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Negotiable Instruments—Forged Endorsement—Drawer's Right Against Collecting Bank.—Stone & Webster Eng. Corp. v. First Nat'l Bank & Trust Co. of Greenfield

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courts leave management little leeway to discourage unionization.[28] In contrast with this restrictive approach, the Fifth Circuit in *Exchange Parts* relies heavily on the ability of the worker to withstand the economic onslaughts of his employer. A presumably rational being would realize that if he votes against the union, he gets no special economic bonus. Similarly, if he votes for the union, he loses nothing in terms of newly granted wages or benefits.[29] Any loss of favor with management will be offset by the certification of a union to represent the workers at the bargaining table.

Whether or not Congress intended to prohibit employers from granting pre-election benefits—even unconditionally—for the purpose of opposing unionization is a question which will probably never be answered with any historical certainty.

STEPHEN WILLIAM SILVERMAN

Negotiable Instruments—Forged Endorsement—Drawer's Right against Collecting Bank.—***Stone & Webster Eng. Corp. v. First Nat'l Bank & Trust Co. of Greenfield.***[1]—Between January and May 1960 Stone & Webster became indebted to the Westinghouse Electric Corporation for goods and services. To pay the debt it drew checks on the First National Bank of Boston. An employee of the drawer did not deliver the checks to Westinghouse but instead "cashed" them at the defendant bank, by forging the payee's indorsement. When the First National refused to re-credit the drawer's account it sued the defendant as the collecting bank which cashed the checks for the forger. The Massachusetts Supreme Judicial Court sustained the defendant's demurrer to the declaration. HELD: The drawer had no cause of action against the collecting bank for money had and received, contract, conversion or negligence. Since the drawer was not a holder or payee and did not therefore have a right to present the checks to the drawee for payment, the value of its rights in the checks were only their physical paper value; and it had suffered no legal harm since the defendant had received the funds of the drawee, not the drawer's funds.

When a signature on a check is forged, there results a confusing conflict of the rights and liabilities of the drawer, drawee, payee, indorsers and collecting bank (the bank which cashes or takes the check for deposit). Where the signature of the drawer is forged, he may recover from the

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[28] [A]dministrative and judicial constructions of the Act threaten almost any activity that substantially hinders an organizational drive . . . . [E]ven though an employer makes a careful attempt to maintain his activities within the terms of the Act, the danger that his actions may be used to void the election or that they will result in an unfair labor practice is always present.

Comment, 36 Texas L. Rev. 651, 657 (1958).

[29] "An offer of vacation with pay not always has the desired result; the employees may accept the offer without ceasing union activities." 2 Teller, Labor Disputes and Collective Bargaining § 288, at 786 (1940), citing Metropolitan Eng. Co., 4 N.L.R.B. 542, 1-A L.R.R.M. 348 (1937).

[1] 1962 Mass. Adv. Sh. 1267, 184 N.E.2d 358.

drawee bank the full amount wrongfully charged to his account,[2] since the bank undertakes to pay only on the direction of the drawer.[3] Thereafter, the drawee bank is generally precluded from collecting from the bank or person from whom it received the forged instrument if such person is a bona fide holder.[4]

Where there is a check with a forged indorsement, it is well established that the drawee bank is bound to determine the authenticity of indorsements and, failing to do so, must re-credit the drawer's account in the absence of negligence or conduct warranting estoppel of the drawer.[5] Contrary to the case of a forged check, a drawee bank which has paid out funds for a check with a forged indorsement has recourse against the person from whom it received the check.[6] This recovery has been based on money had and received[7] or breach of warranty.[8] The collecting bank will proceed against the party from whom it received the item and so, theoretically, recoveries will be made successively by each transferee from the person who transferred the item to him. This chain of litigation will place the loss finally on the party who forged the indorsement, or at least the person who took from him. What happens when a direct suit is brought by the drawer against the collecting bank, thus avoiding the above chain of litigation, is the problem which the court faced in the instant case. The question had never been decided in Massachusetts.

There is a split of authority among the courts whether the drawer of a check, which was never received by the payee, has a cause of action against the collecting bank which cashed the check with a forged indorsement of the payee. One group of decisions allows such a suit basing the theory of liability on conversion,[9] money had and received[10] or avoidance of circuitry

[2] National Metropolitan Bank v. United States, 323 U.S. 454 (1945); Murphy v. Metropolitan Nat'l Bank, 191 Mass. 159, 77 N.E. 693 (1906). A forged signature is wholly inoperative under NIL § 23 and UCC § 3-404.

