FIRST NAT. BANK OF TRINIDAD v. FIRST NAT. BANK OF DENVER.

Case No. 4,810.

{4 Dill. 290;[1] 7 Amer. Law Rec. 168; 6 Reporter, 356; 10 Chi. Leg. News, 388; 2 Tex. Law J. 74; 7 Cent. Law J. 170; 20 Pittsb. Leg. J. 24.}

Circuit Court, D. Colorado. July, 1878.

DUTY AND RESPONSIBILITY OF A BANK AS A COLLECTING AGENT—NEGLIGENCE—USAGE—CUSTOM—MEASURE OF DAMAGES.

1. A bank which acts as the collecting agent of another bank must use reasonable diligence and care, and if, in consequence of a failure to do so, a loss happens, it is liable.

2. The defendant bank received from the plaintiff bank a sight draft for collection, drawn, by the plaintiff on a third bank against funds actually to the credit of the drawer; the defendant received this draft for collection January 10th, and transmitted it directly to the drawee., its correspondent, on the same day; it ought to have reached the drawee in two days; the drawee continued good until January 29th, when it failed; the drawee did not acknowledge the receipt of the draft, and in fact the draft miscarried and never reached the drawee; the defendant made no inquiries about it until February 9th; the plaintiff and defendant both supposed, meanwhile, that it had been paid: the defendant gave the plaintiff no notice of any

kind in respect of the draft until February 11th; the plaintiff sued the defendant for its negligent omission to give it notice: *Held,* that the defendant was liable.

[Cited in Levi v. National Bank of Missouri, Case No. 8,289; First Nat. Bank of Circleville v. Bank of Monroe, 33 Fed. 411.]

3. The usage or custom set up by the defendant, to the effect that it was not required to make inquiries concerning such remittances prior to the receipt of the regular monthly statement of accounts between banks, was not established by the evidence.

4. Under the special facts, the measure of damages was the amount of the draft.

On the day of its date, the plaintiff bank drew the following:

"$5,000. Trinidad, Col., Jan. 9, 1878. Pay to the order of D. H. Moffat, cashier (of defendant bank) five thousand dollars. Geo. B. Swallow, Cashier. To the First National Bank, Kansas City, Mo."

The plaintiff was the correspondent of the defendant bank, and both were the correspondents of the above named bank at Kansas City. Defendant (to the order of whose cashier the draft was payable) received the same, in due course of mail, January 10th, and without delay transmitted it on the same day, for credit and advice, directly to the drawee—the Kansas City bank. When the draft was drawn by the plaintiff it had more than the amount actually on deposit with the Kansas City bank, and it at once credited the last named bank with the amount According to usage, the defendant, on the receipt of the draft, credited, January 10th, the amount to the plaintiff and charged the amount to the Kansas City bank. This was done in anticipation that the draft would reach the drawee and be duly paid when it arrived. The letter containing the draft which was sent by the defendant to the Kansas City bank would, in due course of mail, have reached the drawee on January 13th, at the latest on January 14th. The Kansas City bank never received the letter containing the draft. That bank continued to do business until January 29th, 1878, when it closed its doors, and afterwards the comptroller of the currency appointed a receiver, and the bank Is now in process of liquidation. If the draft had been presented at any time before January 29th, it would have been paid. The Kansas City bank did not of course, acknowledge the receipt of the draft since its president testified that it was never received. Singularly enough, another draft for $5,000, drawn about the same time by the plaintiff on the same Kansas City bank, and forwarded for collection through a bank in Pueblo, Colorado, was never received by the Kansas City bank—so its officers testify.

The defendant bank made no inquiries prior to February 9th, 1878, concerning the draft here in question, or why the receipt of it had not been acknowledged by the Kansas City bank. The defendant's officers assumed that it had been received and credited, until February 9th, when, on receiving the monthly statement or account current of the Kansas City bank, it learned there from that it was not credited with the draft in question. The defendant immediately (February 9th) telegraphed the Kansas City bank that it had, on

January 10th, transmitted the draft, which did not appear in their statement just received. On February 10th, the Kansas City bank wrote the defendant that it had never received the remittance. This letter being received by the defendant February 11th, the defendant at once, on that day, notified the plaintiff and charged back the amount to it. Until this, the plaintiff supposed the draft had been paid. The plaintiff objected to the defendant charging back the amount, but the defendant insisted, and refused, upon demand, to restore the credit, or to pay the amount to the plaintiff.

The plaintiff's action is against the defendant to recover the amount, and is based upon the defendant's alleged negligence, as the agent of the plaintiff, in omitting to give the plaintiff notice that the draft had not been credited or received prior to the failure of the drawee. The defendant denies the imputed negligence, and sets up, in its answer, a custom or usage among the banks in Colorado, to the effect that in transmitting bank checks and drafts to correspondents, on whom they are drawn, it was usual and customary to await for advices, the regular and usual monthly statement and that such custom or usage did not require the defendant to make any inquiries concerning such remittances prior to the receipt of the regular monthly statement The replication denies the existence of any such custom or usage, or any knowledge thereof, by the plaintiff.

