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STOCKTON

OREGON SUPREME COURT DECISIONS

Full Text Published by Courtesy of F. A. Turner, Reporter of the Supreme Court.

First National Bank of Cottage Grove v. Bank of Cottage Grove, Lane County.

First National Bank of Cottage Grove, a corporation, appellant, v. Bank of Cottage Grove, a corporation, respondent. Appeal from the circuit court of Lane county. The Hon. L. T. Harris, judge. Argued and submitted July 25, 1911. H. W. Thompson, (Thompson & Hardy on the brief), attorney for appellant. J. C. Johnson, attorney for respondent. Bean, J. Affirmed.

This is an appeal from a judgment sustaining a demurrer to each cause of action in plaintiff's complaint, and dismissing the action.

The plaintiff, for its first cause of action, after the allegations of the corporate existence of plaintiff and defendant, sets forth:

"That the plaintiff and defendant during all the times herein mentioned were banking corporations located and doing business in the city of Cottage Grove in the county of Lane and state of Oregon. That on or about the 5th day of October, 1908, the defendant presented to the plaintiff for payment a certain forged, fraudulent and worthless check purporting to have been drawn by one F. M. Chapman upon plaintiff's bank in favor of J. H. Barnwell for $55, dated October 2, 1908, and endorsed in blank by J. H. Barnwell, Garman Hemenway Co., and the defendant herein.

That said forged, fraudulent and worthless check was in words and figures as follows, to-wit:

'No.——

'Cottage Grove, Ore., Oct. 2, 1908. First Nat'l Bank, pay to J. H. Barnwell or bearer, $55 Fifty-five dollars. F. M. Chapman.

That there was endorsed on the back of said check words and figures as follows to-wit:

'J. H. Barnwell, Garman Hemenway Co. Bank of Cottage Grove. Paid Oct. 5, 1908, Cottage Grove, Ore.

"That F. M. Chapman was a depositor in plaintiff's bank and had to his credit a sufficient amount to pay said check; that said check was presented to plaintiff by defendant with a large number of other checks on said day and that plaintiff, believing said check to be genuine, and believing that the purported signature thereon of F. M. Chapman was genuine, and, relying upon such belief, paid to the defendant the said sum of $55 and charged the same to the account of said F. M. Chapman, who thereafter refused to allow credit to plaintiff for said checks; that thereafter and on or about the 6th day of October, 1908, plaintiff discovered that said check was false, fraudulent, forged and worthless and thereupon immediately notified said defendant of said facts and tendered said check to said defendant and demanded from said defendant the repayment of said sum of $55; that said plaintiff paid said sum of $55 to said defendant, relying upon the genuineness and validity of said check and under the mistake that said check was genuine and valid and the check of F. M. Chapman and was drawn by said F. M. Chapman and bore his genuine signature; that in fact said check was false, worthless and fraudulent and the signature to the same purporting to be that of F. M. Chapman was forged and fraudulent; that defendant refused and still refuses to pay to this plaintiff said sum of $55; that by reason of the premises there is now due and owing from said defendant to this plaintiff the sum of $55, with interest at the rate of six per cent per annum from the 6th day of October, 1908."

The second cause of action for $50, paid in like manner upon the forged check of F. M. Chapman, and the third cause for $75, paid upon the forged check of the Diston Lumber company, signed by H. D. Crites on its behalf, are in substance and form the same as the first, except as to names, amounts, dates, and the fact that the third check was delivered to plaintiff at defendant's bank and taken to plaintiff's bank, where the forgery was discovered within less than two hours and the defendant immediately notified.

Bean, J. It will be noticed that there is no allegation that defendant knew or suspected the checks were forged. Nor is defendant charged with any act of negligence in failing to make proper inquiry as to the genuineness of the checks, or that plaintiff was misled through any fault of defendant. It was assumed, upon the argument of counsel, that plaintiff acted in entire good faith, and it is conceded that there are no special circumstances connected with the case, such as the ability to obtain the money from the persons committing the fraud.