[3] Implicit under UCC § 4-401.

[4] Price v. Neal, 3 Burr. 1354 (1762); UCC § 3-418. This is the old exception to the rule that money paid under a mistake of fact may be recovered; a drawee bank is obliged to know its depositors' signatures.

[5] Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N.E. 740 (1909); National Bank of Detroit v. Fidelity & Deposit Co., 291 Mich. 36, 288 N.W. 325 (1939); Fitzgibbons Boiler Co. v. National City Bank, 287 N.Y. 236, 39 N.E.2d 897 (1942). See also UCC §§ 4-207, 4-401.

[6] Krensky v. Pilgrim Trust Co., 337 Mass. 401, 149 N.E.2d 665 (1958); Canal Bank v. Bank of Albany, 1 Hill (N.Y.) 287 (1841); UCC §§ 3-417(2)(b) & 4-207(2)(b).

[7] See cases, supra note 6; United States v. National Exch. Bank of Providence, 214 U.S. 302 (1909); First Nat'l Bank of Minneapolis v. City Nat'l Bank of Holyoke, 182 Mass. 130, 65 N.E. 24 (1902).

[8] Clearfield Trust Co. v. United States, 318 U.S. 363 (1943). Britton indicates the true basis for recovery is mistake of fact, Britton, Bills and Notes § 139 (1943); Restatement, Restitution §§ 20, 35 (1937).

[9] Home Indem. Co. v. State Bank, 233 Iowa 103, 8 N.W.2d 757 (1943); Gustin-Bacon Mfg. Co. v. First. Nat'l Bank, 306 Ill. 179, 137 N.E. 793 (1922), noted 32 Yale L.J. 837 (1923); Sidles Co. v. Pioneer Valley Sav. Bank, 233 Iowa 1057, 8 N.W.2d 794 (1943).

[10] Washington Mechanics Sav. Bank v. District Title Ins. Co., 65 F.2d 827 (D.C. Cir. 1933), noted in 32 Mich. L. Rev. 264 (1933); Railroad Bldg. Loan & Sav. Ass'n v. Bankers Mortgage Co., 142 Kan. 564, 51 P.2d 61 (1935); Labor Bank & Trust Co. v. Adams, 23 S.W.2d 814 (Tex. Civ. App. 1930).

of actions.[11] These courts, although not uniform on the precise grounds of liability, are in agreement that the drawer, like the payee, has some interest in his check and should be allowed to proceed against the bank which cashed the check on a forged indorsement. The contrary authorities[12] indicate that since the drawee bank had no right to charge the drawer's account in the first place, the drawer's right is not affected by the drawee's act of paying the wrong party. He may still recover from the drawee for the unauthorized debit. Although the drawee or payor have a cause of action, the drawer is confined to a proceeding against the drawee bank.[13]

There are creditable reasons for each position. The avoidance of multiple suits is desirable, and if liability can first be imposed on the party ultimately to be held liable, we have swift and complete justice. Thus, it is said that the drawer should be allowed to sue the collecting bank directly. Also, it seems farcical to inform the drawer that his money has not been touched. To then conclude that the drawer has no action for money had and received because the drawee has used its *own funds* to pay the collecting bank is hardly persuasive.[14]

On the other hand, there is no contractual relationship between the drawer and the bank which cashes a check with a forged indorsement. The drawee bank does pay out its own money since the drawer is only a creditor of the bank and has no specific funds on deposit; hence, in reality, there are no grounds for actions of money had and received or conversion. Warranty cannot be the basis for recovery because no warranty made by the collecting bank runs to the drawer.[15] In view of these reasons for each position what should the drawer be allowed to do? Does the Uniform Commercial Code resolve the problem? Although the court recognized that the issue "has been left untouched by the Uniform Commercial Code" it found guidance in the Code.[16]

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[11] Home Indem. Co. v. State Bank, supra note 8; Life Ins. Co. v. Edisto Nat'l Bank, 166 S.C. 505, 165 S.E. 178 (1932). For a warranty theory of liability, see Farmers State Bank v. United States, 62 F.2d 178 (5th Cir. 1932); contra, Note, 36 Harv. L. Rev. 879 (1923) & UCC § 3-417(1). Other cases recognizing a right in the drawer but not specific as to its basis: Fidelity-Baltimore Nat'l Bank & Trust Co. v. John Hancock Mut. Life Ins. Co., 217 Md. 367, 371, 142 A.2d 796, 797 (1958); City Bank v. Hamilton Nat'l Bank of Washington, 108 F.2d 588, 589 (D.C. Cir. 1939).

