



4-1-1948

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Recommended Citation

Alfred D. Ward, *Bills and Notes -- Reacquisition -- Liability of Intermediate Indorser to Purchaser from Reacquiring Payee*, 26 N.C. L. REV. 299 (1948).

Available at: <http://scholarship.law.unc.edu/nclr/vol26/iss3/8>

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be nullified by a decision that causes the public to fear the consequences of adopting a child when their efforts are at the whim and caprice of the natural parent.⁵¹

J. W. ALEXANDER, JR.

Bills and Notes—Reacquisition—Liability of Intermediate Indorser to Purchaser from Reacquiring Payee

The payee of a negotiable promissory note indorsed the note to the defendant. The defendant shortly thereafter indorsed it back to the payee, who indorsed to the plaintiff. Plaintiff was admittedly a holder in due course. All indorsements were special. *Held*: Reacquisition by the payee gave the note a "fresh start," terminating the contractual liability of the intermediate indorser, so that he could not be regarded as in the line through which the holder traced his title.¹

It is important that the problem of the instant case be distinguished at the outset from that arising under §58² of the Negotiable Instruments Law.

We are here concerned with a holder who is a holder in due course in his own right. The specific question is: Does an indorser remain liable to a subsequent holder in due course, in spite of reacquisition by a prior party, when the holder took with notice of the reacquisition?

Section 58,³ on the other hand, deals with defenses available to prior parties when the instrument is in the hands of a holder *not* in due course. This section reads as follows: "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. But a holder who derives his title through a holder in due course and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter." Thus the specific question arising under this section is: Under what circumstances can a holder *not* in due course avoid the defenses of prior parties?

This distinction is necessary, for, as will be noted below, the courts have confused the issue somewhat in discussing the instant problem, by drawing §58 into the picture, though it is obviously inapplicable.⁴

⁵¹ *Ex parte Schultz*, 181 P. 2d 585 (Nev. 1947).

¹ *Denniston's Adm'r v. Jackson*, 304 Ky. 261, 200 S. W. 2d 477 (1947), briefly noted in 46 MICH. L. REV. 97.

² N. C. GEN. STAT. (1943) §25-64 (quoted in text below).

³ N. C. GEN. STAT. (1943) §25-64.

For an extensive discussion of the problem arising under this section, see Chafee, *The Reacquisition of a Negotiable Instrument by a Prior Party*, 21 COL. L. REV. 538 (1921). Also see Note, 1 N. C. L. REV. 187 (1923).

⁴ See 46 MICH. L. REV. 97, 98 (1947) (brief discussion of the difference between these two problems).

The exact problem of the principal case has arisen very few times either under the law merchant⁵ or the Negotiable Instruments Law.⁶ There was a split of authority under the law merchant,⁷ and that split has been carried forward⁸ by virtue of the fact that the Negotiable Instruments Law has no express provision covering the situation. Thus in North Carolina *Adrian v. McCaskill*⁹ released the intermediate indorser, and its doctrine was applied under the Negotiable Instruments Law by *Ray v. Livingston*,¹⁰ while in Massachusetts, *West Boston Savings Bank v. Thompson*¹¹ held the indorser, and was approved after adoption of the Negotiable Instruments Law by *State Finance Corp. v. Pistorino*.¹² The one other case decided under the Negotiable Instruments Law cited the Massachusetts cases and allowed the purchaser from the reacquiring payee to hold the intermediate indorser, only to be reversed on appeal on another ground.¹³

⁵ *Howe Mach. Co. v. Hadden*, 12 Fed. Cas. 710, No. 6, 785 (C. C. Ind. 1878) (releasing the indorser); *West Boston Savings Bank v. Thompson*, 124 Mass. 506 (1878) (holding the indorser); *Adrian v. McCaskill*, 103 N. C. 182, 9 S. E. 284 (1889) (releasing the intermediate indorser); see *Herrick v. Carman*, 12 Johns. 159, 161 (N. Y. 1815) (Note the interpretation of the holding of this case in *Hall v. Newcomb*, 7 Hill 416, 420 [N. Y. 1844].).

