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Bank's Obligation to Perform Stop Payment Order Received Prior to Charging Depositor's Account - Keller v. Fredericktown Savings Institution

BANK'S OBLIGATION TO PERFORM STOP PAYMENT ORDER RECEIVED PRIOR TO CHARGING DEPOSITOR'S ACCOUNT

Keller v. Fredericktown Savings Institution[1]

Action was brought by plaintiff-appellant against the Fredericktown Savings Institution, appellee, a bank located at Frederick, Maryland, which paid appellant's check after payment thereon had been stopped. On September 20, 1947, appellant drew an uncertified check on said bank payable to the order of the Allied Realty Corp.; on receipt the payee deposited it in the Bank of Bethesda, Bethesda, Maryland. This check was received by appellee's treasurer

[1] 66 A. 2d 924 Md. (1949).

by mail from the Bank of Bethesda on the morning of September 23, 1947. The following instructions were enclosed: "Check by Miriam Strouse Keller payable Allied Realty Corp. Upon receipt, please wire if paid or if not paid—collect." The treasurer called the President of the Bethesda bank by telephone and told him the check was good and he was "remitting for it". The treasurer then drew a draft on the Riggs National Bank of Washington for the amount of the check less service charges, prepared it for mailing, and placed it in the mail basket for delivery to the Post Office. He then recorded the draft and made out a credit slip to the Riggs National Bank for the amount involved. The check was placed in a tray along with other such items to await processing through the proof machine before going on to the bookkeeping department where they would be actually "cancelled" and charged to depositors' accounts. Around noon that same day appellant called at the bank and signed a form to stop payment on this check. This was provided by one of appellee's officials, who knew at the time that the check in question was in the bank. Appellant's account had not been charged on the ledger of the bank at the time the order to stop payment was given. The check was thereafter paid. On suit by appellant, the lower Court ruled the bank was not liable. The Court of Appeals, however, reversed the action of the lower Court and entered judgment for the appellant for the amount of the check and interest. The sole question presented was whether or not, under the circumstances, the bank had a right to pay the check to the Bethesda Bank and charge the same to the appellant's account.

It is well settled that a check in itself does not operate as an assignment of any part of the money deposited with the drawee.[2] The relationship between the bank and its depositors is that of debtor and creditor and a check drawn by the depositor is an exercise by him of his contractual right to draw upon the fund loaned by him to the bank. The check is an order by the depositor to the bank to pay the designated sum to order or to bearer. It may be countermanded if the stop payment order is presented to the bank prior to its discharge of the check by actual payment or to its performance of acts constituting an acceptance or certification of the check and legally binding it to remit.[3]

In this case there was clearly no acceptance of the check since the Maryland Code requires that such an

[2] Md. Code (1939) Art. 13, Sec. 208.
[3] 9 C. J. S. Banks and Banking, Sec. 344, 602.

acceptance must be in writing.[4] Although there might have been an acceptance, had the Fredericktown Savings Institution replied by telegram as requested by the Bank of Bethesda,[5] a telephone conversation that a check will be accepted for payment does not constitute an acceptance on which the payor bank could be subjected to suit by the collecting bank.[6] Therefore, since the Fredericktown Savings Institution was not legally bound by the telephone conversation of its treasurer, this act without more could not serve as a basis for a denial of the depositor's right to countermand by a stop payment order.

With the acceptance question disposed of, the court turned to the question of whether or not the bank had performed acts constituting payment prior to the receipt of the stop order. Although the check was in the bank at the time and a draft had been drawn for the remittance, the depositor had not yet been charged with the amount of the check on the books of the bank. The question thus resolved itself to a question of fact as to the exact point of time in the bank's handling of a check when it could be said that discharge by payment had taken place. The Court took the position that the acts done by the Fredericktown Savings Institution in this case were merely acts of preparation, indicating an unexecuted intention to pay but not in themselves constituting a completed payment.[7] And, further, that until the transaction was actually entered upon the ledger, charging the depositor's account with the amount of the check, there was no discharge by payment and nothing to preclude an effective stop payment

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[4] Md. Code (1939) Art. 13, Secs. 151 and 204. Under the provisions of the May 1949 draft of the proposed Uniform Commercial Code, Sec. 3-409, 347, all acceptances would be required to be written on the draft and "collateral" acceptances even though in writing would be eliminated.

[5] See Snyder & Blankfard Co., Inc. v. Farmers' Bank of Tifton, 178 Md. 601, 16 A. 2d 837 (1940) indicating that the requirement that an acceptance be in writing is satisfied by a telegram.

[6] Gruber v. Bank of America, 127 Misc. 132, 215 N. Y. S. 222 (1926). See also Ballen & Friedman v. Bank of Kremlin, 37 Okl. 112, 130 P. 539, 44 L. R. A., N. S., 621 (1913) negating the possibility of a contention that the payor bank, having informed the payee bank that the check was good, is estopped to deny liability, on the ground that the Negotiable Instruments Law was intended to fix and settle the rights of the parties so far as they are affected by its operation, and therefore, the ordinary principles of law do not apply.

