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Negotiable Instruments—Rights of a Payee in a Misdelivered Check.—Denver Electric & Neon Service Corp. v. Gerald H. Phipps, Inc.

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At any rate, the Supreme Court's determinations in the several Brown-Olds cases[19] presently pending before it, whether or not in accord with the views submitted above, will be, at least, conclusive of the issues herein portrayed.

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Negotiable Instruments—Rights of a Payee in a Misdelivered Check.—***Denver Electric & Neon Service Corp. v. Gerald H. Phipps, Inc.***[1]**—** Defendant Phipps drew two checks payable to plaintiff electric company which were unaccountably delivered to another electric company. The recipient company endorsed the checks in its own name and deposited them in its depositary bank. The bank, in turn, collected the amounts of the checks from the drawee bank. Payee instituted suit, joining the drawer, the drawee bank, the collecting bank and the recipient company as parties defendant. The claim against the drawer was posited on two grounds: (1) on a negligence theory for misdelivery of the checks; and (2) on an indebtedness in the total amount of the checks "on an account stated."[2] The claims against the collecting bank, the drawee bank and the recepient company were grounded in theories both of conversion and money had and received.[3] Defendant-drawer moved for dismissal of the claim against him. The trial court granted the motion and the Supreme Court of Colorado affirmed. HELD: By suing the collecting bank, the payee ratified and adopted the payment and collection of the checks, and, having thus acquired a right to recover from the collecting bank in the amount represented by the checks on a theory of money had and received, can make no present showing of damage on which to predicate a negligence claim against the drawer.[4] In addition, a count alleging indebtedness in the amount of the checks "on an account stated" is essentially an action on the checks, and, as such, insufficient where the checks have been in law discharged with the payee's ratification and adoption of their payment and collection. *United States Portland Cement Co. v. United States National Bank*[5] is approved, and

[19] Local 60, United Brotherhood of Carpenters v. N.L.R.B., 273 F.2d 699 (7th Cir. 1960), cert. granted, 363 U.S. 837 (1960) (This case is contra the holding in the principal case.); N.L.R.B. v. Local 357, International Brotherhood of Teamsters, 275 F.2d 646 (D.C. Cir. 1960), cert. granted, 363 U.S. 837 (1960). The Board has filed petitions for writs of certiorari in the principal case, as noted supra note 1, and in the case of N.L.R.B. v. American Dredging Co., 276 F.2d 286 (3d Cir. 1960). All of these cases involve the Brown-Olds remedy. The Supreme Court's determinations in the United Brotherhood of Carpenters case, which was argued before it on March 1, 1961, should produce the conclusive declaration of the proper limits of Brown-Olds relief.

[1] 354 P.2d 618 (Colo. 1960).

[2] Id. at 620. In the words of the court: "Claim 9 merely alleges an indebtedness based upon an account stated by Phipps for the total sum represented by the two checks."

[3] Under an amended complaint claims against the drawee bank were eliminated.

[4] The dismissal of the negligence count was without prejudice to a latter refiling if damage could then be shown.

[5] 61 Colo. 334, 157 Pac. 202 (1916).

extended to control in situations where a check is unendorsed by the payee as well as in instances where the payee's signature is forged or unauthorized.

When a check has been collected through the bank collection process bearing the forged or otherwise unauthorized signature of the payee, he has two remedial courses of action. He may elect to treat the entire transaction as a nullity, and proceed against the drawer on the original obligation.[6] On the other hand, he may choose to enforce his rights in the instrument itself. This latter remedy usually involves proceeding against the collecting bank, either in tort for conversion or in quasi-contract for money had and received.[7] The conversion theory rests on the thesis that the collecting bank's exercise of control in accepting the check and collecting on it is in contravention of the payee's property right.[8] The quasi-contract theory is predicated on a ratification of the series of transactions which culminates in receipt of the proceeds of the check by the collecting bank from the drawee bank, as a result of which the collecting bank is regarded as holding money belonging to the payee.[9]

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[6] NIL § 23; UCC § 3-404.

