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COMMENTS

NEGOTIABLE INSTRUMENTS—TIME OF PAYMENT OF A CHECK

Introduction

Under the Uniform Negotiable Instruments Law, the drawer of a check is entitled to have a stop order honored if he gives such an order before the check is accepted, certified, or paid.¹ In *Bohlig v. First National Bank in Wadena*,² the problem was presented as to what the word "paid" means. The drawer of a check sued the drawee bank for its failure to obey a stop order. The Supreme Court of Minnesota found for the drawer-plaintiff on the following facts. The payee had deposited the check with his own bank. The payee's bank sent the check through regular banking channels to the drawee, which received it, perforated it with the word "Paid," the date, and its transit number, and charged the amount to the drawer's account. The drawee bank then deposited in the mails a remittance draft, which included the amount of this check, addressed to the payee's bank.³ At this point, the drawer gave his verbal stop order.⁴ The bank refused to act, claiming that the stop order had come too late. It said that the check had already been paid. Both parties agreed, and it was so found by the court, that the drawee could have intercepted the remittance draft, under existing postal regulations, before it reached its destination. On these facts, the court affirmed the decision of the lower court for the plaintiff-drawer⁵ on the grounds that the check had not been paid⁶ and

1. MINN. STAT. § 335.743 (1949); NEGOTIABLE INSTRUMENTS LAW § 189; BIGELOW, BILLS, NOTES, AND CHECKS 146 (3rd ed., Lile, 1928); BRADY, BANK CHECKS 355-6 (2d ed., with supplement, 1933); BRANNAN, NEGOTIABLE INSTRUMENTS LAW 1316 (7th ed., Beutel, 1948).

2. 48 N.W.2d 445 (Minn. 1951.)

3. Minn. Stat. 1927, c. 138, p. 214, makes payment by remittance draft acceptable. Minnesota has not enacted the Bank Collection Code which contains a provision to the same effect.

4. Although in this case the drawee had by contract limited its liability to honoring only written stop orders, the court held that since the drawee had declined to act, not because the order was verbal, but on the sole ground that it was too late, it had waived its contractual right to a written order, citing *Malmquist v. Peterson*, 149 Minn. 223, 183 N.W. 138 (1921), where Bigelow was quoted. BIGELOW, ESTOPPEL 717 (6th ed.).

5. The court did not discuss whether the drawer was actually indebted to the payee. If the former was so indebted, the payment would operate to discharge a debt that would have to be paid anyway. Therefore, having

that ordinary or customary diligence had not been exercised by the bank in an attempt to obey the stop order.⁷

*What Constitutes Payment*⁸

The cases generally agree that merely stamping or otherwise mutilating a check to indicate payment does not, in the absence of other acts, complete payment of a check.⁹ The cases also agree that this act, accompanied by a charging of the drawer's account and either a crediting of the payee's account, a delivery of cash to the payee, or the placing of a remittance draft into his possession, does complete payment. (Of course, his agent may be substituted for the payee in any of the foregoing actions, and payment is still regarded as having occurred.)¹⁰ However, it is in the situation where more than marking or mutilating the check, but something less than a combination of the above mentioned acts said to complete payment has occurred that agreement ceases.

A large number of jurisdictions follow the rule that the mere charging of the drawer's account constitutes payment.¹¹ A number of the courts which reach this result do so on the basis of the Bank Collection Code, which contains a specific provision to that effect.¹² Moreover, in many of the cases¹³ decided without

suffered no loss, he could not collect from the drawee for failure to stop payment. BRANNAN, *op. cit. supra* note 1, at 902.

6. The court also held that there was no acceptance or certification of the check since these must be in writing and signed by the drawee. MINN. STAT. §§ 335.51, 335.741 (1949); NEGOTIABLE INSTRUMENTS LAW §§ 132, 137.

7. The court held that the failure to take any action to prevent payment of the check after the stop order was given could not possibly be the exercise of either customary or ordinary diligence when the check was for \$5,000.

