1893

Raised Bills and Checks

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"Raised" Bills & Checks

by

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Contents

Introduction.

A thesis upon this subject which purports to be exhaustive must necessarily be extensive. Before me lies a mass of law, diffusive and discordant. To follow the many principles of law and equity bearing upon the subject and to appreciate their relation and importance requires a dissection of the mass. Another reason, which impels me to this course, is because of the indiscriminate and unreasonable application of different theories by courts and

text writers to the same state of facts, which gives rise to much uncertainty and error when followed to a logical and replete conclusion.

Therefor I have thought best to separate the different doctrines of Mistake; Implied Warranty, Failure of Consideration, Caveat Emptor; Want of Consideration, Estoppel, Negligence, Waiver, etc. and by applying them in their full extent to preserve them in their purity. By pursueing this course one is enabled at a glance to master any situation, and to proceed with confidence to criticise and condemn.

I shall not confine myself strictly with forgeries of the amount, for this discussion would not be complete if I did not turn aside for a moment, to consider forgery of the drawers name and to discuss the different rule which exists in an analogous case.

If, however, in attempting to apply analogy to any given case the application works injustice, or if a general rule seems rather severe in a particular instance, we should not be too prompt to criticize or condemn, for it should be remembered that

the structure which supports a transfer of promissory notes and bills of exchange over the common law chasm of unassignability of choses in action, was built for universal safety rather than individual justice.

I shall consider, seriatim, the mutual rights and obligations existing between the drawer and drawee, and the drawee and holder, both before and after payment.

This whole discussion is applicable equally to bills of exchange and checks; wherever their peculiarities call for a suggestion or demand a

different application the
exception will be noticed.

Drawer and Drawee.

Forgery of Amount.

The relations and rights of the drawer and drawee, where a bill genuine in its inception is altered after it leaves the hands of the drawer, to a much larger amount, and the drawee relying on the genuineness of the signature pays such increased amount to the holder, are obvious, for as a general rule the bank or drawee can only charge the original amount against the drawer, for that limits

the extent of his authority to the drawee; and such an alteration is a forgery of his name for which he is by no means responsible: Except when the drawer has drawn his bill in such a careless or incomplete manner that it may be altered, by raising the amount, without leaving such traces of the forgery as would create suspicion, or put the drawee (or better a man of ordinary care and prudence) on inquiry.

So that in order to entitle the drawee to charge the raised amount against the drawer he must not only show

that the drawer was negligent in drawing the bill, but also that he was free from negligence in paying it.

It is well settled that the fact, that the body of the bill is in a different handwriting from the signature is of little importance, but when we go any farther the question as to whether the drawee has been contributorily negligent becomes more difficult

The leading case upon the question of negligence is that of Young v. Grote 4 Bing. 253. Young on leaving home gave his wife several

drafts signed in blank, and she filled up one for fifty two pounds, two shillings, but began the word "fifty" with a small "f" and wrote in the middle of a blank line; and also in writing the marginal figures left a considerable space between the "£" mark and the figures "52".

The check in this form was handed to her husbands clerk to get the money and he after inserting "three hundred" before the word "fifty" and "3" before the figures "52" presented it and drew £352

It was held that the whole amount was chargeable

against the drawer, as the careless drawing of the check had made the forgery easy and simple; but the arbitrator had found that the alteration was made in such a manner that no person using due and ordinary diligence could have discovered any difference between the addition and the rest of the instrument.

If the addition had been made with a different colored ink or in a different handwriting the forgery would have been so palpable that the drawee would have

been chargeable with contributory negligence and could not have recovered for the excess.

Nor would the drawee be negligent in paying a bill where the figures and letters stating the amount for which the bill was payable were in a different handwriting from the remainder of the bill, for he may fairly presume that it was filled in by the holder under an authority so to do. It can neither be alleged that he was negligent nor that the holder was a special

agent, and that the drawee is chargeable with notice of his exact authority, for the courts say that the holder has apparent authority to fill it up for any amount and if he exceeds his authority the drawer can not show it as a defense.

