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Bills and Notes: Indorsee of Check After Eight-Day Delay in Negotiations as Holder in Due Course

Tom Sawyer

nitely described the shares which she intended complainant to have and assumed that these shares, after the increase in the whole number of shares, would pass to complainant in their changed form of 3 to 1."[45]

In *In Re Fitch's Will*,[46] the New York court clearly indicated that intention, rather than classification, was to be the controlling factor. The testator there disposed of all his stocks which he owned when he executed his will. Before his death, but after the stocks had been disposed of, there was a three for one stock split. The court held the legacies to be general and therefore not adeemed. However, the court also determined that the legatees were entitled to not only the original number of shares of stock named in the will, but also the additional shares resulting from the split. Thus, they held that both general and specific legatees may, under certain circumstances, be entitled to additional stock split shares.[47]

The Illinois Court, in affirming the lower court's decision in this case, stated: "that in the absence of an intention to the contrary, a legatee of shares of stock is entitled to additional shares issued as a result of a stock split occurring after execution of the will."[48]

Thus, Illinois, appearing to be one of the jurisdictions which does not feel bound to classify bequests, seems to put into actual practice the idea that: "The guiding principle in the interpretation of any will is the intention of the testator, which is another way of admonishing the court to keep in mind that the business at hand is determining what the testator willed by his will."[49]

ROBERT EARL KUELTHAU

Bills and Notes: Indorsee of Check After Eight-Day Delay in Negotiation as Holder in Due Course—Question of Law or Fact—A check was drawn in payment of the price of a truck sold by payee to drawer. Drawer, drawee, and payee all maintained their principal offices within a ten mile radius of each other, and within the same county. Some four to eight days after issuance, drawer stopped payment, claiming misrepresentation respecting the quality of the truck. Payee, on the eighth day after issuance, cashed the check at the plaintiff bank, which was not the drawee. Upon prompt presentment to drawee, payment was refused. Action was brought against drawer,

[45] See *supra* note 38, at 263.
[46] 281 App. Div. 65, 118 N.Y.S. 2d 234, 235 (3rd Dept. 1952).
[47] In re McFerren's Estate, 365 Pa. 490, 76 A.2d 759, 762, 763 (1950). In this case, the Pennsylvania court similarly found that although the legacy was general, the legatee was entitled to increase resulting from a stock split. The court there stated: ". . . that the intention of the testator governs concerning identity or value of a legacy; that what the testatrix manifestly intended was to bequeath to each legatee 50 shares of the stock as it was at the time of the making of the will, the equivalent of which was 125 shares as of the time of death."
[48] See *supra* note 38, at 265.
[49] *Id.* at 262.

and the due course status[1] of the plaintiff denied generally in the answer, the answer also alleging the claimed misrepresentation in the transaction of issuance.[2] Plaintiff moved for summary judgment;[3] and, on denial of such motion, appealed. *Reversed*: "It is a matter of common knowledge of which this court may take judicial notice that banks and stores frequently cash checks which are more than eight days old. Surely eight days is not such an unreasonable delay in the presentment of a check as to make the check obviously stale." *Home Savings Bank v. Bentley*, 5 Wis. 2d 19, 92 N.W. 2d 377 (1958).

The governing statute on the issue of the above appeal reads as follows:[4]

> When an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

The statutes further provide a general guide for construction of the critical words of said statute:[5]

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[1] "A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon. . . ." N.I.L. 57, WIS. STAT. §116.62 (1957).
"In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable." N.I.L. 58, WIS. STAT. §116.63 (1957).
"A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular on its face; (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) That he took it in good faith and for value; (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the person negotiating it." N.I.L. 52.
Wisconsin adds a subdivision reading: "(5) That he took it in the usual course of business." WIS STAT. §116.57 (1957).

[2] Failure of consideration between the original parties is no defense against a holder in due course. N.I.L. 28, WIS. STAT. §116.33 (1957). See also 5 UNIFORM LAWS ANNOTATED §57.
"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is upon the holder to prove that he or some person under whom he claims acquired the title as holder in due course." N.I.L. 59, WIS. STAT. §116.64 (1957).
In an action to enforce payment of a check on which payment was stopped by the maker, the burden of proof was upon the bank which obtained the check from the payee to show that it was an innocent holder for value. Union Nat. Bank v. Fox, 24 Tenn. App. 664, 148 S.W. 2d 381 (1941).

