Michigan Law Review

Volume 58 | Issue 3

1960

Bills and Notes - Acceptance - Payment by Drawee of Raised Check Precludes Recovery Under Section 62 of the Uniform Negotiable Instruments Law

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BILLS AND NOTES—ACCEPTANCE—PAYMENT BY DRAWEE OF RAISED CHECK PRECLUDES RECOVERY UNDER SECTION 62 OF THE UNIFORM NEGOTIABLE INSTRUMENTS LAW—Defendant, collection bank and presenter, paid the face amount of a raised check, executed its unqualified indorsement thereon, transmitted the check through regular banking channels, and received payment from drawee bank. Upon discovery of the overpayment plaintiff, surety, reimbursed the drawee and sought recovery from the defendant. The trial court sustained defendant's demurrer. On appeal, *held,* affirmed. Under section 62[1] of the Uniform Negotiable Instruments Law, a drawee bank which pays a raised but otherwise genuine check to a non-negligent holder in due course cannot recover the amount by which the instrument was raised because payment constitutes an acceptance of the instrument according to its tenor at the time of payment. *Kansas Bankers Surety Co. v. Ford County State Bank,* 184 Kan. 529, 338 P. (2d) 309 (1959).

At common law the warranty of an acceptor or payor of a bill of exchange extended only to the genuineness of the drawer's signature[2] and to the state of his account.[3] It did not preclude quasi-contractual[4] recovery from the presenter when the bill had been materially altered before pay-

1 Kan. Gen. Stat. (1949) §52-603.

2 Jenys v. Fawler, 2 Str. 946, 93 Eng. Rep. 959 (1715); Price v. Neal, 3 Burr. 1354, 97 Eng. Rep. 871 (1726). See, generally, Aigler, "The Doctrine of Price v. Neal," 24 MICH. L. REV. 809 (1926).

3 Liberty Trust v. Haggerty, 92 N.J. Eq. 609, 113 A. 596 (1921).

4 WOODWARD, QUASI CONTRACTS §80 (1913).

ment or acceptance.[5] The enactment of section 62 of the Uniform Negotiable Instruments Law was considered by most authorities not to have changed this common law rule.[6] This section provides: "The acceptor, by accepting the instrument, engages that he will pay it according to the tenor of his acceptance, and admits: (1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and (2) the existence of the payee and his then capacity to endorse." In the principal case, the court held that "tenor of his acceptance" refers to the terms of the check as of the time it is presented for payment. Furthermore, the court accepted the argument, despite the precise use of technical language in section 62 and related sections, that payment and acceptance are synonymous. No other court has precluded recovery by a drawee in such a case. It would seem that on both of these points the court failed to give adequate consideration to the common law antecedents of the NIL. As to the first point, the phrase "tenor of his acceptance" had a recognized common law meaning.[7] It referred to the nature of the acceptance contract —whether it was general or qualified—not to the terms of the accepted bill. That this meaning was incorporated into section 62 is suggested by the provisions of sections 139 through 142,[8] which in terms recognize the validity of general and qualified acceptances of bills of exchange. Also, the Kansas court's interpretation of section 62 does not seem consistent with section 124,[9] which deals with the effect of a material alteration upon all parties to the instrument. It avoids the altered instrument except as to

[5] See Espy v. Bank of Cincinnati, 18 Wall. (85 U.S.) 604 (1873); White v. Continental Nat. Bank, 64 N.Y. 316 (1876); Young v. Lehman, 63 Ala. 519 (1879).

[6] Security Commercial & Savings Bank v. So. Trust & Commerce Bank, 74 Cal. App. 734, 241 P. (2d) 945 (1925) [forged drawer's signature: anno., BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 7th ed., §62, p. 905 (1948)]; McClendon v. Bank of Advance, 188 Mo. App. 417, 174 S.W. 203 (1915) (raised bill); National Reserve Bank v. Corn Exchange Bank, 171 App. Div. 195, 157 N.Y.S. 316 (1916) (raised bill); Interstate Trust Co. v. United States Nat. Bank, 67 Colo. 6, 185 P. 260 (1919) (alteration of payee's name). See Greeley, "The Effect of Acceptance of an Altered Bill," 27 ILL. L. REV. 519 (1933); Woodward, "The Risk of Forgery or Alteration of Negotiable Instruments," 24 COL. L. REV. 469 at 476 (1924); Aigler, "The Doctrine of Price v. Neal," 24 MICH. L. REV. 809 (1926). But see Ames, "The Negotiable Instruments Law," 14 HARV. L. REV. 241 (1900).

[7] BAYLEY, BILLS OF EXCHANGE 18 (1789). For citation of an extensive list of authorities, see Greeley, "The Effect of Acceptance of an Altered Bill," 27 ILL. L. REV. 519 at 519-520 (1933).

[8] NIL, §139 provides: "An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn." Sections 140 and 141 define more specifically general and qualified acceptances. Section 142 concerns the holder's rights when there has been a qualified acceptance. Kan. Gen. Stat. (1949) §§52-1108, 1109, 1110, 1111.

