Buffalo Law Review

Volume 3 | Number 2 Article 12

4-1-1954

Commercial Law—Provision in Stop Payment Order Releasing Bank from Liability for Negligence Against Public Policy

Victor C. Silverstein

COMMERCIAL LAW — PROVISION IN STOP PAYMENT ORDER RELEASING BANK FROM LIABILITY FOR NEGLIGENCE AGAINST PUBLIC POLICY

Depositor signed a stop payment order containing a provision constituting a release of the bank from all liability if the bank pays the check through "inadvertence." *Held* (5-1): Such provision is against public policy. *Thomas v. First Nat. Bank of Scranton*, ___ Pa. ___, 101 A. 2d 910 (1954).

The uniform course of decision is that where there is a stop payment without a purported release the bank will be held liable if it inadvertently pays the holder. The theory is that since the check does not operate as an assignment *pro tanto* of the depositor's funds, the order to pay is merely executory and may be countermanded at any time. *American Defense Society v. Sherman Nat. Bank*, 225 N. Y. 506, 122 N. E. 695 (1919); *Elliott v. Worcester Trust Co.*, 189 Mass. 542, 75 N. E. 94 (1905); NEGOTIABLE INSTRUMENTS LAW § 325. However, there has been an attempt by banks to escape liability through the insertion of purported releases.

The effect of these releases have resulted in a split of authority. The majority of states hold such a release to be effective. *Gaita v. Windsor Bank*, 251 N. Y. 152, 167 N. E. 203 (1929); *Tremont Trust Co. v. Burack*, 235 Mass. 398, 126 N. E. 782 (1920); *Hodnick v. Fidelity Trust Co.*, 96 Ind. App. 342, 183 N. E. 488 (1932). However, in an early New York case such a purported release was construed to be a mere statement by the bank that it would not be liable unless it failed to exercise ordinary care. *Elder v. Franklin Nat. Bank*, 25 Misc. 716, 55 N. Y. S. 576 (Sup. Ct. 1899). The questions of consideration or the public policy regarding the release were not discussed but it reflected that "The courts are not prone to construe instruments in such a way as to support a waiver of liability for negligence." *Elder v. Franklin Nat. Bank, supra* at 719, 55 N. Y. Supp. at 578. See: *Mynard v. Syracuse, etc., Railroad Co.*, 71 N. Y. 180 (1877) (a case involving an attempt by a common carrier to avoid responsibility by stipulation). New York has also found such a release ineffective for want of consideration and as against public policy. *Levine v. Bank of U. S.*, 132 Misc. 130, 229 N. Y. Supp. 108 (1928). But a Massachusetts court, in *Tremont Trust Co. v. Burack, supra*, held such a release not against public policy and found consideration for the stop payment order in the "mercantile relation of the parties." New York, in *Gaita v. Windsor Bank, supra*, which relied on the *Tremont* case though not discussing public policy or consideration, talked of "freedom of contract" and found that a depositor could issue either a limited or qualified notice not to pay or an absolute and

unqualified notice. If he issued the former, the bank would be relieved of liability, but if the latter the bank would be held to its common law obligation. It noted that if the bank did not wish to assume its common law liability it may terminate its relationship with the depositor. However, a number of cases have found such a provision to be ineffective to escape liability due to a lack of consideration or, as in the instant case, a public policy against such a release. *Speroff v. First Cent. Trust Co.,* 149 Ohio St. 415, 79 N. E. 2d 119 (1948) (though a "mercantile relationship" existed, there was no consideration and a public policy against it); *Hiroshima v. Bank of Italy,* 78 Cal. App. 362, 248 Pac. 947 (1926) (statute declares such a provision against public policy); *Reinhardt v. Clifton Passaic Nat. Bank & Trust Co.,* 16 N. J. 430, 84 A. 2d 741 (1951) (relied on lack of consideration); *Calamita v. Tradesmen's Nat. Bank,* 135 Conn. 326, 64 A. 2d 46 (1949) (provision found to be absolute and positive notice and without consideration).

It is to be noted that in the instant case the issue was not complicated by the question of consideration because the order contained the language of the Uniform Written Obligations Act of 1927, 33 P. S. § 6, stating that: "The undersigned agrees to be legally bound hereby." But the majority found such a release to be against public policy analogizing a bank to a common carrier or public utility. They also mention Sections 4-103 (1) and 4-407 of the Uniform Commercial Code, though not yet effective has been enacted in Pennsylvania, which forbids a bank to disclaim or limit their liability for negligence and give the bank the right of subrogation against the payee. The sole dissenter, following *Tremont Trust Co. v. Burack, supra,* and *Gaita v. Windsor Bank, supra,* finds a release due to the notice being limited and qualified and that since these releases "... relate exclusively to personal and private affairs" that no public interest is involved.

It is submitted in the light of the fact that the bank is not subrogated to the drawer's rights against the payee they should be able to limit their liability by contract. However, since there is a strong public policy averse to limitations on liability for negligence, the proposal of the Uniform Commercial Code, apparently relied on in the instant case, prohibiting such limitation and allowing subrogation seems just and equitable.

Victor C. Silverstein