

Negotiable Instruments--Payee as Holder in Due Course--Payee, a Bona Fide Holder for Value Without Notice, Held To Be a Holder in Due Course (South Shore Securities Co. v. Goode, 5 M.2d 972 (Sup. Ct. 1957))

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the city, in order to bear witness to a speedometer test; no longer will such a number of policemen be removed from "active" duty to appear in court as witnesses. If a defendant desires, he may always subpoena the tester, or a witness to the tests, and question him about them.²⁴

Furthermore, it was feasible to hold that Section 374-a was meant, at least in spirit, to cover the present situation. It is the duty²⁵ of the police force to apprehend violators of traffic regulations. Speedometer testing appears to be inherent in this "business"²⁶ and is performed in the regular course thereof. However, some doubt as to the application of this section does arise when one considers that the requirement, that evidence be shown to prove that the speedometer was tested for its accuracy every fifteen days, necessarily demands that one of the two tests be *after* the alleged violation.²⁷ It is submitted that if this decision does not stand, it will be because the trustworthiness of the written entry is not sufficient to satisfy the requirements implied in Section 374-a.²⁸



NEGOTIABLE INSTRUMENTS—PAYEE AS HOLDER IN DUE COURSE — PAYEE, A BONA FIDE HOLDER FOR VALUE WITHOUT NOTICE, HELD TO BE A HOLDER IN DUE COURSE.—A building company contracted to build an animal hospital for defendant. The company assigned plaintiff its rights to first monies due on the contract as security for a loan. Defendant, who had notice of the assignment, forwarded a check, payable to plaintiff's order, to the building company to be marked "payment approved" and sent on to the plaintiff. Before plaintiff could cash the check, defendant stopped payment because the building company had abandoned its contract. In an action on the check the New York Supreme Court *held* that plaintiff, although payee, was a holder in due course and entitled to recover. *Squith*

²⁴ See N.Y. CIV. PRAC. ACT § 403.

²⁵ *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) has declared that the person supplying the information to the entrant must be under a business duty to do so. Therefore, where an outside agency tested the patrol car's speedometer, admission of a written record of the test under § 374-a has been refused. *People v. Boehme*, 1 M.2d 629, 152 N.Y.S.2d 759 (County Ct. 1955); *People v. Greenhouse*, 4 M.2d 692, 136 N.Y.S.2d 675 (County Ct. 1955).

²⁶ In *People v. Heyser*, 2 N.Y.2d 390, 141 N.E.2d 553 (1957), the testimony of a patrolman, experienced in estimating the speed of motor vehicles, who had opportunity to observe the defendant's automobile, was sufficient to convict the defendant of speeding.

²⁷ See *People v. Sachs*, 1 M.2d 148, 155, 147 N.Y.S.2d 801, 808 (N.Y.C. Magis. Ct. 1955).

²⁸ See *Williams v. Alexander*, 309 N.Y. 283, 286, 129 N.E.2d 417, 418-19 (1955).

Shore Securities Co. v. Goode, 5 M.2d 972, 162 N.Y.S.2d 962 (Sup. Ct. 1957).

Authorities are not agreed whether under the Negotiable Instruments Law a payee can be a holder in due course.¹ The question, which has been discussed since the passage of the English Bills of Exchange Act,² centers around whether the payee is an "immediate party" to an instrument and whether an instrument can be "negotiated" to him.³

To qualify as a holder in due course a payee must meet the requirements of Section 91 of the New York Negotiable Instruments Law.⁴ It is agreed that a payee can come within the purview of the first three subsections.⁵ But does he qualify under the

