Volume 63 | Issue 4 Article 3

June 1961

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The question presented for consideration is whether a bank which through error or even deliberately has wrongfully refused to pay a check of one of its depositors might be held liable by the depositor for damages accruing to the depositor as a result of his being subjected to criminal prosecution for having executed a check which was not paid by the drawee bank.

The law is well settled that when a bank accepts a checking account from a depositor the bank either expressly or impliedly assumes the duty to the depositor to pay on demand all checks which are properly drawn and properly presented to the bank for payment, assuming of course that the drawer has sufficient funds or credit with the drawee bank to cover the sum of the check.[1] If the bank should violate this contractual duty by wrongfully dishonoring the depositor's check, the depositor may maintain an action against the drawee bank for either breach of contract, and (or) in tort for breach of duty arising from the contract of deposit.[2]

It has been judicially recognized that the depositor-drawer has a cause of action sounding in contract against the drawee bank for having wrongfully refused to pay his check when properly presented, assuming funds or credit was available with the bank to cover the check. However, such remedy in contract is hardly satisfactory to the depositor-drawer. If the action is brought for breach of contract, the recovery of damages is limited to the amount of the check with interest from the date that payment was demanded and refused, and in some states by virtue of statute the additional costs of the action.[3] Because the measure of damages when the action sounds in contract is so limited the action by the depositor is usually brought on the tort theory.

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[1] Waggoner v. Bank of Bernie, 22 Mo. App. 165, 281 S.W. 130 (1926); Woody v. National Bank, 194 N.C. 549, 140 S.E. 150 (1927).

[2] Macrum v. Security Trust & Sav. Co., 221 Ala. 419, 129 So. 74 (1930); Woody v. National Bank, *supra* note 1; Marzetti v. Williams, 1 Bar. & Ad. 415, 109 Eng. Rep. 842 (K.B. 1830).

[3] Woody v. National Bank, *supra* note 1.

The relationship of a bank and its depositor, whether the depositor opens a checking or savings account, is that of creditor and debtor. Ordinarily a creditor may not be held liable for damages in tort for the mere nonpayment of his debt.[4] The remedy of the creditor would ordinarily be based on the theory of breach of a contract to pay. Notwithstanding the creditor-debtor relationship that exists between the bank and its depositor, the courts have in certain situations, with no apparent hesitancy, recognized that the drawee bank may be legally liable to the drawer-depositor in an action sounding in tort for having wrongfully refused to pay one or more of the drawer-depositor's checks.[5] Judge Williams in *Robin v. Steward,* said:

> ". . . I think it cannot be denied, that, if one who is not a trader were to bring an action against a banker for dishonouring a cheque at a time when he had funds of the customer's in his hands sufficient to meet it, and special damage were alleged and the jury, in estimating the damages, may take into their consideration the natural and necessary consequence which must result to the plaintiff from the defendant's breach of contract: just as in the case of an action for slander of a person in the way of his trade, or in the case of an imputation of insolvency on a trader, the action lies without proof of special damage."[6]

In either case, the plaintiff is entitled to recover at least nominal damages which the law presumes from the wrongful act of the defendant.

The decision in the *Robin* case not only has been followed in this country, but even extended. Such an extension occurs in *Wood v. National Bank:*

> "In view of the almost universal custom now obtaining with respect to the banking business, this distinction does not seem to us to be well founded. A plaintiff's right to maintain this action, under present conditions, ought not to be dependent upon or determined by his business or occupation; the conditions upon which the distinction was founded no longer prevails."[7]

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[4] *Ibid.*
[5] *Ibid.*
[6] 14 Com.B. 594, 607, 139 Eng. Rep. 245, 250 (1854).
[7] 194 N.C. 549, 554, 140 S.E. 150, 153 (1927).