The question is whether a banker, upon whom a check or bill has been drawn, and who has paid the check or bill upon which the drawer's name has been forged, can, upon discovery of the forgery, recover the amount from the holder in due course, under the circumstances as shown by the complaint. Upon this important question, which is presented to this court for the first time, there has been a great difference of opinion between the court s and the eminent text-writers, and before entering into a consideration of our own statutes on the subject we will refer to a few of these authorities. Following the ancient case of Price v. Neal, III Burrows, 1355, decided by Lord Mansfield, the courts of this country have many times held that such a recovery could not be had, maintaining the position that, as between the drawee and the holder, in due course of a check the drawee bank is to be deemed the place of final settlement, where all prior mistakes and forgeries can be corrected at once and finally, and if overlooked and payment is made, the matter is at an end, and there can be no recovery thereafter. National Bank of Rolla v. First National Bank, 125 S. W. (Mo.), 513; Rodlington v. Woods, 45 Cal., 406; Bank of Quincy v. Ricker, 71 Ill., 439; First National Bank v. Northwestern Bank, 152 Ill., 296; National Bank v. Ninth National Bank, 46 N. Y., 77; Ellis v. Life Ins. Co., 4 Ch. St., 628; see also Dedham Bank v. Everett Bank, 177 Mass., 392.

A bank is presumed to know the signatures of its depositors and the condition of their accounts and credits, and in those cases where the name of the maker has been forged to the instrument and the check or draft has in due course finally been presented to and accepted and paid by the drawee, the courts have in numerous instances refused a recovery from the indorser. Deposit Bank v. Fayette National Bank, 90 Ky., 10; National Bank v. State Bank, 107 Ia., 327; Howard v. Mississippi Val. Bank, 28 La. Ann., 727; Com. & Farmers Nat. Bank v. Baltimore First Nat. Bank, 30 Md., 11; Salt Springs Bank v. Syracuse Sav. Bank, 62 Barb. (N. Y.) 101; Nat. Bank Commonwealth v. Grocers Nat. Bank, 35 How. Pr. (N. Y.), 412; Carthage First Nat. Bank v. Yost, 11 N. Y. Sup., 862; Farmers & Mer. Bank v. Bank of Rtuherford, 115 Tenn., 64; St. Albans Bank v. Farmers & Mer. Bank, 10 Vt., 141; Germania Bank v. Boutell, 60 Minn., 189.

There is a line of decisions that state the rule as follows: The drawee of a forged check, who has paid the same, may upon discovery of the forgery, recover the money paid from the party who received it, even though the latter was a holder in due course, provided the latter has not been misled or prejudiced by the failure of the drawee at the time of payment to detect the forgery, and that the burden of showing that he has been misled or prejudiced is upon the party claiming the right to retain the money. Lisbon Bank v. Wyndmere Bank, 15 N. D., 299; 108 N. W., 546; Bank v. Bingham, 71 Pac. (Wash.), 43; American Express Cŏ. v. Bank, 113 Pac. (Okla.), 711; 5 Cyc., 546, 547; Danvers Bank v. Salem Bank, 151 Mass., 280; Dedham Bank v. Everett Bank, 177 Mass., 392. Some cases have modified the old rule. Many of the text writers advocate that in such cases there should be a recovery, for the reason that the money so paid was paid under mistake of fact, and that to allow a recovery is, therefore the most equitable rule. II Parsons on Notes & Bills, 80; IIDaniel (5 ed.), Sec. 1656. The rule in Price v. Neal, supra, has been criticised as inequitable and fundamentally wrong (II. Morse on Bank & Banking, Sec. 464); it is said to be harsh and against the great rule that money paid by mistake may be recovered. II. Bolles on Modern Law of Banking, 721. In the divergent opinions in Germania Bank c. Boutell, 60 Minn., 189, the different doctrine are said to be well stated, in the dissenting opinion in which we note that Mr. Justice Ganty, favoking the so-called modern rule, remarks: "I concede that it is good public policy to hold that a banker should know the signature of his depositor. It tends to greater vigilance on the part of the banker, and more prompt discovery of the forgery, which makes the business of forgery more dangerous and less successful." But the learned justice affirms that this should not overturn and exclude other well established principles applicable thereto.

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We have noticed these authorities in a general way for the purpose, among others, of considering their effect upon legislation. On account of a confusion of ideas upon this and other questions of similar nature, and realizing that in modern commerce the coin of the country is supplemented and aided by means of drafts, checks and other commercial paper, the legislatures of more than three-fourths of our states, in an endeavor to have a uniform law in this respect, within the past few years have enacted a "negotiable instruments" law. Ours was adopted in 1899; see Sec. 5834, L. O. L., et sequi.

