St. John's Law Review

Volume 34, May 1960, Number 2 Article 9

Bills and Notes--Mutual Rescission of Bank Draft After Payee Has Title Held Invalid (International Firearms Co. v. Kingston Trust Co., 6 N.Y.2d 406 (1959))

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individual principal has, although the corporation's liability for breach of contract endures.[25] It is noteworthy that similar words in the National Banking Act have been construed by the Appellate Division to permit removal of bank officers without subjecting the bank to liability even for damages for breach of contract.[26]

It is well settled that courts of equity will not ordinarily enforce contracts of personal service. This doctrine is based on sound principles, substantive as well as procedural. Further, the public policy of both New York and New Jersey is clear that corporations, particularly when publicly held, be managed by their boards of directors. The intentions of the parties to a contract in this area should be irrelevant in the face of what seems to be a strong public policy. It can be doubted that the arbitration laws were intended to allow circumvention of this public policy by provision of an arbitration clause in a contract of employment. A better solution might have been to send the parties back to arbitration in order to assess damages.[27]

BILLS AND NOTES — MUTUAL RESCISSION OF BANK DRAFT AFTER PAYEE HAS TITLE HELD INVALID.—The purchaser of a bank draft from defendant bank remitted it to his escrow agent with the restrictive condition that it should be held until the merchandise, which he had contracted to buy from the payee, had cleared the United States Customs.[1] In the meanwhile, the payee transferred his interest to the present plaintiff. After a futile request for the draft was made to the escrowee, the plaintiff obtained a Canadian judgment in rem for breach of contract, in pursuance of which the court awarded him the draft. The Court of Appeals held that the defendant drawer bank was liable to payee's successor on the draft even though the payment had been countermanded by a subsequent agreement between the defendant and the remitter. *International Firearms Co. v. Kingston Trust Co.*, 6 N.Y.2d 406, 160 N.E.2d 656, 189 N.Y.S.2d 911 (1959).

A convenient method of transacting a commercial credit venture in which the creditor will be readily satisfied is through the purchase

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[25] *In re* Paramount Publix Corp., 90 F.2d 441 (2d Cir. 1937).

[26] Copeland v. Melrose National Bank, 229 App. Div. 311, 241 N.Y. Supp. 429 (1st Dep't), *aff'd mem.*, 254 N.Y. 632, 173 N.E. 898 (1930).

[27] See Matter of Staklinski (Pyramid Elec. Co.), 6 N.Y.2d 159, 164, 160 N.E.2d 541, 543 (1959) (concurring opinion).

[1] The remitter of the bank draft refused to complete the necessary forms to allow the merchandise to clear through the customs, thereby making it impossible for the payee to deliver the goods.

of a bank draft.[2] The primary benefit to the creditor is that he will receive the order of the bank to pay the face amount [3] instead of the promise of his individual debtor. This important factor has caused the market place to characterize the bank draft as being the symbol and equivalent of cash.[4] The courts have equated the bank draft to a cashier's check,[5] and have stated that the rules which are applicable to the latter are also applicable to bank drafts.[6]

A draft is an order to the correspondent bank to pay money as directed. It is evidence of a completed transaction.[7] By the weight of authority the purchase of the draft results in the formation of a debtor-creditor relationship [8] between the drawer and the holder. It is deemed not to constitute the creation of a trust [9] or an agency [10] and is not regarded as an assignment of funds.[11]

The remitter, even though he may surrender the draft, cannot by himself compel the drawer to countermand payment. It is com-

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[2] A bank draft may be defined as a bill of exchange drawn by a bank on its correspondent bank and usually issued at the solicitation of a stranger who purchases and pays therefor. Kohler v. First Nat'l Bank, 157 Wash. 417, 289 Pac. 47, 49 (1930). See BRITTON, BILLS AND NOTES 299-300 (1943).

[3] N.Y. NEGOTIABLE INSTR. LAW § 111. "The drawer by drawing the instrument admits the existence of the payee . . . and engages that on due presentment the instrument will be accepted and paid . . . and that if it be dishonored . . . he will pay the amount thereof to the holder. . . ."

