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Banks--Suit by Depositor in Tort for Breach of Banker-Depositor Relationship (Stella Flour & Feed Corp. v. National City Bank, 285 App. Div. 182 (1st Dep't 1954))

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Viewed pragmatically, the conclusion reached by the Supreme Court would seem preferable. It obviates the possibility that a seaman from another state may be deprived of a remedy under the Jones Act because of the failure of the local state legislature to provide for the survival of local tort actions, and assures him the relief which it was the purpose of the statute to extend.



BANKS—SUIT BY DEPOSITOR IN TORT FOR BREACH OF BANKER-DEPOSITOR RELATIONSHIP.—Defendant bank cashed four checks on which the names of the payees had been altered, and charged them to the plaintiff's account. Plaintiff sued in contract for the value of the checks. In addition, the plaintiff pleaded a cause of action in negligence, alleging that the bank's breach of the "duty" of care imposed by the depositor-banker relationship caused damage to the plaintiff's credit and business. The Court *held*¹ that, under the facts pleaded, no cause of action in tort arose separate from the contract obligations of the depositor-banker relationship. *Stella Flour & Feed Corp. v. National City Bank*, 285 App. Div. 182, 136 N.Y.S.2d 139 (1st Dep't 1954).

Basically the relationship between a bank and its depositor is that of debtor and creditor.² Under the implied contract between the parties, the bank's liability on the debt, or account, is discharged only to the extent that the bank pays out money pursuant to the depositor's order.³ Consequently, a loss occasioned by the bank's paying a forged or altered check must be borne by the bank,⁴ unless the depositor was negligent in preparing his checks⁵ or in examining them on return.⁶

¹ Three justices concurred in the opinion, two dissented.

² See *Solicitor for the Affairs of His Majesty's Treasury v. Bankers Trust Co.*, 304 N.Y. 282, 291, 107 N.E.2d 448, 452 (1952); *Irving Trust Co. v. Leff*, 253 N.Y. 359, 361-362, 171 N.E. 569, 570 (1930); *Critten v. Chemical Nat. Bank*, 171 N.Y. 219, 224, 63 N.E. 969, 970 (1902); *Woody v. National Bank*, 194 N.C. 549, 140 S.E. 150, 152 (1927).

³ *Critten v. Chemical Nat. Bank*, *supra* note 2; see *Irving Trust Co. v. Leff*, *supra* note 2; *Shipman v. Bank of the State of New York*, 126 N.Y. 318, 326-327, 27 N.E. 371, 372 (1891).

⁴ See *City of New York v. Bronx County Trust Co.*, 261 N.Y. 64, 184 N.E. 495 (1933); see *Shipman v. Bank of the State of New York*, *supra* note 3 at 327, 27 N.E. at 372-373; *Screenland Magazine, Inc. v. National City Bank*, 181 Misc. 454, 460, 42 N.Y.S.2d 286, 290-291 (Sup. Ct. 1943).

⁵ See *City of New York v. Bronx County Trust Co.*, *supra* note 4 at 71, 184 N.E. at 497; see *Critten v. Chemical Nat. Bank*, *supra* note 2.

⁶ *Critten v. Chemical Nat. Bank*, *supra* note 2; *Stumpp v. Bank of New York*, 212 App. Div. 608, 209 N.Y. Supp. 396 (1st Dep't 1925); *Screenland Magazine, Inc. v. National City Bank*, *supra* note 4. *Contra*: *Weisser's Adm'rs v. Denison*, 10 N.Y. 68 (1854). See also N.Y. NEG. INST. LAW § 326 (which states that a bank shall not be liable for payment of a forged or raised check

Even under such circumstances, the bank will bear the loss if it, too, was negligent.⁷

The liability of a bank, however, is not limited to the contract liability of an ordinary debtor. Thus, banks have been held liable to their depositors in tort, as well as contract, for the proximate damages caused by the bank's refusal to honor a properly drawn check.⁸ In many jurisdictions, general damages to a businessman's credit are inferred from such a dishonor.⁹ Non-businessmen, usually limited to nominal damages,¹⁰ may recover special damages if they are alleged and proved.¹¹ Although in some jurisdictions ". . . the liability is the same whether the wrong is willful or merely heedless . . .,"¹² only nominal damages may be recovered in New York for a dishonor resulting from an oversight.¹³ However, a dishonor made with knowledge of its consequences will not be considered innocent.¹⁴ Furthermore, at least one jurisdiction has allowed punitive damages, at the jury's discretion, where the dishonor was malicious.¹⁵

The Court in the instant case was faced with a problem similar to the one presented in the case of a wrongful dishonor. Whereas the latter is primarily concerned with damage suffered from a wrongful refusal to pay, the injury in the instant case came as a result of a wrongful payment. Although the two situations are distinguish-

unless the depositor shall notify the bank of the forgery within one year after the return of the check), and § 43 (which states that a bank shall not be liable for payment on a forged or unauthorized endorsement unless within two years after the check's return the depositor shall notify the bank of the forgery). These are not statutes of limitations, but conditions to a claim of ultimate liability. See PRASHKER, *NEW YORK PRACTICE* 54 n.19(c) (3d ed. 1954).