This position was further strengthened by the following statement taken from Morse in his work on *Banks and Banking:*

> "It can hardly be possible that customer's check can be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he cannot from the nature of the case furnish independent, direct proof thereof. . . . Exemplary damages may be given when the failure to pay is malicious on the part of the bank, but they shall not be given unless the bank was guilty of either fraud, malice, gross negligence, or oppressive [*sic*]."[8]

Today banks are necessarily considered to be quasi public institutions with all the additional responsibilities that must follow from such a position. They either satisfy these additional responsibilities and the additional duties owed to their depositors or are faced with claims for having violated one of these duties. As Judge Paxon said in *Patterson v. Marine Nat'l Bank:*

> "The business of the community would be at the mercy of banks if they could at their pleasure refuse to honor their depositor's checks, and then claim that such action was the mere breach of an ordinary contract, for which only nominal damages could be recovered, unless special damages were proved. There is something more than a breach of contract in such cases. . . ."[9]

Having established that the drawee bank may be held liable in tort for having violated its contractual duty to the depositor-drawer, let us examine a series of cases from various state courts wherein the drawer-depositor has sought, and in some cases has been successful in his litigation for, damages from the drawee bank on the grounds that the drawee bank had improperly refused to honor the depositor's checks, in violation of its contractual duty, and ultimately caused the depositor's arrest.

In the cases to be considered preliminary attention should be directed to the fact that one problem has been found to be common to all of these cases and likewise dealt with by all the courts. That is, whether the drawee bank's refusal to have honored its depositor's check was, or was not, the proximate cause of the depositor's arrest

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[8] 2 MORSE, BANKS & BANKING § 458 (5th ed. 1917).
[9] 130 Pa. 419, 433, 18 Atl. 632, 633 (1889).

and damages which resulted therefrom, or whether the swearing out of a warrant by a third person was an intervening force or act relieving the bank from fault. Two theories have been developed or recognized by the courts on the issue of the bank's act as the proximate cause of the depositor's injury. One theory is that the failure of the drawee bank to honor the drawer-depositor's check was, as a matter of law, not the proximate cause of the drawer-depositor's arrest and injury. Therefore the drawee-bank could not be held liable for the resulting damages. The second and better view, is that the jury in each case is entitled to determine as a matter of fact whether the bank's wrongful action in dishonoring the check was the proximate cause of the depositor's damages which followed.

In *Bank of Commerce v. Goos,*[10] it was shown that Goos was a depositor of the Bank of Commerce. Goos claimed that he had had on deposit in the defendant bank an amount in excess of 3,300 dollars and that he drew a check on this account for $804.90 payable to one Rush, who in turn presented the check to the defendant for payment; payment was refused by the defendant bank on the pretense that plaintiff had no funds in the bank. Whereupon Rush filed a complaint charging plaintiff with the crime of obtaining a tax receipt under false pretenses and by falsely representing that he had funds in defendant's bank subject to be paid on the check of the plaintiff. Plaintiff was arrested and confined in jail for about four hours before being released on bond. The fact of Goos' arrest received wide notariety, whereupon Goos sought damages of 50,000 dollars from the Bank of Commerce.

The defendant denied that Goos had had sufficient funds in his account to cover the check as the bank had set-off against this depositor's account the amount of a note which it held owed by the plaintiff thus diminishing the balance of the plaintiff's account to an amount less than that of the check; the bank based its defense on the allegation that it had not wrongfully refused to pay the check. The bank further asserted that the filing of the complaint by Rush and the subsequent arrest and detention and publication of these acts were not the actual and necessary consequences of the defendant's refusal to pay the check and denied that damages for these acts were thus chargeable to the defendant's conduct. That

[10] 39 Neb. 437, 58 N.W. 84 (1894).

is, the bank's refusal to pay the check was not the proximate cause of the damages of which the plaintiff complained. The parties stipulated that if the bank had properly exercised the right of set-off, as it claimed, then the bank would not be liable in damages for having refused to honor the check in question.