Here delay by the drawer in discovering the alteration will not effect his rights; but in the case of a check, the depositor who sends his pass book to be written up and receives it back with entries of debits and

credits and as paid checks
as vouchers for the former,
is bound with due diligence
to examine the pass book
and vouchers and report
to the bank without
unreasonable delay any
errors which may be discovered
in them and if he fails to do
so and the bank is thereby
misled to its prejudice he cannot
afterwards dispute the
correctness of the balance shown
by the pass book.
Leather Mfg Bk v. Morgan 117
U.S. 96; Frank v. Chem. Bk 84 N.Y. 209.

Drawer and Holder

Forged Signature

A clear statement of the rules which govern the rights of the drawee who has paid a bill where the signature was forged is absolutely necessary for a complete discussion of the radically different rules which obtain in the cases of alteration; therefore it seems altogether fitting to start out upon this division of the subject with a short discussion of a famous case in English

law, i.e. Price v. Neale 3 Burrows 1354

It was an inspetious decision by Lord Mansfield who interrupting counsel, said that it was one of those cases that never could be made plainer by argument.

It was an action for money had and received to his the plffs. use, upon the presentation by the defendant of a bill of exchange to which, unknown to both parties, the drawers name had been forged. The plaintiff argued that he ought to recover back the money as it was paid by him by mistake on the supposition that they were true, genuine,

bill, and he could never recover it against the drawer because in fact no drawer exists nor against the forger for he is hanged.

Lord Mansfield: "In this action the plaintiff cannot recover the money unless it be against conscience in the def. to retain it. But it cannot be against conscience in the defendant to retain this money, when he has once received it upon a bill of exchange, indorsed to him for a fair and valuable consideration which he had bona fide paid without the least privity or suspicion of any forgery. If there was

no neglect in the plaintiff, yet
there is no reason to throw off
the loss from one innocent
man upon another.
But in this case if there was
any fault or negligence in
any one in was certainly in
the plaintiff and not in the
defendant."

And Lord Mansfield
conceiving the equities to be
equal left the parties as he
found them.

I quite agree with Lord
Mansfield that the case
cannot be made plainer by
argument. It is an arbitrary
rule of law with a decided
weight of equity and reason

against it.

Morse in his work on Banks and Banking § 464 retracting from this doctrine says,—

"The <u>old doctrine</u> was that a bank was bound to know its correspondents signature & drawee could not recover money paid upon a forgery of the drawee's name, because, it was said, the drawee was negligent not to know the forgery and it must bear the consequence of its negligence. This doctrine is fast fading into the misty past where it belongs.

It is almost dead.

The funeral notices are ready.

And no tears will be shed,

for it was founded in misconception of the fundamental principles of law and common sense"

Why should a bank be held to a stricter knowledge of the drawers signature than the drawer himself? The maker of a note paying innocently upon his own forged signature may sue the person who received it, for money paid by mistake may be recovered even though the payor was negligent. The rule is no doubt unsound and unjust, that is as an original proposition but it has now become a

conclusive presumption of
law or nearly so, and is so
well settled, so widely known,
and of such universal
application that parties
may well be presumed to
know that they pay a note
at their peril if it afterwards
turns out that the drawers
signature was forged,
and they must therefor
use greater care in
scrutinizing a signature
Judge Allen says "A rule
so well established and so
firmly rooted and grounded
in the jurisprudence of the
country ought not to be
overruled or disregarded

It has become a rule of right and of action among business men, and any interferance with it would be mischevious" 46 N.Y. 77

The rule is now recognized over the whole commercial world. The reports are alive with decisions and dicta to the effect that the drawee of a bill of ex. is presumed to know the handwriting of his correspondent, and if he accepts or pays a bill in the hands of a bona fide holder to which the drawers name has been forged, he is bound by

the act, and can neither repudiate the acceptance nor recover the money.

There is no danger that the rule will be frittered away as was feared by Ruggles J. 4 Const. 149, nor that the new doctrine will take its place in the near future which Morse contends for.

There are, however, a few important exceptions which will be stated here briefly.

First. It does not apply when either by express agreement or a settled course of business the holder takes upon himself

the duty of exercising some material precaution to prevent the fraud Ellis & Morton v. Life Ins. Co. 4 A. St. 625.