⁷ *Gutfreund v. East River Nat. Bank*, 251 N.Y. 58, 167 N.E. 171 (1929).

⁸ See, e.g., *Wildenberger v. Ridgewood Nat. Bank*, 230 N.Y. 425, 130 N.E. 600 (1921); see *Citizens' Nat. Bank v. Importers & Traders' Bank*, 119 N.Y. 195, 199, 23 N.E. 540, 541 (1890).

⁹ See *Third Nat. Bank v. Ober*, 178 Fed. 678 (8th Cir. 1910); *Wildenberger v. Ridgewood Nat. Bank*, *supra* note 8; *Atlanta Nat. Bank v. Davis*, 96 Ga. 334, 23 S.E. 190 (1895); *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N.E. 655 (1903); *Rolin v. Steward*, 14 C.B. 595, 139 Eng. Rep. 245 (1854); see *Lorick v. Palmetto Bank & Trust Co.*, 74 S.C. 185, 54 S.E. 206, 207 (1906) (concurring opinion).

¹⁰ *Third Nat. Bank v. Ober*, *supra* note 9. *Contra*: *Atlanta Nat. Bank v. Davis*, *supra* note 9; see *Woody v. National Bank*, 194 N.C. 549, 140 S.E. 150, 153 (1927).

¹¹ See *Third Nat. Bank v. Ober*, *supra* note 9 at 680; *Katz v. Pacific Bank*, 212 App. Div. 601, 209 N.Y. Supp. 497 (1st Dep't 1925); see *Rolin v. Steward*, *supra* note 9 at 607, 139 Eng. Rep. at 250.

¹² *Wildenberger v. Ridgewood Nat. Bank*, *supra* note 8 at 427, 130 N.E. at 600.

¹³ See *Burroughs v. Tradesmen's Nat. Bank*, 87 Hun 6, 33 N.Y. Supp. 864 (Gen. T. 2d Dep't 1895), *aff'd mem.*, 156 N.Y. 663, 50 N.E. 1115 (1898); see *Wildenberger v. Ridgewood Nat. Bank*, 230 N.Y. 425, 427-428, 130 N.E. 600 (1921). *But cf.* *Nealis v. Industrial Bank of Commerce*, 200 Misc. 406, 107 N.Y.S.2d 264 (Sup. Ct. 1951).

¹⁴ *Wildenberger v. Ridgewood Nat. Bank*, *supra* note 13.

¹⁵ See *First Nat. Bank v. Stewart*, 204 Ala. 199, 85 So. 529 (1920).

able, both involve a breach of the bank's duty to pay in accordance with the depositor's order, and in each case the legally protected interest is the credit standing of the depositor. Despite this similarity, the Court held that no cause of action in tort arose under the facts pleaded in the case. The decision was based on the conclusion that ". . . the contractual relationship occupies fully the rights and responsibilities of the parties . . .,"¹⁶ and that a breach of such contract ". . . should not be treated as some other kind of 'wrong' separately actionable."¹⁷ The majority acknowledged that in some cases breach of contract may give rise to tort liability. However, the Court held, without citing any authority, that the instant case ". . . certainly does not come within that area."¹⁸

Usually contractual relationships occupy fully the rights and responsibilities of the parties. Hence, a breach of contract ordinarily gives rise to a cause of action in contract only. However, the existence of the contract does not preclude an action in tort. Thus, actions in tort have been allowed for negligent performance of a contract by a plumber,¹⁹ an insurer,²⁰ a public weigher,²¹ and a milkman.²² In each of these cases it was decided that a duty of care arose separate from, although collateral to, the contract promise. In bank cases in other jurisdictions, depositors have been allowed to bring actions in either tort or contract.²³ This point, heretofore, was not settled in New York; some cases have indicated that the liability is in contract only, while others have indicated that the bank is liable in tort as well.²⁴ The minority opinion pointed out that there have been many cases in New York in which depositors have recovered in tort for the proximate, foreseeable consequences of a breach of contract by a bank.²⁵ Furthermore, some cases have stated that banks have a duty to protect their depositors from fraud and larceny.²⁶ In

¹⁶ *Stella Flour & Feed Corp. v. National City Bank*, 285 App. Div. 182, 187, 136 N.Y.S.2d 139, 145 (1st Dep't 1954).

¹⁷ *Ibid.*

¹⁸ *Id.* at 184, 136 N.Y.S.2d at 142.

¹⁹ See *Horwitz v. Teague*, 77 Ga. App. 386, 48 S.E.2d 697 (1948).

²⁰ See *Waters v. American Casualty Co.*, 73 So.2d 524 (Ala. 1953).