⁶ *Denniston's Adm'r v. Jackson*, 304 Ky. 261, 200 S. W. 2d 477 (1947); *State Finance Corp. v. Pistorino*, 245 Mass. 402, 139 N. E. 653 (1923) (holding the indorser); *Ray v. Livingston*, 204 N. C. 1, 167 S. E. 496 (1933), 17 MINN. L. REV. 808 (releasing the indorser); *Persky v. Bank of America Nat. Ass'n*, 235 App. Div. 146, 256 N. Y. S. 572 (1932) (holding the indorser), *rev'd on other grounds*, 261 N. Y. 212, 185 N. E. 77 (1933). (The decision in the *Persky* case, holding the indorser, relied heavily on several cases in which the plaintiff purchased the instrument before maturity from the party primarily liable thereon, and was allowed to recover from a defendant who had indorsed prior to such acquisition or reacquisition by the primary party. *Rogers v. Gallagher*, 49 Ill. 182 [1868] [Payee indorsed a bill to the acceptor and was held liable to a purchaser who took from the acceptor before maturity.]; *Eckert v. Cameron*, 43 Pa. 120 [1862] [note reacquired by the maker and negotiated to the plaintiff]; cf. *Horn v. Nicholas*, 139 Tenn. 453, 201 S. W. 756 [1918]. See also *National Bank v. Lindsey*, 25 Del. 83, 78 Atl. 407 [1910] [Note was indorsed to plaintiff by maker after indorsing to and reacquiring from the defendant. Recovery was allowed.]; see *Peltier v. McFerson*, 67 Colo. 505, 507, 186 Pac. 524, 525 [1920]; *Chicago Title & Trust Co. v. Bidderman*, 275 Ill. App. 457, 468-73 [1934]. See Note L. R. A. 1918 E 170 [and the cases cited therein] for an extensive discussion of this problem. It is submitted by the writer that the analogy between the problem of these cases and that of the principal case is certainly well drawn. It should be noted that the Kentucky court, in *Denniston's Adm'r v. Jackson*, referred to its being influenced by the Kentucky position, "differing from the majority," that "when a maker of a note acquires it by assignment or endorsement, the obligation is extinguished and cannot be revived." *Conley v. Louisa Nat. Bank*, 296 Ky. 797, 178 S. W. 17 [1943]; *Long v. Bank of Cynthia*, 11 Ky. 290 [1822]. The court recognized, of course, the fact that these cases did not preclude its holding the intermediate indorser.)

⁷ See note 5 *supra*.

⁸ See note 6 *supra*.

⁹ 103 N. C. 182, 9 S. E. 284 (1889).

¹⁰ 204 N. C. 1, 167 S. E. 496 (1933).

¹¹ 124 Mass. 506 (1878).

¹² 245 Mass. 402, 139 N. E. 653 (1923).

¹³ *Persky v. Bank of America Nat. Ass'n*, 235 App. Div. 146, 256 N. Y. S. 572 (1932), *rev'd on other grounds*, 261 N. Y. 212, 185 N. E. 77 (1933).

That was the situation at the time the Kentucky court approached the problem, in the instant case, and in reaching its conclusion the court relied largely on the two North Carolina cases. Therefore a critical comment on the decision in *Denniston's Adm'r v. Jackson*¹⁴ necessitates an analysis of *Adrian v. McCaskill*, and its life-giver under the Negotiable Instruments Law, *Ray v. Livingston*.

In the *Adrian* case the plaintiff purchased the note in question, after maturity, from the payee. At the time it bore two blank indorsements—that of the payee followed by that of the defendant. Plaintiff knew nothing of any prior transaction between the payee and the defendant. In affirming a judgment rendered for the defendant, the court noted the law merchant rule¹⁵ which prevented a reacquiring party from holding liable a subsequent indorser to whom he would in turn be liable. With no reference to the origin of this rule, and without citing any authority, the court read in the following extension:¹⁶ "It must be equally clear that one who derives possession from him, with notice of the fact, cannot hold such intermediate indorsers liable. . . ." The court stated that the indorsements were sufficient to charge the plaintiff with notice of the reacquisition.

Forty-four years later, after the adoption of the Negotiable Instruments Law, the North Carolina court approved the rule of the *Adrian* case and applied it in *Ray v. Livingston*. The plaintiff was a holder in due course. The note bore only two genuine signatures—the indorsement of the payee followed by that of the defendant. The signatures of three co-makers and four additional blank indorsements were forged. The circumstances under which the defendant had indorsed did not appear, but the note was purchased by the plaintiff from the payee, and the court assumed a negotiation by the payee to the defendant and a renegotiation—the possession of the payee raising a presumption of ownership. Plaintiff brought suit on the warranties for which the defendant's indorsement stood by virtue of §66¹⁷ of the Negotiable In-

¹⁴ 304 Ky. 261, 200 S. W. 2d 477 (1947).

