

RECENT LEGISLATION

Banks and Banking—Drawee Bank's Liability for Premature Payment of Postdated Checks—A recent Florida statute has effected a change in the rules governing the liability of a drawee bank for the premature payment of a postdated check. It provides:

"Whenever a postdated check is drawn upon any bank in the State of Florida it shall be the duty of the person, firm or corporation drawing such check to notify the bank upon which such check is drawn, giving a complete description thereof, including the names [sic] of the payee, the date, the number and the amount thereof, otherwise the bank upon which such check is drawn shall not be held liable for paying a postdated check through error."¹

The postdated check is a valid negotiable instrument,² which, however, embodies some danger of liability or loss to the drawee bank from premature payment. If the bank pays before the date of the check, and the drawer subsequently, but prior to the date of the check, stops payment, the bank normally will be unable to recover the amount paid from the payee unless it can show fraud, collusion or bad faith on his part,³ nor will it be permitted to charge the amount to the drawer's account.⁴ There are two dubious theories upon which the bank may be permitted to charge the drawer's account, neither one widely approved or adopted by the courts. The first has the drawee subrogated to the payee's rights on the check,⁵ but the bank's rights would depend on the drawer's having received full value for his check, and stop payment orders are usually inspired by the drawer's failure to receive full value. The other theory, that the bank, by paying the check, becomes a holder in due course able to enforce the instrument against the drawer,⁶ is rarely accepted by the courts. Thus little protection can be gained for the bank on these theories. In addition to the stop payment situation there is a second important way in which the bank may suffer loss from premature payment. When the premature payment depletes the drawer's account to a point necessitating the dishonor of a subsequent check drawn prior to the date of the postdated check, such dishonor is wrongful, and the bank will be held liable to the drawer for all consequent damages.⁷

One way in which banks might seek to protect themselves from all types of loss on postdated checks would take the form of a clause on

1. Fla. Laws 1947, c. 23756, § 1.

2. UNIFORM NEGOTIABLE INSTRUMENTS LAW, § 12; 1 PATON, DIGEST OF LEGAL OPINIONS 1103, Opinion 19:1 (1940); Breckenridge, *Negotiability of Postdated Checks*, 38 YALE L. J. 1063 (1929).

3. 1 PATON, *op. cit. supra* at 1105, Opinion 19:3.

4. *Stag Company v. Union Bank of Chicago*, 201 Ill. App. 510 (1916); *Richey v. York County National Bank*, 52 York Legal Record 33 (Pa. 1938); 1 PATON, *op. cit. supra* at 1105, Opinion 19:4; 2 MICHIE, BANKS AND BANKING 1081, § 138(4ba) (1913).

5. *See Bijur, J.*, in *Dousmanis v. Colonial Bank*, 134 Misc. 472, 473, 235 N. Y. Supp. 489 (1929); *see also Bijur, J.*, concurring in *K. ank K. Silk Trimming Co. v. Garfield National Bank of N. Y.*, 127 Misc. 27, 31, 215 N. Y. Supp. 269, 273 (1926).

6. *Usher v. A. S. Tucker Co.*, 217 Mass. 441, 105 N. E. 360 (1914); *see Crawford v. West Side Bank*, 100 N. Y. 50, 56, 2 N. E. 881, 883 (1885); *see Peters, J.*, dissenting in *Dousmanis v. Colonial Bank*, 134 Misc. 472, 473, 235 N. Y. Supp. 489, 490 (1929); 1 PATON, *op. cit. supra* at 1105, Opinion 19:4.

7. *Smith v. Maddox-Rucker Banking Co.*, 8 Ga. App. 288, 68 S. E. 1092 (1910); 1 PATON, *op. cit. supra* at 1104, Opinion 19:2.

the signature card filled out by the customer when he opens an account, the clause stating that the customer agrees that the bank will not be liable for prematurely paying any postdated check.⁸ In general, however, courts are inclined to construe such provisions, which are designed to prevent liability for negligence, as strictly as possible against the party who has framed them.⁹ Courts have found such stipulations invalid where they were printed on stop order forms used by the customer to stop payment on a check.¹⁰ It would seem even more proper to deny effect to such a provision when it is signed perhaps far in the past and in view of the fact that the postdated check will carry on its face ample warning of the danger of mistaken payment, unlike the ordinary check on which payment has been stopped.

This new statute provides full protection from the danger of loss, a protection which is evidently not otherwise available except through vigilance and precautionary measures. It does so at the cost of a slight burden on the customer. Any attempt to justify the enactment of such a statute will doubtless be based on two chief arguments. First, the volume of checks handled by banks today makes it impossible to avoid occasional error in payment. The second argument rests on the deceptive nature of a postdated check. Its deferred payment feature recommends it to the individual attention given to collection items, while the form used will relegate it to the volume handling procedure used for cash items, and the hazard of mistaken payment is consequently greater than usual. Finally, more in defense than in justification, it can be said that the statute affects only this hybrid instrument and does not weaken the rule that the drawee bank must in general bear the loss caused by any mistake in paying a check, a rule essential to the value and efficiency of the check device. Moreover it does not unduly hamper the use of the postdated check, an instrument that may have features uniquely desirable in some commercial situations.¹¹ However, an examination of the proportions of the evil sought to be corrected by this statute reveals that it cannot be justified. Representatives of five large Philadelphia banks expressed the unanimous opinion that the danger of premature payment of a postdated check is no source of either concern or appreciable loss to the bank, and that there is absolutely no need for such remedial legislation. One bank estimated that only one postdated check is encountered daily in an average volume of 28,000 checks, and none could recall without investigation ever having taken a loss on premature payment. This testimony is borne out by the paucity of cases on this point. Legislative protection is clearly not called for in such a situation, especially since it is not established that banks themselves are unable to cope with whatever small difficulty is presented by the postdated check. This conclusion is based on an investigation restricted to local banking circles, and there is a possibility that the problem may vary in gravity in different localities.¹² If such a provision were being considered for inclusion in a uniform code for commercial instruments, where it might be especially desirable to leave no gaps, it would be advisable to investigate the proportions of the postdated check problem in communities throughout the nation.

8. 1 PATON, *op. cit. supra* at 1107, Opinion 19:5.

9. 3 PATON, *op. cit. supra* at 3469, Opinion 7:1.

10. 3 PATON, *op. cit. supra* at 3472.

11. Comment, 29 YALE L. J. 321 at 325 (1920).

12. A letter from a banker in Alabama in reference to a statute substantially the same as this one, which failed to pass the Alabama legislature, states that bankers generally would welcome a statute "discouraging" postdated checks, since they do provide a nuisance element in bank operation.