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Bills and Notes

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BILLS AND NOTES

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Although the number of cases assigned to this category is greater than for the first survey period—an increase from six to seventeen—there are no significant decisions among the group. The appellate courts repeated a number of well-known principles and considered an occasionally novel factual situation, but they left the law of bills and notes essentially undisturbed. There have been no legislative changes whatsoever during this period.[1] In the main these cases dealt with the attempted assertion of various defenses by maker, drawer, drawee and indorser. Almost without exception these were personal defenses, urged in controversies between the original parties.

In several of the assigned cases there was a bills and notes point only in the sense that such an instrument served a the vehicle for the motivation of the legal controversy. For example, there were suits based on a note,[2] the amount of a check,[3] and on a bill of lading.[4]

MATTERS OF DEFENSE IN GENERAL

In three of the survey cases the courts considered the subject of affirmative defenses. *Byrom v. Ringe*[5] was a suit by a holder who had taken certain checks with notice and after dishonor, against the drawer thereof. The drawer filed a cross action alleging damages sustained by reason of the payee's breach of an oral contract of employment. The court held that this was a plea of set-off, and not of recoupment, in the absence of a showing that the payees had been obligated under the contract to cash checks for the defendant at his demand. Since there was no such showing, the checks constituted a contract independent of the contract of employment.

The distinction between set-off and recoupment, as defenses to a suit based on a negotiable instrument, was clearly illustrated both in that case, and in *Alpharetta Feed and Poultry Co. v. Cocke*.[6] In the latter case there was a plea of recoupment since the parties relied on the same contract.

The court pointed out in *Clay v. Smith*[7] that where defendant maker is

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1. Since the Negotiable Instruments Law was adopted in Georgia in 1924, and later codified as Part I of Title 14, there have been only three amendments.
2. Whitner v. Whitner, 207 Ga. 97, 60 S.E.2d 464 (1950).
3. Smith v. Patterson, 82 Ga. App. 595, 61 S.E.2d 679 (1950). The defense to this suit was that the check in question was merely "loaned" to the payee thereof in order that the payee, who was an agent both for the drawer and for a third party, could obtain a similar amount from this third party. In holding that the maker was not entitled to recover on any theory, the court stated that it would not render its aid in support of a party where the suit was dependent upon illegal or immoral action.
4. Atlanta-Asheville Motor Express, Inc. v. Superior Garment Mfg. Co., 82 Ga. App. 812, 62 S.E.2d 376 (1950).
5. 83 Ga. App. 234, 63 S.E.2d 235 (1951).
6. 82 Ga. App. 718, 62 S.E.2d 642 (1950).
7. 207 Ga. 610, 63 S.E.2d 602 (1951).

sued upon a promissory note, he must assert as a defense to that suit all of his claims for legal and equitable relief arising out of the agreement of which the note was a part. He could not bring an independent equitable action to enjoin the suit upon the note.

Two cases involved pleas of consideration. In *Mons v. Morgan's, Inc.*,[8] it was held that where suit is brought upon a promissory note, and the defendant pleads that the note was without consideration, the burden is on the defendant to sustain the plea by showing this failure of consideration by a preponderance of the evidence. That plea was available as a possible defense in this controversy between the original parties. In *Peavy v. General Securities Corp.*[9] the court held that the plea of want of consideration was maintainable even though the action at law be based upon a promissory note under seal, where the suit is by the first indorsee against the payee as the indorser.

In any suit by the original payee, the party primarily liable can interpose all personal defenses available, including that of fraud in the inducement. This latter defense was urged in the case of *Johnston v. Dollar.*[10] The defendant had stopped payment of the check sued upon, the execution of which he admitted, and claimed that his wife and his wife's sister had fraudulently induced him to execute the check to the sister, who would in turn convey certain land to the wife, who promised, on her part, to continue to live with the defendant.[11]

In *Mutual Inv. Corp. v. Friedman*[12] the court stated that the assignee of a non-negotiable chose in action takes the same subject to the equities existing between the assignor and the debtor at the time of assignment. That case actually involved a conditional sales contract, which contained no word of negotiability and was clearly nonnegotiable.

