

COMMENT ON RECENT DECISIONS

BILLS AND NOTES—DISCHARGE—PAYMENT TO PAYEE NOT HAVING POSSESSION OR TITLE—[Federal].—Defendant executed a note to the order of the payee Atlantic City Bank which sold it to plaintiff Federal Reserve Bank. Defendant paid payee before maturity knowing that the note could not be returned at the time because it was held by plaintiff. The Federal Reserve Bank had in the past authorized the payee bank to collect notes which the Reserve Bank held and had acknowledged the instant transaction by telephone conversation. Plaintiff sued on the note, the payee having refused to remit the sum paid. *Held*, judgment for defendant; the issue of whether the payee, in receiving the money, was acting as agent for the maker or the holder, was properly left to the jury.¹

A maker paying a note to one not in possession does so at his peril.² This is true even where the payee is a bank designated as the place for payment.³ A payee receiving money from the debtor in such a case ordinarily accepts it as agent of the debtor and not of the holder.⁴ If it can be shown, however, as in the instant case, that the party receiving payment was the holder's agent, the debt is extinguished.⁵

Some courts have held the agency relation a question for the jury, even when no authority to receive payment was expressly given by the holder.⁶ That the maker does not require the agent to produce the note is immaterial.⁷ He merely assumes the burden of proving agency by circumstantial evidence, such as the apparent relations and conduct of the parties.⁸ In Missouri, where the principal knowingly permitted the agent to assume authority to collect notes, payment has been held good as against him although no authority in fact existed.⁹ The same results have been reached where there was an extended course of dealing between holder and payee;¹⁰ where

1. *Federal Reserve Bank v. Algar*. (C. C. A. 3, 1939) 100 F. (2d) 941.

2. *Wood v. Swan* (1928) 206 Iowa 1198, 221 N. W. 791; *Ritter v. Plumb* (1927) 203 Iowa 1001, 213 N. W. 571; *Avery v. Swords* (1888) 28 Ill. App. 202; *Bigelow, Bills, Notes, and Checks* (3d ed. 1928) 457, sec. 561.

3. *McDonald v. Smith* (1918) 201 Mo. App. 78, 206 S. W. 591.

4. *Cheney v. Libby* (1890) 134 U. S. 68; *Ward v. Smith* (U. S. 1868) 7 Wall. 447; *Smith v. Kidd* (1877) 68 N. Y. 130.

5. *Stock Yards Nat. Bank v. Neugebauer* (1935) 97 Colo. 246, 48 P. (2d) 813; *Peoples Saving Bank v. Manes* (1918) 136 Ark. 215, 206 S. W. 315; *Quinn v. Dresbach* (1888) 75 Cal. 154, 16 Pac. 762; *Brannan, Negotiable Instruments Law* (5th ed. 1932) 814-815, sec. 88.

6. *Peoples Saving Bank v. Manes* (1918) 136 Ark. 215, 206 S. W. 315; *Sharp v. Knox* (1892) 48 Mo. App. 169.

7. *Pfeiffer v. Heyes* (1932) 166 Wash. 125, 6 P. (2d) 612; *Universalist Convention v. Guest* (1934) 179 Ga. 168, 175 S. E. 466.

8. *Pfeiffer v. Heyes* (1932) 166 Wash. 125, 6 P. (2d) 612.

9. *Plummer v. Knight* (1911) 156 Mo. App. 321, 137 S. W. 1019. Here the court also emphasized the fact that the bank represented to the public that the agent possessed such authority, although no authority in fact was given.

10. *Bautz v. Adams* (1907) 131 Wis. 152, 111 N. W. 69, 120 Am. St. Rep. 1030. In this case there was a course of dealings with regard to several notes carried on for more than ten years.

the payee executed a note which provided that the assignor should attend to collections;¹¹ where the holder bank permitted the payee to advance an additional loan upon the mortgage and to accept renewals after assignment of the same without the maker's knowledge.¹² Where a loan broker makes a loan as payee and later assigns the note and mortgage, the assignor is deemed the agent of the assignee; and the maker is not required to demand a return of the instrument.¹³

The dissent in the instant case reasoned that no agency was shown either expressly or by ratification, and that it could not be shown by custom because the note was not returned and plaintiff did not charge the payment against the account of the payee. Therefore, the minority felt a directed verdict for plaintiff proper.¹⁴ The Federal Reserve Bank and its member banks are separate and distinct corporate entities, and no agency relation exists between them except such as arises from contract.¹⁵ The dissenting judge relied on the *Gettleman* case which held that the return of prior notes by the Federal Reserve Bank was merely indicative of the Bank's acquiescence in payment of the notes and did not create a general agency.¹⁶ In the instant case, however, the note was not returned; and the Federal Reserve Bank did not charge payment against the account of the Atlantic City Bank.¹⁷

Although the majority view may be the more equitable under the facts presented, the dissent seems to rest on a sounder general foundation. The former appears to represent an application of the "two innocent parties" maxim, whereas the latter tends to favor the negotiability of commercial paper.

L. M. B.

BURGLARY AND LARCENY—FEIGNED ACCOMPLICE—PARTICIPATION IN OVERT ACT AS BASIS OF CONVICTION—[Colorado].—To detect one who had boasted of prior crimes, defendant, not an officer, encouraged him in a scheme for

11. *Sherrill v. Cole* (1930) 144 Okla. 301, 291 Pac. 54.

12. *Stock Yards Nat. Bank v. Neugebauer* (1935) 97 Colo. 246, 48 P. (2d) 813.

13. *James v. Conklin & Hill* (1911) 158 Ill. App. 640; *May v. Jarvis-Conklin Mortgage & Trust Co.* (1897) 138 Mo. 275, 39 S. W. 782; *Pfeiffer v. Heyes* (1932) 166 Wash. 125, 131, 6 P. (2d) 612, 614. The court quoted from *Delaney v. Nelson* (1925) 132 Wash. 472, 477, 232 Pac. 292: "In this day of complicated commercial affairs we know that many duly authorized agents have power to collect for others, although they have not possession of the note or instrument upon which the collection is made. The authority to make collection is dependent upon all of the surrounding circumstances and the acts of the parties, and not alone upon the possession by the supposed agent of the note or other instrument upon which payments are being made." *Contra*, *Interstate National Bank v. Koster* (1930) 131 Kan. 461, 292 Pac. 805.

14. *Federal Reserve Bank v. Algar* (C. C. A. 3, 1939) 100 F. (2d) 941.

15. *Federal Reserve Bank v. Gettleman* (1937) 117 N. J. L. 416, 189 Atl. 86.

16. *Ibid.*

17. *Federal Reserve Bank v. Algar* (C. C. A. 3, 1939) 100 F. (2d) 941.