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Negotiable Instruments--Conversion--Forged Indorsement (Henderson v. Lincoln Rochester Trust Co., 303 N.Y. 27 (1951))

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with reference to the fact situation in the *International Shoe Co.* case, said anything that would justify the basing of jurisdiction on a single act, be it contractual or tortious in nature.[13]

A practical criterion also will establish that the court in the instant case overextended the rule to protect its residents. By predicating jurisdiction on a single tortious act, an interesting anomaly develops. Initially the court assumes jurisdiction over the defendant because he has been charged with a tort. Upon litigation of the facts it may appear that no tort had been committed. Thus, the court after having caused the parties to litigate the facts before it, must admit that it had no jurisdiction in the first place. The result is tantamount to basing jurisdiction on the allegations contained in the plaintiff's complaint.

It is submitted that the instant case in basing jurisdiction on the commission of a single tort has made too deep an inroad on the traditional concept of jurisdiction. It erred in applying the rule of the *International Shoe Co.* case to a situation never contemplated by the Court in that decision.

NEGOTIABLE INSTRUMENTS — CONVERSION — FORGED INDORSEMENT.—On February 1, 1946, a firm of stockbrokers drew its check on defendant bank as drawee payable to plaintiff. One Savitt, to whom the check was entrusted for delivery, presented the check at defendant bank and received payment for it upon the forged indorsement of plaintiff. The check was never certified by the defendant. Plaintiff, alleging she received no notice of the forgery until 1949, made demand and brought an action against the bank. Special Term granted defendant's motion to dismiss. *Held,* affirmed. As to the first cause of action,[1] it is clear that plaintiff would have been entitled

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[13] Other statutes which subject to jurisdiction a person doing a single act are distinguishable from the statute in the instant case. For instance, a statute which subjected to jurisdiction a non-resident motorist whose use of the state's highways resulted in the commission of a tort was upheld in Hess v. Pawloski, 274 U. S. 352 (1927). But, in that case the statute, directed against a specific inherently dangerous type of conduct, ultimately based "jurisdiction" on the consent of the non-resident which was implied from his voluntary use of the highways. In the instant case the statute, directed against generally undefined conduct, purports to base jurisdiction on "presence" by making a tort tantamount to doing business within the state.

[1] In the same complaint, plaintiff alleged a second cause of action based on a check drawn on the Security Trust Company, and also cashed by Savitt at the defendant bank. The court affirmed the action of Special Term in denying defendant's motion to dismiss.

In relation to the second check, the defendant was a *collecting* bank. The liability of a collecting bank which pays a check on a forged indorsement is beyond the scope of this article.

to recover in an action for conversion commenced before the three-year period of limitations had run. *Henderson v. Lincoln Rochester Trust Co.*, 303 N. Y. 27, 100 N. E. 2d 117 (1951).

It is well settled that the drawer may maintain an action in contract against a drawee bank which pays on a forged indorsement,[2] since by making payment, the bank breaches its implied obligation to disburse money only upon the depositor's order.[3] The rule is otherwise with respect to the payee. While the bank is under a contractual duty to the drawer to pay checks only in exact conformity with the drawer's directions,[4] no such privity of contract exists between the payee and the drawee bank until acceptance or certification by the bank.[5] It is therefore apparent that the payee could not possibly have maintained an action in *contract* against the drawee bank.[6]

In the principal case, any possible conversion action was barred by the statute of limitations. The provocative question is raised, however, whether a payee may maintain a conversion action against a drawee bank which pays a check on a forged or unauthorized indorsement.

Conversion is defined as an "[u]nauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights."[7] Neither Section 127 of the Negotiable Instruments Law (providing for the freedom from liability of the drawee of a draft before acceptance), nor Section 189

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[2] Segal v. Nat. City Bank of New York, 183 Misc. 994, 1001, 52 N. Y. S. 2d 727, 734 (Sup. Ct. 1944) (motion for summary judgment granted), *rev'd on other grounds mem.*, 269 App. Div. 986, 58 N. Y. S. 2d 261 (2d Dep't 1945).

[3] Shipman v. Bank of the State of New York, 126 N. Y. 318, 327, 27 N. E. 371, 372 (1891); *cf.* Crawford v. West Side Bank, 100 N. Y. 50, 2 N. E. 881 (1885). "In discharging its obligation as a debtor, the bank must do so subject to the rules obtaining between principal and agent.

"In disbursing the customer's funds, it can pay them only in conformity to his directions. . . ." *Id.* at 53, 2 N. E. at 881.

[4] Sweeney v. Nat. City Bank of Troy, 263 App. Div. 418, 33 N. Y. S. 2d 885 (3d Dep't 1942), *aff'd*, 290 N. Y. 624, 48 N. E. 2d 711 (1943); *accord*, Critten v. Chemical Nat. Bank, 171 N. Y. 219, 224, 63 N. E. 969, 970 (1902).

[5] See note 8 *infra*.