Liability of Secondary Parties: Presentment and Notice of Dishonor

The liability of the drawer of a bill of exchange is secondary. In order to charge him with liability, it must be shown that the instrument was presented for payment to the party primarily liable, that it was dishonored,

8. 83 Ga. App. 814, 65 S.E.2d 34 (1951). A previous decision in this case, 79 Ga. App. 525, 54 S.E.2d 498, was included in the last survey, 2 MERCER L. REV. 14 (1950).
9. 208 Ga. 82, 65 S.E.2d 149 (1951).
10. 83 Ga. App. 219, 63 S.E.2d 408 (1951).
11. The court cited CODE §§ 14-505 and 14-508 (1933), which state when a title is defective and when a negotiable instrument is subject to original defenses. In connection with the subject of personal and real defenses, the editorial note to CODE § 14-507 (1933) points out that the three available "real" defenses are forgery (CODE § 14-223 (1933)), material alteration (CODE §§ 14-906, 14-907 (1933)) and fraud in the procurement.
In Newcomb v. Niskey's Lake, Inc., 190 Ga. 565, 10 S.E.2d 51 (1940), the court held that the passage of the Negotiable Instruments Law in Georgia did not repeal Section 4288 of the 1910 Code, which provided that the following defenses could be urged against a holder in due course, to-wit:
(1) *Non est factum,*
(2) Gambling or immoral and illegal consideration,
(3) Fraud in the procurement.
This old section has been added to the 1947 supplement of the 1933 CODE as Section 14-510.
12. 83 Ga. App. 544, 64 S.E.2d 298 (1951).

and that notice of this dishonor was given to the drawer. An answer on behalf of the drawer which denies the paragraph alleging presentment and notice raises an issuable defense.[13] The drawer engages that on due presentment the instrument will be accepted or paid, or both, 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.[14]

In *Simpson v. Pethel*[15] the plaintiff was the payee of a check drawn on partnership funds by a deceased member of the partnership, and the defendant was the surviving partner. The petition shows that the maker died more than seven months after the check was drawn, but failed to allege presentment to the drawee bank and notice of dishonor before the death of the maker, or facts excusing such presentment, and notice within a reasonable length of time after the date of the check,[16] and further failed to allege presentment to the personal representative of the maker after his death, or to the surviving partner.[17] The petition was held to be subject to general demurrer.

DUTIES AND LIABILITIES OF THE DRAWEE BANK

As was stated by the Court of Appeals in the case of *Citizens and Southern Nat. Bank v. New York Casualty Co.*,[18]

> . . . where one deposits money in a bank on general deposit, the bank immediately becomes the debtor of the depositor for the money deposited, and undertakes, impliedly, to pay that money to the depositor or to some person to whom he directs it paid; and, in order to discharge itself from this liability to the depositor, the bank must pay the money to the depositor, or as directed by him. The liability cannot be discharged in any other way.

In the above case a check was made payable to joint payees who were not partners. The evidence was clear that one of the two payees did not indorse the check and that she did not authorize the other joint payee or anyone else to make this indorsement. The evidence thus established that the indorsement of her name was a forgery and, as such, it was wholly ineffective to pass any title or confer any interest in the check.[19] The bank was held liable to the depositor for payment of the check.

Whenever the bank pays out the funds of a depositor on any other order than that of the depositor, the bank pays its own funds. *Williams v. American Surety Co. of New York*[20] was a suit by an assignee of a bank to recover from the payee the amounts of several checks which the bank had cashed. The defendant was a former employee of the bank's depositor and he had in the past been authorized by the depositor to draw checks on the depositor's account. This authority had been terminated by the depositor and notice thereof given to the bank. However, the bank had carelessly