8. Professor Aigler points out that courts frequently use the terms "payment" and "acceptance" interchangeably to mean payment. Aigler, *Rights of Holder of Bill of Exchange Against the Drawee*, 38 HARV. L. REV. 857, 874 (1925).

9. *Hanna v. McCrory*, 19 N.M. 183, 141 Pac. 996 (1914); *Hunt v. Security State Bank*, 91 Ore. 362, 179 Pac. 248 (1919).

10. *Tobiason v. First State Bank*, 173 Minn. 533, 217 N.W. 934 (1928); *Johnson v. First State Bank*, 144 Minn. 363, 175 N.W. 612 (1920); *First National Bank v. Wis. National Bank of Watertown*, 210 Wis. 533, 246 N.W. 593 (1933).

11. *Keller v. Fredericktown Sav. Institution*, 66 A.2d 924 (Md. 1949); *Union State Bank v. Hibernia Bank & Trust Co.*, 224 Mo. App. 375, 18 S.W.2d 93 (1929); *Morris v. Cleve*, 197 N.C. 253, 148 S.E. 253 (1929); *Oregon Iron & Steel Co. v. Kelso State Bank*, 129 Wash. 109, 224 Pac. 569 (1924). See Note, 10 A.L.R.2d 428, 429 (1950); Brady, *op. cit. supra* note 1, at 311.

12. "Where the item is received by mail by a solvent drawee or payor

the aid of the Bank Collection Code, the court need not have relied upon the sole ground of charging the drawer's account,¹⁴ even though the court so verbalized its decision. Thus, in *Morris v. Cleve*, for example, the drawee had upon receipt of the check not only debited the account of the drawer, but also delivered a remittance draft to the payee's bank. Nevertheless, the court merely said:

When the drawee bank has to the credit of the drawer funds sufficient and available for the payment of his check, and accepts and charges the check to the drawer's account, the check is paid. . . .¹⁵

Despite the fact that, because of the circumstances involved, these cases could have been decided without this rule, the large number of decisions which have plainly stated that a charging of the drawer's account constitutes payment makes the statement of no small significance.

There are some jurisdictions which hold that a charging of the drawer's account does not alone complete payment.¹⁶ In following one of these decisions,¹⁷ the court in the principal case distinguished it from those holding that a mere charging of the account completes payment, by pointing out, as was done *supra*, that there were in many of these cases other facts supporting the decision, and that the same result could have been reached without the rule that a charging completes payment.

bank, it shall be deemed paid when the amount is finally charged to the account of the maker or drawer." BANK COLLECTION CODE § 7. For list of states adopting, see BRANNAN, *op. cit. supra* note 1, at 133, n.

13. *Andrew v. Hartley State Bank*, 207 Iowa 407, 219 N.W. 929 (1928); *Union State Bank v. Hibernia Bank & Trust Co.*, 224 Mo. App. 375, 18 S.W.2d 93 (1929); *Morris v. Cleve*, 197 N.C. 253, 148 S.E. 253 (1929); *Oregon Iron & Steel Co. v. Kelso State Bank*, 129 Wash. 190, 224 Pac. 569 (1924). See Note, 10 A.L.R.2d 428, 429 (1950); BRADY, *op. cit. supra* note 11, at 311.

14. *Andrew v. Hartley State Bank*, 207 Iowa 407, 219 N.W. 929 (1928) (payee's agent accepted check); *Union State Bank v. Hibernia Bank & Trust Co.*, 224 Mo. App. 375, 18 S.W.2d 93 (1929) (evidence sufficient for jury to find stop order not received in time by drawee); *Morris v. Cleve*, 197 N.C. 253, 148 S.E. 253 (1929) (remittance draft delivered to collecting bank); *Oregon Iron & Steel Co. v. Kelso State Bank*, 129 Wash. 190, 224 Pac. 569 (1924) (remittance draft delivered to payee).

15. 197 N.C. 253, 265, 148 S.E. 253, 260 (1929).