¹ 2 DANIEL, NEGOTIABLE INSTRUMENTS § 884, at 929 (7th ed. 1933). Equally strong statements have been made to uphold either side of the controversy. For example, ". . . it is *clear* [that a third party] . . . negotiates the instrument when he transfers it to the payee." BRANNAN, NEGOTIABLE INSTRUMENTS LAW 676 (7th ed., Beutel 1948) (emphasis added). "*Plainly* under these two sections [NEGOTIABLE INSTRUMENTS LAW §§ 30, 191] a negotiable instrument payable to a named payee is negotiated when the physical possession of it is handed for value to the person named as payee." *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N.E. 605, 606 (1914) (emphasis added). Holder in due course "seems *unquestionably* to be used to indicate a person to whom after completion and delivery the instrument has been negotiated." *Vander Ploeg v. Van Zuuk*, 135 Iowa 350, 112 N.W. 807, 808 (1907) (emphasis added).

² Bills of Exchange Act, 1882, 45 & 46 VICT., c. 61. The negotiable instruments laws adopted in America, at least as far as the sections concerning a payee being a holder in due course, are substantially the same as the English Act. For examples of the early controversy, see *Lloyds Bank, Ltd. v. Cooke* [1907] 1 K.B. 794; *Smith v. Prosser*, 77 L.J.K.B. 71 (1907); *Herdman v. Wheeler* [1902] 1 K.B. 361 (1901).

³ There are no cases holding that a payee can be a holder in due course where the maker delivered the note to the payee. In order to be a holder in due course the payee must be a remote party to the dealing. *First Nat'l Bank & Trust Co. v. Conzo*, 169 Misc. 268, 7 N.Y.S.2d 334 (Sup. Ct. 1938). The instrument must be delivered by a third person at least appearing to be a purchaser, for example, a person acting as a "remitter." See *Munn v. Boasberg*, 292 N.Y. 5, 7, 53 N.E.2d 371, 373 (1944). ". . . [T]he remitter does not act as agent of the drawer, but acts for himself, and in a suit on the bill by the payee against the drawer, want of consideration can not be shown, if the payee is a *bona fide* holder for value." *Armstrong v. American Exchange Bank*, 133 U.S. 433, 453 (1890); *Aigler, Payees as Holders in Due Course*, 36 YALE L.J. 608, 609-11 (1927).

⁴ A holder in due course is a holder who has taken the instrument under the following conditions: 1. that it is complete and regular upon its face; 2. that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; 3. that he took it in good faith and for value; 4. that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it. N.Y. NEGOTIABLE INSTR. LAW § 91.

⁵ Under § 2 of the law, "holder" is defined as ". . . the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." N.Y. NEGOTIABLE INSTR. LAW § 2. Any difficulty the payee has in conforming to the section is resolved, under the first three subsections at least, by substituting the words "payee in possession" for "holder" when that word appears.

fourth subsection by being the person to whom the instrument was "negotiated"?⁶

Section 60 of the law states in part: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof."⁷ Professor J. D. Brannan, upholding the view that a payee can be a holder in due course, points out that the transferor is not required to be a holder but only a person. Therefore ". . . a maker or drawer, for instance, or a person intrusted with the instrument though not himself a holder, negotiates it when he transfers it to the payee."⁸

This might well end discussion except Section 60 continues on: "If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery."⁹ Professor Brannan explains this last sentence by saying it ". . . must be construed to refer to negotiation after the instrument has come into the hands of the payee or other holder. . . ." ¹⁰ In a leading Massachusetts case, the court interpreted the last sentence of Section 60 as ". . . not intending to include the ways in which an instrument might be negotiated, nor to restrict the comprehensive terms of the preceding sentence."¹¹

Proponents of the opposing view construe the last sentence of Section 60 together with the Negotiable Instruments Law's definition of "issue": "the first delivery of the instrument, complete in form, to a person who takes it as a holder."¹² They conclude that the payee does not meet the condition of Section 91 because there was no instrument before issue and, even if there were, it was not indorsed to the payee by a holder. As the case of *Vander Ploeg v. Van Zuuk*¹³ succinctly states, a holder in due course ". . . seems unquestionably to be used to indicate a person to whom after completion and delivery the instrument has been negotiated."