13. Lanier v. Waddell, 83 Ga. App. 423, 64 S.E.2d 79 (1951). An earlier decision in this case, 80 Ga. App. 713, 57 S.E.2d 240 (1950), was included in the last survey, 2 MERCER L. REV. 15 (1950).
14. GA. CODE §§ 14-602, 14-713, 14-821 (1933).
15. 82 Ga. App. 374, 61 S.E.2d 154 (1950).
16. See GA. CODE §§ 14-710, 14-712, 14-713 (1933).
17. See GA. CODE §§ 14-707, 14-708 (1933).
18. 84 Ga. App. 47, 65 S.E.2d 461 (1951).
19. GA. CODE § 14-223 (1933); also Section 14-412, which requires an indorsement by all of the payees where they are not partners and one does not have authority to indorse for the others.
20. 83 Ga. App. 66, 62 S.E.2d 673 (1950).

honored two checks drawn by the defendant on the depositor's account after this notice was given. The bank was liable to the depositor, and, in turn, it could recover from the defendant.[21]

A drawee bank is liable to its depositor for payment of a check on a forged signature where the depositor notifies the bank thereof within sixty days after he received the cancelled voucher representing such payment.[22] In *Moore v. Bank of Dahlonega*[23] the court pointed out that this Code Section was inapplicable to the forgery of an indorsement. In that case, there was, in actuality, no forgery at all. The plaintiff had ordered certain goods from a wholesale hardware company, sending his check payable to that company. The check was indorsed in blank by the company's agent and was deposited to this company's account in a forwarding bank. Acknowledging that the company's agent was traveling under an assumed name and that there was actually no such business, the court stated that he had a right to adopt any name he wished to transact this supposed hardware business. The forwarding bank had paid the check to the man it knew by the assumed name and there was no forgery of the indorsement. The only fraud was that of this agent in representing that he would carry out a contract with the plaintiff, and the bank, therefore, was not liable in paying on the indorsement.

In *Stewart v. Western Union Tel. Co.*[24] it was pointed out that since the drawee bank is the agent of the drawer of a check, the drawer is entitled as a matter of right to stop payment on any check drawn by him on such bank before such check is presented to the bank for payment. This right cannot, of course, be exercised by him in such a way as to prejudice the rights of holders in due course.[25]

MISCELLANEOUS

Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transferor vests in the transferee such title as the transferor had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferor.[26]

In the case of *Dawson v. General Discount Corp.*[27] the court cited Code Section 14-420, together with one of the earlier decisions of the Court of Appeals, as the basis for the proposition that possession of a negotiable instrument is presumptive evidence of title.[28]

21. It is interesting to note the defense. This former agent contended that his employer was indebted to him and that he had applied the money he obtained from the cashed checks to the cancellation of this indebtedness. The court gave no serious thought to the novel proposition.
22. GA. CODE § 13-2044 (1933).
23. 82 Ga. App. 142, 60 S.E.2d 507 (1950).
24. 83 Ga. App. 532, 64 S.E.2d 327 (1951).
25. GA. CODE §§ 14-507, 14-604, 14-609 (1933).
26. GA. CODE § 14-420 (1933).
27. 82 Ga. App. 29, 60 S.E.2d 653 (1950).
28. It is interesting to trace this alleged presumption back to its source. In Culpepper v. Culpepper, 18 Ga. App. 182, 89 S.E. 161 (1916), the court dealt with a certificate of deposit that had not been indorsed by the transferor. The court announced this presumption and partially relied on it in reaching its decision that a gift of this certificate would not be defeated where the circumstances indicated that the omission

to reduce to writing the evidence of the transfer of the legal title was due to ignorance, accident or mistake. They cited Nisbet v. Lawson, 1 Ga. (1 Kelly) 275, 284 (1846) for their authority.

What the court really said in the Nisbet case was " . . . the agent of a negotiable note *payable to bearer or indorsed in blank*, may sue thereon in his own name, as may all others who are in possession of *such paper*—possession being presumptive evidence of title. . . . " (Emphasis supplied.) Georgia seems to be clearly in the minority in holding that an instrument payable to order gives rise to a presumption of title when possessed by a transferee without an indorsement. See, for example, BRITTON, BILLS AND NOTES 280-291 (1943). The majority view is that there is a presumption that a person in possession under these circumstances without indorsement is in wrongful possession.