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Negotiable Instruments—Mere Failure to Return a Check Within Twenty-four Hours as Constituting Acceptance.—Fidelity & Deposit Co. of Md. v. Idaho Bank & Trust Co.

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plete care on the part of another, when that other could have prevented the loss if the drawee had not accepted the instrument.[9] The transaction, under the facts in this case, should end with the acceptance of the check by the drawee; to hold otherwise would leave the way open for the establishment of contingent liabilities on the part of those who deal with checks prior to the acceptance of the drawee, and without knowledge of the forgery. Those situations where money has been paid out before the check is accepted present a new question and it is possible that a balancing of the loss on a theory of comparative negligence might be more equitable in such a case. In the case at hand, however, the drawee should be estopped by its own action in accepting the check, from asserting that it may reclaim the money from the defendant even though the latter may not have taken every possible precaution.

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Negotiable Instruments—Mere Failure to Return a Check Within Twenty-four Hours as Constituting Acceptance.—*Fidelity & Deposit Co. of Md. v. Idaho Bank & Trust Co.*[1]—Plaintiff, bonding company of forwarding bank, brought an action in the United States District Court in Idaho against the defendant drawee bank for losses arising out of a check kiting operation claiming: (a) that defendant as agent of the forwarding bank was negligent in the performance of its duties in collecting certain checks forwarded by plaintiff's assignor and, (b) alternatively, that in failing to return these checks as dishonored within 24 hours after their receipt, defendant became liable as acceptor thereof under § 27-1006 of the Idaho Code [NIL § 137]. On defendant's motion to dismiss, HELD: (1) The counts alleging negligence in collection stated a cause of action since a drawee bank to which a collection item has been forwarded direct is a collecting agent of the forwarding bank as well as a paying agent of the drawer; and (2) the counts alleging failure of the drawee to return the checks as dishonored within 24 hours after receipt did not state a cause of action since mere retention of checks does not constitute an acceptance of them.

In accord with the instant case, it is generally held that a drawee bank, receiving a check for collection from a forwarding bank, acts in the dual capacity of collecting agent for the forwarder and paying agent for the drawer.[2] As such, the drawee's duty, as collecting agent, is to present the checks for acceptance and payment; its duty to the drawer is to pay the

[9] Railway Express Agency v. Bank of Philadelphia, 168 Miss. 279, 150 So. 525 (1933).

[1] 173 F. Supp. 70 (D. Idaho 1959).

[2] Joffrion-Woods v. Brock, 180 La. 771, 157 So. 589 (1934); Old Motor Works v. First State Savings Bank of Morenci, 258 Mich. 269, 241 N.W. 813 (1932); First Nat'l Bank of Murfreesboro v. First Nat'l Bank of Nashville, 127 Tenn. 205, 154 S.W. 965 (1913).

check in accordance with his order if sufficient funds are on deposit to cover it.[3]

The more difficult problem was the question of the liability of the drawee bank as acceptor. Before the NIL, mere retention of a bill of exchange by a drawee did not constitute acceptance although such could be implied from the drawee's conduct.[4] Under NIL § 132 acceptance must be in writing. An exception is provided in § 137 where it is stated that destruction or refusal by the drawee to return the bill within 24 hours is deemed acceptance by him.

The leading case of *Wisner v. First National Bank*[5] construed § 137 as meaning that mere retention by the drawee of a bill of exchange for more than 24 hours after receipt was an acceptance, stating that, "in the enactment of this section of the statute, the legislature regarded the presentation for acceptance as a demand for acceptance, which when the bill is retained by the drawee, implies a demand for its return . . . therefore the neglect or failure to return is a refusal to return the bill."[6] The Court observed that a contrary result would in effect require the payee or his forwarding agent simultaneously with the presentation to make a demand that the instrument be accepted or returned dishonored within a certain time. Although the rule of the *Wisner* case has been criticized by textwriters,[7] the majority of courts have followed it as the proper construction of § 137.[8]