¹⁵ *Bishop v. Hayward*, 4 T. R. 470, 100 Eng. Rep. 1124 (1791) (The payee of a note was not allowed to recover from the defendant, to whom the payee had originally indorsed. The court admitted that there might have been circumstances under which he could have recovered, in which no *circuity* would be involved. Thus the ground for so holding was *circuity of action.*); *Britten v. Webb*, 2 B. & C. 483, 107 Eng. Rep. 463 (1824) (Drawer of bill to own order was not allowed to recover from the party to whom he had originally indorsed. Plaintiff sought to make this one of the exceptions mentioned in the *Bishop* case, by alleging agreement by defendant to indorse as security for payment by drawee, but the court said there was no consideration for the agreement, so the case involved *circuity of action* and the rule of the *Bishop* case applied.).

¹⁶ *Adrian v. McCaskill*, 103 N. C. 182, 186, 9 S. E. 284, 285 (1889).

¹⁷ N. C. GEN. STAT. (1943) §25-72: "Every indorser who indorses without qualification warrants to all subsequent holders in due course (1) the matters and things mentioned in subdivisions one, two, and three of §25-71 [genuineness, good title, and capacity of prior parties to contract]; and (2) that the instrument is at

struments Law, and, in pressing his claim, relied on the language of that section, that "Every indorser who indorses without qualification, warrants to *all* [italics supplied] subsequent holders in due course. . . ."

The court did not let this language trouble it however. It merely stated that the section should be considered in connection with the other provisions of the Negotiable Instruments Law, and proceeded to muddle the picture by injecting the problem arising under §58. The court then quoted §50¹⁸ (in part a codification of the common law rule preventing suit by a reacquiring party against a subsequent indorser), and concluded by restating the law as announced in *Adrian v. McCaskill*.

Thus the court set out to reason away the efficacy of §66, and wound up without having done so¹⁹ by reciting the codification of the rule of the law merchant of which the *Adrian* case was an extension, and holding directly on the basis of that case.²⁰

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."

¹⁸ N. C. GEN. STAT. (1943) §25-56: "Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this chapter, reissue and further negotiate the same. But *he* [italics supplied] is not entitled to enforce payment thereof against any intervening party to whom he was personally liable."

¹⁹ "The decision is clearly wrong. The court relied on the last sentence of section 50, but clearly overlooked the fact that by section 66 the warranty runs to all subsequent holders in due course." BRANNAN'S NEGOTIABLE INSTRUMENTS LAW, 532 (6th ed., Beutel, 1938). "The court evidently overlooked the word 'all' in this section [§66]." *Id.* at 814.

Professor Britton began a recital of the holding of this case: "Without reference to Sections 65 and 66. . . ." BRITTON, BILLS AND NOTES §299 n. 2 (1943).

²⁰ The court made no reference to the possibility of the plaintiff's having relied on the defendant's indorsement as having been for the accommodation of the payee. Evidently the question was not raised by the parties. In *Adrian v. McCaskill*, 103 N. C. 182, 188, 9 S. E. 284, 285 (1889), the court intimated that had the plaintiffs purchased before maturity so as to be "bona fide holders before maturity," they might have been able to recover from the intermediate indorser because of such reliance. It should be noted that in each of these two N. C. cases the indorsements were in blank, and the payees, from whom the plaintiffs had purchased, had not indorsed after the defendant. Some courts have held the intermediate indorser on these grounds, saying that the indorsements import accommodation. *Mauldin v. Branch Bank*, 2 Ala. 502 (1841); *Palmer v. Whitney*, 21 Ind. 58 (1863) (Intermediate indorsement is presumed to be for accommodation "in absence of contrary proof." The court said the bill was indorsed by the payee to the defendant, back to the payee, and by him indorsed to the plaintiff, but did not say whether by special or blank indorsements.); see *Howe Mach. Co. v. Hadden*, 12 Fed. Cas. 710, No. 6, 785 (C. C. Ind. 1878) (The court discussed these cases, but did not follow them, for it was dealing with special indorsements, and, in addition, the complaint disclosed that the plaintiff had actual knowledge of the fact that the instrument had been negotiated to the defendant by the payee.).