Second. Where the payment is made without presentation, and accepted subject to future examination of the paper. Goddard v. Merchants Bk. 4 Comst. 147 Allen v. Fourth, Nat. Bk 5-9 N. Y. 19 5-9 N. Y. 211

Third. Where the forgery is discovered and notice given immediately, or within such time as to give the holder the same advantage of proceeding against the party from whom he received the bill as if it had

been dishonored.
Price v. Neale.
Smith v. Mercer 6 Taunt 76
4 Const. 149.

Forgery of Amount

I shall now consider the basis upon which the right of the drawee, who has paid money upon an altered bill, rests; and shall be unsparing in my criticism of those opinions which make use of the principles of law and the maxims of equity in a most unmeaning and incoherent manner. It is true they arrive at a correct and just conclusion but they quote and apply terms indiscriminately

and we often find them basing their conclusions on joint grounds of mistake and failure of consideration, which is most inconsistent reasoning for mistake prevents what failure of consideration implies namely, the existence of a contract" Anson on Con. p. 168

I have therefor thought best to go into the different reasons, which are relied on in cases of alteration, fully and exhaustively and to find the rules which should control, decision, incident, and analogy. And first, I shall consider

Negligence

We find this statement in nearly all of the cases on this subject both in England and in the United States, namely- "Money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless payment has caused such a change in the position of the other party that it would be unjust to require him to refund. Nat. Bk. Comm. v. Nat. Mech. Bk. 9-5-A. J. 211

I shall concern myself at present merely with negligence, the rest of the proposition will receive attention further on.

Where the party to whom money has been paid upon a "raised" bill, is privy to or has knowledge of the forgery he cannot successfully defend in a suit by the drawee to recover the excess upon the ground that the drawee was negligent in making the mistake, and that he has suffered damage thereby.

Where, however, the holder has acted bona fide in

demanding payment, two different situations may arise; first, where he has been guilty of negligence in discovering the alteration which is generally termed negligence; and second where he has been guilty of delay in apprizing the payee or holder of it after he has discovered it, which may be termed either, laches, negligence or estoppel, but which is so closely related with the first situation that I have thought best to treat of it in this connection.

First as to negligence in discovering the alteration,

Am Bk. of Com. v. Union Bk. 3 Comst. 230,
A bank in New Orleans drew a bill at sight upon the plffs. bank in N.Y. for $105 payable to J. Durand. After it was issued the bill was fraudulently altered to a bill for $1005 payable to J. Bonnet and indorsed with that name.

The plaintiffs at sight paid the bill to the defendants bank in New York, which had received it for collection from a bank in Charleston. The plaintiff recovered.

The court said that the drawee would undoubtedly be answerable for negligence

in paying an altered bill if the alteration were manifest on its face. Whether it were so or not in this case was properly submitted to the jury, who found that it was paid by mistake and properly, as the bill had passed through the defendants bank and the Charleston B'k. without suspicion.

The greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery and it was the interest and duty in the present case for the bank of C.—

to satisfy itself that the bill was genuine or that its immediate indorser was able to respond in case the bill should prove to be spurious."

I think it is beyond question that the holder and drawee both have the same opportunity for discovering a forgery in the body of the instrument; yet the cases are full of dicta to the following effect which is taken from the opinion in Nat. Bk. of Com. v. Nat. Mech. Bk. 5-5-N.Y. 211 "If the defendant had shown that it had suffered loss in consequence of the mistake

committed by plaintiff; as for instance if in consequence of the recognition by the plaintiff of the check in question the plaintiff had paid out money to its fraudulent depositor then clearly to the extent of the loss thus sustained, the plaintiff should be responsible"

The court in that case had already arrived at the conclusion that a bank was only bound by a recognition of the signature of a depositor, or of the body of a bill when it was made out by

the bank itself, and the above dictum seems to be nothing more than a weak concession.

In Redington v. Woods 49 Cal. 423 the defendants sent a check by their messenger boy with instructions to collect, and to inform the plaintiff that "the defendants knew the house of plaintiffs' to be all right but they did not know the man who presented the check, who was a stranger". The check afterwards turned out to have been fraudulently "raised" and the plaintiffs

sought to recover the excess
The court said, "They did
not expect the teller to
enlighten them as to the
stranger or how the check
came into his possession.
If they were seeking inform-
ation on that point they
would naturally have
applied to the drawer of the
check and not to the
officers of the bank, who
could not be supposed
to have any information
on the subject. If there
was negligence, it was on
the part of the defendants
and not the bank".
And the court further

held, that the mere fact that the body of the check was in a different hand-writing from that usually employed was not of itself sufficient to raise the slightest suspicion of fraud.