Apparently without ruling on the question of whether the bank acted properly in asserting a set-off, the court did hold that the arrest of the plaintiff could not properly be considered in assessing and determining the damages claimed against the Bank of Commerce. The court said:

> "It is evident that the petition was framed upon the theory that the bank was liable for the arrest and imprisonment of plaintiff, and the publication of that fact, whereby his credit was greatly damaged. The trial court, however, very properly held that these matters could not be charged to the bank for the mere refusal to pay the check of the plaintiff; his prosecution and imprisonment, and the published statements in violation thereof, not being the natural result of such refusal."[11]

The action was continued to determine the plaintiff's damages for loss of his credit resulting from defendant's wrongful refusal to pay the check. In the principal case the lower court awarded damages for the loss of the plaintiff's credit standing, but the supreme court reversed the lower court. The higher court knew and felt that the jury had learned of the arrest of the plaintiff, that information (which the jury might not properly consider) was so prejudicial to the defendant that even though an instruction was given to the jury to disregard the evidence on this point the verdict of the lower court could not be sustained.

In *Western Nat'l Bank v. White,*[12] a Texas case, the evidence was that as a result of an error on the part of an individual bookkeeper of the defendant a deposit which had been made by the plaintiff to be credited to his account had been credited to the account of another Mr. White. When the check drawn by the plaintiff was presented for payment it was dishonored, there being insufficient funds credited to the plaintiff's account to cover the amount of the check. The plaintiff's arrest followed; there was con-

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[11] *Id.* at 443, 58 N.W. at 86.
[12] 62 Tex. Civ. App. 374, 131 S.W. 823 (1910).

flicting evidence as to who was actually moving party in obtaining the plaintiff's arrest for uttering the bad check. The defendant bank, upon being informed of the plaintiff's arrest, re-checked its deposit slips. The error was discovered, the sheriff notified, and plaintiff was released. The plaintiff based his claim against the bank, in part, for damages resulting from "mental pain, anguish, and humiliation caused by such further detention in arrest upon the finding that appellant bank was the proximate cause of the detention of appellee after the bank found out he was under arrest, and did not use ordinary care to notify the officer who had appellee under arrest that he had 400 dollars to his credit in said bank."[13]

The court stated that the testimony clearly showed that while the arrest of the plaintiff was unlawful and was made without the knowledge of the defendant-drawee, there was no evidence to show that the defendant bank had ratified the unlawful arrest. Judge Levy said:

> "That appellant could not reasonably have contemplated that an unlawful arrest would result from the error which led to the dishonoring of appellee's check is quite clear. . . . The arrest therefore, could not be held, we think, to be the proximate result of the breach of the contract involved in the dishonoring of the check. . . . If, as a matter, of law, the arrest could not be held to be the proximate result of the breach of appellant's contract, then in point of fact in this case *appellant is not shown to be responsible for the further detention of the appellee by the city marshal after it had information of his arrest.*" (Emphasis added.)[14]

In the frequently cited *Hartford v. All Night & Day Bank*[15] case another variation of the problem was considered by the California court. The check of the plaintiff having been improperly dishonored by the bank, one Maphet, an indorser on the check, swore to and filed a criminal complaint charging the plaintiff with violation of the criminal code for having issued a check willfully and with intent to defraud, the drawer knowing at the time that he had

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[13] Western Nat'l Bank v. White, 62 Tex. Civ. App. 374, 376, 131 S.W. 828, 829 (1910).

[14] *Id.* at 379, 131 S.W. at 830.

[15] 170 Cal. 538, 150 Pac. 356 (1915).

not sufficient funds in or on credit with the bank to meet the check. The plaintiff sought 15,000 dollars damages for injuries resulting from this arrest and the detention which followed.

The facts show that the plaintiff had an account with the defendant bank, the account being a savings account as distinguished from a checking account. The by-laws and rules of this savings bank provided that the depositor must give notice to the bank of his intention to make a withdrawal from the savings account, unless the bank should waive this requirement, and in any event any withdrawals could only be made upon notation being made in the depositor's passbook at the time of the withdrawal. While the passbook ultimately found its way to the bank it did not accompany the transfer of the check.

There was nothing appearing on the check nor accompanying it which would have put the defendant-drawee bank upon notice nor calling its attention to the fact that the plaintiff expected that the check would be paid out of the sum in his savings account, nor that the passbook was delivered to the bank to the end that the required entry of withdrawal might therein be entered.