The plaintiff in substance claims to be a holder in due course of the checks in question, which defendant had purchased in good faith, and indorsed, and promptly presented to the plaintiff bank for payment, and they were honored and paid by plaintiff, and that such payments were under a mistake of fact. "If an implied warranty of genuineness accompanies the unrestricted indorsement or transfer of any negotiable instrument, it is an assurance to the drawee of its genuineness in all respects, save that of the name of the drawer alone, with which knowledge the drawee is charged." Bank v. Bank 96 Am. St., 169, 175. The doctrine that a bank is bound to know the signature of its customer has been applied very strictly by the United States supreme court. II. Daniel (5 ed.), Sec. 1656. It should be remembered however, that the party holding such a check should in no way contribute to the success of the fraud. If so he would certainly not be a holder in due course. II. Daniel (5 ed.) Sec. 1657. See also note on page 896 to the case of Peoples Bank v. Franklin Bank, 17 Am. St., 884. A check is in the nature of a bill of exchange, and treated as such. Neal v. Coburn, 92 Mo., 139.

The sections of our negotiable instruments law, bearing upon the question involved, provide as follows:

L. O. L. Sec. 5856. "Where a signature is forged, or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority."

L. O. L. Sec. 5885, states that, "A holder in due course is a holder who has taken the instrument under the following conditions: (1) that it is complete and regular upon 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 title of the person negotiating it." This definition does not embrace the case of a drawee.

L. O. L. Sec. 5899. Every indorser who indorses without qualification warrants to all subsequent holders in due course (1) the matters and things mentioned in subdivisions 1, 2, and 3 of the next preceding section, (That the instrument is genuine and in all respects what it purports to be); and (2) that the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that, on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it."

L. O. L. Sec. 5965. "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. It must not express that the drawee will perform his promise by any other means than the payment of money."

L. O. L. Sec. 6020. "Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance."

L. O. L. Sec. 6021. "Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from diability thereon."

L. O. L. Sec. 6025. "In any case not provided for in this act the rules of the law merchant shall govern."

When the defendant bank, which was a holder in due course, presented these checks to the plaintiff bank, the drawee, and they were honored, accepted and paid, the prior indorsers were thereby discharged from further liability. The checks when so paid had run their course; they were no longer checks within the meaning of the negotiable instruments law, but only cancelled vouchers, and the plaintiff was not a holder thereof in due course. St. Louis Bank v. German American Bank, 127 S. W. (Mo.), 434; Riverside Bank v. Shenandoah Bank, 74 Fed., 276; Neal v. Coburn, 92 Mo., 139; Farmers & Merchants Bank v. Rutherford Bank, 115 Tenn., 64. The payment of a bill or check by the drawee amounts to more than an acceptance. The rule, holding that such a payment has all the efficacy of an acceptance, is founded upon the principle that the greater includes the less. Bank v. Bank, 125 S. W., 513; Neal v. Coburn, supra. In Bank v Bank, 109 Mo. App.,665, Mr. Justice Broaddus, answering the argument that absolute payment was not an acceptance, said: "An acceptance binds the acceptor to pay the bill, and he cannot be heard to deny that he has funds in his hands for the purpose. A payment of the bill is more than acceptance, for the one is an obligation to pay; the other a discharge of the indebtedness represented by such bill. If the one concludes the drawee, it is inconceivable why the other would not." Under the provision in Sec. 6021, L. O. L., that where the holder of a check procures it to be accepted or certified the indorsers are discharged from liability, the plaintiff, when it paid the checks in question, precluded itself from setting up that the check was a forgery on any want of authority of the person affixing the signature it purported to bear, within the meaning of Sec. 5856, L. O. L. The following cases, in which the negotiable instruments law is applied, sustain this view: Bank of Com. v. Mech. Nat. Bank, 127 S. W. (Mo.), 429; Title Guarantee & T. Co. v. Haven, 111 N. Y. Sup., 305; Bank of Rolla v. Salem Bank, 125 S. W. (Mo.), 513; Farmers & Mer. Bank v. Rutherford Bank, 115 Tenn., 64. In the case of Title Guarantee & T. Co. v. Haven, supra, Mr. Justice Ingraham, in considering sections of the negotiable instruments similar to those quoted from our statute, construed them as making it conclusive upon the drawee after acceptance that the note was genuine and all prior indorsements assured.

Under our negotiable instruments law, as well as by the weight of judicial authority, we think that where a bank, as the plaintiff, being the drawee of a bill of exchange or check drawn upon it by one of its depositors, pays the bill or check to a holder thereof in due course (as the defendant, who has in no way contributed to the fraud and is not guilty of negligence in the matter), and it is afterward ascertained that the signature to the bill or check is a forgery, the bank making such payment cannot recover the money from such holder. A case of this kind is an exception to the general rule that money paid under a mistake of fact may be recovered.

There was no error in the judgment of the lower court, sustaining the demurrer, and it is affirmed.

Mr. Chief Justice Eakin did not sit in this case, and took no part in its decision.

———o———

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