We must therefore conclude that if the alteration be made in such a manner, that on the face of the paper there appears enough to excite a reasonable suspicion of fraud nevertheless the holder is as capable of detecting it, as the drawer, and if he does not

detect it he has been guilty of contributory negligence, or of negligence prior to that of the plaintiff.

If however the drawee has information outside of the bill, which would lead a prudent person to suspect that the bill had been altered it would doubtless be his duty to decline payment, or notify the holder of such suspicions; and if he did not do so he would be negligent.

Yet, what if he was negligent?

The fact that the

mistake occurs through negligence does not give the payee any better or the payor any worse title to the money" Lawrence v. Am. Nat. Bk. 5-4 N. Y. 436.

And Daniels (§1636) in treating of an altered check says: "And as the holder demanding payment warrants the genuineness of the instrument under which such demand is made we should say that the negligence of the payor should be very great and positive to deprive him of the right of restitution."

The discussion

as to mistake and warranty is taken up later on but it may be as well to remark here that perhaps the negligence which would defeat a recovery by the drawee, would necessarily have to be of a grosser nature if the plaintiffs right was based on warranty by the holder, than in a case where the drawee was seeking to recover on the ground of mistake.

But what I was getting at was the necessity of another element which is clearly brought out by

Morse in his works on Banks & Banking § 464 "It is not enough to create legal liability or to give A. a right to acquire or retain the property of B. to show merely that A. has been negligent, if so property would be changing hands so rapidly that it could not be seen in transit, any more than the spokes of a bicycle. One more element is necessary namely, that damage to A. being himself innocent in the matter should naturally and proximately result from B's negligence.

This principle underlies the whole doctrine of negligence, as many times as there are cases in the books involving the question of liability for negligence the necessity of both elements has been illustrated and enforced (except in the old forgery cases [Price v. Neal etc.]). They are strangely off the track for in them it is held that the mere fact that B. was negligent gives A. a right to B's property, which A. did not have before the negligence. (for no case affirms that the holder of forged paper has any right to demand

payment of it until it is accepted without regard to the question whether A. has sustained any loss by the negligence or not."

Estoppel

But the use of the word negligence is improper for it has no application whatever to such a case; the whole discussion turns upon the principles of Estoppel. I do not wish to raise a paltry quibble over terms but the use of the word negligence in this connection, arises from a

misconception of the situation and is highly misleading.

It has been shown that both parties are equally capable of discovering any suspicious alteration and if there is any negligence it must be on the part of the holder

If the drawee has information which would lead a prudent person to suspect that the bill had been altered and fails to inform the holder at the time of payment and by reason thereof the holder would suffer loss if he

were obliged to refund the surplus the drawee might be estopped from setting it up.

That is if the drawee had knowledge of suspicious facts and circumstances <u>at the time</u> when he paid the bill, and the holder relying on the fact of payment, as he always does to a certain extent, changes his situation so that it would be inequitable to require him to refund the increased amount I do not see why he should be compelled to do so; for the

drawee's knowledge or suspicion of the alteration goes to the very root of the matter, especially where he bases his right of recovery on the ground that he has paid money under an innocent mistake of fact.

I have been speaking of cases where the drawee has actual knowledge. Where he has no such knowledge or information but has the means of acquiring it within his possession a different case is presented; for the doctrine of estoppel in pais is founded upon

equitable principles and is applied to prevent fraud and injustice. It would be a very singular and extraordinary application of the doctrine to apply it for the purpose of preventing a party from alleging an innocent mistake.

In White v. Cont. Nat. Bk. 64 N.Y. 320 some time had elapsed before plaintiffs discovered the forgery, but as soon as they balanced their accounts with the drawee they detected the alteration and immediately notified the defendants.