[6] First Nat. Bank of Washington v. Whitman, 94 U. S. 343 (1876); Sinclair Refining Co. v. Moultrie Banking Co., 45 Ga. App. 768, 165 S. E. 860 (1932); NEGOTIABLE INSTRUMENTS LAW § 189; N. Y. NEG. INST. LAW § 325.

[7] Laverty v. Snethen, 68 N. Y. 522, 524 (1877); *accord*, Eureka County Bank v. Clarke, 130 Fed. 325 (9th Cir.), *cert. denied*, 195 U. S. 631 (1904). The definition poses many problems when it is applied to the case of a payee suing for the conversion of an uncertified check which never came into his possession. Does the uncertified check "belong" to the payee? Is the payee's tentative expectation of possession a sufficient property or possessory *right* to be protected by the conversion action? Again, is it desirable to project the necessity of the common law elements of the tort into the field of bills and notes, where liability is largely imposed by legislative fiat, and where the statutes represent a codification of the law merchant rather than of the common law?

(providing for the freedom from liability of the drawee of an uncertified check) affirmatively provides for such an action.[8]

Still, the action has often been successfully maintained on the theory that the payee is the rightful owner.[9] Other cases have denied the action,[10] on the ground that no property right of the payee is appropriated by the drawee bank since the payee still has his action against the drawer.[11] On the other hand, it has been stated that to allow the payee to proceed directly against the drawee bank tends to avoid circuity of action.[12] Some courts have considered the return of the check to the drawer as the assumption of dominion necessary to constitute conversion,[13] and usually it is the check itself and not the funds to pay it, which is the subject of the tort.[14]

In some of the cases permitting the actions the possession of the payee's absconding agent who forges the indorsement has been

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[8] *Compare* NEGOTIABLE INSTRUMENTS LAW § 127; N. Y. NEG. INST. LAW § 211. "A bill of itself does not operate as an assignment of the funds in the hands of the drawee . . . and the drawee is not liable *on the bill* unless and until he accepts . . . ," *with* NEGOTIABLE INSTRUMENTS LAW § 189; N. Y. NEG. INST. LAW § 325. "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is *not liable to the holder*, unless and until it accepts or certifies the check."

Considering an action *on the bill* as one in contract upon the instrument itself, Section 127 by implication leaves room for an action of conversion where the payee is suing the drawee to recover for a loss caused by a forged indorsement on an ordinary draft. It is difficult to draw the same inference with relation to an action for conversion of a *check* in view of the wording of Section 189. The problem is analyzed in detail in an exhaustive note, 38 HARV. L. REV. 857, 869 (1925).

[9] Louisville & N. R. R. v. Citizens' & Peoples' Nat. Bank of Pensacola, 74 Fla. 385, 77 So. 104 (1917); State v. First Nat. Bank of Albuquerque, 38 N. M. 225, 30 P. 2d 728 (1934); *cf.* Hartford Accident & Indemnity Co. v. Bear Butte Valley Bank, 63 S. D. 262, 257 N. W. 642, 643 (1934).

[10] Sinclair Refining Co. v. Moultrie Banking Co., 45 Ga. App. 768, 165 S. E. 860 (1932); Gordon Fireworks Co. v. Capital Nat. Bank, 236 Mich. 271, 210 N. W. 263 (1926); Miller v. Northern Bank, 239 Wis. 12, 300 N. W. 758 (1941).

[11] In Miller v. Northern Bank, *supra* note 10 at 760, the court said: "The drawer's account remained intact in the bank and the respondent's cause of action against her brokers who were the drawers of the check was in no way interfered with." *See* Nat. Union Bank of Maryland v. Miller Rubber Co. of New York, 148 Md. 449, 129 Atl. 688, 690 (1925).

[12] 26 COL. L. REV. 113, 114 (1926); 12 TEX. L. REV. 226, 227 (1934).

[13] Blacker & Shepard Co. v. Granite Trust Co., 284 Mass. 9, 187 N. E. 53 (1933).

[14] Blacker & Shepard Co. v. Granite Trust Co., *supra* note 13; State v. First Nat. Bank of Albuquerque, 38 N. M. 225, 30 P. 2d 728, 732 (1934); *cf.* Hartford Accident & Indemnity Co. v. Bear Butte Valley Bank, 63 S. D. 262, 257 N. W. 642, 643 (1934). *But see* Goodall Real Estate & Ins. Co. v. North Birmingham American Bank, 225 Ala. 507, 144 So. 7, 9 (1932) (plaintiff waived the tort and recovered in an action for money had and received); Kentucky Title Savings Bank & Trust Co. v. Dunavan, 205 Ky. 801, 266 S. W. 667, 670 (1924) (drawee held liable on both grounds; assertion of dominion over the check, and appropriation of the funds).

held to be the possession of the principal.[15] In thus considering the plaintiff-payee's *constructive* possession, these courts have at least given lip service to the common law elements of the tort. The fact of the plaintiff's prior possession has not always been considered important, however, and, where the drawee bank has been negligent, a recovery has been allowed without treatment of the question.[16]