The minority position reasons that the NIL constitutes a codification of the common law under which mere retention did not constitute acceptance,[9] that the language of § 137 which makes "refusal" to return an acceptance does not apply to "failure" to return,[10] and that § 150 providing that: "where a bill is duly presented for acceptance and is not accepted within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance . . ." seems to require more than mere inaction by the drawee. Otherwise a bill retained beyond the 24 hour period would be required under both sections to be treated as accepted and dishonored at the same time.[11]

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[3] First Nat'l Bank of Murfreesboro v. First Nat'l Bank of Nashville, supra note 2 at 213, 154 S.W. at 967.

[4] Moulton v. Matteson, 11 Hun. 268, aff'd 79 N.Y. 627 (1880); Short v. Blount, 99 N.C. 49, 5 S.E. 190 (1888); First Nat'l Bank v. McMichael, 106 Pa. 460 (1884).

[5] 220 Pa. 21, 68 Atl. 955 (1908).

[6] Id. at 29, 68 Atl. at 958.

[7] 1 Paton, Digest of Legal Opinions, § 7:2 (4th ed. 1940); 5 Michie, Banks and Banking, 520-521 (Perm. ed. 1950), 6 Zollman, Banks and Banking, 173-175 (1933).

[8] First Nat'l Bank v. Citizens Bank of Campti, 163 La. 919, 113 So. 147 (1927); Miller v. Farmers State Bank of Arco, 165 Minn. 359, 206 N.W. 930 (1925); Blackwelder v. Fergus Motor Co., 80 Mont. 374, 260 Pac. 734 (1927); Clark v. Northern Pac. R. Co., 55 N.D. 454, 214 N.W. 33 (1927); Mount Vernon Nat'l Bank v. Canby State Bank, 129 Or. 36, 276 Pac. 262 (1929).

[9] Crawford, The Negotiable Instruments Law § 136 (4th ed. 1916); Feezer, Acceptance of Bills of Exchange by Conduct, 12 Minn. L. Rev. 129, 133.

[10] Mitchell Livestock Auction Co. Inc. v. Bryant State Bank, 65 S.D. 488, 275 N.W. 262 (1937).

[11] Feezer, op. cit. supra note 9.

Moreover, some courts have distinguished between time drafts and checks and have held that even if mere retention of the former should constitute acceptance, it would require a "strained construction of § 137"[12] to reach the same result with respect to checks presented for payment.[13] In § 137 the phrase "delivered for *acceptance*" seems inapplicable to checks and other demand bills which, unlike time drafts, are customarily presented not for "acceptance" but for "payment." The *Wisner* case and those following it have held, impliedly or expressly, that it is immaterial whether the paper, be it a check, a demand draft, or a time draft, is presented for payment or acceptance. The Court in *First State Bank v. Black Bros. Co.* stated that, "presentment for payment most certainly comprehends, and the act of payment most certainly includes, a 'signification by the drawee of his assent to the order of the drawer,' within the broader meaning of that term. . . ."[14] Considering that presentment for payment and presentment for acceptance are "two different acts well known to the law of negotiable instruments . . . ,"[15] the Court in the instant case held that the section relied on had no application to the factual situation presented.

The further question is raised as to whether the drawee bank when it receives the check in the mail does so as agent of the forwarder or as agent of the drawer. If as agent of the forwarder, what constitutes "presentment to the drawee"?

Avoiding entanglement in these problems which were deemed to have little relation to, or actual significance for, the practicalities of the banking business, the Court took a realistic approach and adopted the view expressed in *First Nat'l Bank of Murfeesboro v. First Nat'l Bank of Nashville* that: "Where the drawee is acting in the dual capacity . . . there can be no acceptance . . . until the bills are passed through the books of the bank, charging the account of the drawer and crediting the account of the remitting bank, and making a completed transaction."[16]

The Court also relied on § 26-1507 of the Idaho Code [§ 7 of the Bank Collection Code] which provides that where a drawee bank receives an item it shall be deemed paid when finally charged to the account of the drawer. Construing the word "paid" as including the act of acceptance,[17] it was held that this section precludes acceptance by mere retention.

