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Agency -- Bills and Notes -- Agent's Indorsement of Check Drawn to Principal's Order

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can impose new duties on the debtor while having the advantage of the debtor's check in his possession as a threat. In any event, the reasoning of the present case seems open to criticism as it results in permitting the creditor to shift the burden of acting upon the debtor without giving a reasonable length of time in which to act. The same result could more logically be attained on the ground of lack of consideration, since no part of the disputed amount was paid but only the sum admittedly due.[10]

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Agency—Bills and Notes—Agent's Indorsement of Check Drawn to Principal's Order

An attorney, with authority to settle his client's claim, received a check payable jointly to himself and the client. He indorsed for both, cashed the check, and retained the proceeds. *Held,* the transaction amounted to payment to the attorney of the amount of cash represented by the check and received thereon, and was payment of client's claim.[1]

Although some courts show a tendency to hold that an attorney with authority to settle a client's claim has implied authority to indorse a check received in payment,[2] the rule generally laid down is that authority to indorse negotiable paper will not be implied unless it is absolutely necessary to the carrying out of the purpose of the agency.[3] By this rule, the check in the instant case was wrongfully indorsed.

[10] Whittaker Chain Tread Co. v. Standard Auto Supply Co., 216 Mass. 204, 103 N. E. 695 (1913) (Refuses to follow idea of no voluntary assent by creditor but gets the same result on ground of no consideration); Hamburger v. Economy Dept. Store, 222 N. W. 603 (S. D. 1928); (1929) 14 IOWA L. REV. 474. *Contra:* Chicago, etc. R. Co. v. Clark, 178 U. S. 353, 20 Sup. Ct. 924, 44 L. ed. 1099 (1899); 1 WILLISTON, ON CONTRACTS (1924) §129; Schnell v. Perlmon, 238 N. Y. 362, 144 N. E. 641, 34 A. L. R. 1023, aff'd 239 N. Y. 504, 147 N. E. 171 (1924). Discussed in (1924) 2 N. Y. L. REV. 414; Shapleigh Hardware Co. v. Farmer's Federation Inc., 195 N. C. 702, 143 S. E. 471 (1928). See also, May Bros. v. Doggett, 124 Sou. 476 (Miss., 1929). If the disputed portion belongs to a separate and distinct transaction then it cannot carry over so as to apply to the admitted indebtedness and create a dispute as to it, Brent v. Whittington, 214 Ala. 613, 108 Sou. 567 (1926). But *cf.* Sylva Supply Co. v. Watt, *supra* note 8. For general discussion see (1925) 9 MINN. L. REV. 458; (1929) 8 N. C. L. REV. 71.

[1] Patterson v. Southern Ry. Co., 151 S. E. 818 (Ga. App. 1930).

[2] Nat. Bank of the Republic v. Old Town Bank, 112 Fed. 726 (C. C. A. 7th, 1902); Brown v. Grimes, 74 Ind. App. 655, 129 N. E. 483 (1921); 1 THORNTON, ATTYS. AT LAW (1914) 363, 364.

[3] Bank of Morganton v. Hay, 143 N. C. 326, 55 S. E. 811 (1906); Crahe v. Mercantile etc. Bank, 295 Ill. 375, 129 N. E. 120 (1920); Note (1921) 12 A. L.

Under such circumstances, the weight of authority allows an action by the client or principal against the drawee bank, either on the theory that payment on unauthorized indorsement constitutes acceptance, or on the theory that the bank is guilty of a conversion.[4] If the check is cashed by a bank other than the drawee, and then collected, an action lies against the cashing bank[5]—even in jurisdictions which would not allow an action against the drawee.[6]

When the principal sues the debtor, however, he is generally denied recovery as in the instant case.[7] The basis of these decisions

R. 111; AGENCY RESTATEMENT (Am. Law. Inst. 1928) §§366 and 347 comment (d). *Contra:* Lorton v. Russel, 27 Neb. 372, 43 N. W. 112 (1889); Chamberlin, etc. Co. v. Bank of Pleasanton, 107 Kan. 79, 190 Pac. 742 (1920) (holding that a collecting agent has apparent authority to indorse checks received).

[4] Dawson & White v. Nat. Bank of Greenville, 197 N. C. 499, 150 S. E. 38 (1929) (acceptance); Louisville & N. R. Co. v. Citizens & Peoples Nat. Bank, 74 Fla. 385, 77 So. 104 (1917) (conversion); (1929) 38 YALE L. J. 1143; (1926) 26 COL. L. REV. 113; Note (1921) 14 A. L. R. 764.

First Nat. Bank v. Whitman, 94 U. S. 343, 24 L. ed. 229 (1877) is the leading case denying recovery on theory of acceptance. But see Fidelity & Deposit Co. v. Bank of Charleston, 267 Fed. 367, 370 (C. C. A. 4th, 1920) which intimates that under same circumstances an action for conversion would well lie.

Pennsylvania would probably refuse recovery on either theory. Tibby Bros. Glass Co. v. Farmers and Mechanics Bank, 220 Pa. 1, 69 Atl. 280 (1908).

[5] Schaap v. State Nat. Bank, 137 Ark. 251, 208 S. W. 309 (1918); Porges v. U. S. Mortgage & Trust Co., 203 N. Y. 181, 96 N. E. 424 (1911); (1929) 77 U. OF PA. L. REV. 127; Note (1924) 31 A. L. R. 1068.