Aside from the above considerations, there is little symmetry in the pattern of decisional law, either in the *ratio decidendii,* or in the circumstances giving rise to the suit. Professor Britton[17] takes the novel position that a payment to an agent of the payee who signs the payee's name may well not be a payment under a forged indorsement at all. The reason assigned is that presentment of an uncertified check to the drawee is merely a surrender for payment, the payee's signature operating only as a receipt and not as an indorsement. He concedes that liability in conversion will still result where the agent had no authority to collect, since the drawee has exercised dominion over the instrument by paying it to someone other than the holder.[18]

Strangely, there has been but one New York case directly in point since the enactment of the Negotiable Instruments Law. In *Spaulding v. First National Bank*[19] the complaint alleged that ". . . plaintiff was . . . the owner of, and entitled to possession of, a certain check . . . that defendant wrongfully disposed of and converted said check and the proceeds thereof to its own use. . . ." There was no allegation of negligence or of the plaintiff's prior possession of the check. The court denied the defendant's motion to dismiss but recognized that the authorities did not universally permit the action to be maintained.[20] The court categorically affirmed the right of the payee to recover, without considering either the plaintiff's prior possession or the defendant's negligence as a prerequisite to the action.

Despite the many reasons and underlying circumstances it is evident that a majority rule has nevertheless developed allowing a recovery in conversion in a variety of factual situations. The rule has received some criticism, principally on the ground that it deviates from the expressed intent of the Negotiable Instruments Law. The dissenting justice in *State v. First National Bank of Albuquerque*[21] vigorously protested: "To permit recovery in trover and deny it

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[15] Louisville & N. R. R. v. Citizens' & Peoples' Nat. Bank of Pensacola, 74 Fla. 385, 77 So. 104, 105 (1917); *accord,* State v. First Nat. Bank of Albuquerque, 38 N. M. 225, 30 P. 2d 728, 732 (1934).

[16] Fidelity & Deposit Co. of Maryland v. Bank of Charleston Nat. Banking Ass'n, 267 Fed. 367 (4th Cir. 1920).

[17] BRITTON, BILLS AND NOTES § 146 (1943).

[18] *Ibid.*

[19] 210 App. Div. 216, 205 N. Y. Supp. 492 (4th Dep't), *aff'd mem.,* 239 N. Y. 586, 147 N. E. 206 (1924).

[20] *Id.* at 217, 205 N. Y. Supp. at 493.

[21] 38 N. M. 225, 30 P. 2d 728, 733 (1934).

in assumpsit is to circumvent the intended purpose of the Negotiable Instruments Law, and extend the common law fiction of pleading in trover to an extent that even the pleaders during the time of Bracton dared not indulge. . . ." Likewise, the growth of the rule has been attributed to a failure on the part of the courts to give due consideration to the effect of abolishing the theory of the assignment of the account by the drawer upon the issuance of the check.[22]

In the new Uniform Commercial Code, it is specifically provided that payment on a forged instrument is a conversion.[23] The Code, in amending and combining Sections 127 and 189 of the Negotiable Instruments Law,[24] also attempts to remove some of the existing doubts as to potential tort liability arising outside the instrument.[25]

TORTS—NUISANCE—LIABILITY FOR DOUBLE-PARKING.—Plaintiff lawfully parked his car on a public street. When he returned forty minutes later, he was unable to leave because defendant had double-parked alongside his car. Plaintiff claimed that as a result of such discomfort and inconvenience he suffered damages in the amount of twenty-five dollars. Defendant moved for judgment on the pleadings. *Held,* motion denied. The complaint states a cause of action. An obstruction in the public highway is a nuisance. *Harnik v. Levine,* 106 N. Y. S. 2d 460 (N. Y. Munic. Ct. 1951).

The steadily increasing volume of traffic in the City of New York has produced a situation in which the lot of the average motorist is far from a happy one. Among the more frustrating concomitants of such a situation is the virtual imprisonment of one lawfully parked by a double-parker. Practical experience clearly demonstrates that the annoyance and inconvenience caused thereby is not a fictitious element. Few such victims, however, have attempted to litigate their rights.

Concededly, double-parking is a violation of the Traffic Regulations of the City of New York which provide: "No person shall park a vehicle: . . . (o) on the roadway side of any vehicle stopped or parked at the edge or curb of a street. (Double-parking.)" [1]

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[22] Miller v. Northern Bank, 239 Wis. 12, 300 N. W. 758, 760 (1941).

[23] UNIFORM COMMERCIAL CODE § 3-419 (Spring 1951).

[24] UNIFORM COMMERCIAL CODE § 3-409 (Spring 1951). "(1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." See note 6 *supra.*

[25] UNIFORM COMMERCIAL CODE § 3-409, Comment 3 (Spring 1950). "The language of the original section 189, that the drawee is not liable 'to the holder,' is changed as inaccurate and not intended. The drawee is not liable on the instrument until he accepts; but he remains subject to any other liability to the holder."

[1] TRAFFIC REGULATIONS OF THE CITY OF NEW YORK Art. 2, § 10(o).