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PAYMENT TO INNOCENT HOLDER OF FORGED CHECK

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A case interesting to bankers and business men generally, regarding the rights of parties in cases of forged bank checks, has been decided by Judge Reid in the Circuit Court at Merrill. Pearl Reake made an exchange of automobiles with H. H. Roehrborn, a garageman, and gave in exchange a check on the Bradley Bank purporting to be signed by Rudolph Ott for $250.00. Roehrborn immediately cashed the check at the bank and immediately thereafter the bank made demand on Roehrborn for a return of the money claiming that the check was a forgery. Roehrborn refused to return the money and the bank charged the $250.00 against the checking account at the bank. Roehrborn then sued to recover the money. The case was submitted to a jury which decided by its special verdict that the check was a forgery but that Roehrborn had exercised due care in accepting the check from Reake. The check was issued on July 30, endorsed to Roehrborn on August 2 and cashed by him on August 3. The principal question in the case was whether, under the circumstances, Roehrborn was a holder in due course.

Judge Reid in his opinion concludes that, the jury having acquitted the plaintiff of any negligence or obligation to further inquiry into the genuineness of the check than he did, there remains only the question whether he became a holder of the check in due course, and entitled to the benefit of the rule laid down that a drawee bank paying a check to holder for value, in due course, who is without negligence or notice that the drawer's signature is forged, cannot recover back the money paid when it is discovered that the check is a forgery.

No decision of the question in Wisconsin has been found, and apparently this state is free to adopt the rule deemed to be the soundest. Upon first impression it seemed to the court that the holder of the check, in endorsing and presenting it for payment, warranted the genuineness of all preceding signatures and that under the principle that money paid upon mistake of fact might be recovered back. The rights of the drawee bank were superior to the last holder who received payment. But, under the Uni-

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form Negotiable Instruments Law, only a person negotiating commercial paper warrants that the instrument is genuine and in all respects what it purports to be. It is entirely clear that a holder who presents a check for payment does not negotiate it, and that the drawee bank in paying it does not become a holder in due course.

It appears that the check in question was four days old when it was negotiated to the plaintiff Roehrborn. It is clear that a reasonable time for presentation of the check for payment at the bank had elapsed but the authorities of other states and of the supreme court of the United States will support a conclusion that such delay in presentment, as occurred in this case, would not make the check overdue when negotiated to the plaintiff. In the light of these authorities the court held that the check here in question was not overdue when the plaintiff received it and that the plaintiff must be deemed a holder in due course. Plaintiff should recover the $250.00 withheld from him.

In view of the importance of the question involved the opinion of Judge Reid is here set out *in toto*.

STATE OF WISCONSIN, IN CIRCUIT COURT, FOR LINCOLN COUNTY

H. H. ROEHRBORN, Plaintiff, vs. BRADLEY BANK, Defendant, and RUDOLPH OTT, Impleaded

Opinion

The plaintiff conducts a garage and the defendant a bank in the city of Tomahawk, and the impleaded defendant, Ott, is and was a depositor at the bank and resided about 15 miles from the city of Tomahawk. On August 2, 1923, one Pearl Rieke bargained with the plaintiff for an exchange of automobiles upon which Pearl Rieke was to pay a difference of $210, and thereupon, after banking hours, negotiated to the plaintiff a check on the Bradley Bank purporting to be signed by Ott and running to Pearl Rieke as payee. Before receiving the check, plaintiff, after business hours, inquired of the Cashier of the bank whether a check of Ott for $250 would be good at the bank, and upon receiving an affirmative answer, plaintiff accepted the $250 check, delivered the car which he gave in exchange, and paid Pearl Rieke $40 in cash. On the following morning, at the opening of the bank, plaintiff presented the check for payment, and it was paid.

The jury have found, on evidence presenting a jury issue, that the check was a forgery. The bank was notified on the very day that it made payment that Ott claimed the check to be a forgery, and notice was immediately given to the plaintiff and payment by the plaintiff to the bank of the amount of the check was demanded. Thereafter, the bank charged the amount of the check to the open account of the plaintiff at the bank, and thereby collected it. Plaintiff now seeks to recover the amount so charged to him.

The check was dated July 30, 1923. The purported payee, with her husband, lived in the vicinity of the residence of Ott. They had no fixed place of abode. The plaintiff first saw them about a week before August 2. They were in his place of business, as he testified, frequently during that week, looking at second-hand cars, buying gasoline, etc. The check was negotiated to the plaintiff about six o'clock P. M., August 2. It was presented for payment and paid in cash on the following morning, and was charged back by the bank to the plaintiff's account later in the same day. Between the time of payment and the time when the check was charged back the plaintiff's position was not changed to his disadvantage. Pearl Rieke and the car she received, both disappeared quite promptly after the trade.

