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Negotiable Instruments--Check Used By Agent to Pay His Own Debt to Payee--Right of Maker to Recover From Payee (Munn v. Boasberg, 266 App. Div. 818 (1943))

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parties in *George v. Bacon* [10] and in *Levin v. Schickler*,[11] but in each instance the effect was to compel contribution from an indorser who would not otherwise have been liable. No example of the release of an accommodation party on the strength of an implied promise has been found, prior to the principal case.

The decision would appear to make clear, then, that the general rule has lost none of its force in cases between individuals, despite the fact that it will no longer be applied when a bank is a party. And the limitation of the suspension of the rule in bank cases is well illustrated in *Citizens' First Nat. Bank of Frankfort v. Parkinson*.[12] In that case the accommodation co-maker's defense was that the bank had neglected to foreclose on collateral security which the maker had deposited, although the co-maker had demanded that the bank do so at a time when the security was ample to pay the note. While recognizing that by the rule in the *Shalom* and *Bergoff* cases, any agreement by the bank to relieve the accommodation party would be void, the court nevertheless held that the defendant might invoke the equitable doctrine in *Pain v. Packard*,[13] and that the accommodation party was released by the failure of the bank to respect his right of exoneration. The principal case will distinguish the rules of construction to be applied to the accommodation party's undertaking in cases between individuals from those which govern when a bank is a party. Once the contract has been construed, the accommodation party in both types of cases will be accorded all the benefits of the doctrine of *strictissimi juris*.

H. L. D.

NEGOTIABLE INSTRUMENTS—CHECK USED BY AGENT TO PAY HIS OWN DEBT TO PAYEE—RIGHT OF MAKER TO RECOVER FROM PAYEE.—George Shuman, owner of the capital stock of a country club, induced plaintiff to give him a check for $775 for the purpose of paying certain deposits to the utilities people which, if not paid, would jeopardize negotiation of an important contract and bring about foreclosure of the country club property. Upon these representations and to provide for these deposits, the plaintiff gave to Shuman his check for $775 drawn to the order of defendant herein, who was the president of the country club. Defendant applied the proceeds of this check in payment of a personal indebtedness owing to him from Shuman.[1] At the close of the trial the complaint was dis-

[10] 138 App. Div. 208, 123 N. Y. Supp. 103 (1910).
[11] 155 Misc. 372, 374, 279 N. Y. Supp. 491, 493 (1935).
[12] 178 Misc. 630, 35 N. Y. S. (2d) 615 (1942).
[13] 13 Johns. 174, 7 Am. Dec. 369 (1816).

[1] An agent must act within authority granted, and persons dealing with an agent appointed for a particular purpose, must inquire as to the extent of the agency. *See* Miles v. Smith, 141 S. E. 314, 37 Ga. App. 619 (1928).

missed. Plaintiff requested no ruling that he was entitled to recover amount of check as a matter of law, but he requested that the case be submitted to the jury to determine whether defendant was a holder in due course and took exception to court's ruling.[2] *Held,* judgment of lower courts in defendant's favor reversed. The check, being drawn by the plaintiff to the order of defendant, placed on defendant the duty to inquire as to the apparent title of Shuman, for it imported on its face that the money represented by it was plaintiff's property.[3] An inquiry would have disclosed that Shuman had no title and was merely an agent authorized to deliver the check to the defendant, to be used for a specific purpose.[4] The defendant was, therefore, chargeable with knowledge of that fact.[5] The possession by Shuman of the plaintiff's check gave no appearance of authority to use the check for purposes other than were intended, and the defendant could not in good faith accept the check and apply the proceeds to the payment of Shuman's personal indebtedness to him.[6] Possession alone is insufficient to support a bare appearance of authority. The use to which defendant put the check was entirely unauthorized.[7] The check itself was constructive notice to plaintiff to inquire of the principal as to the agent's authority. Defendant was not a *bona fide* purchaser for value and a holder in due course because (1) he is the named payee;[8] (2) he could acquire no title from Shuman;[9] (3) Shuman was not a remitter;[10] (4) there was no privity of contract between maker and payee; and (5) defendant is chargeable with knowledge of agent's limited authority.[11] *Munn v. Boasberg,* 266 App. Div. 818, 42 N. Y. S. (2d) 573 (1943).