[9] NIL, §124 provides, "where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers; but when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor." Kan. Gen. Stat. (1949) §52-906.

parties making, authorizing, or assenting to the alteration and as to subsequent indorsers. Clearly, the bill is avoided as to a subsequent acceptor.[10] Other sections, also, interrelate to these presented and point to the same conclusion.[11] However, the Kansas court, without discussion of these sections, relied upon two prior controversial[12] decisions[13] that had made inroads into this settled state of the law. They both held that *certification*[14] by the drawee of an altered[15] instrument constituted an acceptance of the instrument as it existed at the time of presentment.[16] Regarding the second major point decided by the Kansas court, there seems to be a clear distinction between payment and acceptance[17] both at common law[18] and under the NIL.[19] Payment of a bill of exchange comprehends performance by the drawee of the drawer's order, which extinguishes the vitality of the instrument except as a voucher or receipt. Acceptance, on the other hand, contemplates the addition of the acceptor's contractual obligations to the bill, increasing its negotiability. The court in the principal case, in equating payment and acceptance, though probably motivated by the popular understanding of the effect of payment as an acceptance,[20] failed to consider the precise technical concepts embodied in the language of sections 62

[10] This had been the prior common law rule. Greeley, "The Effect of Acceptance of an Altered Bill," 27 ILL. L. REV. 519 (1933). But see BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 7th ed., §62, p. 917 (1948), where it is suggested that the acceptor may be an "assenter" and obliged to pay the bill as altered after acceptance.

[11] See Greeley, "The Effect of Acceptance of an Altered Bill," 27 ILL. L. REV. 519 (1933).

[12] Comments, 31 MICH. L. REV. 408 (1933); 26 ILL. L. REV. 697 (1932); notes, 79 UNIV. PA. L. REV. 492 (1931); 22 COL. L. REV. 260 (1922); 31 YALE L.J. 548 (1922); 6 MINN. L. REV. 405 (1922).

[13] Nat. City Bank v. Nat. Bank of the Republic, 300 Ill. 103, 132 N.E. 832 (1921); Wells Fargo Bank and Union Trust Co. v. Bank of Italy, 214 Cal. 156, 4 P. (2d) 781 (1931).

[14] NIL, §187 provides that certification is equivalent to an acceptance. The question whether payment constitutes an acceptance was not reached.

[15] Payee's name had been changed in each case.

[16] These courts seem to have rested their decisions on grounds of statutory construction based upon popular meanings. "It is difficult to see how he (the acceptor) can escape liability if any meaning is to be given to the words 'engages that he will pay according to the tenor of his acceptance.' The tenor of the acceptance is determined by the terms of the bill as it is when the drawee accepts and that is a bill for the raised amount. That is the bill he accepted and no other, and according to its tenor he has engaged that he will pay it." Wells Fargo Bank and Union Trust Co. v. Bank of Italy, note 13 supra, at 162-163, quoting BRANNAN, NEGOTIABLE INSTRUMENTS LAW, p. 567. The Kansas court in the principal case uses this same rationale.

[17] It is beyond the scope of this note to review all areas where the question of payment as constituting an acceptance arises. Thus the discussion must be limited to facts analogous to those under discussion.

[18] First Nat. Bank v. Whitman, 94 U.S. 343 (1876); Elyria Savings & Banking Co. v. Walker Bin Co., 92 Ohio St. 406, 111 N.E. 149 (1915). See, generally, note, 31 MICH. L. REV. 565 (1933). See also Aigler, "Rights of Holder of Bill of Exchange Against the Drawee," 38 HARV. L. REV. 857 at 878 (1925). Note that Price v. Neal, note 2 supra, established an exception to this general rule, based upon considerations of business policy. See note, 19 ILL. L. REV. 277 (1924).

[19] South Boston Trust Co. v. Levin, 249 Mass. 45, 143 N.E. 816 (1924). See also note, 19 ILL. L. REV. 277 (1924). See generally the cases and articles cited in note 6 supra.

[20] See Ames, "The Negotiable Instruments Law," 14 HARV. L. REV. 241 at 243 (1900).

and 189.[21] This latter section clearly provides that a bank is not liable to a holder until it accepts or certifies the check.

There are admittedly persuasive arguments favoring denial of recovery by drawee. There is established a finality of transaction helpful to commerce. The law should not shift the loss where all parties before the court are innocent. No logical ground exists upon which to rest the distinction that payment will bar recovery where the drawer's signature is forged but will not bar recovery where the body of the instrument is materially altered. Requiring the use of special paper and the purchase of forgery insurance will protect drawee. Losses arising from check alteration should constitute a cost of the banking business to be borne by shareholders and depositors. On the other hand, there are also policy considerations supporting recovery by drawee. The party dealing with the alterer is in the best position to scrutinize the transaction and should therefore bear any loss. Although subsequent holders may rely upon a written acceptance, no such reliance results from payment of the instrument by drawee. Commercial transactions will be impeded if drawee bank must closely examine all instruments presented to it for payment. But the above considerations were presumably weighed by the legislature at the time of the enactment of section 62 of the Uniform Negotiable Instruments Law. The function of the court should be effectuation of the legislative intent. This intent cannot be ascertained by refusing to take notice of common law precedent, precise use of technical language, and interrelated sections of the act.

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[21] NIL, §189 provides: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check." Kan. Gen. Stat. (1949) §52-1706.