In addition to finding the check a forgery, the jury found, upon evidence reasonably warranting their conclusions, that the plaintiff was not guilty of negligence in accepting the check without further inquiry as to its validity, and that he had no knowledge or notice of facts which should have put him upon further inquiry as to the genuineness of the check.

Usually, the issue raised in this action between the plaintiff and the bank has, in other cases, arisen where the bank was the plaintiff seeking to recover back from the last holder the amount which it paid to such holder on the forged check. However, this reversal of the parties plaintiff and defendant does not seem to affect the determination of the issue. If the bank, under the circumstances, could not have recovered back from Roehrborn the amount it paid him on the forged check, it cannot now hold the funds of plaintiff on deposit to satisfy such a demand on the part of the bank.

The great weight of authority, including the courts of highest standing and weight, adhere to the rule that a drawee bank paying a check to holder for value, in due course, who is without

negligence or notice that the drawer's signature is forged, cannot recover back the money paid when it is discovered that the check is a forgery. This rule has been applied even where the drawee bank could not be said to have been actually negligent in failing to discover the forgery at the time when the check was presented for payment.

The rule is recognized to be apparently, if not actually, in conflict with the principle that money paid under mistake of fact may be recovered back. In some cases it is spoken of as an exception to that rule. In some cases it is based upon the maxim that as between two innocent and non-negligent parties, the loss sustained must remain where it was placed by the payment of the forged check. In some cases it is said that the drawee bank has or should have at hand absolute means of determining whether the signature of its customer is forged. In still other cases it is held to be a rule of necessity for the protection of commercial paper and of those who deal in it, and that in view of the use of this class of paper as money, it was considered that public policy required that, as between the drawee and good faith holders, the drawee bank should be deemed the place of final settlement where all prior mistakes and forgeries should be corrected and settled once for all, and if not then corrected, payment should be treated as final.

There are decisions challenging the correctness of the foregoing rule and holding to the contrary, but they are vastly in the minority.

No review of the authorities which the court has consulted will be attempted here. They are too numerous to be reviewed except in an extended treatise and we will be content here by referring to extended note 12 A. L. R. 1089; 5 R. C. L. 558; *U. S. vs. Chase Nat. Bank,* 40 S. C. Rep. 361; *Bank vs. Bank,* 14 A. L. R. 479, 197 Bac. 547; in which last mentioned case the question was considered in connection with the Uniform Negotiable Instrument Law, and the authorities are quite fully reviewed.

No decision of the question in Wisconsin has been found, and apparently this state is free to adopt the rule deemed to be the soundest.

Upon first impression it seemed to this Court that the holder of the check in endorsing and presenting it for payment, warranted the genuineness of all preceding signatures, and that under

the principle that money paid upon mistake of fact might be recovered back, the rights of the drawee bank were superior to the last holder who received payment. But under the Uniform Negotiable Instrument Law, only a person negotiating commercial paper warrants that the instrument is genuine and in all respects what it purports to be. (Sec. 1677—5 & 6.)

It is entirely clear that a holder who presents a check for payment does not negotiate it, and that the drawee bank in paying it does not become a holder in due course.

And the reasons given for making such a situation as is here presented an exception, if it be an exception to the general rule, that money paid on a mistake of fact might be recovered back, seem sound and sufficient.

The rule stated which denies to a drawee bank which has paid a forged check the right to recover back payment must, however, be restricted to its proper limits. The holder receiving payment must, as we have seen, have been free from negligence, and free from knowledge of any facts reasonably tending to show infirmity in the instrument; in fact, free from any deception or bad faith on his part, and above all, must be a holder in due course.

For example, the payee named in a check must be presumed to have had absolute means of knowledge whether the same was genuine and would not be entitled to the same protection as a later holder who was a bona fide endorsee for value.

The jury having acquitted the plaintiff of any negligence or obligation to further inquire into the genuineness of the check than he did, there remains only the question whether he became a holder of the check in due course and entitled to the benefit of the rule laid down.

The plaintiff's position seems to meet all the calls of Sec. 1676—22 of the Negotiable Instrument Law, unless it be held that under Sec. 1676—23 the lapse of time between the date of the check and the date of its negotiation to the plaintiff was an unreasonable length of time and that therefore it was in effect over-due when the plaintiff received it. This presents a difficult and delicate question.

The statute provides (Sec. 1675) that in determining what is a reasonable time or unreasonable time, regard is to be had to the nature of the instrument, the usage of the trade or business, if

any, with respect to such instruments and the facts of the particular case.

A check is a bill of exchange drawn on a bank, payable on demand, and 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. (Sec. 1684—1 & 2.)

It must be noted that this relates to presentment for payment and not to negotiation. A reasonable time for negotiation of a check may be different from a reasonable time for presentment of it to the bank for payment. So too, the statute prescribes the penalty for delay beyond a reasonable time in presenting a check for payment, which penalty is discharge of the drawer from liability, wholly or *pro tanto,* in case of loss.