The Court said: "The defendants in receiving

the money and in disposing of it did not act upon the faith of any admission by the plaintiffs express or implied or of any fact which they now controvert in prosecuting this action. There was therefor no want of good faith, no negligence, or want of care on the part of the plaintiffs in the payment of the money. The defendant in the entire transaction acted upon other evidence of its right to the money than the statements or acts of plaintiffs and acted upon the apparent title and

genuineness of the instrument and of the responsibility of those from and through whom it received the bill. It follows that there could be no negligence on the part of the plaintiffs which could defeat their right to reclaim their money paid whenever the forgery and the consequent mistake in the payment were discovered. Owing no duty and making no misrepresentation there was no estoppel to bar the action."

As the drawer who fails to notify the drawee

of an alteration until some time has elapsed after he has discovered it, may be estopped from setting it up while the drawee has suffered a loss in the meantime: So the drawee may be estopped by his laches in failing to notify the holder who has in the meantime been lulled into security and omitted efforts he would have made to procure indemnity etc., for as between two innocent persons neither should be allowed to impair or jeapordize the rights of the other by any negligence,

acquiescence or laches whatever and he who commits the wrong should suffer.

The drawee is required to exercise only reasonable diligence in giving notice after the forgery comes to light and the holder must show that he has suffered loss by reason of the want of such notice.

Alteration a Discharge

In order to lead up to the discussion of Failure, and Want of Consideration, and for the purpose of insuring proper conclusions in such discussion, I shall first treat of alteration as a discharge.

"The material alteration of a bill by a party, discharges all parties. The holder of a bill after materially altering it cannot recover either on the bill or the original consideration."

"It cannot be sued on in its altered form nor read in evidence to support an action even when brought by a bona fide holder without notice."

"It is a material alteration to raise the amount and such alteration will render the instrument void in the hands of a bona fide holder, even though it cannot be detected by the closest scrutiny"

Randolph SS 1742-5-4-63
Daniels S 1314.

The one who alters an instrument with fraudulent intent can neither recover

against the drawer on the instrument nor the original indebtedness 55 N. Y. 412

The statements in the text books upon this subject are too sweeping and apt to confuse. In Crawford v. W. S. Bk. 100 N. Y. 50 the court said:- "A material alteration of the terms of commercial paper after execution and before payment would destroy its validity. There is some authority for the proposition that a banker after payment has a right to hold an altered check for its correct amount as against the maker (citing

Bank v. Loomis 55 N.Y. 207).

The question arising on such paper between drawee and drawer however always relates to what one has authorized the other to do. They are not questions of negligence, or of liabilities of parties upon commercial paper but are those of authority solely. In this view it has been held that when the check of a depositor was fraudulently altered after issue and was paid by the bank, that the bank was entitled to charge only the original amount to the depositor.

But when payment is made by mistake on an altered bill from which the party paying has been discharged by the alteration he may recover the payment so made.

Failure of Consideration

I shall now consider what is meant by failure of consideration, and try to determine if the doctrine of Failure of Consideration, as that term is popularly understood by the profession, is technically correct, as applied to its full extent, in this connection.

I quote the following from Daniels, § 731, "It is well settled that the transferee by delivery of the bill or note is liable for failure of consideration if it turns out that it was

fictitious or originally forged, or subsequently altered either in the signature or in the amount.[21]

But "value received" in a bill means, prima facie, value received by the drawer. Now when the holder presents the bill to the drawee and receives payment what is the consideration which is intended by the parties to support such payment?[2]

It is the evidence which is given to the drawee that he has been authorized by the drawer to make such payment. But suppose the bill has been vitiated.

by a fraudulent alteration.
Is there not then a total
failure of consideration,
the parties having all been
discharged and the paper
turns out to be a mere nullity.
Surely not in this case
for the drawee can use it
as an evidence of discharge
as against his drawer for
the original amount.
So the failure of the con-
sideration is only partial
"Benj. Chalmers" Art. 93 lays
down that "partial failure
of consideration is a defence
pro tanto against an imme-
diate party where the failure
is an ascertained and

liquidated amount but not otherwise".

This proposition is not very well founded upon the cases and I have not been able to find it recognized at all in N. Y., and although it would be a defense in favor of the drawer in this case, yet I doubt if it would be available as a ground for affirmative relief.