16. *Steinhart v. D.O. Mills & Co.*, 94 Cal. 362, 29 Pac. 717 (1892); *Guardian Nat. Bank v. Huntington County State Bank*, 206 Ind. 185, 187 N.E. 388 (1933); *Holdingsford Milling Co. v. Hillman Farmers' Co-op. Creamery*, 181 Minn. 212, 231 N.W. 928 (1930); *Traders' Nat. Bank v. First Nat. Bank*, 142 Tenn. 229, 217 S.W. 977 (1920).

17. *Holdingsford Milling Co. v. Hillman Farmers' Co-op. Creamery*, 181 Minn. 212, 231 N.W. 928 (1930).

In deciding the significance of the deposit of a remittance draft in the mail, the decisions are also in conflict. The majority of the decisions follow the analogy of the law on the acceptance of a contract, and hold that a deposit of the draft in the mail completes payment.¹⁸

However, the minority hold that the remittance draft must be delivered to the payee or his agent before payment is complete.¹⁹ This view has the support of some legal writers.²⁰ Those holding this view contend that the rule in the law of contracts set forth in the English case of *Adams v. Lindsell*²¹ should not apply in the United States, since postal regulations have been changed to permit the sender to recover mail after it has been posted, but not delivered. The contention is that although in theory any act might be selected as constituting acceptance of an offer (or analogously, some would say, payment of a check), in practice to have the act occur before the letter is unequivocally out of the offeree's (or drawee's) control, and before the offeror (or payee) even knows the act has happened, puts the offeror (or payee) at great disadvantage. The offeree (or drawee) can, in practice, remove the letter from the mail without the other party's knowledge. However, this reasoning does not apply to the principal case because it is to the advantage of the payee here, as in many payment cases, to be paid as soon as possible.

The above position has little support from the courts.²² Al-

18. *Chapman v. Mills*, 241 Fed. 715 (S.D.N.Y. 1917); *McIntire v. Raskin*, 173 Ga. 746, 161 S.E. 363 (1931); *Bank of Commerce v. Reis*, 253 Ky. 648, 69 S.W.2d 754 (1934); *Farmers' Guarantee State Bank v. Burris Mill & Elevator Co.*, 207 S.W. 400 (Tex. Civ. App. 1918); *Canterbury Bank v. Bank of Sparta*, 91 Wis. 53, 64 N.W. 311 (1895). "Mailing a draft to the collecting bank . . . should be final [payment]." BRANNAN, *op. cit. supra* note 1, at 1233.

19. *Steinhart v. D. O. Mills & Co.*, 94 Cal. 362, 29 Pac. 717 (1892); *Watt-Hurley-Holmes Hdw. Co. v. Day*, 1 Ga. App. 646, 57 S.E. 1033 (1907); *Buehler v. Galt*, 35 Ill. App. 225 (1889); *Guardian Nat. Bank v. Huntington County State Bank*, 206 Ind. 185, 187 N.E. 388 (1933); *Holdingsford Milling Co. v. Hillman Farmers' Co-op. Creamery*, 181 Minn. 212, 231 N.W. 928 (1930); *Traders' Nat. Bank v. First Nat. Bank*, 142 Tenn. 229, 217 S.W. 977 (1920).

20. See *Notes*, 92 A.L.R. 1062 (1934); 9 A.L.R. 386 (1920); 17 C.J.S. 405 (1939); 13 C.J. 303, n. 39 (1917).

21. 1 B. & Ald. 681, 106 Reprint 250 (1818).

22. This doctrine was first proposed in 13 C.J. 303, n. 39 (1917), which relied on the alleged change in U.S. Post Office Regulations (1913) §§ 552, 553 and the English case of *Ex parte Cote*, L.R. 9 Ch. 27 (1873), where a letter posted in France was held not to constitute acceptance since French law permitted the person posting to recover the letter. The rule was adopted in *Traders' Nat. Bank v. First Nat. Bank*, 142 Tenn. 229, 217

though in principle it has merit with regard to the law of contracts, it is almost uniformly rejected even in that field. In the interest of uniformity of the law, and because this rule would usually operate to the disadvantage of the payee in the check situation, it would seem unwise to apply it in determining when payment has occurred.