[4] Gravenhorst v. Zimmerman, 236 N.Y. 22, 31, 139 N.E. 766, 769 (1923).

[5] Kohler v. First Nat'l Bank, 157 Wash. 417, 289 Pac. 47, 49 (1930). A cashier's check may be defined as a bill of exchange drawn by a bank upon itself and accepted in advance by the act of its issuance. Causey v. Eiland, 175 Ark. 929, 1 S.W.2d 1008, 1010 (1928).

[6] Kerr S.S. Co. v. Chartered Bank of India, Australia & China, 292 N.Y. 253, 262, 54 N.E.2d 813, 817 (1944); Polotsky v. Artisans Sav. Bank, 37 Del. 142, 180 Atl. 791 (1935), *aff'd*, 37 Del. 151, 188 Atl. 63 (1936); Powell Bldg. & Loan Ass'n v. Larabie Bros. Bankers, 100 Mont. 183, 46 P.2d 697, 700 (1935); Montana-Wyoming Ass'n of Credit Men v. Commercial Nat'l Bank, 80 Mont. 174, 259 Pac. 1060, 1061 (1927); Kohler v. First Nat'l Bank, 157 Wash. 417, 289 Pac. 47, 49 (1930).

[7] See Ligniti v. Mechanics and Metals Nat'l Bank, 230 N.Y. 415, 130 N.E. 597 (1921).

[8] Hurley v. Union Trust Co., 244 App. Div. 590, 591, 280 N.Y. Supp. 474, 477 (3d Dep't 1935); Andrews v. Alta State Bank, 206 Iowa 65, 218 N.W. 957 (1928); Powell Bldg. & Loan Ass'n v. Larabie Bros. Bankers, 100 Mont. 183, 46 P.2d 697 (1935); Smalley v. Queen City Bank, 94 S.W.2d 954 (Mo. Ct. App. 1936); State v. First State Bank, 123 Neb. 643, 243 N.W. 884 (1932).

[9] Ligniti v. Mechanics & Metals Nat'l Bank, 230 N.Y. 415, 130 N.E. 597 (1921); American Express Co. v. Cosmopolitan Trust Co., 239 Mass. 249, 132 N.E. 26 (1921); Beecher v. Cosmopolitan Trust Co., 239 Mass. 48, 131 N.E. 338 (1921); Louisville Banking Co. v. Paine, 67 Miss. 678, 7 So. 462 (1890).

[10] American Express Co. v. Cosmopolitan Trust Co., 239 Mass. 249, 132 N.E. 26 (1921).

[11] Harrison v. Wright, 100 Ind. 515 (1884); Clark v. Toronto Bank, 72 Kan. 1, 82 Pac. 582 (1905); Gramel v. Garner, 55 Mich. 201, 21 N.W. 418 (1884).

pletely within the discretion of the drawer to refuse to do so.[12] In *Kerr S.S. Co. v. Chartered Bank of India, Australia & China,*[13] the remitter was unable to place the instrument in the possession of the payee. The court held that the transfer of the draft in exchange for money paid is an *executed transfer*[14] between the bank and the remitter, and is characterized as a purchase and sale. Such a transaction may not be rescinded by the remitter even when supervening war delays the presentment indefinitely. In general, the remitter is the recipient of no promises made to himself and therefore he is in no position to claim that because of unperformed promises he is entitled to a return of his money.[15] In *Gellert v. Bank of Calif. Nat'l Ass'n,*[16] the court allowed rescission because the remitter, who had intended to make a gift of the draft to the payee, died before delivery and it was forever legally impossible for payee to obtain title. Clearly, the drawer of the instrument could not rescind unilaterally because the remitter does have rights in assumpsit on the instrument and it is doubtful whether they could be defeated in such a manner.[17] The paucity of the cases in this latter area may be explained by the fact that in an ordinary situation when the draft has been dishonored, the drawer will be sued by the payee on the instrument rather than by the remitter for money had and received.