[3] A summary judgment is not to be granted in a situation where the evidentiary facts set forth in the affidavits filed in support of the motion for summary judgment fail to touch upon a material issue raised by the pleadings. Hermann v. Lake Mills, 275 Wis. 537, 82 N.W. 2d 167 (1957).
The plaintiff's affidavits in the principal case, so far as they disclosed the circumstances of plaintiff's taking the check, recited only that: ". . . on the 26th day of July, 1957, the defendant, . . . presented to me at the Home Savings Bank a check dated July 18, 1957, and drawn on the Cudahy State Bank . . .; that I paid five hundred and 00/100 ($500.00) dollars cash to the defendant." This affidavit was signed by a clerk in the plaintiff's bank.

[4] N.I.L. 53 and WIS. STAT. §116.58 (1957).

[5] N.I.L. 193 and WIS. STAT. §116.01(15) (1957).

> In determining what is a "reasonable time" or an "unreasonable time" regard is to be had to the nature of the instrument, the usuage of the trade or business (if any) with respect to such instruments, and the facts of the particular case.

It is widely held that the question of reasonableness of time is ordinarily one of fact, dependent upon all of the facts and circumstances surrounding the delay.[6] Accordingly, in applying the same statute,[7] or one closely related thereto and using the same critical word,[8] the courts have reached varying conclusions under difference circumstances.[9]

Isolated cases have ruled the question as a matter of law, ordinarily under extreme circumstances.[10]

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[6] "Thus, the question: what is a reasonable time, involves questions of fact, usually for the jury under proper instructions." BRITTON, HANDBOOK ON THE LAW OF BILLS AND NOTES §120 (1943).
In Coolidge v. Rueth, 209 Wis. 458, 245 N.W. 186 (1932), the Wisconsin Court said that what constitutes a reasonable time is a question of fact. Mars, Inc. v. Chubrilo, 216 Wis. 313, 257 N.W. 157 (1934).
The New Jersey court held that whether delay in the negotiation of a check involved an unreasonable length of time was a question of fact for the jury and not a strict question of law. First Nat. Bank at Glendale v. Sussex County Airport, 137 N.J.L. 667,61 A. 2d 206 (1948).
"The facts in each particular case must be taken as the test for that case." Clarinda Sales Co. v. Radio Sales Pavilion, 227 Iowa 671, 288 N.W. 923 (1939).
See also 5 UNIFORM LAWS ANNOTATED §186, n47.

[7] N.I.L. 53 and WIS STAT. 116.58 (1957).

[8] N.I.L. 186 and WIS. STAT. §118.62 (1957). "A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

[9] Ordinarily what constitutes a reasonable time for presentment is a question of fact, but where it is indisputable that the route by which the check was sent for presentment was not the most direct, the question is one of law. Mars, Inc. v. Chubrilo, *supra* note 6.
In Coolidge v. Rueth, *supra* note 6, the check was issued to an attorney in Madison. The same day he mailed it to his client at his client's home in Davidson, Michigan. The check was then forwarded by the Davidson bank for collection, but the drawee bank had closed on the previous day. Held that in view of the facts the delay was not unreasonable.
In Columbian Banking Co. v. Bowen, 134 Wis. 218, 114 N.W. 451 (1908) a delay of thirty-eight days was declared not to be unreasonable in view of the facts of this particular case.
A delay of five days was held reasonable when the payee had no chance to get to the bank before five days unless she left work to do so. Peterson v. School Dist. No. 14, Roseau County, 162 Minn. 357, 203 N.W. 46 (1925).
For additional cases see BRANNAN, NEGOTIABLE INSTRUMENTS LAW ANNOTATED 586, 1140, and 1183 (1932).

[10] The Wisconsin court in Coolidge v. Rueth, *supra* note 6, said: "A rule has grown-up requiring the payee to present a check before the close of the next business day where the bank is located in the same place in which the payee lives . . ."
A check held for approximately twelve years after issue was held an unreasonable delay as a matter of law. Weaver v. Harrell, 115 W. Va. 409, 176 S.E. 608 (1934).
Where payee and drawee are in the same town a delay of one week is unreasonable as a matter of law. Parker v. Grau, 188 Ark. 1016, 68 S.W. 2d 1023 (1934).
For additional cases pertaining to notes 9 and 10, see 5 UNIFORM LAWS ANNOTATED §53, nn. 2 and 8; §186, nn. 48-57, 64-5.