The Pennsylvania rule is *contra:* Tibby Bros. Glass Co. v. Farmers & Mechanics Bank, *supra* note 4.

[6] Merchants Bank v. Nat. Capital Press, 288 Fed. 265 (Ct. of App., Dist. of Col., 1923). See also Fidelity & Deposit Co. v. Bank of Charleston, *supra* note 4.

[7] "When a debtor delivers his check to the creditor or his agent, duly authorized to receive it, and has funds in the bank to meet the check, the transaction, as between debtor and creditor, should be treated as payment, precisely as though cash had been paid, even though the agent forges an indorsement and steals the money." Burstein v. Sullivan, 134 App. Div. 623, 119 N. Y. S. 317, 319 (1909); Morris v. Hofferberth, 81 App. Div. 512, 81 N. Y. S. 403 (1903); Morrison v. Chapman, 155 App. Div. 509, 140 N. Y. S. 700 (1913); McFadden v. Follrath, 114 Minn. 85, 130 N. W. 542 (1911); Mills v. Hurley, etc. Co., 129 Ark. 350, 196 S. W. 121 (1917); Monacelli v. Traeger, 239 Ill. App. 30 (1925). But see Merchants Bank v. Nat. Capital Press, *supra* note 6, at 266.

As pointed out in McFadden v. Follrath, *supra,* Thomson v. Bank of British North America, 82 N. Y. 1 (1880) and Kansas City, M. & B. R. Co. v. Ivy Leaf Coal Co., 97 Ala. 705, 12 So. 395 (1892) are distinguishable.

Siegel v. Kovinsk, 93 Misc. 541, 157 N. Y. S. 340 (1916) relies on the Thomson case, *supra,* and says the debtor is still liable. In Siegel v. Kovinsk, however, the agent did not even have authority to collect cash.

The New York Supreme Court held the debtor liable in Bernheimer v. Herrman, 44 Hun 110 (1887) (check was given to bookkeeper). There seems to be no valid distinction between this case and the group holding the debtor was not liable.

seems to be equitable considerations rather than the result of legal reasoning.[8] In seeking to hold the debtor, it is generally argued that he can recoup his loss by bringing suit against the drawee bank; but in the words of the New York Supreme Court, "Defendant should not be compelled to pay twice, or be subjected to the hazard of a law suit with the bank, for having taken the precaution to protect plaintiffs by making a check payable to their order."[9] Justice Simpson of the Minnesota Court puts a supposed case in which the drawee bank becomes insolvent immediately after paying the check, and then says that the loss which must result should fall on the person who chose the dishonest agent.[10]

When the debtor gives a check or draft on himself and pays it on an agent's indorsement of the creditor's name, the case seems a stronger one for the debtor, since the paper is very much like a receipt signed in creditor's name by his agent.[11]

If the check was made payable to the agent, then *a fortiori* the principal's claim is paid.[12]

If an agent has authority to accept cash, many courts say that, in view of modern business methods, he has authority to accept a check.[13] However, the question as to such authority would seem to be immaterial if the check is actually paid.[14]

HUGH L. LOBDELL.

The Pennsylvania court apparently would hold the debtor liable. Tibby Bros. Glass Co. v. Farmers & Merchants Bank, *supra* note 4.

See (1916) 16 COL. L. REV. 430 for conclusion *contra* to the instant one.

[8] The reasoning of the Pennsylvania court in Tibby Bros. Glass Co. v. Farmers & Mechanics Bank, *supra* note 4, seems sounder from a purely analytical standpoint; the bank has paid out its *own* money, the debtor has lost nothing, and the original position of the debtor and creditor has not been altered.

[9] Burstein v. Sullivan, *supra* note 7, at 319.

[10] McFadden v. Follrath, *supra* note 7. It could be argued with equal force that the loss should fall on the depositor who chose an unsound bank.

[11] Nat. Fire Ins. Co. v. Eastern Bldg. & Loan Assn., 63 Neb. 698, 88 N. W. 863 (1902); Hart v. Northwestern, etc. Bank, 191 Ill. App. 396 (1915). But *cf.* Lochenmeyer v. Fogarty, 112 Ill. 572 (1884).

[12] Potter v. Sager, 184 App. Div. 327, 171 N. Y. S. 438 (1918); Pacific Acceptance Corp. v. Jones, 95 Cal. App. 365, 272 Pac. 1084 (1928); Gibson v. Ward, 9 Ga. App. 363, 71 S. E. 506 (1911); (1929) 38 YALE L. J. 995.

[13] Potter v. Sager; Gibson v. Ward, both *supra* note 12.

[14] Harbach v. Colvin, 73 Ia. 638, 35 N. W. 663 (1887); see Brown v. Grimes, *supra* note 2. But see Hamling v. Aetna Life Ins. Co., 34 F. (2d) 112, 116 (C. C. A. 8th, 1929) for theory that when he received the check, the agent became the *debtor's* agent to transmit the proceeds to the creditor.

Where agent takes collateral security without authority, the proceeds from its sale have been held payment of principal's claim, though the agent embezzled such proceeds. Block v. Drake, 2 Colo. 330 (1874); Holliday v. Thomas, 90 Ind. 398 (1883).