In *Kohler v. First Nat'l Bank,*[18] the court held that the drawer bank is not permitted to countermand payment and rescind even under a mutual agreement with the remitter when the payee is a holder in due course. Clearly his rights dictate such a conclusion. To do otherwise would make the draft of no greater value than a personal check. Such a result would unsettle the commercial world. The drawer has been allowed to stop payment and rescind when the possessor was not a holder in due course but had obtained the draft through a gambling transaction. The theory was that since the negotiation was void, the title to the instrument had not passed.[19]

The underlying principle in this area is that once the draft has

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[12] Polotsky v. Artisans Sav. Bank, 37 Del. 142, 180 Atl. 791 (1935), *aff'd,* 37 Del. 151, 188 Atl. 63 (1936).

[13] 292 N.Y. 253, 54 N.E.2d 813 (1944).

[14] *Accord,* Moe v. Bank of United States, 211 App. Div. 519, 207 N.Y. Supp. 347 (2d Dep't 1925); Polotsky v. Artisans Sav. Bank, 37 Del. 142, 180 Atl. 791 (1935), *aff'd,* 37 Del. 151, 188 Atl. 63 (1936).

[15] Schweitzer v. Fargo, 255 N.Y. 60, 173 N.E. 923 (1930).

[16] 107 Ore. 162, 214 Pac. 377 (1923).

[17] The Uniform Negotiable Instruments Law contains no provision which expressly deals with the status of a remitter or any other person similarly situated. Therefore, as provided for by § 196, his rights are to be determined by the law merchant. See Beutel, *Rights of Remitters and Other Owners Not Within the Tenor of Negotiable Instruments,* 12 MINN. L. REV. 584 (1928).

[18] 157 Wash. 417, 289 Pac. 47 (1930).

[19] Hurley v. Union Trust Co., 244 App. Div. 590, 280 N.Y. Supp. 474 (3d Dep't 1935).

been issued by the bank and the bank chooses to comply with the remitter's request for rescission it must do so at its own risk and must undergo the consequences of possible suit.[20] In the principal case the Court under principles of comity gave effect to the judgment of the Canadian court. This it may do as long as New York State public policy is not violated.[21] That there is an implied obligation of good faith binding the parties to a contract not to deliberately frustrate its performance cannot be doubted.[22] This Canadian judgment was recognized not as *per se* binding upon the defendant but only as the establishment of a link in the plaintiff's chain of title.[23]

The defendant's contention that it was not a party to the Canadian action was defeated with a well reasoned answer. The defendant ". . . no more needed to be a party . . . than the United States Government would need to have been, if its currency had been the subject of the [escrow] deposit." [24] To have allowed the defendant's contention, the Court would have had to allow the whole question of the remitter's actions to be relitigated. The Court held that when legal title to a bank draft is in the payee or his successor, it is sufficient to prevent a countermanding of payment. It is not necessary that the payee be a holder in due course. This decision clearly defines the obligation of the drawer in that once the draft has been validly issued, it is irrevocable as against all legal holders. Cashier's checks may be countermanded, provided they are not in the hands of a holder in due course, for fraud and for failure of consideration for which they were issued.[25] It would seem that since neither fraud nor failure of consideration was present in the instant case, the rule is still applicable to bank drafts.

The law of negotiable instruments, being a substantive law, is a creature of growth. It is founded on the customs and needs of merchants, and represents a combined result of reason and experience. It should keep pace with and respond to commercial usage if it is to be of value.[26] Holdings such as the present one do much to en-

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[20] See Polatsky v. Artisans Sav. Bank, 37 Del. 142, 180 Atl. 791 (1935), *aff'd*, 37 Del. 151, 188 Atl. 63 (1936).

[21] Hilton v. Guyot, 159 U.S. 113 (1895).

[22] O'Neil Supply Co. v. Petroleum Heat & Power Co., 280 N.Y. 50, 54-55, 19 N.E.2d 676, 678 (1939); Wigand v. Bachmann-Bechtel Brewing Co., 222 N.Y. 272, 277, 118 N.E. 618, 619 (1918).

