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Uniform Commercial Code - Cash Payment by the Payor Bank - Kirby v. First & Merchants Nat'l Bank, 210 Va. 88, 168 S.E. 2d 273 (1969)

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recognize the need for insanity as a ground for divorce, the situation of the sane spouse, as in *Crittenden*, undoubtedly will recur.

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Uniform Commercial Code—CASH PAYMENT BY THE PAYOR BANK, *Kirby v. First & Merchants Nat'l Bank*, 210 Va. 88, 168 S.E.2d 273 (1969).

On December 30, 1966 appellant Kirby presented to the appellee payor bank a check in the amount of $2,500 drawn by Neuse Engineering and Dredging Co. payable to and endorsed by appellant.[1] Appellant maintained an account with the appellee and his deposit ticket accompanied the check calling for a deposit in currency of $2,300. That portion of the ticket which provided for the listing of checks deposited was blank. The teller, as requested, handed the appellant $200 in cash and on the appellee's next business day the appellant's account was credited with a deposit of $2,300. An employee of the appellee noted on the back of the check, "cash for dep." [2]

On January 4, 1967, the appellee discovered that the drawer's account contained insufficient funds to cover the check, and an officer of appellee phoned the appellant to advise that the appellee had dishonored the check. Appellant promised to cover the check but did not, and appellee charged appellant's account with $2,500, creating a $543.47 overdraft. The appellee then instituted an action to recover. Appealing from a judgment for the appellee bank, the appellant questioned the bank's right to charge back the check.[3]

The Supreme Court of Appeals of Virginia held that the appellee had no right to charge the appellant's account with the dishonored check. Finding that the $2,500 had been paid in cash, the court concluded that the bank had made final payment and could not sue the appellant on the check, notwithstanding defendant's indorsement and presentment.[4]

Traditionally, payment in cash of an item by the payor bank has constituted final payment and the Uniform Commercial Code has

1. Kirby v. First & Merchants Nat'l Bank, 210 Va. 88, 168 S.E.2d 273 (1969).
2. *Id.* at 88, 168 S.E.2d at 279.
3. *Id.* at 91, 168 S.E.2d at 275.
4. *Id.* at 92, 168 S.E.2d at 276.

adopted this rule.[5] With few exceptions[6] the transaction has then been regarded as closed as between the parties to the payment.[7] Upon discovery of his error, the payor cannot collect the sum so paid to the payee.[8] Although the Negotiable Instruments Law was vague in this regard,[9] the U.C.C. has clearly adopted the majority view.[10]

The courts have generally held that when negotiable paper is dishonored, the depository bank may charge the depositor on his unrestricted indorsement, and the U.C.C. concurs;[11] however, this right of recovery is not applicable when the depository bank is also the payor bank and pays the item in cash. The drawee is under a positive duty in respect to the account of the drawer[12] and an indorsement to the

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5. UNIFORM COMMERCIAL CODE § 4-213 provides:

> (1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:
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> (a) paid the item in cash. . . .

See Id., Comment 3, which sets forth the traditional view and § 3-418.

6. *E.g.*, Manufacturers Trust Co. v. Diamond, 17 Misc. 2d 909, 186 N.Y.S. 2d 917 (Sup. Ct. 1959) held that the drawee may recover provided the payee is not damaged; Turetsky v. Morris Plan Indus. Bank, 22 N.Y.S.2d 514 (Sup. Ct. 1936).

7. The RESTATEMENT OF RESTITUTION § 33 (1937) concludes:

> The holder of a check or other bill of exchange who, having paid value in good faith therefor, receives payment from the drawee without reason to know that the drawee is mistaken, is under no duty of restitution to him although the drawee pays because of a mistaken belief that he has sufficient funds of the drawer or that he is otherwise under a duty to pay.

This is clearly the prevailing view. *See e.g.*, Orlich v. Rubio Sav. Bank, 240 Iowa 1074, 38 N.W.2d 622 (1949); National Bank v. Marshburn, 229 N.C. 104, 47 S.E.2d 793 (1948); National Bank v. Berrall, 70 N.J.L. 757, 58 A. 189 (1904); Fidelity & Cas. Co. v. Planenscheck, 200 Wis. 304, 227 N.W. 387 (1929); 33 MINN. L. REV. 305 (1949).

8. "According to the weight of authority the drawee who honors an overdraft is denied the right to recover the money so paid from the bona fide purchaser thereof." W. BRITTON, BILLS AND NOTES § 137 at 388 (2d ed. 1961).

Virginia has long followed this rule. *E.g.*, Citizens Bank v. Schwarzschild & Sultzberger Co., 109 Va. 539, 64 S.E. 954 (1909). *See also* National Bank v. Berrall, 70 N.J.L. 757, 58 A. 189 (1904); Manufacturers Nat'l Bank v. Swift, 70 Md. 515, 17 A. 336 (1889); Spokane & E. Trust Co. v. Huff, 63 Wash. 225, 115 P. 80 (1911).

9. C. BUNN, H. SNEAD, & R. SPEIDEL, AN INTRODUCTION TO THE U.C.C., at 3.29 (A) (1964).

10. *See* UNIFORM COMMERCIAL CODE §§ 3-418, 4-213; *Id.* §§ 3-417, 4-207 Comments.