In the earliest New York case, *Brown v. Brown*,¹⁴ the court held that a payee could be a holder in due course. The court did not

⁶ An early Massachusetts case, speaking of the word "negotiated" as used in the Negotiable Instruments Law of that state, said that "it was given its common legal significance of concluded by bargain or agreement. . . . This is the common and popular signification of the word. It was the sense in which it was used in the law merchant prior to the Negotiable Instruments Act. Its meaning has not been changed by the act." *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N.E. 605, 606 (1914).

⁷ N.Y. NEGOTIABLE INSTR. LAW § 60.

⁸ BRANNAN, NEGOTIABLE INSTRUMENTS LAW 676 (7th ed., Beutel 1948).

⁹ N.Y. NEGOTIABLE INSTR. LAW § 60.

¹⁰ BRANNAN, *op. cit. supra* note 8, at 676. "Reading the definition of 'holder' in sec. 2 into the paragraph it will read, 'if payable to order it is negotiated by the indorsement of the "payee" or indorsee who is in possession.'" *Ibid.*

¹¹ *Liberty Trust Co. v. Tilton*, 217 Mass. 462, 105 N.E. 605, 606 (1914).

¹² N.Y. NEGOTIABLE INSTR. LAW § 2.

¹³ 135 Iowa 350, 112 N.E. 807, 808 (1907).

¹⁴ 91 Misc. 220, 154 N.Y. Supp. 1098 (N.Y. City Ct. 1915).

intensively examine the statute, but rested its decision on the need for uniformity of interpretation of the law throughout the country. Most New York decisions follow the *Brown* case.¹⁵

Several New York cases hold against a payee claiming to be a holder in due course, but base their result on the presence of an element which would have prevented any holder from being a holder in due course.¹⁶ In the most recent Court of Appeals case, *Munn v. Boasberg*,¹⁷ the facts were that Shuman paid a personal debt to Boasberg with a check drawn to Boasberg by Munn. The check was to have been used to forestall foreclosure proceedings against Munn's club. The court, reversing a dismissal of the complaint, declared that the evidence raised a question of fact as to whether Boasberg was a holder in due course. The court said

. . . the check itself was constructive notice that the funds it represented were funds of the plaintiff which could not be applied in payment of the agent's personal indebtedness without inquiry of the principal. Such an inquiry might well have disclosed immediately the purpose for which the check was delivered. The defendant was therefore chargeable with knowledge of the fact.¹⁸

The issue determined was not whether a payee could be a holder in due course but whether the apparent agency of the transferor put this payee on notice that the check could not be applied in payment of the agent's personal indebtedness.¹⁹

¹⁵ See, e.g., *Bergstrom v. Ritz-Carlton*, 171 App. Div. 776, 157 N.Y. Supp. 959 (1st Dep't 1916), *appeal dismissed*, 220 N.Y. 569, 115 N.E. 1033 (1917) (payee held to answer each requirement of §91); *First Nat'l Bank & Trust Co. v. Conzo*, 169 Misc. 268, 7 N.Y.S.2d 334 (Sup. Ct. 1938) (payee was holder in due course since his relation to defendant and to the transaction was remote and that of a purchaser of the instrument).

In one case, however, the court said it felt that a payee might be a holder in due course but that this happens so rarely that it is doubtful whether he enjoys the prima facie presumption of being a holder in due course provided by §98 of the Negotiable Instruments Law. *Yokohama Specie Bank v. Milbert Importing Corp.*, 182 Misc. 281, 44 N.Y.S.2d 71 (Sup. Ct. 1943).