The rule is well settled in Wisconsin that where the payee of a check resides and receives a check at the place where the bank is located, a reasonable time for presentment for payment ends at the close of the banking hours of the day succeeding the receipt of the check, excluding Sundays and holidays. (*Grange vs. Reigh,* 93 Wis. 552.)

And if the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day and presented at latest upon the day following its receipt at the place of payment. *Aebi vs. Bank,* 124 Wis. 73, 77. *Gifford vs. Hartner,* 88 Wis. 528.

This rule is very well established and prevails almost universally. The object of it is to fix the place where the loss falls in case the bank fails while the payee or an endorsee is unnecessarily delaying in presenting the check to the bank for payment. It by no means determines what is a reasonable time for negotiation of a check in order that the endorsee may become a holder in due course.

No decisions in Wisconsin have been cited or have been found by the court which squarely determines the question. The only case which approaches a discussion of it is *Columbian Banking Co. vs. Bowen,* 134 Wis. 218. But that case does not deal with a bank check, but does deal with a draft drawn by one bank upon its correspondent bank in a distant town and sold to its customer for the purpose of making a remittance. It was, therefore, not affected by Sec. 1684—2.

The draft was forwarded by the drawer bank to the payee by mail and promptly endorsed and forwarded by the payee to Spokane, Washington, for the purpose of making a remittance. Its first negotiation was thus clearly within a reasonable time. The endorsee appears to have held it twenty-four days before selling it to a bank in California. After such transfer there was no unnecessary delay in presentation for payment.

While the Court discusses several sections of the Negotiable Instrument Law, it did not consider the question whether the holding of the draft by the endorsee for a period of twenty-four days before selling it to the California Bank extended over an unreasonable length of time, nor whether on that account the California Bank could not become a holder in due course. No reference is made in the opinion to Sec. 1676—23. The case was made to turn upon the question whether the presentment for payment was made within a reasonable time after the last negotiation in accordance with Sec. 1678—1. This statute was made to control the decision. We cannot, therefore, give this case much weight in determining the question before us.

A check is a bill of exchange payable on demand. Its purpose is, however, different from that of a demand bank draft and it differs still more from a promissory note payable on demand. A draft is intended for the purpose of remittance to some distant place and is expected to go through various channels of exchange before being presented for payment. A demand note is intended as an extension of credit until such time as the payee shall desire payment and so notify the maker. While demand of payment must be made within a reasonable time in order to continue the note as live commercial paper, such reasonable time might be very much longer than the time that would be deemed reasonable for the presentment of a draft for payment; and in turn, the time reasonable for the presentment of a draft might be much longer than that reasonable for the presentment of a check. A check usually is intended only for local use to transfer the deposit of the maker to the credit of the payee or his endorsee.

Still the lapse of such time between making of the check and presentation for payment as would discharge the drawer in the event of failure of the bank in the meantime does not necessarily make the check over-due and in effect dishonored before its presentment for payment. Demand of payment and refusal to pay

is necessary to make the check over-due, unless such demand has been unreasonably delayed.

It appears here that the check in question was four days old when it was negotiated to the plaintiff. The payee named in it, while not residing in Tomahawk, did reside in the vicinity. To the knowledge of the plaintiff she was in the city of Tomahawk between the date of the check and the time of its negotiation to him, and therefore he knew that she could have presented the check for payment in the meantime. She appears to have been in plaintiff's place of business during banking hours of the day when plaintiff received the check. It is clear that a reasonable time for presentation of the check for payment at the bank had elapsed. But the authorities of other states and of the Supreme Court of the United States well support a conclusion that such delay in presentment as occurred in this case did not make the check over-due when negotiated to the plaintiff. 8 C. J. 413, notes 51, 52 & 53. *Bull vs. Kasson Bank,* 31 S. C. R. 97; 123 U. S. 105. *Fealey vs. Bull,* (N. Y.) 57 N. E. 631. *Citizens Bank vs. Cowlen,* (N. Y.) 73 N. E. 33. *Johnson vs. Harrison* (Ind.) 97 N. E. 931. *Estes vs. Lovering,* (Minn.) 61 N. W. 674.

While these decisions are not made in construing the Uniform Negotiable Instrument Law, and do not refer to any statute similar to our Sec. 1676-23, it seems to be clear that our statute is merely a codification of the common law on this question.

In the light of these authorities this court must hold that the check here in question was not over-due when the plaintiff received it, and on the findings of the jury and the undisputed facts, he must be deemed a holder in due course.

For the reasons above stated plaintiff should recover judgment for the $250 withheld from him, and interest and costs.

Dated November 2, 1923.[1]

A. H. REID, *Judge.*

[1] See article "Defenses against a Holder in Due Course," 5 MARQUETTE LAW REVIEW 71.—Ed.