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BILLS AND NOTES-INDORSEMENTS-LIABILITY OF COLLECTING BANK TO DRAWER FOR PAYMENT ON FORGED INDORSEMENT

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RECENT DECISIONS

BILLS AND NOTES—INDORSEMENTS—LIABILITY OF COLLECTING BANK TO DRAWER FOR PAYMENT ON FORGED INDORSEMENT—Plaintiff was the drawer of a series of checks which were signed by an authorized agent because of the fraudulent representation of one of its employees. These checks were never delivered to the payees but were cashed by defendant bank for the guilty employee upon indorsements forged by him. Defendant indorsed the checks and collected thereon from the drawee bank which, in turn, charged the checks to plaintiff's account. Plaintiff discovered the fraud after the statute of limitations had run on any action by plaintiff against the drawee bank. Plaintiff brought this action seeking recovery on the basis of (1) a contractual obligation on defendant's indorsement, (2) conversion of the money collected from the drawee bank or (3) money had and received for the use and benefit of the plaintiff. On appeal from a judgment for defendant, *held*, affirmed. *California Mill Supply Corp. v. Bank of America National Trust and Savings Association*, (Cal. 1950) 223 P. (2d) 849.

There is an irreconciliable conflict in the authorities on the question of whether the drawer can collect from an intermediate bank which pays a check upon a forged indorsement and then collects on it from the drawee. Some courts have held that the drawer may recover for conversion of the instrument,[1] but others have argued that there can be no substantial recovery in such an action as the paper converted is not an obligation to pay money until delivered[2] and until then has no value.[3] Some have held that the drawer may recover for money had and received or conversion of the drawer's money,[4] but other courts have argued that the drawee was a general debtor of the drawer and paid the checks out of its own funds and not any of the drawer's.[5] It would seem that the cases denying recovery on the theories of conversion and money had and received are the

[1] Washington Mechanics' Savings Bank v. District Title Ins. Co., (D.C. Cir. 1933) 65 F. (2d) 827; Gustin-Bacon Mfg. Co. v. First National Bank of Englewood, 306 Ill. 179, 137 N.E. 793 (1922); Railroad Building, Loan and Savings Assn. v. Bankers Mortgage Co., 142 Kan. 564, 51 P. (2d) 61 (1935); Sidles Co. v. Pioneer Valley Savings Bank, 233 Iowa 1057, 8 N.W. (2d) 794 (1943).

[2] Section 16 of the Negotiable Instruments Act, 5 U.L.A. §16 (1943) states that "every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto."

[3] Principal case at 852; Trojan Publishing Corp. v. Manufacturers Trust Co., 117 N.Y.L.J. 1914 (1947); affd., 273 App. Div. 843, 76 N.Y.S. (2d) 845 (1948); affd., 298 N.Y. 771, 83 N.E. (2d) 465 (1948); Metropolitan Life Ins. Co. v. San Francisco Bank, 58 Cal. App. (2d) 528, 136 P. (2d) 853 (1943); 36 HARV. L. REV. 879 (1923).

[4] Figuers v. Fly, 137 Tenn. 358, 193 S.W. 117 (1916) (money had and received); United States Fidelity and Guaranty Co. v. First National Bank of El Paso, (Tex. Civ. App. 1936) 93 S.W. (2d) 562 (money had and received); Home Indemnity Co. v. State Bank of Fort Dodge, 233 Iowa 103, 8 N.W. (2d) 757 (1943) (conversion of money).

[5] See note 3 supra; General Fire Assurance Co. v. State Bank, 177 App. Div. 745, 164 N.Y.S. 871 (1917); Lavanier v. Cosmopolitan Bank & Trust Co., 36 Ohio App. 285, 173 N.E. 216 (1929).

sounder decisions.[6] Some courts have based recovery upon another theory, that of avoiding circuity of action.[7] These courts reason that since the drawee is under an obligation to make payment only in accord with the directions of the drawer and upon failure to do so must recredit the drawer's account,[8] whereupon the drawee then generally can recover from the collecting bank on the warranties or for money had and received,[9] the drawer should be allowed recovery directly from the collecting bank. Most courts, however, simply state that the drawer's action is against the drawee.[10] In the principal case such a theory would be inoperative, since the theory presupposes no defense to any of the actions. Here the statute of limitations would bar suit against the drawee. It would seem clear, however, that, the purpose of this statute being for the protection of the drawee alone, the drawee might choose to waive or ignore the statute and recredit the drawer's account, thereby precluding the collecting bank from using the statute as a defense to an action by the drawee bank either on the warranties or for money had and received.[11]

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[6] The cases allowing recovery generally do not discuss the arguments raised by the cases disallowing it, but often rely principally upon cases in which the payee, who does have title, has recovered. 32 MICH. L. REV. 264 (1933); Washington Mechanics' Savings Bank v. District Title Ins. Co., supra note 1; Life Insurance Co. of Virginia v. Edisto National Bank of Orangeburg, 166 S.C. 505, 165 S.E. 178 (1932). A number of cases seem to have no definite theory. National Surety Co. v. Halsted Street State Bank, 246 Ill. App. 92 (1927); Labor Bank and Trust Co. v. Adams, (Tex. Civ. App. 1930) 23 S.W. (2d) 814.

[7] Life Insurance Co. of Virginia v. Edisto National Bank of Orangeburg, supra note 6; Home Indemnity Co. v. State Bank of Fort Dodge, supra note 4.

A situation in some respects resembling that under consideration herein is presented when it is the payee who sues the collecting bank after payment on a forged indorsement. Assuming that the facts permit the conclusion that the payee has acquired ownership of the instrument [See Crisp v. State Bank, 32 N.D. 263, 155 N.W. 78 (1915)], it is a chattel worth presumably the amount it calls for. The collecting bank's part may then reasonably be viewed as a tortious intermeddling, a conversion, as may also be possibly true of the paying drawee. It is much more difficult to find ownership of the check, as a chattel of significant value, in the drawer thereof than it is to find such ownership in the payee.

[8] 9 C.J.S. §356 at 734; Metropolitan Casualty Insurance Co. v. First National Bank in Detroit, 261 Mich. 450, 246 N.W. 178 (1933); City of New York v. Bronx County Trust Co., 234 App. Div. 244, 254 N.Y.S. 741 (1932), affd., 261 N.Y. 64, 184 N.E. 495 (1933).

[9] Canal Bank v. Bank of Albany, 1 Hill (N.Y.) 287 (1841) (money had and received); First National Bank of Minneapolis v. City National Bank of Holyoke, 182 Mass. 130, 65 N.E. 24 (1902) (money had and received); Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573 (1943) (warranties); United States v. National Exchange Bank of Providence, 214 U.S. 302, 29 S.C. 665 (1909) (warranties); *contra*: First National Bank of Minneapolis v. City National Bank of Holyoke, supra (warranties).

[10] First National Bank of Bloomingdale v. North Jersey Trust Co., 18 N.J. Misc. 449, 14 A. (2d) 765 (1940); Lavanier v. Cosmopolitan Bank and Trust Co., supra note 5; General Fire Assurance Co. v. State Bank, supra note 5.

[11] National Surety Corp. v. Federal Reserve Bank, 188 Misc. 207, 70 N.Y.S. (2d) 636 (1946); affd., 188 Misc. 213, 70 N.Y.S. (2d) 642 (1946); *contra*: Merchants' National Bank v. Federal State Bank, 206 Mich. 8, 172 N.W. 390 (1919).