¹⁶ See, e.g., *Miller v. Campbell*, 173 App. Div. 821, 160 N.Y. Supp. 834 (1st Dep't 1916), *aff'd mem.*, 223 N.Y. 728, 120 N.E. 869 (1918); *Empire Trust Co. v. Manhattan Co.*, 97 Misc. 694, 162 N.Y. Supp. 629 (Sup. Ct. 1916), *aff'd mem.*, 180 App. Div. 891, 166 N.Y. Supp. 1093 (1st Dep't 1917) (wherein a thief presented himself to payee as agent, not remitter); BRANNAN, NEGOTIABLE INSTRUMENTS LAW 686 (7th ed., Beutel 1948); Note, 30 HARV. L. REV. 515 (1917).

¹⁷ 292 N.Y. 5, 53 N.E.2d 371 (1944).

¹⁸ *Munn v. Boasberg*, 292 N.Y. 5, 9, 53 N.E.2d 371, 373 (1944). However, it would seem even if the payee does not inquire he still has ". . . the benefit of . . . anything that inquiry would have developed . . ." *Reif v. Equitable Life Assurance Soc'y*, 268 N.Y. 269, 273, 197 N.E. 278, 279 (1935); *Mutual Trust Co. v. Merchant's Nat'l Bank*, 236 N.Y. 478, 487, 141 N.E. 922, 925 (1923). See also, Fagan, *Notice and the Endorsing Fiduciary*, 30 ST. JOHN'S L. REV. 153 (1956).

¹⁹ An early case states that one in Boasberg's position could be a holder in due course. *Boston Steel & Iron Co. v. Steuer*, 183 Mass. 140, 66 N.E. 646, 647 (1903) (dictum).

A few New York cases take the view that a payee can never be a holder in due course.²⁰ In *Alpert v. City Motor Sales, Inc.*,²¹ the court held that a payee could not be a holder in due course and stated that *Munn v. Boasberg* had conclusively determined the point. It would seem, however, that the court overly extended the *Munn* rule to apply to all cases wherein a payee seeks to prove himself a holder in due course.

The Court in the instant case, by holding that a payee can be a holder in due course, impliedly rejected the *Alpert* case's interpretation of *Munn v. Boasberg*,²² stating that the law in New York has not been definitively settled by the Court of Appeals.

Under the Uniform Commercial Code all uncertainty about a payee being able to qualify as a holder in due course is resolved by the Code specifically stating that the payee can so be.²³

While no New York case gives a section by section examination of the Negotiable Instruments Law to determine the point, the position adopted by most of the courts, that a payee can be a holder in due course, follows the spirit of the Negotiable Instruments Law when read in its entirety.



TAXATION — STOCK RETIREMENT AGREEMENTS — LIFE INSURANCE PREMIUMS PAID BY CORPORATION HELD NOT TAXABLE INCOME TO STOCKHOLDER.—Petitioners, two brothers who were substantially the sole stockholders in a corporation, each took out policies of insurance on his own life, naming his brother as beneficiary. Both brothers agreed that the insurance proceeds would be used by the corporation to purchase the deceased brother's stock. During the taxable year, the corporation paid the premiums on these policies. The Commissioner and the Tax Court determined that the premiums were taxable income to the insured officer-stockholders. The United States Court of Appeals, reversing, held that the premiums were not taxable income since the corporation, although not named as such, was the real bene-

²⁰ See, e.g., *Cohen v. Rossmore*, 225 App. Div. 300, 233 N.Y. Supp. 196 (1st Dep't 1929).

²¹ 194 Misc. 909, 90 N.Y.S.2d 479 (Albany City Ct. 1949).

²² The decision of *Alpert v. City Motor Sales, Inc.* appears consistent with *Munn v. Boasberg* since the facts were similar and the question of the agency of the transferor was involved. However, since the agency question was not involved in the instant case, it would seem that to have followed the *Alpert* interpretation would have led to an incorrect decision.

²³ UNIFORM COMMERCIAL CODE § 3-302(2). West Virginia also specifically includes a payee in its definition of holder in due course: a holder in due course is ". . . a holder, including a payee, who has taken the instrument under the following conditions. . . ." W. VA. CODE ANN. § 4363 (1955).