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Bills and Notes: Liability of Drawee of Draft Who Has Orally Promised To Accept

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determine non-disclosure of a loan made by the agent to a purchaser to be a breach of duty.[17]

Where the agent breaches his fiduciary duty to the principal by non-disclosure of a material fact relating to the agency, the seller is not limited to a single remedy. Since the agent loses his right to any commission the seller need not pay him if the agency contract is executory,[18] or if the agent has retained the commission from the purchase price, the principal may sue to recover it.[19] Should any damage be sustained by the principal because of this breach of duty by the agent, even where the agent acts in good faith, liability will also result in a tort action by the principal against the agent for damages.[20] Nor are the remedies limited solely to actions against the agent. The sale may be rescinded with the purchaser upon returning what was received. The third party purchaser may be entirely ignorant of any duplicity on the part of the agent yet the seller may avoid the sale.[21]

Although no case could be found with the same fact situation, the present decision can be justified by precedent. What constitutes a material fact in each instance will be a question of fact for the jury. It is submitted that the rule of the Restatement of Agency[22] is the more logical one especially where the seller was aware of the sale price, cognizant of the buyer and uninformed only as to the financing of the purchaser by the auctioneer.

ROBERT BACHMAN

Bills and Notes — Liability of Drawee of Draft Who Has Orally Promised to Accept — Drawer undertook to pay for cattle by issuing three drafts upon defendant payable to plaintiff. Drawer had previously purchased cattle from plaintiff with similiar drafts which had regularly been honored by defendant. In answer to an inquiry by plaintiff, sometime before the sale in question, defendant informed plaintiff that the drawer was in bad shape, but when the drawer's drafts were no good, he would tell him. Relying upon these representations by defendant, plaintiff took the drafts in question and delivered cattle to

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[15] Jensen v. Snow, 131 Me. 415, 163 Atl. 784 (1933); McPhetridge v. Smith, 101 Cal. App. 122, 281 Pac. 419 (1929).
[16] Richard v. Holmes, 18 How. 143 (U.S. 1855).
[17] Restatement of the Law of Agency, Sec. 391(b) "An agent may properly deal with the other party to a transaction if such dealing is not inconsistent with his duties to the principal. Thus an agent employed to sell may properly loan money to the buyer to complete the purchase or, unless because of business policy or otherwise it is understood that he is not to do so, he may "split commissions" with the buyer."
[18] Kessler v. Bishop, 51 R.I. 202, 153 Atl. 247 (1931).
[19] Holtsinger v. Beverly, 56 Ga. App. 614, 186 S.E. 776 (1936).
[20] Estate of Pratt: Regan v. Pedrick, 221 Wis. 114, 266 N.W. 230 (1936).
[21] Napier v. Adams, 166 Ga. 403, 143 S.E. 566 (1928).
[22] Restatement of the Law of Agency, Sec. 391(b).

the drawer. Defendant dishonored the drafts. Plaintiff sued him for the purchase price of the cattle, alleging that the drawer was an agent of defendant in buying the cattle. *Held:* the proof is insufficient to establish agency, and were it not for the oral promise of the defendant to accept drafts drawn upon him by this particular drawer until notice to the contrary, the judgment for the plaintiff would be reversed. Whether or not the defendant orally promised to accept the drafts is a jury question and constitutes the basis of defendant's liability. *Owen v. Sumrall, 36 So. (2nd) 800 (Miss., 1948).*

It is difficult to tell upon what theory the Court in the principal case held the defendant liable. There can be no recovery on the drafts which are clearly unaccepted since the promise is oral.[1] Some courts have given the payee relief by spelling out an estoppel,[2] fraud by the drawee, third party beneficiary contract, equitable assignment,[3] or novation.[4] To establish any of these theories there should be additional facts. Any case holding the drawee liable merely on his oral promise to accept is contrary to section 132 of the Negotiable Instruments Law, which has been adopted by all the states. The acceptance need not necessarily be on the instrument itself,[5] but must be in writing. Courts have held a telegram sufficient as long as it refers specifically to the instrument in question.[6]

The general rule in the United States is clearly stated in *Reo Motor Car Co. v. Western Bank and Trust Co.*,[7] where the drawer sent an agent to buy a car from the plaintiff with an uncertified check upon the

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[1] Negotiable Instruments Law, Sec. 132 . . . "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee." To the same effect: First National Bank v. Dickson, 59 S.W. (2d) 179 (Tex. Civ. App., 1933); Ewing v. Citizens' National Bank, 162 Ky. 551, 172 S.W. 955 (1915); Reo Motor Car Co. v. Western Bank and Trust Co., 48 Ohio App. 387, 194 N.E. 392 (1934).

[2] Restatement of Contracts, sec. 90: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided by enforcing such promise."

[3] In Fourth Street Bank v. Yardley, 165 U.S. 634, 17 S.Ct. 439 (1897), it was held that there had been an assignment due to unusual circumstances in the case. In order to invoke the doctrine of equitable assignment, there must be more than a mere oral promise on the part of the drawee to accept. There must be additional facts, and these facts must consist, at least in part, of some manifestations by the drawer, for a check of itself does not operate as an assignment. Sec. 127, Negotiable Instruments Law.

[4] For a further collection of these cases see Fn. 132 in 26 Columbia L. R. 713 (1926).

[5] Negotiable Instrument Law, sec. 134 . . . "Where the acceptance is written on a paper other than the bill itself, . ." Coolidge v. Payson, 2 Wheat. 66, 4 L.Ed. 185 (1817); Synder and Blankfard Co. v. Farmers Bank of Tifton, 178 Md. 601, 16 A.(2d) 837 (1940).