A jury was waived, and on the trial to the court the facts appeared substantially as above set forth.

Wells, Smith & Macon, for plaintiff.

Sayre, Butler & Wright, for defendant.

DILLON, Circuit Judge. The plaintiff treats the defendant as its agent to collect the draft in question, and the ground of the action is the alleged negligent omission of duty on the part of the defendant, resulting in loss to the plaintiff. I have fully examined the adjudged cases relating to the duty and responsibility of a bank which undertakes to act as a collecting agent for its customers, or for other banks. They clearly show that the defendant bank ought to have ascertained, within a reasonable time, whether the draft transmitted had been received by its correspondent; and if not, to have advised the plaintiff thereof. The practice of banks to send such checks or drafts directly to the drawee (as in this case), is attended with some obvious additional peril, and does not weaken, if, indeed, it does not increase, the diligence required of the collecting bank in respect to inquiry and notice. The defendant

bank allowed an unreasonable time to elapse before it made inquiry concerning the draft, and more than a reasonable time had elapsed before the failure of the Kansas City bank occurred. It was this negligence that caused the loss, since it is established by the evidence that the draft would have been paid if it had been presented at any time before the suspension of the drawee, on the 29th day of January. Here, then, was an unexcused delay for fifteen or sixteen days to make any inquiry, or to give any notice. Aside from the custom or usage pleaded in defence, to be noticed presently, the decisions in England and in this country are uniform, that such delay to make inquiry, and omission to notify the party interested, as occurred in this case, impose a liability, if loss is thereby occasioned.

The alleged custom or usage, in derogation of the otherwise legal rights of the plaintiff, is one which scarcely seems consistent with reasonable vigilance, or the well known practice of business men and banks, to acknowledge promptly the receipt of money remittances. The evidence in this case showed that it was the uniform practice to make such acknowledgments. The defendant claimed that all the banks in Denver and Colorado relied on the monthly statements, and that it was not customary or usual to inquire after remittances in the interim between monthly statements. The evidence failed to show any such custom or usage common to all, or even to the majority, of the banks in Denver. In fact, it failed to show that there was any such uniform usage in the defendant bank, whose business seems to be well regulated. The cashier of the defendant frankly testifies that, if his attention had been called to the fact that no letter of advice had been received, in due course, from the drawee, he would have made inquiries. At all events, the usage of the defendant was, at most, its private usage or mode of doing business. It was not known to the plaintiff, and if it was invariably adhered to by the defendant, it was of such a nature that the plaintiff was not bound to take notice of it. It was shown in evidence that the defendant bank did a very extensive business; and it was claimed by the cashier, on the witness stand, that it was impracticable to look after all the paper sent forward to correspondents for credit in the interval between the transmission of such paper and the receipt of the monthly statement. But the evidence did not sustain this claim. On the contrary, it showed that banks in general were in the habit of so keeping their books as to have their attention called to a failure to receive advices, in order that they might institute the needful inquiries, and that it was the usual practice to make such inquiries unless upon the eve of the time when the monthly statement was due. The fact that the defendant transacts a large business cannot relieve it from the duty of giving due attention to every piece of paper it undertakes to collect. The measure of diligence cannot fluctuate with the amount of business which a given bank may do. And the defendant would not, perhaps, like to be discharged from liability on the ground, judicially declared, that it was not bound to the same degree of care as smaller banks, in transacting the business of its correspondents. I consider the liability of the defendant beyond any reasonable doubt.

Under the circumstances, I regard the rule of damages as equally clear. The plaintiff had more than the amount actually on deposit, subject to draft, in the Kansas City bank. The draft would have been paid if it had been presented in time; if plaintiff had been notified within a reasonable time that the draft had miscarried, it could have protected itself against loss. The Kansas City bank has failed. There was no evidence what dividend, if any, its creditors will receive. The draft in question was drawn in favor of the defendant, and it had, and has, the legal title thereto. The plaintiff, when it drew the draft, credited it to the drawee and charged it to the defendant, and received In turn credit from the defendant therefor. The defendant having the legal title to the draft, will be entitled to prove it as a lost instrument against the Kansas City bank, and to receive all dividends which may be declared. Under those circumstances, the defendant is liable for the full amount of the draft, and will be entitled to hold the draft as its own, or to have a duplicate if it desires. There is no other practicable rule of damages in the posture in which the case stands, and this rule cannot fail to measure the exact loss which may eventually ensue.

Judgment for plaintiff.

[1] {Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.}