[7] See Hewit v. Security State Bank, 91 Ore. 362, 179 P. 248, 251 (1919) from which the Court of Appeals quoted on this point and which recognized that the act of the bank in mailing a draft covering the amount of the check to the collecting bank could not be considered as payment in the absence of any entry of the transaction on the books of the bank. See also BEUTEL'S, BRANNAN NEGOTIABLE INSTRUMENTS LAW (7th ed.) 1233 for comment on this case.

order by the depositor. The Court, therefore, held that at the time appellant gave the order to stop payment the bank had neither certified or otherwise accepted the instrument nor paid the check, and thus had no right thereafter to pay the check and charge the same to appellant's account.[8] Although it was not mentioned in the brief of either party or by the Court in its decision, this holding would seem to be impelled by the Bank Collection Code which has been statute law of Maryland since 1929 and which provides in part: "Where the item is received by mail, by a solvent drawee or payor bank, it shall be deemed paid when the amount is finally charged to the account of the maker or drawer."[9]

It is often argued, as it was by the appellee bank in this case, that when the check is received by mail, preliminary acts such as the preparation of a draft, the drawing of a credit memo, the placing of the check on file to be debited and other such office procedures should constitute payment of the check rather than the final entries of the bookkeepers. Although it is true that the designation of the bookkeeping entry as the critical point of time in the discharge of the instrument is an arbitrary one, it seems that the judicial and statutory selection of the later rather than the earlier point of time is more to be desired as a matter of policy. The right of the depositor to stop payment is a valuable one and a service which the depositor is entitled to receive. It should not be sacrificed, even in part, by a rule which would arbitrarily preclude its exercise at a time when it would still be possible for the bank, by exercise of reasonable diligence, to protect the depositor from injury, without subjecting itself to liability.

The May 1949 draft of the proposed Uniform Commercial Code clearly recognizes the importance of the stop payment right and comments that "The inevitable occasional losses through failure to stop should be borne by the banks as a cost of the business of banking, and to the extent that they cannot be covered by a charge made for the service should be covered by banker's insurance, the cost of which is included in the charges made to all

[8] In reaching this decision the court relied upon Exchange Bank v. Sutton Bank, 78 Md. 577, 28 A. 563, 564, 23 L. R. A. 173 (1894); First National Bank v. First National Bank, 127 Tenn. 205, 154 S. W. 965 (1913); Sokoloff v. National City Bank, 250 N. Y. 69, 164 N. E. 745 (1928); Hunt v. Security State Bank, *supra*, n. 6; Guardian National Bank v. Huntington County State Bank, 206 Ind. 185, 187 N. E. 388, 92 A. L. R. 1056 (1933); Davidson v. Allen, 47 Idaho 405, 276 P. 43, 68 A. L. R. 856 (1929); 9 C. J. S., Banks & Banking, Sec. 344, 692.

[9] Md. Code (1939) Art. 11, Sec. 114.

depositors."[10] And yet, the proposed new sections would completely nullify the law as laid down in this and other cases by providing that in the case of an instrument received by mail the stop payment order must have been presented prior to the receipt of the instrument[11] and that, "an instrument properly payable when received takes priority for payment over all subsequently received stop orders."[12]

Were these two sections to be adopted and applied to situations such as the one here presented, they would allow the bank to deny to a depositor the right to protect his deposit by a stop payment order merely because the check had already been received, even though it would still be quite possible for the bank, by the exercise of reasonable diligence, to stop the payment without incurring any liability upon itself.

Such a change in the law does not seem justified in the light of its effect in shifting from the bank to the depositor the burden of a loss resulting from the bank's failure to stop payment when the direction was received after the receipt of the check but before acceptance or payment. Policy-wise it would seem to be more desirable that the rule as laid down in *Keller v. Fredericktown Savings Institution*[13] and by the Bank Collection Code as it presently exists[14] remain the controlling law in such cases.

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[10] AMERICAN LAW INSTITUTE, UNIFORM COMMERCIAL CODE, May 1949 draft, Sec. 3-415, Comment 2, 359.

[11] *Ibid.*, Sec. 3-415, "Stopping Payment . . . (2) The direction must be received at such time and in such manner as to afford a reasonable opportunity to act on it, and *in the case of an instrument presented by mail or through a clearing house before receipt of the instrument*". (Italics supplied.) Observe that an adoption of this proposal would involve a change of the existing provision of the Bank Collection Code, *op. cit. supra*, n. 9. It is interesting to note that the italicized portion of this section did not appear in proposed drafts prior to May 1949.

[12] *Ibid.*, Sec. 3-629, "Obligation of Payor Bank, (1) . . . an item properly payable when received takes priority for payment over all subsequently received stop orders, notices or legal process . . ." The comment on this provision, expresses its purpose as being, "To narrow the risk of loss to the owner of an item by: (1) giving his item priority over garnishments or other notices against the drawer's account served after arrival of his item . . ." Although this is a commendable purpose it does not seem entirely necessary in the case of stop payment orders by the drawer of a check. Where the drawer disputes the right of the payee to the proceeds of the check, his power to relegate the payee to a suit at law in which the rights of the parties can be decided need not be terminated by the mere act of presentment in the absence of actual payment.

[13] *Supra*, n. 1.

[14] *Op. cit., supra*, n. 9.