[7] Money had and received: A. Paul Goodall Real E. & I. Co. v. North Birmingham A. Bank, 225 Ala. 507, 114 So. 7 (1932); Merchants' & Manufacturers' Ass'n v. First Nat'l Bank of Mesa, 40 Ariz. 531, 14 P.2d 717 (1932); Schaap v. State Nat'l Bank of Texarkana, 137 Ark. 251, 208 S.W. 309 (1918); George v. Security Trust & Savings Bank, 91 Cal. App. 708, 267 Pac. 560 (1928); Buena Vista Oil Co. v. Park Bank of Los Angeles, 39 Cal. App. 710, 180 Pac. 12 (1919); United States Portland Cement Co. v. United States Nat'l Bank, 61 Colo. 334, 157 Pac. 202 (1916); Independent Oil Men's Ass'n v. First Dearborn Nat'l Bank, 311 Ill. 278, 142 N.E. 458 (1924); Universal Carloading & Distributing Co. v. South Side Bank, 224 Mo. App. 876, 27 S.W.2d 768 (1930); Passaic-Bergen Lumber Co. v. United States Trust Co., 10 N.J.L. 315, 164 Atl. 580 (1933).

Conversion: Walsh v. American Trust Co., 7 Cal. App. 2d 654, 47 P.2d 323 (1935); Good Roads Machinery Co. v. Broadway Bank, 267 S.W. 40 (Mo. 1924); Evenson v. Waukesha Nat'l Bank, 189 Wis. 179, 207 N.W. 415 (1926).

Conversion or money had and received: National Union Bank of Maryland v. Miller Rubber Co., 148 Md. 449, 129 Atl. 688 (1924); Central Trust Co. v. Backsman, 50 Ohio App. 512, 198 N.E. 730 (1935); Zidek v. Forbes Nat'l Bank, 159 Pa. Super. 442, 48 A.2d 103 (1946); Lindsley v. First Nat'l Bank of Philadelphia, 325 Pa. 393, 190 Atl. 876 (1937).

[8] ". . . where a bank receives a check bearing the forged endorsement of the payee, collects it and accounts for it to its depositor (not the payee) it is guilty of a conversion for which it is liable directly to the payee . . . " Zidek v. Forbes Nat'l Bank, supra note 7, at 444, 48 A.2d at 104.

Under the Uniform Commercial Code § 3-409(1), payment on a forged instrument is specifically made a conversion. However, § 3-409(3) exempts from liability a collecting bank which in good faith and in accordance with reasonable business standards deals with the instrument or its proceeds, where such bank no longer has in its possession the instrument or any of its proceeds.

[9] ". . . the plaintiff seeks, as we think he has the right to do, to ratify the collection of the check for him; in such case he ratifies the assumed payment of it, and the check is then paid; the drawee bank and the maker thereof are both released from paying it over again; the payee would be estopped from making such claim. The ratification is not upon the acceptance alone of the check by the drawee bank, but upon its collection by the defendant in error bank and payment by the drawee bank, all of which are ratified by the payee, and the suit is then against the collecting bank as for moneys had and received."

Of necessity, these actions against a collecting bank presuppose that the payee has enforceable rights in the instrument. Under both the Negotiable Instruments Law and the Uniform Commercial Code delivery of the instrument to the payee is an essential prerequisite to the vesting of any such rights.[10] In all cases where recovery has been permitted against a collecting bank, including the *United States Portland Cement* case relied on in the principal case, delivery was made either directly to the payee or to his agent.[11] In the principal case, however, no delivery to the payee was made.

Factually closer to the principal case on the issue of delivery was *Jones v. Bank of America Nat'l Trust & Savings Ass'n*.[12] There the drawer's office manager forged the payee's name on checks and collected upon them through the banks. Upon learning of the transaction the payee brought suit against the collecting bank only to be precluded from ratifying the collection and payment of the checks and suing on the instruments, the court concluding that ". . . if there was no delivery of the checks to the customers [payees], then they remained the property of the brokers [drawers]."[13]

The Colorado court in the principal case would have been well-advised to follow the sound approach adopted in *Jones*. Instead, it rested its decision upon a *sub silentio* holding that delivery of the instrument to the payee is unnecessary in order to vest in him the requisite rights with respect to the instrument which would confer standing to sue the collecting bank. Such a holding is clearly untenable. Without delivery of the instrument to the payee he has no property right in it to be converted. A money had and received theory is equally unauthorized in that it requires ratification of a transaction in which the payee has no interest, in the absence of any rights in the subject-matter of the transaction. All this would be clear enough if, for example, a check was drawn with the intention of withholding it from the payee until a certain condition was fulfilled, only to have the check stolen from the drawer prior to that time. In that instance, assuming the thief successfully cashed the check at a bank which collected the represented amount of money from the drawee bank, it is extremely unlikely that the Colorado court would permit the payee to step in and sue the collecting bank. Yet such a result would be logically consistent with the holding of the principal case.