The plaintiff prosecuted this action on the theory that the defendant bank had been negligent in rejecting the check when it had been properly presented for payment and returning the mere statement that the plaintiff had "no account."

The court found that the defendant bank had not in the first instance been guilty of negligent conduct by asserting that:

> "We do not conceive it to have been the duty of the paying teller, under such circumstances, to have sought to learn whether the drawer had a savings bank account, whether the passbook was at the bank, and whether the check should be passed over to the savings department, there paid, and a withdrawal entry made in the passbook."[16]

As additional strength to the court's decision, the court considered the question as to whether the bank's failure to pay the check was, or was not, the proximate cause of the plaintiff's arrest. Judge Henshaw summarized the issue and the applicable law therein involved by saying:

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[16] Hartford v. All Night & Day Bank, 170 Cal. 538, 540, 150 Pac. 356, 357 (1915).

> "The second legal principle, whose application necessarily works a reversal of this judgment is that the damages claimed are in no legal sense the proximate result of the act of negligence complained of. It did not necessarily follow that plaintiff would be arrested and charged with a felony because of the bank's act. There was no direct causal connection between the two things. There was an interruption and the intervention of an entirely separate cause, which cause was an independent human agency acting with an independent mind."[17]

In a later California case[18] the *All Night & Day Bank* case was cited with approval. Again it was held that arrest of the drawer-plaintiff was caused by an intervening force, and that the bank was relieved of legal responsibility. It should be noted that in this latter case the plaintiff, Tempest Beardon, was seeking damages of 25,000 dollars on the theory that the defendant bank had wrongfully refused to honor a check properly drawn by her, and that as a result the payee of the check had instigated her arrest and imprisonment for having given an invalid order and that she had suffered other indignities incidental to and associated with her arrest.

Perhaps the most considered and best written opinion in which the court found for the defendant bank is *Waggoner v. Bank of Bernice.*[19] This case too involved the plaintiff who had been arrested for having passed a "bad check." The plaintiff claimed that "owing to the willful, negligent and malicious acts of defendant . . . said check was dishonored, and payment was refused and marked 'no account'. . . ."[20] In considering whether the defendant bank's act was the proximate cause of the plaintiff's damage, the court quoted from *Holwerson v. St. Louis & S. Ry. Co.,*[21] in saying: "That negligence which sets in motion a train of events that in their natural sequence might, and ought to be expected to, produce an injury, if undisturbed by any independent intervening cause, is the proximate cause of that injury."[22] The court continued by quoting from *Lawrence v. Heidbreder Co.,*[23] and said:

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[17] *Id.* at 541, 150 Pac. at 357.
[18] Bearden v. Bank of Italy, 57 Cal. App. 377, 207 Pac. 270 (1922).
[19] 22 Mo. App. 165, 281 S.W. 130 (1926).
[20] Waggoner v. Bank of Bernie, *supra* note 1, at 167, 281 S.W. at 131.
[21] 157 Mo. 216, 231, 57 S.W. 770, 774 (1900).
[22] Waggoner v. Bank of Bernie, *supra* note 1, at 168, 281 S.W. 130, 131 (1926).
[23] Lawrence v. Heidbreder Ice Co., 119 Mo. App. 316, 93 S.W. 897 (1906).

> "To constitute one act the proximate cause of another, it is not essential, according to the great weight of authority, that the supposed effect should have resulted of necessity from the act—in other words have been inevitable. . . . Events of causative influence may intervene between the initial act and the final result, without displacing of the initial act from the position of proximate cause, if the intermediate events were natural sequences of the initial act."[24]

Thus, it is not disputed that a defendant may be held responsible even if the loss was not the result of his wrong alone, but also caused in part by his and the concurrent wrongful acts of another.

The court in ruling on the issue of whether the defendant's act was the proximate cause of the plaintiff's injury said:

> "[W]e are unable to discover either by reason or human experience how the act of the Dexter bank in causing plaintiff's arrest can be considered in any other light than an independent, intervening cause or force, not constituting a link in the chain of events which might and ought to have been expected to follow in the wake of defendant's act in refusing payment of plaintiff's check."[25]

The demurrer to plaintiff's petition was thus sustained.