Note the interpretation of *State Finance Corp. v. Pistorino*, 245 Mass. 402, 139 N. E. 653 (1923), in 17 MINN. L. REV. 808 (as restricting the application of the rule of the *Ray* case to regular indorsers, because the court remarked that the trial court had found the defendants to be accommodation indorsers).

Thomas B. Paton, General Counsel for the American Bankers Ass'n, gave as his opinion that when a note payable to the order of the maker is purchased by the holder before maturity from the maker, on which appear an indorsement by the maker, an indorsement by an individual, and another by the maker, the individual is liable as an accommodation indorser. 1 PATON'S DIGEST §2722 (1926).

An analysis of the *Denniston* case again shows no consideration of the history of the common law rule on which §50 is based. The Kentucky court gave no more adequate consideration to the effect of the Negotiable Instruments Law on the problem at hand than did the North Carolina court in *Ray v. Livingston*. In fact, only two sections were cited, §§ 50 and 58, and it is again submitted that the latter has no application to this particular situation.

Those two cases under the Negotiable Instruments Law which held the intermediate indorser gave no extensive reasons for so doing, but reached what is believed to be much the sounder conclusion.²¹ That result is suggested by the history of the common law rule that is embodied in §50. The rule was aimed solely at preventing circuity of action, with no suggestion, express or implied, of a rational basis for its extension to relieve an intermediate indorser of the liability to subsequent purchasers which he assumes by virtue of his indorsement.²² It did not extinguish this liability; it merely prevented the action by the reacquiring party.²³ The rule was based on the policy of the law to prevent circuity of action,²⁴ and therefore is necessarily applicable only where it will do so. Would circuity of action be the result of allowing a purchaser from a reacquiring payee to hold the intermediate indorser? Emphatically no—no more so than it results from a holder's suing the third indorser rather than the first, or the maker. Thus the situation under discussion is not within the rationale of §50, and the purchaser from a reacquiring party, a holder in due course, should take free of "defenses available to prior parties among themselves," under §57,²⁵ unless the Negotiable Instruments Law affords some other basis for saying that reacquisition discharges the intermediate indorser, so that he is not a party "liable thereon."²⁶

Is there any such basis? As shown above, the courts have found none, and that is fairly indicative of the answer. The writer submits that there is none.

²¹ See Chafee, *The Reacquisition of a Negotiable Instrument by a Prior Party*, 21 COL. L. REV. 538, 551-53 (1921) (His discussion deals with reacquisition and reissue by a primarily liable party, favoring holding the intermediate indorser, but he mentions that the same principle applies to reacquisition by any prior party.); see BRITTON, BILLS AND NOTES §300 (1943) (He argues that even a purchaser after maturity should be allowed to recover from an intermediate indorser.).

²² "The provisions just quoted from Sections 50 and 121 were put in, therefore, to prevent circuity of action. The phrasing of these statutory rules unites with the reason for the rules strongly to suggest that they were not directed against any person other than the reacquirer." BRITTON, BILLS AND NOTES, §300 (1943).

²³ Cases cited note 15 *supra*.

²⁴ Cases cited note 15 *supra*.

²⁵ N. C. GEN. STAT. (1943) §25-63: "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."

²⁶ See note 25 *supra*.

Section 121²⁷ may be disregarded, for its use of the word "paid" strongly suggests, when considered in the light of §88²⁸ (defining payment in due course), that it applied only to parties reacquiring after maturity, by virtue of payment in due course, rather than to a reacquisition in the usual course of business before maturity.²⁹ There remains §120,³⁰ which explicitly enumerates the means by which a party secondarily liable may be discharged, and there is no mention of discharge through reacquisition by a prior party. Its manner of expression would seem to indicate that it was meant to exhaust the field.³¹

Nor is there any reason, speaking purely on the merits of the problem, why such an indorser should be discharged³² "because of the fortuitous event that the instrument got back into the hands of a subsequent holder."³³

Thus it should follow that an intermediate indorser is liable to a holder in due course who purchased from a reacquiring payee, even

²⁷ N. C. GEN. STAT. (1943) §25-128: "When the instrument is paid by a party secondarily liable thereon it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except (1) where it is payable to the order of the third person and has been paid by the drawer; and (2) where it was made or accepted for accommodation and has been paid by the party accommodated."

²⁸ N. C. GEN. STAT. (1943) §25-95: "Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective."

