BANK OF CABOT *v.* WILSON & COMPANY.

4-3329

Opinion delivered February 5, 1934.

ESTOPPEL—PAYMENT OF DISHONORED CHECKS.—Where a foreign corporation through its agent purchased a draft from a bank by means of local checks, agreeing to repay any dishonored checks, and thereafter the bank drew a draft on the corporation to which certain dishonored checks were attached, *held* that, after paying such draft, the corporation was estopped to deny that the draft was in satisfaction of the balance due under the corporation's agreement to repay such dishonored checks, although the bank failed to notify the corporation of the dishonor of the checks as agreed.

Appeal from Lonoke Circuit Court; *W. J. Waggoner,* Judge; reversed.

STATEMENT BY THE COURT.

Appellee brought this suit alleging an overpayment in connection with the purchase of a certain draft from appellant bank, under a draft purchasing contract entered into between the parties; and this appeal is prosecuted from a judgment in appellee's favor for the amount claimed to have been overpaid.

Wilson & Company, an Illinois corporation doing business in the State of Arkansas, entered into a draft purchasing agreement with the Bank of Cabot, whereby its salesman and agent was to purchase from the bank for a consideration, drafts payable to the appellee's order with collections and checks from business done by appellee from sales made by its salesman and agent, J. H. Lucas, who was authorized to indorse checks and drafts made payable to appellee for the purchase of drafts under said agreement.

Under this contract should any draft or check payable to appellee's order and indorsed by Lucas be returned unpaid by the bank upon which it was drawn, then same was to be attached to a draft drawn upon appellee company, which appellee agreed to pay. It also provided upon the return of any unpaid check for more than $50, properly indorsed by its salesman, appellant was to notify appellee by wire of said return; and to get in touch with its salesman immediately.

In September, 1931, Lucas, salesman of appellee, purchased of appellant bank a draft for $560.15 paying the exchange charged, and in addition to various checks and cash gave appellant bank his personal check in the sum of $162.79 drawn on an Arkansas bank, which check was in the usual course of business returned unpaid by the bank upon which it was drawn, marked "insufficient funds." Appellant then accepted from J. H. Lucas two of his personal checks, one for the sum of $81 and one for $81.79, both of which were returned by the banks upon which they were drawn, marked "insufficient funds." Appellant then drew a draft against appellee to cover the amount of said checks, attaching them thereto, and said draft was paid by the appellee in the usual course of business.

Appellant did not at the time of the return of the original check for $162.79, or at the time of the return of the substituted checks for $81 and $81.79, or at any time notify the appellee by wire thereof, but did promptly notify the appellee's agent and salesman, J. H. Lucas, of the return of his personal checks.

The draft purchasing agreement provides in part, as follows: "It is very important that you advise us promptly of any checks returned to you for insufficient funds or for other reasons; by wire, when the amount is in excess of $50," etc. * * * We also request that you get in touch with our salesman if possible, notifying him that the item has been returned, so that he may try to have the check made good." The contract authorized the bank to draw on appellee at Kansas City, Kansas, attaching to the draft a memorandum of the checks returned, etc.

A jury was waived at the trial, and the court rendered judgment against the bank, from which this appeal is prosecuted.

John R. Thompson, for appellant.

Reed & Beard, for appellee.

KIRBY, J., (after stating the facts). The undisputed testimony showed that Lucas, appellee's salesman, purchased the draft from the bank as he was authorized to do, indorsed the checks and drafts to be collected by the bank in payment of the purchase money, and gave his

own personal check for the balance, $162.79; that his personal check was not paid, and, upon being notified thereof, he gave two checks for the amount upon other banks in the State, both of which were returned marked "insufficient funds"; that the bank drew on appellee company for the amount of the checks, attaching said unpaid checks to the draft in accordance with the draft purchasing agreement, and that appellee company paid said draft.

It is true that appellee claimed in its action to recover this amount from the bank, as for money had and received, paid through mistake, that the bank had failed to notify it by wire of the return of the checks of Lucas given for part of the purchase money of the draft, and that therefore under the contract it was not liable to the repayment of such money. The purchasing agreement provides, however, that the bank get in touch with appellee's salesman, if possible, notifying him that the item had been returned, etc., and also gives the bank authority to draw on appellee at Kansas City, Kansas, attaching to the draft a memorandum of the checks, etc.

Appellee knew the provisions of the draft purchasing contract, and knew necessarily, when these particular checks were attached to the draft drawn by the bank, that they were unpaid and presented for payment to the company because of the money sent in the draft purchased by the agent not having been collected or realized, and made no objection to the payment of this draft refunding to the bank the money it had advanced under the draft purchased by the company's agent. It is therefore estopped to deny that the payment was not made in satisfaction of the balance of the amount of the draft purchased for appellee company, which was paid for with said checks returned to it unpaid, and for the payment of which the Bank of Cabot was duly authorized to draw on appellee company under the draft purchasing agreement. Although, the Bank of Cabot did not wire the appellee company about the failure of the maker of the checks to pay them, it called that fact to the attention of appellee's agent, J. H. Lucas, maker of the checks, as required under the contract; and, as already said, the

company had sufficient notice of the return of the checks when it paid the bank's draft for the collection of it, and it cannot now repudiate its action, and recover the money it was liable to the payment of under said contract and draft.

The court erred in holding otherwise, and the judgment is reversed, and, the case appearing to have been fully developed, the cause will be dismissed. It is so ordered.