I think the better rule is that, where the consideration fails only in part, principles analogous to those which govern an inquiry into the adequacy of a consider-

ation would be applied to it. If there were a substantial consideration left, although much diminished, it would still suffice to sustain the payment. 40 N.Y. 379; 19 Cal. 150 Pollock on Cont. 493.

My conclusion leads me to the following result namely, - That the drawee cannot recover on the ground of failure of consideration alone, but that the absence of a full consideration goes very far to assist him in obtaining relief under other equitable principles, but it must be remembered,

that so far I have been considering the rights of the drawee; a different situation is presented where the holder seeks to recover from his transferer there, perhaps, there is much more reason for holding that there is a total failure of consideration and that the holder may recover Hamer v. Brainard 26 P. 299 This situation will be discussed later on in the chapter under "Amount of Recovery."

Caveat Emptor

as applied to transfers other than for payment.

The doctrine of implied warranty will be discussed in connection with caveat Emptor, for in cases where the latter applies there can be no implied warranty, and in cases where the law raises an implied warranty the rule of caveat emptor cannot apply.

Caveat Emptor applies where the goods are present and the purchaser must

inspect them for himself, and therefore it has been rightly held that in sales of bills and notes there can be no inspection of the real subject of transfer and caveat emptor does not apply.

"In the sale of what purports to be a promissory note it is not the material substance of the paper and ink for which the consideration is understood by the parties to be paid, but it is the chose in action of which the note purports to be the evidence that is the real subject

of negotiation and transfer. But if the note is forged; if no such chose in action exists; if the vendor neither owns nor parts with anything of the kind it is difficult to see any just grounds upon which he can be allowed to retain the purchase money. He has undertaken to sell what he did not own and that which in fact has no existence. The maxim of caveat emptor is inapplicable to such a case" Dumont v. Williams 18 A. St. 5-20

It is stated by Randolph p. 442 That while an assign-

ment is not equivalent to an indorsement, a transfer without indorsement is of the same force as a sale of goods and does not fall under mercantile law, & see Pugh v. Moore 10 So. 712

The doctrine of implied warranty has arisen out of the law of sales and it has been contended by some that the doctrine is not properly applied to negotiation. I think such contention is without foundation, for whether the act is one of sale or negotiation. but yet they are different

modes of transfer and where title passes by sale, and where it passes by negotiation, can only mean one thing i.e. to transfer it for value and as we shall see implied warranty and mistake must govern alike all cases, where a consideration was intended and expected. Negotiation, to be sure, is a transfer sui generis and is attended by certain peculiar characteristics; but they are all established by law for the benefit and protection of the law merchant and

where no special rule pertains the general law of transfer must prevail.

Some writers have argued that this rule of implied warranty has its rise from the rules governing the transfer of real estate; but no matter as to its origin, for it is built upon the doctrine which requires consideration to support every contract (excepting in certain special cases) and is meant for the protection of the buyer where he cannot inspect the subject of transfer.

If it has been borrowed

from the rules governing conveyances of real property to be applied to personalty, it would seem to be more applicable to transfers of bills and notes, where the real subject of transfer is the evidence of some right, the same as a deed of land, than to the sale of goods, wares and merchandise.

The Court of Appeals in N.Y. in Littauer v. Goldman 72 N.Y. 506-507 have however, applied the doctrine of caveat emptor to the sale of a promissory note which was void

for usury in its inception; and held, that the doctrine that an action to recover back the purchase price paid under a contract of sale of personal property without proof of fraud or warranty, whereupon delivery of the property it proves utterly valueless and where an offer to return has been made and refused is scarcely applicable to negotiable paper".

But what they really decided was that there was no implied warranty that the note was not usurious in absence

of a scienter on the part of the transferor.

The court however concedes that the rule is not without exception and says:- "The law in regard to the transfer of negotiable bills of ex. and promissory notes, as laid down for a century or more only excepts two cases as coming within the doctrine of implied warranty viz: a warranty of title and that the instrument is genuine and not forged!"

It is now well settled that a person who sells

commercial paper as his own is understood to warrant his title to be good and that the instrument is genuine 120 N. Y. 303. We have already stated that he may recover on the ground of failure of consideration.

As Between Drawee & Holder.

