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# One Year Review of Colorado Cases on Negotiable Instruments

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# ONE YEAR REVIEW OF COLORADO CASES ON NEGOTIABLE INSTRUMENTS

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During the past year, the Supreme Court decided four cases dealing directly or indirectly with the Law of Negotiable Instruments. Two of these decisions, *American National Bank of Denver v. First National Bank of Denver, et al.*,[1] and *Harsin Motor Co. v. Colorado Savings & Trust Co., et al.*,[2] dealt directly with problems peculiar to the field of negotiable instruments.

In the *American National Bank* case, the plaintiff brought the action against the Hereford State Bank, the first endorsee on a check and against the First National Bank of Denver, an intermediate endorsee. The check in question was payable to two payees, but was negotiated to the defendant, Hereford bearing the endorsement of only one. Hereford endorsed to a bank in Cheyenne, Wyoming which in turn endorsed to the defendant, the First National Bank of Denver, which presented check to the drawee—plaintiff. The drawer objected to the payment because of the missing endorsement and the plaintiff reimbursed the drawer's account and instituted the action to recover the amount paid on the check.

The action was based upon two theories, one stemming from the Negotriable Instruments Law and the other stemming from the doctrine of payment under mutual mistake of fact, i.e. that all endorsements necessary were not properly on the instrument. The Supreme Court affirmed a dismissal as to the First National Bank, but reversed with respect to a dismissal on the second theory as to the Hereford State Bank.

Reasoning that since the instrument was not properly endorsed by both payees, the Court concluded that the Negotiable Instruments Law was not applicable since the instrument was not negotiable because of the missing endorsement. Apparently basing its decision on quaisi-contractual notions, the Court reversed the dismissal as to Hereford, stating:

> "The present action must be based upon an obligation on Hereford's part to reimburse plaintiff for monies in its possession to which it is not legally entitled."

No explanation was offered for affirming the dismissal as to the First National Bank of Denver. Perhaps it may be assumed that the affirmance of this dismissal was based on the desire to avoid circuity of actions. Nevertheless, the case does stand for the proposition that the first endorsee in the chain of titles who takes an instrument where the endorsement of one of a number of payees is missing, will be held liable in an action by the drawee to recover payments made on the instrument.

In the case of *Harsin Motor Co. v. Colorado Savings & Trust Co., et al.*, the drawer issued a check payable to "Barne's Used Cars" in payment of a car which was purchased. The findings of the trial

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[1] __ Colo. __, 277 P. 2d 235.
[2] __ Colo. __, 284 P. 2d 235.

court were to the effect that one Rickerson, offered to sell Harsin a 1951 Chevrolet automobile, advising Harsin that the title to the car was in the name of "Barnes Used Cars"; that the certificate of title was in the possession of one Zipprodt. Harsin, before completing the purchase, telephoned the manager of Zipprodt, a finance company, who was a third party defendant, and verified that Zipprodt held the certificate of title to the 1951 automobile. Harsin, desiring to make payment to the owner of the car, executed his check payable to Barnes Used Cars, though Rickerson had asked Harsin to make him the payee, which Harsin declined to do. It appeared at the time that Rickerson owed the finance company the sum of $500.00 and that Zipprodt, the finance company, was holding a certificate of title to the automobile. Zipprodt did not have a chattel mortgage on the car. Rickerson then took the check ot the finance company and endorsed it in the presence of the finance company as follows:

> Barnes Used Cars—Charles Barnes—James H. Rickerson.

It was later ascertained that the automobile had been stolen and it was repossessed by the rightful owner, whereupon the plaintill informed the bank that the endorsement on the check was a forgery and demanded that the bank credit his account. The bank did this but later withdrew the credit it had given.

The named payee was actually an existing person, doing business in Ordway, Colorado. Rickerson had assumed the name, although the payee had nothing to do with the transaction, apparently for the purpose of avoiding a violation of the statute requiring a person dealing with used cars to have a license.

The trial court dismissed the action against all defendants. It should be noted that the action was basically a contest between the drawer and the drawee of the check. The question was one of whether or not a forgery had been committed when the payee's name was endorsed by Rickerson. Resolution of the question of whether or not a forgery had been committed depended on the intent of the drawer in making the check payable to "Barnes Used Cars".

The Court drew a distinction between the situation where a check is drawn payable directly to the imposter acting under an assumed name and the situation where the check, as in the present case, is drawn and delivered to the imposter, unpon the representation that the latter is the agent of the payee, even though the payee is fictitious or non-existent. In the former case, it is generally held that the drawer's intent is to make the check payable to the person physically present before him, regardless of the name assumed or employed by the person. On the other hand, if the intent was not to make the check payable to the person physically present before the drawer, but to his principal, whether there was such a principal or not, an endorsement by the importer, may constitute a forgery. If it is a forgery, of course, the drawee may not charge the account of the drawer.

The Court accordingly reversed and remanded with instructions to vacate the order of dismissal, and to proceed with a trial on the merits. It was the opinion of the Court, that inasmuch as a forgery may have been committeed, the facts should be presented before any determination of the issue was made.

In the case of *Wysowatcky, Guardian v. Denver-Willys, Inc.*[3] the problem was that of where an indorsee takes a negotiable instrument from a fiduciary who cashes the check in payment of a personal debt or for his personal benefit. It was contended by the plaintiff-in-error that if the endorser knows that the endorser is a fiduciary, the former is put upon notice of the breach of trust of the endorser and must make inquiries so as to determine the correct facts.

The Court, however, applied the language of the Uniform Fiduciaries Act[4] and held that inasmuch as there was no evidence that the negotiation of the check amounted to a breach of a fiduciary obligation, and more important, no evidence that the indorsee had actual knowledge of the breach of the obligation, the indorsee was not liable to the principal of the fiduciary.

In the case of *Hubby v. Willis Agency, Inc.*,[5] it was held that a payee and holder of a Promisory Note may maintain an action thereon, even though he is not the beneficial owner of the instrument upon which suit is brought. Thus, even though the payee only has naked legal title and is nominally the payee, the beneficial or equitable ownership being vested in another, or if payee and holder does not have the entire interest in the instrument, he may nevertheless maintain an action on it in his own name, regardless of any notions of real party in interest.

The cases decided by the Court on negotiable instruments are not many but it is believed that the first two, the *American National Bank* case and the *Harsin* case are interesting and involve directly problems peculiar to the field of negotiable instruments.—*A. C.*

[3] Colo. ___, 281 P. 2d 165.
[4] C.S.A. 1953, Chapter 57, Article 1, Section 4.
[5] ___ Colo. ___, 283 P. 2d 1080.