11. UNIFORM COMMERCIAL CODE §§ 3-414(1), 4-201. The courts generally regard this right to charge back as no more than a means of enforcing the depositor's liability as an indorser of dishonored paper. *E.g.*, Scott v. W. H. McIntyre Co., 93 Kan. 508, 144 P. 1002 (1914); Caledonia Nat'l Bank v. McPherson, 116 Va. 328, 75 A.2d 685 (1950); Vickers v. Machinery Warehouse & Sales Co., 111 Wash. 576, 191 P. 869 (1920); Blatz Brewing Co. v. Richardson & Richardson, Inc., 245 Wis. 567, 15 N.W.2d 819 (1944).

12. In Manufacturers Nat'l Bank v. Swift, 70 Md. 515, 17 A. 336 (1889), the court

payor is not part of the negotiation but acts merely as a receipt.[13] Should the check be deposited in the payor bank, the bank might be able to protect itself from liability of this character by an agreement with its depositor authorizing the bank to charge back any item found to be improper.[14] Such provisions, however, have been held immaterial when it was understood that the deposit was accepted and treated as cash.[15] A contrary rule would eliminate the certainty of a commercial transaction involving payment by check.[16]

In *Kirby v. First & Merchants National Bank*, the Supreme Court of Appeals of Virginia found that the appellee had paid the item in cash constituting final payment by the payor bank under the U.C.C.[17] The bank could not recover from defendant on the indorser's contract because the indorser contracts to pay only if the instrument is dishonored,[18] and an indorsement runs only to a holder. The drawee-appellee, did not dishonor the check but paid it in cash. The court recognized the application of the warranties made to the drawee bank by a presentor and by prior transferors of a check,[19] but held that the appellant had not breached any warranties.[20]

The court examined the depositor's contract, upon which appellee based his contention that a provisional settlement existed whether or not the check was paid in cash, but found the contract inapplicable by its own terms once final payment had been made.[21] Further, it concluded

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stated that the duty upon the drawee bank is to "know the state of its depositor's account, and if it makes a mistake in this respect it must abide the consequences."

13. C. BUNN, H. SNEAD, and R. SPEIDEL, *supra* note 9, at § 3.4(B).

14. 3 T. PATON, PATON'S DIGEST OF LEGAL OPINIONS, Overdrafts § 5 (1944). *But see* UNIFORM COMMERCIAL CODE § 4-103.

15. "The provision in the passbook and deposit slip as to items deposited for collection has no bearing here, since the plaintiff's check was not accepted and treated as an item for collection, but as 'cash'." Kraus v. Chatham Phenix Nat'l Bank & Trust Co., 143 Misc. 508, 256 N.Y.S. 721, 725 (N.Y. Mun. Ct. 1932).

16. 3 T. PATON, *supra* note 14, at § 4.

17. 210 Va. at 92, 168 S.E.2d at 276; UNIFORM COMMERCIAL CODE § 4-213(1)(a).

18. UNIFORM COMMERCIAL CODE § 3-414(1) stipulates that:

> Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

19. *Id.* §§ 3-417(1), 4-207(1).

20. 210 Va. at 92, 168 S.E.2d at 276.

21. The pertinent provision of the depositor's contract stipulates:

> This bank acts only as depositor's collecting agent and assumes no

that even if the contract could have made the settlement provisional, the bank had not complied with the Code's requirement of prompt return of the item and had lost its right to charge the item back to defendant's account.[22]

The conclusions of the court, operating entirely under the provisions of the U.C.C., are patterned closely after the law developed prior to the Code's adoption. The cash payment of negotiable paper by the drawee is final as between the parties to the payment, and if the drawer's funds prove insufficient the drawee cannot then collect from the payee. It is the responsibility of the drawee to know the state of the drawer's account and he finalizes payment at his own risk.

RICHARD STAFFORD BRAY

Torts—MENTAL DISTRESS—RECOVERY BY THIRD PERSONS. *Archibald v. Braverman*, 275 Cal. App. 2d 290,—P.2d—, 79 Cal. Rptr. 723 (1969).

Plaintiff's son was seriously injured by an explosive allegedly due to defendant's negligence in selling the son explosive materials. Plaintiff brought an action to recover damages for emotional trauma and mental illness, which required institutionalization as a result of viewing her son's injuries within moments after the explosion. Summary judgment was granted for the defendant and the plaintiff appealed.[1]

The District Court of Appeals of California reversed, holding that even though the mother did not actually witness the explosion, she would be entitled to recover if negligence of the defendant were proved.[2] The court in *Archibald*, following the rationale of *Dillon v. Legg*,[3]

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responsibility beyond its exercise of due care. All items are credited subject to final payment and to receipt of proceeds of final payment in cash or solvent credits by this bank at its own office.

Id. at 93 n.6, 168 S.E.2d at 277 n.6.

22. UNIFORM COMMERCIAL CODE §§ 4-212(3), 4-301 provide that in order to revoke a settlement, the payor bank before its midnight deadline must return the item or send written notice of dishonor or nonpayment if return is unavailable.

1. The Superior Court of Riverside County hearing this case in February, 1968, based its decision on Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963), where a mother was denied recovery for injuries sustained as a result of emotional shock and mental disturbance received upon witnessing the defendant's truck run over her infant child.

2. 275 Cal. App. 2d at 290, P.2d , 79 Cal. Rptr. at 723.

3. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). *Dillon*, decided prior to the appeal in *Archibald*, overruled *Amaya v. Home Ice, Fuel & Supply Co.*, and became new precedent. In determining whether the defendant should reasonably