl. 528, 530 (Sup. Ct. 1934) (dictum); Weiner v. Pennsylvania Co., 160 Pa. Super. 320, 324, 51 A.2d 385, 388 (1947) (dictum).

[3] Weiner v. Pennsylvania Co., 160 Pa. Super. 320, 51 A.2d 385 (1947).

[4] *E.g.*, S. S. Allen Grocery Co. v. Bank of Buchanan County, 192 Mo. App. 476, 182 S.W. 777 (1916); Linick v. Nutting and Co., 140 App. Div. 265, 125 N.Y. Supp. 93 (2d Dep't 1910); Trust Co. of America v. Conklin, 65 Misc. 1, 119 N.Y. Supp. 367

liable for breach of a contractual obligation to pay on drawer's order if he has a sufficient balance.[5]

The second view, called balancing the negligence,[6] places the loss on the party whose negligence caused it.[7] Drawer negligence is based on lack of care in retaining the incomplete instrument.[8] In the only decision applying the theory to the benefit of the drawer, the court held the drawer not negligent, since he had placed the signed check in his safe, but found the drawee negligent for failure to require proper identification of the payee.[9] This theory has been criticized on the ground that the jury, instead of the court, determines whether to apply estoppel, and in so doing it may consider the financial as well as the legal responsibility involved.[10]

Most courts follow the third view, which is represented by a recent Pennsylvania decision[11] in which the maxim was applied that "as between two innocent parties, the bank and the depositor, liability should be borne by the one, i.e., the depositor, who made the loss possible." This is estoppel in pais. Jurisdictions adhering to this view uniformly hold that the mere act of signing a blank check is sufficient to estop the drawer from asserting the infirmity of nondelivery.[12] In these jurisdictions, as in those that balance the negligence, the drawee must be free from negligence in identifying the person presenting the check.[13] It is of interest to note that estoppel has been applied even in cases involving an overdraft.[14] In such cases the

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(Sup. Ct. 1909).

[5]S. S. Allen Grocery Co. v. Bank of Buchanan County, *supra* note 4; Weiner v. Pennsylvania Co., *supra* note 3.

[6]Weiner v. Pennsylvania Co., 160 Pa. Super. 320, 51 A.2d 385 (1947).

[7]Edelen v. Oakland Bank of Savings, 39 Cal. App. 302, 178 Pac. 737 (1918); Joseph Heimberg, Inc. v. Lincoln Nat'l Bank, 113 N.J.L. 76, 172 Atl. 528 (Sup. Ct. 1934).

[8]*Ibid.*

[9]Joseph Heimberg, Inc. v. Linoln Nat'l Bank, 113 N.J.L. 76, 172 Atl. 528 (Sup. Ct. 1934).

[10]Weiner v. Pennsylvania Co., 160 Pa. Super. 320, 51 A.2d 385 (1947).

[11]*Id.* at 325, 51 A.2d at 388.

[12]*E.g.*, World Tire Corp. v. Mutual Bank and Trust Co., 174 S.W.2d 230 (Mo. 1943); S. S. Allen Grocery Co. v. Bank of Buchanan County, 192 Mo. App. 476, 182 S.W. 777 (1916); Trust Co. of America v. Conklin, 65 Misc. 1, 119 N.Y. Supp. 367 (Sup. Ct. 1909); Hays v. Lowndes Sav. Bank & Trust Co., 118 W. Va. 360, 190 S.E. 543 (1937).

[13]Snodgrass v. Sweetser, 15 Ind. App. 682, 44 N.E. 648 (1896); Weiner v. Pennsylvania Co., *supra* note 10.

[14]Snodgrass v. Sweetser, *supra* note 13; Trust Co. of America v. Conklin, *supra*