In *Wheeler v. Bank of Edenton*[26] the Supreme Court of North Carolina, in a somewhat unsatisfactory opinion, considered the drawee bank's liability to the drawer for his resulting indictment, trial and conviction for having given a worthless check. The facts of the case did not show that the Edenton Lumber Company, of which plaintiff was an officer, actually had sufficient funds on deposit with the defendant to cover the check, but that the defendant had agreed to pay certain checks to be drawn by the Edenton Lumber Company when presented for payment, and upon presentment of one of the checks the defendant refused to pay it. The bank's refusal to pay the check resulted in the arrest and conviction of the plaintiff for having given a worthless check. The Edenton Lumber Company was not a party to this litigation. The court in ruling for the defendant on the pleadings observed, "an action never lies when

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[24] Waggoner v. Bank of Bernie, *supra* note 1, at 168, 281 S.W. at 131.
[25] *Id.* at 170, 281 S.W. at 132.
[26] Wheeler v. Bank of Edenton, 209 N.C. 258, 183 S.E. 269 (1936).

a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal law of the state, and this principle is not impaired even when the plaintiff is acting under authority of the defendant."[27] It would then seem that the court is saying that if the plaintiff is in fact guilty of the crime with which he was charged he should have no recourse against the bank for the bank had not acted improperly.

To this point of the discussion consideration has only been given to the cases in which the plaintiff-depositor had been denied recovery against the defendant-drawee bank. Consideration will next be extended to those cases wherein the results were more sympathetic to the position of the plaintiff-depositor and which the demurrer of the defendant was not sustained by the court. Of the cases in this latter group, the earliest and one of the better decisions of the court which at least in part sustained the position of the plaintiff is *Woody v. National Bank.*[28] The facts of this case may be thus summarized. Plaintiff executed a check in the amount of six dollars, payable to Hollingsworth, while having in his checking account an amount in excess of fifty dollars. When the check was presented for payment it was dishonored with a notation thereon "no account." The indorsee of the check caused a criminal warrant to be issued charging the plaintiff with giving a worthless check with intent to cheat and defraud. Upon proof at the trial that the plaintiff had always had funds on deposit with the defendant exceeding the amount of the check the prosecuting attorney consented to the entering of a "not guilty" verdict and the plaintiff was discharged. The plaintiff-depositor then sued the drawee-bank for damages resulting from this arrest alleging that the bank had through its agents acted maliciously in refusing to pay the check. The lower court sustained the defendant's demurrer to the plaintiff's complaint and the plaintiff appealed the ruling of the lower court. It was shown that North Carolina had a statute which provided that:

> "No bank shall be liable to a defendant because of nonpayment, through mistake or error, and without malice of a check which should have been paid had the mistake or error of nonpayment not occurred, except for the actual damages by reason of such nonpayment that the depositor shall prove,

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[27] *Id.* at 260, 183 S.E. at 270.
[28] Woody v. National Bank, *supra* note 1.

and in such event the liability should not exceed the amount of damages so proven."[29]

The court in considering the effect of this said: "Upon the facts admitted for the purpose of our present decision, plaintiff is entitled to nominal damages at least. Liability for nominal damages, presumed from the wrongful act of defendant, is sufficient to constitute a cause of action. We must therefore hold that there was error in sustaining the demurrer and in dismissing the action."[30] The court did not expressly consider the measure of damages to be applied for the sole issue on this appeal was the determination of the court on the lower court's ruling on the demurrer. The court did, however, assert by way of dicta that:

> "[I]f the nonpayment of the check was through error or mistake, without malice, and no actual damage resulted to the depositor from such nonpayment for in such case the statute if applicable. If the statute is not applicable, the bank may, upon well-settled principles, be liable to its depositors not only for nominal or actual damages, but also for punitive damages."[31]

The case which is most frequently cited in which the bank has been held liable for the drawer's arrest resulting from the breach of duty by the bank is *Mouse v. Central Sav. & Trust Co.*[32] The facts of the case show that the depositor had opened an account in the defendant's bank on April 9, 1924. On the identification card the plaintiff's name read "Meuse." The account was opened in the name of "G. C. Meuse," and so written in the deposit book. Sometime later the plaintiff authorized his wife also to draw on the account. The account was then carried in the name of "Mr. and Mrs. G. C. Meuse," but the plaintiff signed the card which permitted his wife to draw on the account "G. C. Mouse," the wife signed the card "E. Mouse," and the wife's name also thereon appeared as "Mrs. G. C. Mouse."

