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Negotiable Instruments—Stop Payment—Notice to the Payee.—National Boulevard Bank of Chicago v. Schwartz.

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retention of such bill by the drawee unless its return has been demanded, will not amount to an acceptance; and provided further that the provisions of this section shall not apply to checks."

The provisions of § 137 of NIL were eliminated in the UCC. Under this code, with no exceptions, acceptance must be in writing,[19] although a drawee will be liable to a holder in conversion if the drawee refuses on demand to return the bill.[20] Mere retention of an instrument, voluntarily delivered, without a demand for return, constitutes neither an acceptance nor a conversion.

KENNETH F. JOYCE

Negotiable Instruments—Stop Payment—Notice to the Payee.—*National Boulevard Bank of Chicago v. Schwartz.*[1]—Plaintiff bank received a stop payment order from the drawer on a check issued to the defendant. Drawer sent a similar notice to the defendant payee. Prior to its receipt the defendant indorsed the check "for deposit only" and deposited it in his checking account in his own bank. Plaintiff bank negligently cleared the check for payment and so notified the payee's bank, which on the same day permitted a withdrawal of substantially all the money represented by the check. Later the same day after the withdrawal the plaintiff notified the payee's bank of the mistake. The plaintiff having made the proper adjustment in the drawer's account brings this action in the United States District Court for the Southern District of New York to recover the amount from the payee.[2]

In granting the plaintiff's motion for summary judgment, the court held that where the payee of a check has knowledge that the drawer has stopped payment, but nevertheless accepts payment made as a result of the drawee's negligence in clearing the check, the payee is liable to the drawee on the grounds that under a restrictive indorsement the payee's bank is only an agent for the purpose of collection. In such a relationship the knowledge of the payee would preclude him from keeping the money.

A drawer may stop payment of a check prior to certification or payment.[3] Since the check does not operate as an assignment of the drawer's funds in the bank, the drawee is not liable to the holder prior to acceptance or certification.[4] A drawee who has paid a check after a stop payment

[19] UCC § 3-410.
[20] UCC § 3-419.

[1] 175 F. Supp. 74 (S.D.N.Y. 1959).
[2] Federal jurisdiction was based on diversity of citizenship.
[3] UCC § 4-403(1); Beutel, Brannon's Negotiable Instruments Law, § 189 (6th ed. 1938); Britton, Bills and Notes, § 181 (1943); 3 Paton, Digest of Legal Opinions 3447 (1944).
[4] NIL § 189; UCC § 3-409(1); N.Y. Negotiable Instruments Law, § 325; Brady, Bank Checks, § 10 (2nd ed. 1926); 3 Paton, Digest of Legal Opinions, 3487 (1944); Moore, Sussman and Brand, Legal Methods Applied to Orders to Stop Payment of Checks, 42 Yale L.J. 817 (1933); 7 Am. Jur., Banks, § 602 (1937).

order, not only is precluded from charging the drawer's account, but also from recovering the amount paid to a bona fide holder.[5]

The same result does not follow when the payee as a holder has received payment after notice of the stop payment order.[6] The NIL § 88, states: "Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective."[7] It would seem that as a matter of policy the payee should not be able to reap the benefits of the bank's mistake when he has knowledge of the error. He is not harmed in any way since he could not claim any change in position in reliance upon the bank's payment.

The relation between the payee and the payee's bank is one to be determined by the intention of the parties.[8] A restrictive indorsement will preserve title to the paper in the depositor; and in such a case the bank acts merely as an agent of the depositor for the purpose of collection rather than becoming a holder in due course.[9] New York by statute construes an indorsement "for deposit only" as restrictive.[10] The court in the principal case decided in accordance with the New York statute and the weight of authority.[11] Since the bank is deemed to be a collecting agent under New York law, it did not become the owner of the note. The payee by virtue of his knowledge has not the right to retain the money paid to him by his agent.

Allowing the plaintiff in this action to recover restores all parties to their original position. The drawer has his money, both banks are whole, and the defendant still has a right of action against the drawer for stopping payment of the check. It is the drawer who should bear the consequences, if any, of his stop payment action rather than the drawee bank. In this case the court followed well established principles in arriving at a just and equitable determination.

LAWRENCE A. KLINGER

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[5] The Commercial Bank v. L. F. Hall, 266 Ala. 57, 94 So. 2d 198 (1957); First Nat'l Bank v. Molesky, 15 Ill. App. 2d 470, 146 N.E.2d 707 (1957); Carrol v. South Carolina National Bank, 211 S.C. 406, 45 S.E.2d 729 (1947); Brady, Bank Checks, § 228 (2nd ed. 1926); Ogden, Negotiable Instruments, § 283 (5th ed. 1947); 3 Paton, Digest of Legal Opinions 3475 (1944).

[6] First National Bank v. Molesky, supra note 5; Chase Manhattan Bank of City of New York v. Battat, 297 N.Y. 185, 78 N.E.2d 465 (1951); Smith & McCrorken v. Chatham Phenix National Bank and Trust Co., 239 App. Div. 318, 267 N.Y.S. 153 (1st Dept. 1933); Murfreesboro Bank and Trust Co. v. Travis, 190 Tenn. 429, 230 S.W.2d 658 (1950); 3 Paton, Digest of Legal Opinions 4477 (1944); 9 C.J.S., Banks and Banking, §§ 344, 354(d) (1938).

[7] Accord: N.Y. Negotiable Instruments Law, § 148; UCC § 3-302.

[8] Martin v. Huber, 68 N.Y.S.2d 53 (Sup. Ct. 1946); 9 C.J.S., Banks and Banking, §§ 219, 221(a) (1938).

[9] N.Y. Negotiable Instruments Law, § 350(a); UCC § 3-206; M. J. Badler v. Gillarde Sons Co., 387 Pa. 266, 127 A.2d 680 (1956); 2 Paton, Digest of Legal Opinions 1253 (1944); 7 Am. Jur., Banks, § 448 (1937); 9 C.J.S., Banks and Banking, § 222(b) (1938).

[10] N.Y. Negotiable Instruments Law, § 350(c).

[11] UCC § 3-205; 2 Paton, Digest of Legal Opinions 2111 (1944); 7 Am. Jur., Banks, § 448 (1937); 9 C.J.S., Banks and Banking, § 222(b) (1938). But see, Britton, Bills and Notes, § 70 (1943) which states that in the absence of statutes courts hold that "for deposit only" is not a restrictive indorsement.