[23] Barr v. Gratz, 17 U.S. (4 Wheat.) 213 (1819); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956); Railroad Equip. Co. v. Blair, 145 N.Y. 607, 610, 39 N.E. 962, 963 (1895).

[24] International Firearms Co. v. Kingston Trust Co., 6 N.Y.2d 406, 411, 160 N.E.2d 656, 658, 189 N.Y.S.2d 911, 914 (1959).

[25] Kinder v. Fisher Nat'l Bank, 93 Ind. App. 213, 218, 177 N.E. 904, 906 (1931); Dakota Transfer & Storage Co. v. Merchants Nat'l Bank & Trust Co., 86 N.W.2d 639 (N.D. 1957).

[26] McCornick & Co. Bankers v. Gem State Oil Prods. Co., 38 Idaho 470, 222 Pac. 286, 287 (1923).

hance the usefulness and the validity of a bank draft. The drafts are more readily acceptable and the instrument is realistically equated to cash.

CONSTITUTIONAL LAW—COMMERCE CLAUSE—RAILROAD HELD LIABLE FOR SAFETY APPLIANCE ACTS VIOLATIONS.—Defendant railroad prevailed at trial and primary appellate levels in a suit for statutory penalties under the Safety Appliance Acts. The violations alleged were based on movements of rolling stock by yard crews and engines without operable air-brakes save those on the engines. The acts, by permissive regulation of the ICC, require that all cars involved in interstate commerce be equipped with power-brakes and that eighty-five per cent of the cars in any train have them in operating condition. The journeys in question, while only covering two miles, were intersected by roads and railroad tracks. The Supreme Court, in reversing the Court of Appeals, *held* that such movements constituted train movements within the purview of the acts and were therefore subject to the brake regulations. *United States v. Seaboard Air Line R.R.*, 361 U.S. 78 (1959).

The Safety Appliance Acts,[1] the first of which was promulgated in 1893, had as their ultimate object the increased protection of railroad passengers and employees.[2] Their immediate objective related to the compulsory use of certain safety devices, commencing with the equipping of all rolling stock with power brakes and automatic couplers,[3] and secondly, the use of air-brakes operable from the engine [4] in varying quantities.[5] The purpose was to discourage use of hand brakes and pin-bar couplings through imposition of a $100 fine

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[1] 27 Stat. 531 (1893), 32 Stat. 943 (1903), 36 Stat. 298 (1910), as amended, 45 U.S.C. §§ 1-16 (1958). Modifications have been made by means of ICC regulations.

[2] Preamble, 27 Stat. 531 (1893). See, *e.g.*, Delk v. St. Louis & S.F.R.R., 220 U.S. 580, 582 (1911); Andersen v. Bingham & G. Ry., 169 F.2d 328, 330 (10th Cir. 1948); United States v. New York Cent. & H.R.R., 205 Fed. 428, 429 (W.D.N.Y. 1913); United States v. Chicago, M. & St. P. Ry., 149 Fed. 486, 488 (S.D. Iowa 1906).

[3] See Delk v. St. Louis & S.F.R.R., *supra* note 2.

[4] 27 Stat. 531 (1893), 45 U.S.C. § 1 (1958). *But see* Richmond, F. & P.R.R. v. Brooks, 197 F.2d 404, 407 (D.C. Cir. 1952) (split control of brakes between engineer and conductor, apparently a departure from the act, is allowed because it fulfills the original legislative intent).

[5] 27 Stat. 532 (1893), 45 U.S.C. § 1 (1958) (called for sufficient air-brakes to be installed so as to preclude use of the common hand brake); 32 Stat. 943 (1903), 45 U.S.C. § 9 (1958) (wherein the percentage was set at 50% and the ICC was empowered to alter the rate following suitable hearings and deliberations); 11 ICC Rep. 429 (1905) (the percentage was raised to 75%); 49 CFR 132.1 (1958) (raised in 1910 to 85%, the present ratio).