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Banks and Banking–Negotiable Instruments–Delivery of Incomplete Instrument

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RECENT CASE COMMENTS

BANKS AND BANKING — NEGOTIABLE INSTRUMENTS — DELIVERY OF INCOMPLETE INSTRUMENT. — Plaintiff signed a check drawn on defendant bank and gave it to an employee to be filled in and delivered to a particular person for a special purpose; the check, placed in a drawer, was found or stolen by a third person who filled in the blanks, using the name of a fictitious person as payee, and presented it to the bank, indorsing it in the name of the payee. The bank, although making some effort to identify the payee, failed to do so satisfactorily, but cashed the check, and charged it to the account of plaintiff. The depositor sues to recover the amount so charged to him. Held, that a bank paying out a check without proper identification of the payee, and so paying to a person not intended by the drawer, is negligent and liable to the drawer for the amount of the check which has been charged to his account. Hays v. Lowndes Savings Bank & Trust Co.¹

In terms of the Negotiable Instruments Law, the instrument in this case was incomplete and undelivered, but by way of dictum, the court says that if the bank had not been negligent in failing to properly identify the payee “the loss sustained would have fallen upon the maker of the check, who, by his carelessness, had made it possible that fraud could be perpetrated.” This statement seems in conflict with section 15² of the Negotiable Instruments Act which provides that “When an incomplete instrument has not been delivered, it will not, if completed and negotiated without authority, be a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery.” However, judicial³ and text⁴ authorities recognize a qualification where the drawer was negligent. One decision⁵ has recognized that the statute could be strictly applied to this factual situation, but the idea was discarded without discussion and the decision based on estoppel and negligence. One case⁶ was decided within the

¹ 190 S. E. 543 (W. Va. 1937).
³ See notes 8-12 infra.
⁴ Britton, Negligence in the Law of Bills and Notes (1924) 24 Col. L. Rev. 695, 713; 5 Michie, BANKS AND BANKING (1932) § 181; for an amusing discussion of the two possible views see EWART, ESTOPPEL (1900) 460-461.
section only after the court had explained that the drawer had not been negligent. A third court held that a showing of the drawer’s negligence was not precluded by section 15.

New York cases have made a distinction between those cases in which the drawer bank was involved with the drawer, and those in which a holder in due course was suing the drawer. Feeling that a duty of great care was owed by the depositor to his bank, they have thrown liability on the drawer in the former case and relieved him in the latter. Other courts have made the drawer liable to his bank when his negligence caused the negotiation of the check, without discussing the New York distinction.

One case, going beyond the others, does not make the distinction, but allows a holder in due course to recover from the negligent drawer. This case cannot be so easily justified as the others, which, at least, have the rationale that the duty owed one’s bank is paramount to the rights under section 15.

The principal case and others like it carry the idea of negligence one step further. Recognizing that the drawer’s negligence would make him liable in spite of the lack of delivery, these courts hold that if the drawee bank was negligent in identifying the payee, it will be estopped to set up the drawer’s negligence. In effect, this is no more than applying the tort doctrine of “last clear chance” in the field of negotiable instruments.

It is submitted that in the interest of predictable laws governing commercial paper, it would be better to apply the relevant statutes strictly, and not make such cases as the principal one depend on a showing of negligence on one side or the other. Although the rule might be harsh in particular instances, it would

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create uniformity. If a different result is desirable, the change should come from the legislature rather than the court.

E. H. B.

CONSTITUTIONAL LAW — PRIVILEGES AND IMMUNITIES OF CITIZENS IN THE SEVERAL STATES — RIGHT OF STATE TO IMPOSE RESIDENCE REQUIREMENT FOR DISTRIBUTORS OF NONINTOXICATING BEER.

— H, a nonresident of West Virginia, applies for a writ of mandamus to compel the issuance to him of a license to distribute non-intoxicating\(^1\) beer, contending that the West Virginia statute\(^2\) which makes four years *bona fide* residence in the state a prerequisite to the issuance of such license is violative of the privileges and immunities clause of the Federal Constitution.\(^3\) Held, that the statute was constitutional because the privilege involved was denied only to nonresidents, and the Constitution requires equality only as between citizens. Writ refused. *Hinebaugh v. James.*\(^4\)

The privileges and immunities clause of article 4, section 2, denies to any state the right to discriminate between its citizens and the citizens of other states.\(^5\) Four Supreme Court cases illustrate the view of that tribunal as to the application of this clause to invidiousness between residents and nonresidents of a particular state. In *Blake v. McClung*\(^6\) the Court held a statute unconstitutional which gave "resident" creditors a priority as to the assets of a foreign corporation doing business in the state, because the real intent of the statute was to favor citizens of the state at the expense of citizens of other states. *La Tourette v. McMaster,*\(^7\) de-

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\(^1\) The West Virginia legislature has declared malt beverages not containing more than five per cent of alcohol by weight to be nonintoxicating. W. Va. Acts 1937, c. 12, art. 15, § 2.

\(^2\) *Id.* at § 12(a).

\(^3\) Counsel contended that the statute was invalid under both the privileges and immunities clause of art. 4, § 2, providing: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"; and the privileges and immunities clause of the Fourteenth Amendment, providing: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States". The Court dismissed the contention as to the Fourteenth Amendment on the ground that no new rights are conferred by that privileges and immunities clause. There is considerable authority for this proposition; Slaughter-House Cases, 83 U. S. 36, 21 L. Ed. 394 (1873); *In re Kemmler*, 136 U. S. 436, 10 S. Ct. 930 (1890); Bartemeyer v. Iowa, 85 U. S. 129, 21 L. Ed. 929 (1874); but *quaque* as to the extent to which the law has been changed in this respect by the recent case of Colgate v. Harvey, 296 U. S. 404, 56 S. Ct. 252 (1935).

\(^4\) 192 S. E. 177 (W. Va. 1937).

\(^5\) Slaughter-House Cases, 83 U. S. 36, 21 L. Ed. 394 (1873).

\(^6\) 172 U. S. 239, 19 S. Ct. 165 (1898).

\(^7\) 248 U. S. 465, 39 S. Ct. 110 (1919).