[12] United States v. Bank of Coney Island, 36 F.2d 829, 830 (D.C.E.D.N.Y. 1929); California Mill Supply Corp. v. Bank of America Nat'l Trust & Sav. Ass'n, 36 Cal. 2d 334, 340-41, 223 P.2d 849 (1950); noted in 49 Mich. L. Rev. 1216 (1951); First Nat'l Bank v. North Jersey Trust Co., 18 N.J. Misc. 449, 451-52, 14 A.2d 765 (1940); Trojan Pub. Corp. v. Manufacturers Trust Co., 273 App. Div. 843, 76 N.Y.S.2d 845 (1948), aff'd, 298 N.Y. 771, 83 N.E.2d 465 (1948); Virginia-Carolina Joint Stock Land Bank v. First & Citizens Nat'l Bank, 197 N.C. 526, 150 S.E. 34 (1929); Lavanier v. Cosmopolitan Bank & Trust Co., 36 Ohio App. 285, 173 N.E. 216 (1929); Land Title & Trust Co. v. Northeastern Nat'l Bank, 196 Pa. 230, 46 Atl. 420 (1900); Britton, Bills and Notes § 144 (1943).

[13] Britton, supra note 12.

[14] Peculiar statutes of limitations have further complicated the drawer's problems concerning what party to sue. See Trojan Pub. Co. v. Manufacturers Trust Co., supra note 11. UCC § 4-406(4) provides for a one year statute of limitations. See also Corker, Risk of Loss from Forged Instruments: A California Problem, 4 Stan. L. Rev. 24 (1951).

[15] See UCC §§ 3-417(1)(a) to (2)(a), & 4-207(1)(a) to (2)(a).

[16] 1962 Mass. Adv. Sh. at 1272, 184 N.E.2d at 361. The court rejected the applica-

The chain of litigation is not a rapid conduit, but rather there are defenses and estoppels along the way which could prevent recovery to any one litigant in the chain. It was these very defenses as embodied in the Code which persuaded the court in the instant case to adopt the view disallowing any right to the drawer against the collecting bank.[17] As a court of first impression, it concluded that the assertion of the defenses of the drawer,[18] the collecting bank,[19] and the other rights and defenses between the transferors and transferees[20] would be difficult if the court allowed this suit by the drawer.

This decision clearly adopts a view which gives no right of action to the drawer, but more important than its following this line of authority is the fact that the court here sets forth some sensible reasons for the rule. This is a welcome change from the cases which, in adopting this rule, have merely told the drawer that he should have sued his own bank.[21]

EDWARD J. MCDERMOTT

Negotiable Instruments—Holder in Due Course—Good Faith: Subjective or Objective?—*Westfield Inv. Co. v. Fellers*.[1]—Plaintiff finance company furnished conditional sales contract and promissory note forms to a seller of frozen food and home freezer plans. The body of the conditional sales contract contained an assignment clause which in bolder type described the finance company as the specific assignee of the seller's contract rights. On the reverse side was a place designed for representations by prospective purchasers as to their financial condition, for the purpose of securing credit from the finance company. At one time the note and contract forms were a single sheet of paper separated by a perforated line. The seller fraudulently induced defendants to purchase a food and freezer plan. Defendants executed a promissory note and conditional sales contract but upon discovery of the fraud they refused to make any payments. After repossession and sale, the finance company, as assignee of the note and contract, sued for a deficiency judgment of $1,420.75. Defendants introduced

tion of § 3-419(1), upon which the plaintiff relied for his conversion count, on the ground the defendant was not a "payor bank" as defined in § 4-105(b). It also recognized that although the collecting bank may be liable in conversion to a proper party, subject to denfenses, e.g., under § 3-419(3), there was no explicit provision within the Code which determined to whom the collection bank was liable. Thus the drawer's right of action must be found outside the Code.

17 "The enactment of the Uniform Commercial Code opens the road for the adoption of what seems the preferable view." 1962 Mass. Adv. Sh. at 1273, 184 N.E.2d at 362.

18 UCC §§ 3-406 & 4-406.

19 UCC § 4-406(5).

20 UCC §§ 3-417 & 4-207.

21 It has been indicated that a court in a jurisdiction which has allowed a cause of action to the drawer against the collecting bank may still do so in spite of UCC § 4-406(5). Clarke, Bailey & Young, Bank Deposits and Collections 165 (1959); Bailey, Brady on Bank Checks 512 (3d ed. 1962).

1 74 N.J. Super. 575, 181 A.2d 809 (1962).