It is well settled that the drawee may recover from the holder. Does this right also rest upon the ground of implied warranty? I think not. In White v. Cont. Nat. Bk. 64 N. Y. 322 the

court said; "But waiving the question as to the responsibility of the defendant as to the genuineness of the instrument and taking the most favorable view for defendant, which is to regard it as a case of mutual mistake in respect to which neither was in fault and in that view and upon that theory the case is within the principles decided in Bank of Com. v. Union Bk 3 Comst. 230; Lingeton Bank v. Eltinage 40 N. Y. 391 and plaintiffs are entitled to a new trial.

The payees of a check payable

to him or order who indorses it on presenting it for payment does not stand to the drawee as an indorser of a promissory note stands to his indorsee, nor as the payee of a check or bill of ex. who indorses it to any person other than the drawee to such person. The acceptor of a bill of exchange and the indorsement of such bill by the payee upon its payment carries with it no liability. Its value in the hands of the acceptor is as a receipt and voucher and that is all 45 Cal. 735

The indorsement does

not of itself import an undertaking that the check has not been altered and in proceedings to recover back the amount paid on an altered check the indorsement could not be made the foundation of the action as importing a promise to refund the money in case it should afterwards appear that the amount in the body of the check had been fraudulently altered.

In such cases the right of recovery does not rest in whole or in part upon the indorsement as importing such a promise,

but upon the fact that the money was paid by the drawee without consideration under a mutual mistake.

It is a well settled rule that the drawee and holder are equally bound to know whether the body of the bill is genuine and this per se would seem to prevent any implication of warranty on the part of the holder. But here the doctrine of mistake (because of the absence of consideration) is found to obtain with peculiar force.

There is however respectable authority to the

effect that the drawee could recover on an implied warranty.

Daniels § 1631 "When the holder of an unaccepted bill presents it to the drawee for acceptance and payment he represents in effect to the drawee that he holds the bill of the drawer and demands its acceptance or payment as such. If he indorses it he warrants its genuineness and his very assertion of ownership is a warranty of genuineness in itself."

White v. Con. Nat. Bk. 64 A. D. 319.

"The def. as holder of the bill and claiming to be entitled

to recive the amount thereof from the drawees, was held to a knowledge of its own title and every part of the bill other than the signature of the drawer within the principle which makes every party to a promissory note or bill of exchange a guarantor of the genuineness of the instrument

The presentation of the bill and the demand and receipt of the money thereon was equivalent to an indorsement"

But the court here waived the question as to the responsibility of the defendant for the genuineness of the instrument and based its

decision upon the ground of mistake.

In N. C. RR. v. Westcott 115 N. Y. 469 there is a very strong dictum in favor of implied warranty as follows;—

"A different case would have been presented if the defendant Company through its agent had received the money in its own right, or apparently as from the plaintiff. Then with or without indorsement the defendant may have been treated as warranting the genuineness of the check and as liable to the plff. for the amount (64 N. Y. 316) (80 id 207) The doctrine of guaranty and

liability where the implication is permitted that the party presenting paper and receiving payment is the lawful holder having title is in such cases firmly settled."

Mistake

The rules of law in relation to the corrections of mistakes of fact have been gradually growing more liberal and are moulded so as to do equity between the parties. The exceptions which have been established by authority and have been engrafted upon the commercial law it is not our purpose to disturb, but they should not be extended.

The general principles were negligence in making the mistake is not as has already been shown sufficient to

preclude the party making it from demanding its correction. Such negligence does not give the party receiving the payment the right to retain what was not his due unless he has been misled and prejudiced by the mistake.

If his loss had been incurred and became complete before the payment he should not in justice be permitted to avail himself of the mistake of the other party to shift the loss upon the latter.

Nat. Bk. Comm. v. N. M. Bk. 5-5-L. 4. 211

"Money paid by one party

to another through mutual mistake of facts in respect to which both were equally bound to inquire may be recovered back. The defendants have obtained the money of the plaintiffs without right and on the exhibition of a forged title as genuine, the forgery being unknown to both parties. The defendant thought not in conscience to retain the money because it does not belong to them and for the further reason that the defendants and the previous indorsers have each on the same principle

their remedy over against the party to whom they respectively paid the money until the wrong doer is finally compelled to pay. If that party should not be responsible or if he can not be found, the loss ought to fall on the party who without due caution took the bill from him." Bank of Comm. v. N. Bk. 3 N.Y. 237 citing Canal Bk v. Bank of Albany 1 Hill 292

I have already stated that the proper ground on which the drawee should bring his action against the holder or payee is mistake. But mistake as to what?