Two months after the decision the Idaho legislature amended[18] § 27-1006 of the Idaho Code [NIL § 137] by adding: ". . . provided that mere

[12] 173 F. Supp. 70, 71 (D. Idaho 1959).

[13] First Nat'l Bank v. Whitmore, 177 Fed. 397 (8th Cir. 1910); Urwiller v. Platte Valley State Bank, 164 Neb. 630, 83 N.W.2d 88 (1957); First Nat'l Bank v. Talley, 115 Tex. 591, 285 S.W. 612 (1926).

[14] 187 Okla. 124, 126, 101 P.2d 802, 803 (1940).

[15] First National Bank v. Talley, 115 Tex. 591, 595; 285 S.W. 612, 613 (1926).

[16] 127 Tenn. 205, 216; 154 S.W. 965, 968 (1913).

[17] It may be observed that although the Court might feel that presentment for payment is a different juristic act than presentment for acceptance it may consistently consider that "payment" includes a signification by the drawee of its assent to the order of the drawer.

[18] Session Laws 1959, c. 98.

retention of such bill by the drawee unless its return has been demanded, will not amount to an acceptance; and provided further that the provisions of this section shall not apply to checks."

The provisions of § 137 of NIL were eliminated in the UCC. Under this code, with no exceptions, acceptance must be in writing,[19] although a drawee will be liable to a holder in conversion if the drawee refuses on demand to return the bill.[20] Mere retention of an instrument, voluntarily delivered, without a demand for return, constitutes neither an acceptance nor a conversion.

KENNETH F. JOYCE

Negotiable Instruments—Stop Payment—Notice to the Payee.—*National Boulevard Bank of Chicago v. Schwartz.*[1]—Plaintiff bank received a stop payment order from the drawer on a check issued to the defendant. Drawer sent a similar notice to the defendant payee. Prior to its receipt the defendant indorsed the check "for deposit only" and deposited it in his checking account in his own bank. Plaintiff bank negligently cleared the check for payment and so notified the payee's bank, which on the same day permitted a withdrawal of substantially all the money represented by the check. Later the same day after the withdrawal the plaintiff notified the payee's bank of the mistake. The plaintiff having made the proper adjustment in the drawer's account brings this action in the United States District Court for the Southern District of New York to recover the amount from the payee.[2]

In granting the plaintiff's motion for summary judgment, the court held that where the payee of a check has knowledge that the drawer has stopped payment, but nevertheless accepts payment made as a result of the drawee's negligence in clearing the check, the payee is liable to the drawee on the grounds that under a restrictive indorsement the payee's bank is only an agent for the purpose of collection. In such a relationship the knowledge of the payee would preclude him from keeping the money.

A drawer may stop payment of a check prior to certification or payment.[3] Since the check does not operate as an assignment of the drawer's funds in the bank, the drawee is not liable to the holder prior to acceptance or certification.[4] A drawee who has paid a check after a stop payment

[19] UCC § 3-410.
[20] UCC § 3-419.

[1] 175 F. Supp. 74 (S.D.N.Y. 1959).
[2] Federal jurisdiction was based on diversity of citizenship.
[3] UCC § 4-403(1); Beutel, Brannon's Negotiable Instruments Law, § 189 (6th ed. 1938); Britton, Bills and Notes, § 181 (1943); 3 Paton, Digest of Legal Opinions 3447 (1944).
[4] NIL § 189; UCC § 3-409(1); N.Y. Negotiable Instruments Law, § 325; Brady, Bank Checks, § 10 (2nd ed. 1926); 3 Paton, Digest of Legal Opinions, 3487 (1944); Moore, Sussman and Brand, Legal Methods Applied to Orders to Stop Payment of Checks, 42 Yale L.J. 817 (1933); 7 Am. Jur., Banks, § 602 (1937).