Conclusion

The problem in the principal case was whether the acts of the drawee bank in marking the check "paid," charging the drawer's account, and putting the remittance draft in the mails constituted payment so as to relieve it of liability for failure to comply with the stop order. The courts are not agreed as to what acts complete payment, but the writer believes that the Minnesota Supreme Court erred in not holding that payment had occurred here.

Clearly, merely perforating the check "paid" did not complete payment. Equally clear is the fact that if the remittance draft had been delivered, payment would have occurred. We have seen that many jurisdictions hold that a charging of the drawer's account completes payment. The court attempts to distinguish the present case from these on the facts, as was discussed *supra*, but the plain words of the decisions that a charging completes payment can only be ignored at the expense of the law's predictability. If the law is not to be chaos, the plain words of the courts must be respected. These statements were not dicta, but even as such they would be entitled to great weight. Similarly, most jurisdictions hold that when a remittance draft is mailed, the check is paid. In this case both these acts had occurred.

There is also a policy reason for interpreting payment so as to favor the drawee bank. It is possible that the bank's actions might have made it liable to the payee in tort for conversion if it had halted the draft in the mails. Although most of the cases²³

S.W. 977 (1920). This position is re-affirmed in 17 C.J.S. 405 (1939), and has been adopted by some of the cases. See cases *supra* note 19, and the recent Federal case, *Dick v. U.S.*, 82 F. Supp. 326, 329 (Ct. Cl. 1949). The doctrine is discussed in 9 A.L.R. 386 (1920). The writer there questions the accuracy of the statement about the change in postal regulations, stating that recovery of postal items had been permitted earlier, but otherwise viewing the rule stated with favor.

23. For a discussion of this point see, BRANNAN, *op. cit. supra* note 1, at 1321-1323; Aigler, *supra* note 8, at 881-885; Note, 14 A.L.R. 764, 767-768 (1921); Note, 69 A.L.R. 1076, 1078-1079 (1930); Note, 137 A.L.R. 874, 879 (1942).

holding that the mutilation of a check constitutes a conversion thereof are situations in which the drawee bank paid the proceeds to a forger, it is equally true here that the bank might be said to have handled the check in a manner so inconsistent with the rights of the owner, the payee, that it converted it.

Many cases hold that only some of the acts of the bank in this case complete payment. The bank, if it had obeyed the drawer's order, might have been rendered liable to the payee for conversion. For these reasons, the Supreme Court of Minnesota should have held that the check had been paid.

JACK L. PIERSON

INSURANCE—CHANGE OF BENEFICIARY BY WILL

In the fall of 1944, the insured, an RAF airman stationed in Canada, executed his last will and testament. One of the stipulations in the will was that all of his property, including insurance, should go to his grandmother if he should die unmarried. The insured had been divorced by his wife several months prior to the execution of the will. He held two life insurance policies, and in each of these his former wife was the named beneficiary. The policies reserved to the insured the right to change beneficiaries, provided that he complied with certain formalities.¹ It was conceded that the deceased made no attempt to effect a change of beneficiary other than by his will. In December, 1944, the insured was lost at sea in the line of duty, and shortly thereafter was declared dead. The named beneficiary brought an action for declaratory judgments against the grandmother and the two insurance companies. The insurance companies, as interpleaders, conceded liability and paid the respective amounts of the policies into court. The trial court gave judgment for the grandmother, but this was reversed on appeal² and judgment entered for the ex-wife. The Supreme Court of Ohio affirmed the latter judgment by a four-to-three decision.³

The majority of the court concluded that the named beneficiary was entitled to the proceeds. They reached this conclusion by

1. The opinion does not disclose the formalities required. Generally, such policies provide for a change of beneficiary upon written request to the insurer. The change is then to take effect when indorsements are made on the policy by the insurer and the insured.

2. *Glenn v. Stephens*, 44 Ohio O. 476, 92 N.E.2d 29 (1950).

3. *Stone v. Stephens*, 155 Ohio St. 595, 99 N.E.2d 766 (1951).