Anderson v. Elem[11] cited and relied upon by the Wisconsin Court in the principal case, though appearing from the quoted portion to state its rule as a matter of law, actually was not decided on that basis. While the indorsee accepted the check twenty-four days after issuance, he did so from an indorser-payee whom he knew to be a traveling man. The indorsee was not located in the same locality as the drawer or drawee bank. The Kansas *trial* court found the indorsee to be a holder in due course after a full trial at which all of the facts were disclosed. The Kansas Supreme Court merely affirmed this finding; so that the case actually turned upon its factual circumstances tending to support the trial court's finding. In the Wisconsin case none of the facts explanatory of the eight day delay in negotiation were divulged either at the trial or appellate level.

The circumstantial factors which have, in the majority of cases, been held to require a determination of the question as one of fact are extremely varied.[12] But, the underlying principle which supplies the significance of such factors is fundamentally the requirement that a holder in due course must take the instrument in "good faith," more accurately, since *Goodman v. Harvey*[13] and under N.I.L. 56,[14] the absence of bad faith. The term "commercial bad faith" and the term "ordinary course of business" suggest taking into account the commercial experience and custom of the person whose qualification as a holder in due course is under investigation, as compared with others in the same or similar businesses.[15]

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[11] 111 Kan. 713, 208 Pac. 753 (1922).

[12] A demand note given by the maker to his brother was negotiated four and one half years later. The question of reasonableness under N.I.L. 53 and 193 was for the jury to decide. The court said that the jury finding of reasonableness should not be disturbed. Gershmann v. Adelman, 135 Atl. 688 (N.J. 1927).

A draft presented thirty eight days after issuance was held to be duly presented to charge the payee where the payee indorsed it to a man he knew to be a traveler. Columbian Banking Co. v. Bowen, *supra* note 9.

A delay of seven days was held unreasonable because the payee could as readily have selected a more direct route in presenting. Mars, Inc. v. Chubrilo, *supra* note 6.

A delay of ten days was allowed where the payee lived out of state. Coolidge v. Rueth, *supra* note 9.

[13] 4 Ad. & El. 870 (1836).

[14] WIS. STAT. §116.61 (1957). "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

[15] "The neglect to make inquiry under the circumstances was more than mere negligence. It was a lack of commercial good faith. The knowledge which he had was sufficient to prevent the acquisition of the paper by commercially honest men." Bergheim v. McRae, 190 Minn. 571, 252 N.W. 833 (1934). "The effort is always to ascertain whether the person whose actions are inquired into exercised that degree of both intelligence and uprightness which is deemed necessary to uphold the commercial morals of the community without unduly impairing the intended easy negotiability of promissory paper." Gerseta Corp. v. Wessex-Campbell Silk Co., 3 F. 2d 236 (2d Cir. 1924).

Of all of the factors which have given rise to difficulty in determining a transferee's bad faith, the most troublesome has been a lack of inquiry in the face of variously suspicious circumstances. Of these circumstances, a delay in renegotiation after issuance is but one, and never exists in total isolation. In the principal case, the delay itself was typically coupled with other circumstances, which included (1) the fact that all parties resided in close proximity to each other; (2) the fact that, somewhat uncommonly, the indorser requested cash for the check, rather than the more usual account-credit; (3) the fact that the check was comparatively substantial in amount; (4) the fact that the plaintiff bank apparently placed no reliance on the credit of the drawer, and was not specially acquainted with the drawer; (5) the fact that, from all that the record discloses, utterly no inquiry was made prior to taking the check, and no circumstance suggesting a reasonable explanation of the delay itself was apparent.[16]

To take judicial notice of the alleged common practice of cashing checks which are more than eight days old, as did the court in the principal case, is simply to hold that such delay is not an unreasonable one under every conceivable set of circumstances, a proposition for which there is more than ample authoritative support. But such proposition logically fails to support its converse: that such delay is a reasonable one under every conceivable set of circumstances, a proposition for which there is a marked paucity of support in both the cases and the authorities.