The leading New York case on this point is *Sims v. U. S. Trust Co.*[12] In that case a check was delivered to defendant trust company by *C,* agent for delivery purposes only. Through the negligence of the teller of the trust company in not observing that these were funds of a trust, and relying on a power of attorney given many years before authorizing *C* to withdraw funds from the bank, the check was cashed at the direction of *C,* who absconded with the funds. The bank was held liable in conversion, for the court held that a duty of inquiry was placed upon it since the check on its face gave defendant sufficient notice of the use to which the proceeds were

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[2] Hirsch v. Schwartz & Cohn, Inc., 256 N. Y. 7, 175 N. E. 353 (1931).
[3] Jackson v. Texas Co., 10 Tenn. App. 235 (1929).
[4] Walker v. Peake, 153 S. C. 257, 150 S. E. 756 (1929); Bowles Co. v. Fraser, 59 Wash. 336, 109 Pac. 812 (1910).
[5] Hathaway v. County of Delaware, 185 N. Y. 368, 78 N. E. 153 (1906).
[6] Wen Kroy Realty Co. v. Public Nat. Bank & Trust Co., 260 N. Y. 84, 183 N. E. 73 (1932).
[7] Walker v. Peake, 153 S. C. 257, 150 S. E. 756 (1929), cited *supra* note 4.
[8] Vander Ploeg v. Van Zuuk, 135 Iowa 350, 112 N. W. 807 (1907).
[9] N. Y. NEG. INST. LAW § 98.
[10] Armstrong v. Am. Exch. Nat. Bank of Chicago, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. ed. 747 (1890).
[11] Apostoloff v. Levy, 186 App. Div. 767, 170 N. Y. Supp. 930 (1919).
[12] 103 N. Y. 472, 9 N. E. 605 (1886).

to be put. The circumstances surrounding the check were suspicious enough so that the bank was under a duty to inquire as to the extent of the authority of *C*. Courts throughout the country are uniform on the liability of the bank and third persons in similar cases,[13] with the present decision an expansion of that doctrine. It is sweeping in its effect and overrules previous limitations established by the court. No matter how slight may be the grounds for suspicion, nor how misleading the acts of the agent, where the check is made out to the order of the defendant and delivered to him by a third person who has received it from the maker, the court places upon the defendant a duty to inquire. Before he accepts such a check, he must be certain it was intended for his use. Should he disregard inquiry, he will be liable in conversion if the agent acted without authority.

K. B.

SECURITIES ACT—SALE OF SECURITIES OVER-THE-COUNTER AT HIGHER THAN PREVAILING MARKET PRICES—REVOCATION OF BROKER'S REGISTRATION.—Petitioner, an over-the-counter dealer and broker in securities, after two hearings before the Security Exchange Commission, had his license revoked for fraud and deceit in violation of Section 17(a) of the Securities Act,[1] Section 15(c)(1) of the Securities Exchange Act,[2] and the Commission's own Rule X-15C1-2.[3] The dealer's methods of operation were as follows: Prospects, usually single women or widows with little knowledge of financial transactions, were called to the 'phone or visited in their homes. They were told of a "wonderful stock", a "marvelous buy", one that was "beyond the usual". High pressured salesmanship gradually broke down any resistance, instilled trust and confidence. Sales were effected at mark-ups ranging from 16.1 per cent to 40.9 per cent above prevailing market prices without any disclosure of real values and with little or no risk to the firm involved.[4] Petitioner contended (1) that Section 15(c)(1) of the Act was unconstitutional and Rule X-15C1-2 invalid for vagueness, indefiniteness, and uncertainty; (2) that no violation of Section 17(a) had been shown; and (3) that the Commission had not offered substantial evidence of current market levels. *Held,* order affirmed. The standards for interpreting the Act are set up within the Act itself and are more than adequate. They make for more definiteness than the standards approved by

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[13] See notes 1, 3, 4, 7, 10, *supra.*

[1] 48 STAT. 84, 15 U. S. C. § 77q (1933).

[2] 52 STAT. 1075, 15 U. S. C. § 780(c)(1) (1938).

[3] Acting under its rule-making power, the Commission set up a two-fold definition of the term "manipulative, deceptive, or otherwise fraudulent" in its rule X-15 C 1-2.

[4] The Commission investigated twenty-seven separate transactions of the respondent: in six, mark-ups were 30%; in seventeen, 21%–30%; and in four, 16%–20%, above prevailing market prices.