The plaintiff issued two checks which were signed "G. C. Mouse." These checks were dishonored by the defendant bank even though there were sufficient funds on deposit with the bank to cover

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[29] N.C. Laws 1921, ch. 4, § 38.
[30] Woody v. National Bank, *supra* note 1, at 556, 140 S.E. at 154.
[31] *Ibid.*
[32] Mouse v. Central Sav. & Trust Co., 120 Ohio St. 599, 167 N.E. 868 (1929).

these checks. The payee, Cory, was responsible for the issuance of a warrant for the arrest of Mouse for uttering checks without funds. Mouse was arrested and jailed. The bank having discovered its mistake made payment of the checks and aided in procuring Mouse's release from prison on bond.

Again the question of proximate cause was raised. The court felt that if the bank had exercised reasonable care and diligence the drawee bank could have seen that the consequence of its act would lead to the arrest of the plaintiff. For it was clear that giving a check without funds or credit to meet it constitutes a crime, and it was likewise known to the bank that arrests often resulted from such wrongful conduct on the part of the depositor. It necessarily follows that reasonable minded people might well find on these facts that the bank's act, whether with or without malice, was the proximate cause of the arrest even though the warrant and arrest was suggested by another, namely Cory.

The Ohio court approved the language found in *Ruling Case Law* wherein considering the effect of an intervening act on the defendant's liability the following statement was approved:

> "It is universally agreed that the mere fact that the intervention of a reasonable human being can be braced between the defendant's wrongful act and the injury complained of will not absolve him. On the contrary the general rule is that whoever does a wrongful act is answerable for all the consequences that may ensue in the ordinary course of events, even though such consequences are immediately and directly brought about by an intervening cause, if such intervening cause was set in motion by the original wrongdoer, or was in reality only a condition on or through which the negligent act operated to produce the injurious results. Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence, have been foreseen, the last result, as well as the first, and even intermediate result, is to be considered in law as the proximate result of the first wrongful cause."[33]

The Ohio court has thus found that the fact that a third party actually swears out a warrant for the arrest does not as a *matter of law* break the chain of causation.

[33] *Id.* at 605, 167 N.E. at 870.

The court sought to distinguish the facts of this case from those of the *Hartford* case which reached a contrary conclusion. Judge Allen said:

> "There was evidence in the record to show, in our opinion, That the act of the bank was the causative factor in the entire transaction. The very gist of the prosecution was the non-payment of the check. If at any time prior to the institution of the prosecution the bank had notified Cory of its mistake, concededly Cory would not have sworn out the affidavit and caused the warrant to issue. This is not the case in which the negligence of the bank was a mere condition upon which the independent act of Cory intervened to produce the result. The case is differentiated from Hartford case, . . . by the fact that Cory deliberately consulted with the bank, looked over its books with the bookkeeper, and made a searching investigation before he instituted the prosecution. Hence evidence was presented tending to show that the act of Cory was under the control of the bank, in the sense that if its bookkeeper had carefully compared the entire records, and had observed the name 'Mouse' plainly written in at least three places on the records of the bank, it would have been evident that Mouse had an account with the depositary, and the arrest would have been stayed."[34]

A slightly different approach to the problem may be seen in *Macrum v. Security Trust & Sav. Co.*[35] case. The question of whether a manager who drew checks on behalf of his principal might recover from the bank for his arrest and imprisonment for having uttered a bad check when as a matter of fact the employer did have sufficient funds on deposit to cover the check was considered. The checks were drawn in the name of the company, the plaintiff's employer.

