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Bills and Notes—Liability for Negligent Payment of Altered Checks

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BILLS AND NOTES — LIABILITY FOR NEGLIGENT PAYMENT OF ALTERED CHECKS

Depositor's account was charged on four checks on which the payee's name had been wrongfully changed. Plaintiff claimed breach of contract and tort damages for injury to credit and business. On motion to dismiss, *Held* (3-2): Contract action lies, tort action dismissed. *Stella Flour & Feed Corp. v. National City Bank,* 285 App. Div. 182, 136 N. Y. S. 2d 139 (1st Dep't 1954).

A bank is liable in contract for amounts debited to a depositor on materially altered or forged checks, unless the depositor was negligent in execution. BRITTON, BILLS & NOTES, §§ 132, 277, 282 (1943). As to a bank's liability for injury sustained as a result of the negligent payment of an altered check, no direct authority has been found.

Negligence arising out of the performance of a contract has been the basis of liability in tort for physical or mental injury, *Gillespie v. Brooklyn Heights R. R. Co.,* 178 N. Y. 347, 70 N. E. 857 (1904) (common carrier); *DuBois v. Decker,* 130 N. Y. 325, 29 N. E. 313 (1891) (physician); *Flint & Walling Mfg. Co. v. Beckett,* 167 Ind. 491, 79 N. E. 503 (1906) (constructor of a windmill); and for economic injury, *Trimboli v. Kinkel,* 226 N. Y. 147, 123 N. E. 205 (1919) (attorney's title search); *Ferrie v. Sperry,* 85 Conn. 337, 82 Atl. 577 (1912) (surveyor); *Pearsall v. Western Union Telegraph Co.,* 124 N. Y. 256, 26 N. E. 534 (1891) (telegraph company). In these cases the plaintiff may elect to sue in contract, in which case his damages will be limited to those losses reasonably foreseeable under the familiar rule of *Hadley v. Baxendale,* 9 Ex. 341, 156 Eng. Rep. 145 (1854); or in tort, in which case his damages will be limited by the principles of proximate cause. See Prosser, *The Borderland of Tort and Contract,* SELECTED TOPICS ON THE LAW OF TORTS 402 (1954).

A bank may be liable in contract or in tort for refusal to honor a valid check when the depositor has sufficient funds. *Citizens' National Bank v. Importers & Traders' Bank,* 119 N. Y. 195, 23 N. E. 540 (1890); *Marzetti v. Williams,* 1 B. & Ad. 415, 109 Eng. Rep. 842 (1930). Whether there can be recovery of substantial damages in such a case is made to depend on different factors in the various jurisdictions. See 33 MINN. L. REV. 528 (1949). In New York recovery is limited to nominal damages in all cases, unless the dishonor was intentional. *Wildenberger v. Ridgewood National Bank,* 230 N. Y. 425, 130 N. E. 600 (1921); *Clark Company v. Mount Morris Bank,* 85 App. Div. 362, 83 N. Y. Supp. 447 (1st Dep't 1903), *aff'd,* 181 N. Y. 533, 73 N. E. 1133 (1905). In a

recent case, *Nealis v. Industrial Bank of Commerce,* 200 Misc. 406, 107 N. Y. S. 2d 264 (Sup. Ct. 1951), an attorney recovered $100 damages in libel and nominal damages in negligence for the wrongful refusal to honor a valid check. If the plaintiff elects to sue in contract, evidence of injury to his credit is admissible at the trial. *Levine v. State Bank,* 80 Misc. 524, 141 N. Y. Supp. 596 (Sup. Ct. 1913).

A bank may be liable beyond the limits of a contract where it fails to lend money, *Goldsmith v. Holland Trust Co.,* 5 App. Div. 104, 38 N. Y. Supp. 1032 (1st Dep't 1896), or fails to renew notes, *Bank of Commerce v. Bright,* 77 Fed. 949 (3d Cir. 1896). But, the specific hazard must have been in contemplation at the time the contract was made. McCormick, Damages § 139 (1935).

In the instant case the minority is shocked that a bank can cause foreseeable gross harm to a depositor, and escape liability. It argues that credit standing is a protected interest, and that an attempt at proof of foreseeable injury caused by the negligent payment should not be denied the plaintiff. But even under the rationale of the New York wrongful-refusal-to-pay cases more than nominal damages beyond the amounts of the checks would be denied. Also, it would appear that in accord with *Levine v. State Bank, supra,* proof of injury to credit standing would still be admissible at the trial of the contract action.

To the writer the holding of the majority is sound. Although consequential tort damages are commonplace in other areas, the door should not be opened to impose additional liability on banks for the results of their errors. Since the banks must assume the losses on forged checks, tort damages would place their standard of responsibility completely out of proportion to that in other commercial and professional areas.

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CHILDREN'S COURT ACT—MEDICAL TREATMENT OF CHILD AGAINST PARENT'S WISHES

Proceeding by Commissioner of Social Welfare to obtain custody of twelve year old boy whose father, because of personal philosophy, refused to allow an operation on son's hairlip and cleft palate. *Held* (3-2): Children's Court should have ordered medical and surgical care. *In re Seiferth,* 285 App. Div. 221, 137 N. Y. S. 2d 35 (4th Dep't 1955).