United States Portland Cement Co. v. United States National Bank, supra note 3, at 338-39, 157 Pac. at 204.

[10] NIL § 16; UCC §§ 3-201, 3-202. See also UCC § 3-306(c) which provides that even where one is a holder, if he is not a holder in due course he takes the instrument subject to the defense of nondelivery.

[11] See supra note 7. But see Henderson v. Lincoln Rochester Trust Co., 303 N.Y. 27, 100 N.E.2d 117 (1951), criticized in 37 Cornell L.Q. 310 (1951).

[12] 49 Cal. App. 2d 115, 121 P.2d 94 (1942).

[13] Id. at 120, 121 P.2d at 97. Accord, People v. Kasper American State Bank, 364 Ill. 121, 4 N.E.2d 14 (1936); Home Indemnity Co. v. State Bank of Fort Dodge 233 Iowa 103, 8 N.E.2d 757 (1943); Gallup v. Barton, 313 Mass. 379, 47 N.E.2d 921 (1943); Reese v. State, 192 Miss. 147, 5 So. 2d 236 (1941); See also Britton, Bills and Notes, § 87, p. 343 (1943). Contra, Crisp v. State Bank of Rolla, 32 N.D. 263, 155 N.W. 78 (1915).

If the payee has no standing to sue on any theory based on rights in the instrument he would then be obliged to rely exclusively on the original obligation. It would appear that this was the gravamen of the count alleging indebtedness "on an account stated,"[14] although the court construed it as an action on the checks themselves. Had the court regarded this claim as one arising from the original obligation, this would have put an immediate end to the case and effectively avoided the subsequent litigation devolving from this decision.

FRANCIS J. LAWLER

Negotiable Instruments—Signature in Representative Capacity—Admissibility of Parol Evidence.—*Norman v. Beling.*[1]—Plaintiff, holder in due course of a series of promissory notes, sought to recover from the defendant who, with another, had signed the notes below the name of a corporation without giving any indication of representative capacity.

The form of the notes was as follows:

". . . After Date *We* Promise to Pay . . .

Teal Corporation
J. Harold Samar
Christopher A. Beling" .

The notes were a printed form, with "We" and "Teal Corporation" typed in and the signatures were handwritten. The trial court ruled that there existed a patent ambiguity on the face of the instruments and, on the basis of parol evidence which it admitted in order to resolve the ambiguity, found that the defendant had signed the note only in a representative capacity and was therefore not liable as a co-maker. The Superior Court, Appellate Division, reversed, holding that the instruments revealed unambiguously that defendant bound himself individually on the instruments.[2] The New Jersey Supreme Court reversed the Appellate Division and reinstated the judgment of the trial court. HELD: The signatures on each note created an ambiguity on the face of the instrument, since a reasonably prudent man would be unable to determine from the signatures, with any degree of certainty, the status of the individual signers and therefore parol evidence could be used to resolve the ambiguity.

Under the parol evidence rule as applied to negotiable instruments, when commercial paper has on its face an ambiguity apparent to a reasonably prudent man, proof of the facts and circumstances surrounding the execution of the instrument may be introduced to aid in its construction.[3] The courts

[14] Supra note 2.

[1] 33 N.J. 237, 163 A.2d 129 (1960).

[2] 58 N.J. Super. 575, 157 A.2d 17 (App. Div. 1959).

[3] Canton Provision Co. v. Chaney, 70 N.E.2d 687 (Ohio Ct. App. 1945); Germania Nat'l Bank v. Mariner, 129 Wis. 544, 109 N.W. 574 (1906); UCC § 3-403(2)(b) and Comment 3 thereto.