There was no mistake as

to the existence of the subject matter, for I have already stated that as regards the rights of the drawee against the drawer the note was not vitiated by the alteration, for he might hold it as evidence of his discharge, for the original amount, against the drawer.

There would be a mistake as to the existence of the subject matter, as between transferor and transferee prior to payment, for after the bill was altered it ceased to exist as a bill, and could have no validity or effect whatever until it

had been paid by the drawee.

There was a mistake as to this fact namely;- both parties thought it was a bill for its face while in fact it was a bill for a smaller amount; & in the case of a check, treating the bank as the agent of the depositor and the mistake as a mistake of the authority of the bank to pay out the depositors funds.

There is however one exception to the rule viz: where a party has transmitted and indorsed a bill for collection to the defendant who has presented the same for

payment, received payment thereon and delivered it to the person from whom he had received the bill, before notice of the forgery. In such cases it is well settled that the drawee cannot recover as he was advised by the indorsement that defendants company was simply acting as agent. 118 N. Y. 469, 111 N. E. 33.

Certification

As to the effect of certification of a check upon the doctrine of mistake, it is now well settled that when a check has been raised by some person without authority before certification, the certifying bank cannot be called upon in consequence of its certification to pay the amount of the raised check, and when a bank has thus certified a raised check by mistake and subsequently pays the money thereon

without any culpable
negligence on its
part, it can recover the
amount thus paid as
money paid by mistake;
and whether the forgery
and alteration were made
before or after acceptance
can make no difference
Claus v. Bank 89 N. Y. 422
Security Bk. v. National
Bank 67 N. Y. 461

Duty to Return the Forged Bill

In all cases where the drawee demands a return of the money paid under mistake he should, perhaps, return, & offer to return the forged bill. I think the following quotation warrant this statement.

"If there be prior indorsers to whom the defendant may look it is quite obvious that his remedy would be incomplete, and perhaps ineffectual without the possession of

the forged paper. The defendant is entitled to the fullest opportunity to obtain indemnity from prior indorsers or guarantors, or from the person to whom he paid the consideration, and the possession of the check was necessary in order for them to have effectively prosecuted civil proceedings for such recovery.

I am therefore of the opinion that a failure to return or offer to return the check to defendants is a valid defense to the action" Reading Co v. Woods 43 Cal.

"If the alteration was made without fraudulent

intent, the payee may resort to the original indebtedness, if that was independant of the note, and has not been discharged by the execution of it and pursue the maker upon that. But to have such resort he must be able to produce and surrender the note. Here its real value is not destroyed by the alteration. Its worth is as much as the independant original indebtedness was worth at the time of the conversion".

Booth v. Powers 56 N.Y. 31

Conclusion of Recovery.

It is now well settled that in an action by the drawee against the holder the recovery is limited to the amount of the bill as paid by him less the original amount with interest.

Bank of Comm. v. Merch. Bk. 55 N.Y. 212
Hart v. Grennell 122 N.Y. 371

In an action by a bona fide holder against his immediate transferer, the amount of his recovery will depend on circumstances.

If the transferer knew

of the alteration and was guilty of fraud the holder may rescind the contract and recover the consideration which he paid for the worthless paper; or he may bring an action for deceit.

Where the holder and his transferer were both ignorant of the alteration at the time of the transfer and the drawee has paid the original amount to the holder upon presentation; or where he has paid the raised amount but has recovered the excess in an action against such holder the right of recovery would

seem to be limited to the amount as raised less the original amount.

If the drawee being aware of the alteration refuse to pay the bill at all what are the rights of the holder? The paper is worthless and all parties prior to the alteration have been discharged.

The cases and text books are somewhat blind upon this point, but the better view is that the holder having presented the bill for payment and payment having been refused may, after having

given due notice to the last indorser on the bill (who indorsed it subsequent to the alteration) bring an action against him as indorser to recover the amount of the bill, or he may recover back the consideration which he paid on the bill from his immediate transferer on the ground of implied warranty or failure of consideration.

Finis.