[6] Iowa State Savings Bank v. City National Bank, 183 Iowa 1347, 168 N.W. 148 (1918).

[7] Note 1, *supra.*

defendant bank. The plaintiff called the defendant in regard to the financial status of the drawer and was informed that he had ample funds. Defendant also told plaintiff that they would set aside enough to meet the check when it came through. The Court held that the defendant bank was not bound for the acceptance must be in writing, and to permit a result to the contrary would thwart the actual intent of the Negotiable Instruments Law and enable the courts to arrive at a conclusion which the Act was specifically designed to prevent.

There have, however, been cases like the principal one where the courts have disregarded the Act and given the payee relief on the oral promise of the drawee to accept.[8] In *First National Bank of McClusky, N.D. v. Rogers-Amundson-Flynn Co.*[9] the facts were analagous to those in the instant case, and the result reached by the Court may be some authority for the decision in the principal case. In that case the Court, in holding the drawee liable on an unaccepted draft, said:

> "If one to whom goods are consigned for sale receives the consignment with notice that the consignor has made a draft on him on the credit of the goods, he is bound to accept the draft. acceptance of the goods is deemed the equivalent of a promise to accept the draft."

Notice of the draft is essential, for in *Hoven v. Leedham*[10] where the drawee had no notice of the draft when he accepted the shipment, recovery was denied. Recovery in these cases is not given because of the drawee's liability on the draft, but rather on the contract implied from his acts.[11] Although liability in the principal case was apparently on the oral promise of the drawee to accept, the Court may have had this theory in mind when it instructed the jury.[12] This doctrine has not met with approval in most jurisdictions for it in effect nullifies section 132 of the Negotiable Instruments Law.[13]

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[8] First National Bank of O'Donnell v. Citizens National Bank, 38 S.W.(2d) 648 (Tex. Civ. App., 1931), where the Court said: "We hold that the oral promise of the defendant bank to pay plaintiff bank was an original and independent promise to pay such sum and that it does not come under the provisions of the statute of frauds and therefore need not be in writing to be enforceable."

[9] 151 Minn. 243, 186 N.W. 575 (1822).

[10] 153 Minn. 95, 189 N.W. 601 (1922).

[11] First State Bank v. Stockmen's State Bank, 42 S.D. 585, 176 N.W. 646 (1920), where the Court said: "But the plaintiff is not basing its cause of action upon an alleged acceptance by defendant, but upon an implied agreement to honor the check on presentation and an estoppel to deny such agreement."

[12] "If you believe from all the evidence that the defendants had full knowledge of all the material facts affecting their rights and liabilities growing out of the agreement sought to be enforced in this suit against them by the plaintiff, and that with such knowledge the defendants received the benefit of the agreement, and that the agreement was made on their behalf, then the Court instructs the jury that the defendants are precluded by the acceptance of such benefits from questioning the agent's authority in the transaction."

[13] First National Bank v. Dickson, 59 S.W.(2d) 179 (Tex. Civ. App., 1933): "It makes no difference whether the suit is upon the acceptance, the breach,

In *Allen v. Mendelsohn & Son*,[14] where a draft payable to plaintiff's order and mailed to him was stolen en route, and the thief, having forged plaintiff's endorsement, sold the draft to defendant who in good faith collected the money from the drawee, the Court held that an action for money had and received lay against the defendant even though there was no privity between the parties. The basis for the decision was to avoid circuity of action. To invoke this doctrine in the principal case it should appear that the payee (plaintiff) has an action against the drawer on his engagement, and that the drawer has a cause of action against the drawee (defendant) for the purchase price of the cattle. If these two causes exist, then the payee might sue the drawee directly, but in such an action the drawee should be permitted to assert his defenses against the drawer, as well as the drawer's defenses against the payee.[15] Such recovery against the drawee in quasi contract has been accepted in some cases,[16] and affords the only legitimate remedy of the payee of a draft against the drawee when the latter has orally promised to accept.

RAY ECKSTEIN

Domestic Relations — Commencement of a Divorce Action as Interrupting the Statutory Period of Desertion — Plaintiff in 1945, brought a divorce action and the defendant filed a cross-complaint alleging grounds for a divorce. On October 16, 1947 the complaint and cross-complaint were dismissed for want of equity. On October 17, 1947 the plaintiff in the dismissed case filed suit for a divorce, alleging desertion since 1945. The lower court found the defendant guilty of desertion for the required one year period and granted the plaintiff a divorce. *Held:* where a suit for divorce is brought and the same is pending between the parties to the marriage contract, the parties are not only justified in living apart but must necessarily do so. Such living separate and apart does not constitute wilful desertion within the meaning of the Divorce Act. The time so consumed by the litigation cannot be reckoned in the calculation of the statutory period of desertion. Wilful desertion for the space of one year during the pendency of the divorce action was legally impossible. *Borin v. Borin, 82 N.E. (2d) 70 (Illinois, 1948).*

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or upon the estoppel, the effect is to compel the bank to make good its oral promise to pay the bill, and, under the provisions of sec. 132 of the Negotiable Instruments Law this cannot be done."

[14] 207 Ala. 527, 93 So. 416 (1922).

[15] Midland Sav. & Loan Co. v. Tradesmen's National Bank, 57 F. (2d) 868 (1932), where the Court said: "The drawee bank when sued by its customer for paying checks on forged indorsements, could set up as a defense that the payee had been duly paid." To the same effect: Beeson-Moore Stave Co. v. Clark County Bank, 160 Ark. 385, 254 S.W. 667 (1923).

[16] For a collection of these cases, see 31 A.L.R. 1063, and 67 A.L.R. 1535.