The essence of the rule for which the principal case stands is that a delay in negotiation of a check (if not of other types of demand paper) is a circumstance to be considered largely in isolation from the other circumstances confronting the taker at the time he surrenders value for the paper. To be significant, or even to be inquiry-provoking, such delay must be sufficient to characterize the paper as "obviously stale."

It is to be doubted that such a rule tends to promote the recognized objectives of the Uniform Act in respect either to uniformity or to certainty in the law of bills and notes.[17] Just as different triers of fact, giving consideration to all of the circumstances surrounding a negotiation, may differ in their findings as to the ultimate reasonable-

[16] It was commercial bad faith for an experienced banker to cash a check for a man who had no account at the bank without first inquiring as to the validity of the check with the drawee bank. Miles City Bank v. Askin, 257 P. 2d 896 (Mont. 1953).

[17] "The adoption of the Negotiable Instruments Act by nearly every state of the Union resulted from a belief that a uniform law upon the subject approximated in importance a national currency system, and it was passed for the purpose of harmonizing and making uniform the law upon a subject concerning which there was much disagreement, giving rise to embarrassment and confusion in the commercial world. The end thus attained should not be frittered away by conflicting judicial interpretations of the act." Fidelity & Casualty Co. v. Planenscheck, 200 Wis. 304, 227 N.W. 387 (1930).

ness or good faith of the taker, so also may different appellate tribunals disagree as to when paper becomes "obviously stale." It is not suggested, presumably, that "staleness" is a matter to be determined solely on the basis of whether or not "banks and stores frequently cash checks" older than a given number of days; for, if that were true, the time requirements of N.I.L. 53 and 186 would descend to the level of the poorest practice of merchants, and thereby be virtually extinguished. But neither, on the other hand, can the word "stale" be applied to the problem literally or objetively, as signifying a state of physical dehydration.[18]

The preferable course would probably have been to follow the established current of authority in submitting the question of good faith to the trier of fact for determination under all of the circumstances, giving to his determination of the ultimate question the usual weight and significance. The ultimate outcome of the case might well have been the same, but the uniform law of the subject would thereby have been spared a highly dubious source of future confusion.

TOM SAWYER

Conflict of Laws: Law of Domicile as Controlling Over Interspousal Immunity Rule of Place of Wrong—A woman, allegedly the wife of the driver, was injured in a vehicle being operated in California. The alleged husband and wife were at that time domiciled in Wisconsin. The wife brought an action in Wisconsin against the driver and his insurer. The trial court granted summary judgment against the plaintiff on the ground that, under California law,[1] one spouse is immune from suit in tort by the other spouse. On appeal, *reversed*:

[18] "Stale: being in some stage of decay, as meat or egg . . . being in a state of dryness, as bread . . ." FUNK & WAGNALL'S NEW STANDARD DICTIONARY (1946);
"In the language of the courts of equity, a 'stale' claim or demand is one which has not been pressed or asserted for so long a time that the owner or creditor is chargeable with laches, and that changes occurring meanwhile in the relative situation of the parties, or the intervention of new interests or equities, would render the enforcement of the claim or demand against conscience." BLACK'S LAW DICTIONARY (3rd ed. 1933).
The literal application of these definitions would tend to permit almost any period of delay, under the court's rule in the principal case.

[1] Peters v. Peters, 156 Cal. 32, 103 P. 219 (1909); Cubbison v. Cubbison, 73 Cal. App. 2d 437, 166 P. 2d 387 (1946); Paulus v. Bauder, 106 Cal. App. 2d 589, 235 P. 2d 422 (1951). There is no specific California statute on this subject, the cases holding that the common law immunity is preserved under the familiar married women's property acts, except in property litigation.

[2] The principal case expressly overrules "at least six prior decisions of this court:" Buckeye v. Buckeye, 203 Wis. 248, 234 N.W. 342 (1931); Forbes v. Forbes, 226 Wis. 477, 277 N.W. 122 (1938); Bourestom v. Bourestom, 231 Wis. 666, 285 N.W. 426 (1939); Garlin v. Garlin, 260 Wis. 187, 50 N.W. 2d 373 (1951); Scholle v. Home Mutual Casualty Co., 273 Wis. 387, 78 N.W. 2d 902 (1956); Hansen v. Hansen, 274 Wis. 262, 80 N.W. 2d 320 (1956); and "partially overrules two others:" Nelson v. American Employer's Insurance