It is recognized that the basis of all actionable torts is that the law imposes a duty on an action not to do negligently or wrongfully any act which would probably injure another, unless there is some justification for the act. Applying this rule to the case under consideration, the court felt that it was for the jury to determine the question of whether the defendant's act was the proximate

[34] *Id.* at 603, 167 N.E. at 869.
[35] 221 Ala. 419, 129 So. 74 (1930).

cause of the plaintiff's injury and not one of law to be determined by the judge. The court speaking through Judge Foster said:

> "As applicable to the instant case, the jury may find that the banker should have had *knowledge of the peril of plaintiff individually* to sustain some nature of damage as the proximate result of the wrongful refusal to cash the check issued by the plaintiff, the manager, and in the name of his principal. Stated otherwise, could it be said to be reasonably foreseeable, or that there was reasonable danger that his plaintiff individually would sustain damage, as the proximate result of the alleged negligent, willful, or wanton wrong of the bank, though such wrong consists of a breach of contract with the plaintiff's principal, for which such principal would have a tort action? Our conclusion is that the answer to the above inquiry is that it should be left to the jury on proper proof and not be determined as a matter of law whether such alleged wrong did or did not proximately injure him and constitute the basis of a tort action, when the complaint alleged that it did." (Emphasis added.)[36]

The only case discovered in which a verdict of damages for the depositor against the bank was actually sustained was *Collins v. City Nat'l Bank & Trust Co.*[37] In the *Collins* case the plaintiff drew a check for $3.62 on the defendant bank which he cashed at the Canan National Bank. The check after having passed through the clearing house was presented to the defendant for payment, payment being refused with the notation "no account." The plaintiff had sufficient funds on deposit to cover the check, but the bank had negligently failed to discover the plaintiff's account. The court said: "The head bookkeeper believed that it was a crime for a person to draw a check on a bank where he had no account and realized that by returning the check so marked he was exposing the plaintiff to prosecution for a crime."[38] When the check was returned to the Canan National Bank with the notation "no account" it formally registered a complaint with the state police who in turn swore out a warrant for the arrest of the plaintiff. The court felt that the acts of the Canan National Bank and the police did not as a matter of law, act as an intervening force or act in the

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[36] *Id.* at 422, 129 So. at 76.
[37] 131 Conn. 167, 38 A.2d 582 (1944).
[38] *Id.* at 169, 38 A.2d at 583.

sense that either broke the chain of causation between the negligent act of the defendant and the resulting injury to the plaintiff.

This court in sustaining a verdict for the plaintiff of 2,000 dollars said while there was no award of punitive damages the amount allowed was liberal, but could not be said by the court to be so excessive as to require interference by the court.

The court in summarizing its position relating to the problem of whether the defendant's action was the proximate cause of the plaintiff's damages stated its position as follows:

> "A primary duty of a commercial bank to its depositors is to honor the latter's checks when they are good, . . . before refusing to do so, it should use reasonable care to ascertain whether this duty had been breached. The test to be applied was, 'would the ordinary man in the defendant's position, knowing that he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result.' Looking back from the injury to the negligent act, the jury reasonably could have found the necessary casual connection. This is the correct method of determining the existence of proximate cause."[39]

From the examination of all the cases cited it is the issue of proximate cause and intervening force which has been found to be common to all of these cases and resulted in conflict in the decisions. Some courts obviously feel as a matter of law that the drawee bank should not be held liable for the subsequent arrest of one of its depositors for allegedly having given a "worthless check" even though the bank had acted in error in refusing to pay a check which they had by contract expressly or impliedly agreed to honor, because of the intervening act of a third person. Other courts are of the opinion that the decision on the issue of proximate cause should be determined by the jury, that is the jury should find if the bank is to be held liable for the full consequences, including damages resulting from the arrest of the depositor. It should be noted that the decisions on this troublesome point are fairly evenly divided in number. As the problem presents itself each state therefore must make its own determination as to which is the smoother and better path to follow.

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[39] *Id.* at 170, 38 A.2d at 583.