²¹ See *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

²² See *Eads v. Marks*, 39 Cal.2d 807, 249 P.2d 257 (1952).

²³ See, e.g., *J. M. James Co. v. Continental Nat. Bank*, 105 Tenn. 1, 58 S.W. 261 (1900); see, e.g., *First Nat. Bank v. Stewart*, 204 Ala. 199, 85 So. 529, 531 (1920); *Lorick v. Palmetto Nat. Bank*, 76 S.C. 500, 57 S.E. 527, 528 (1907).

²⁴ Compare *Citizens' Nat. Bank v. Importers & Traders' Bank*, 119 N.Y. 195, 23 N.E. 540 (1890) and *Burroughs v. Tradesmen's Nat. Bank*, 87 Hun 6, 33 N.Y. Supp. 864 (Gen. T. 2d Dep't 1895), *aff'd mem.*, 156 N.Y. 663, 50 N.E. 1115 (1898), with *Hartford Accident & Indemnity Co. v. Bank of New York*, 261 App. Div. 278, 24 N.Y.S.2d 783 (1st Dep't), *aff'd mem.*, 286 N.Y. 576, 35 N.E.2d 926 (1941). For a discussion of related problems see PRASHEKER, *NEW YORK PRACTICE* § 27A (3d ed. 1954).

²⁵ See *Stella Flour & Feed Corp. v. National City Bank*, 285 App. Div. 182, 190, 136 N.Y.S.2d 139, 148 (1st Dep't 1954) (dissenting opinion).

²⁶ See *Kummel v. Germania Savings Bank*, 127 N.Y. 488, 492, 28 N.E. 398,

one case,²⁷ the court went so far as to hold the bank liable to the beneficiary of trust funds deposited with it, merely because the bank was found to have had constructive knowledge of misappropriation by the wife of the trustee. Moreover, the banks themselves consider that they have a greater responsibility to protect their depositors than do other business concerns, particularly where, as in the principal case, the depositor is also a borrower from the bank.²⁸ This may result from a recognition of the bank's special status, which has been described as semi-public²⁹ or quasi-public,³⁰ and affected with a public interest.³¹

Perhaps some of the difficulty involved in determining whether an action against a bank is in contract or in tort has been due to an inability to categorize or name the action. Regardless of the label,³² however, it appears that the gravamen of such an action is a breach of a duty of care imposed by the banker-depositor relationship. Therefore, the conclusion reached by the minority, that a good cause of action in tort could here be pleaded, seems to be the correct one.



CORPORATIONS — ADVERSE JUDGMENT NOT REQUIRED TO DENY DIRECTOR REIMBURSEMENT FOR LITIGATION EXPENSES. — A stockholder's derivative action was brought by one of the two stockholders of a corporation against the other, as director, for corporate misconduct. The complaint was dismissed on a finding that the plaintiff participated in and ratified the misconduct of the defendant. On mo-

399 (1891); *Commisso v. National City Bank*, 174 Misc. 409, 413, 21 N.Y.S.2d 187, 191 (Sup. Ct. 1939), *aff'd mem.*, 259 App. Div. 891, 20 N.Y.S.2d 1007 (2d Dep't), *motion for leave to appeal denied*, 284 N.Y. 817, 29 N.E.2d 396 (1940).

²⁷ *Lee v. Corn Exchange Bank Trust Co.*, 270 App. Div. 2, 58 N.Y.S.2d 290 (2d Dep't 1945), *aff'd mem.*, 295 N.Y. 945, 68 N.E.2d 43 (1946).

²⁸ See CHAPIN, CREDIT AND COLLECTION PRINCIPLES AND PRACTICE 282-284 (5th ed. 1947) (This is evident from the banking practice of attempting to restrict the dissemination of credit information; credit men from mercantile houses, on the other hand, are much less reserved in dispensing credit information regarding those with whom they do business.).

²⁹ *Id.* at 283.

³⁰ See, e.g., *German Baptist Orphans' Home v. Union Banking Co.*, 13 F. Supp. 814, 816 (W.D. Mich. 1935); *Citizens' Bank & Trust Co. v. Mabry*, 102 Fla. 1084, 136 So. 714, 716 (1931); *Priest v. Whitney Loan & Trust Co.*, 219 Iowa 1281, 261 N.W. 374, 377 (1935).

³¹ See, e.g., *In re Thornton*, 7 F. Supp. 613, 614 (D. Colo. 1934); *Dyer v. Broadway Central Bank*, 225 App. Div. 366, 367, 233 N.Y. Supp. 96, 97 (1st Dep't 1929), *rev'd on other grounds*, 252 N.Y. 430, 169 N.E. 635 (1930); *Hoff v. First State Bank*, 174 Minn. 36, 218 N.W. 238, 241 (1928).

³² "There is no necessity whatever that a tort must have a name." PROSSER, TORTS 4-5 (1941).