²⁹ See BRITTON, BILLS AND NOTES §294 (1943). But see Chafee, *supra* note 21, at 548. The origin of the first exception of §121 also supports the above construction of that section, for it is generally recognized as having been created by Lord Mansfield in *Beck v. Robley*, 1 H. Bl. 89, 126 Eng. Rep. 54 (1788) (See Chafee, *supra* note 21, at 552.), in which a bill was not paid when due, and was taken up by the drawer. Thus, as it originated, the "paid" of the exception was payment after maturity.

³⁰ N. C. GEN. STAT. (1943) §25-127: "A party secondarily liable on the instrument is discharged (1) by any act which discharges the instrument; (2) by the intentional cancellation of his signature by the holder; (3) by the discharge of a prior party; (4) by a valid tender of payment made by a prior party; (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved; (6) by any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable or unless the right of recourse against such party is expressly reserved."

³¹ See BRITTON, BILLS AND NOTES §300 (1943).

³² It should be noted that in several of the cases the defendant originally took the instrument for security purposes only. *Denniston's Adm'r v. Jackson*, 304 Ky. 261, 200 S. W. 2d 477 (1947); *West Boston Savings Bank v. Thompson*, 124 Mass. 506 (1878); *Adrian v. McCaskill*, 103 N. C. 182, 9 S. E. 284 (1889). Thus it might be argued that his position differs somewhat from that of an intermediate indorser who really purchases an instrument and sells it back to a prior party, if the subsequent purchaser from the reacquiring party has actual knowledge of the transaction. This goes purely to the merits however, for there is nothing in the present law to warrant any such distinction. In the opinion of the writer, the argument is tenuous at best, for the party who takes for security need not indorse the instrument in order to return it to his indorser, and if he does he should be held liable.

³³ BRITTON, BILLS AND NOTES §300 (1943).

though the holder had actual knowledge of the reacquisition. This view is supported by that language of §66 which was so completely disregarded in *Ray v. Livingston*.

The Negotiable Instruments Law is now being revised by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, as a part of their Commercial Code project.³⁴ This problem should be dealt with explicitly so that there will be no question but what an intermediate indorser will be held to that liability which he assumes.³⁵

ALFRED D. WARD

Criminal Law—North Carolina Bastardy Statute—Support of Illegitimate Children

In *State v. Stiles*,¹ the defendant was indicted for willful failure to support his illegitimate child. In order to secure a conviction under this indictment, it is necessary that the State prove two elements. First, that the defendant is the father of the illegitimate child, and second, that his failure to support the child was willful.²

The prosecutrix's testimony as to the conception presented sufficient evidence on the point of paternity to support the jury's finding that the defendant was the father of the child. Since the defendant admitted having failed to support the child, it was only incumbent upon the prosecution to show that his failure to support was accompanied by a willful intent. When the State proved that the defendant had known of the prosecutrix's pregnant condition and her requests for "aid" even before the birth of the child, the jury was fully justified in finding that his subsequent failure to support the child was willful, without justification or excuse. However, had the State failed to establish the requisite willful intent, the defendant would have been guilty of no crime, since the statute makes willfulness a necessary ingredient of the offense.³

The present statute⁴ under which the defendant was indicted superseded the old Bastardy Proceedings. Bastardy Proceedings⁵ were civil

³⁴ See HANDBOOK AND PROCEEDINGS, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 143 (1944).

³⁵ It has been learned through correspondence that the revision in its present tentative form includes a provision discharging an intermediate indorser on reacquisition by a prior party. This draft is, of course, "subject to change without notice," and the writer hopes that such will be the fate of the provision in question.

¹ 228 N. C. 137, 44 S. E. 2d 728 (1947).

² N. C. GEN. STAT. (1943) §49-2.

³ *State v. Vanderlip*, 225 N. C. 610, 35 S. E. 2d 885 (1945); *State v. Hayden*, 224 N. C. 779, 32 S. E. 2d 333 (1944); *State v. Allen*, 224 N. C. 530, 31 S. E. 2d 530 (1944); *State v. Moore*, 220 N. C. 535, 11 S. E. 2d 660 (1941); *State v. McLamb*, 214 N. C. 322, 199 S. E. 81 (1938); *State v. Tarlton*, 208 N. C. 734, 182 S. E. 481 (1935); *State v. Tyson*, 208 N. C. 231, 180 S. E. 85 (1935).

⁴ N. C. GEN. STAT. (1943) §49-2.

⁵ N. C. CODE ANN. (Michie, 1931) §265.