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Validity of Indorsement

Ernst W. Puttkammer

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COMMENT ON RECENT CASES

BILLS AND NOTES—VALIDITY OF INDORSEMENT BY SWINDLER.—
[Georgia] H stole an article which he then sold to Michel, telling the latter that his name was G. There really was a person named G, but both H and G were unknown to Michel, who acted in good faith throughout. As requested by H, Michel drew a check in payment, payable to G and intended by him to belong to the man then before him. H indorsed the check in G's name, and sold it for value to the defendant, who likewise was unacquainted with H and assumed that he was in fact G, as he claimed to be. The drawee bank paid the check, but now, after disclosure of all the facts, seeks to recover, in behalf of its depositor, Michel. *Held* for the defendant. The payment had been properly made. *Milner v. First National Bank*.¹

Obviously the decision is correct, and the situation is one repeatedly met with wherever there is need to trace out the chain of title to any property, tangible or intangible. The drawer, M, created a piece of property, the check. He meant to extinguish title thereto in himself and to create it in someone else, viz., the man then and there before him. True, he mistakenly thought that this individual's name was G, and that he had a fair claim on him for this sum of money, neither fact being true. But all this was collateral, by way of inducement; the sole intent was to make the human being then present the owner of the check. H, being the owner, could and did pass a good title to the defendant. The plaintiff bank therefore paid the face amount to the very person entitled, and cannot now recover as on an improper payment. To cite more than a few of the leading cases for this manifest chain of reasoning would be an affectation of learning.²

Instead, however, of resting its decision on this simple ground the court says:

"Under the facts appearing, the loss resulting from the acts of Hollis, the impostor, should fall upon Michel, and to permit a recovery by the bank in the instant case is to allow a shifting of this loss to another person, who in accepting the check acted innocently and did only what Michel intended should be done. It was Michel who bought the cotton and issued the check, and thus put it in the power of Hollis to go out into commercial channels and to procure from another money to which he was not entitled. Both Michel and Milner appear to have acted in good faith. But, where one of

1. (Ga. 1928) 145 S. E. 101.

2. *Cundy v. Lindsay* (1878) 3 App. Cas. 459; *Coggill v. American Exchange Bank* (1847) 1 N. Y. 113, 49 Amer. Dec. 310; *Hortsman v. Henshaw* (1850) 52 U. S. 177; *Trust Co. of America v. Hamilton Bank* (1908) 127 App. Div. 515, 112 N. Y. Supp. 84. With facts almost identical with the instant case, and hence on all fours with it see *Seaboard Natl. Bank v. Bank of America* (1906) 100 N. Y. Supp. 740, 51 Misc. 103.

two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury must bear the loss."

The last sentence of the quotation, with its pseudo-principle of law really sums up the basis of their decision. Even assuming that there was such a principle, it might well be asked in passing, why, under it, M, and not the defendant, was the one who "put it in the power of the third person to inflict the injury." Had the defendant refrained from taking the check and paying H value for it, it would not have been possible for him to have suffered loss. Thus it was he whose conduct made the loss to himself possible. It is no answer to say that he (the defendant) did only what Michel intended should be done. Michel intended that the check should pass only by indorsement by the rightful owner. If H is not that person, then Michel did not mean him to pass it or the defendant to buy it. If H is that person, then the defendant's title is good without recourse to the present argument.

But of course the real vice of the opinion is in its setting up a "principle of law" that does not exist and never has existed. Nor is it given standing by confident references to it as "a well-known rule,"³ when it is neither well-known nor a rule. If A leaves his bicycle in front of his home, and B, a stranger, takes a ride on it and in so doing injures C, it is A whose conduct has put it in B's power to inflict injury on the innocent person, C. But we may be confident that neither Georgia nor any other state would hold A liable to C.⁴ If A asks his friend B to take care of his bicycle for him for a day or two, and B promptly sells it to C, C need not have great hopes of retaining it against A, simply because it was A who put the article in the power of B.⁵ Indeed, it has been so held in Georgia even in a case where A did intrust the article to B

3. *Commercial Bank v. Armsby Co.* (1904) 120 Ga. 74.

4. Exactly in point hereon is *Lewis v. Amorous* (1907) 3 Ga. App. 50, 59 S. E. 338, where an unauthorized person thus misused A's automobile. A passage in the opinion (p. 55) warrants quotation for other reasons beside the sound law that it lays down. "It is insisted, in the argument, that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While, by reason of the rate of pay allotted to judges in this state, few, if any, of them have ever owned these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limits of human ingenuity to make them move at all."

5. "The true owner of property will lose his title in favor of an innocent purchaser for value without notice, only where he has given to another such evidence of the right of selling his goods as, according to the custom of the trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of his property." *Patterson Co. v. Peoples Loan & Saving Co.* (1924) 158 Ga. 503, 507. See also dissent in *Flemming v. Drake* (1926) 163 Ga. 872, 876.

for the very purpose of disposing of it, but where the manner of disposal was improper, and C was defeated despite his innocence.⁶ Or finally, if A, wishing to pay a debt owed by him to B, draws a check for the proper amount, payable to B, and hands it to C with the request that C carry it to B, A puts it in C's power to forge B's indorsement and so to deceive some innocent person into buying the check from him. Yet no one would suppose that such a person could hold A liable, nor does the Georgia rule differ from that of other states.⁷ In the instant case, therefore, if H had not pretended to be G, but had asserted that he was G's agent and so had secured the check payable to G, and then forged G's indorsement, the innocent buyer of the check would not have been protected. Yet it is difficult to see any difference between that and the actual case, if the decision is to lie on the pretended principle of law set up by the court. Certainly M's share in making possible H's fraud was the same whether he believed that H was G or that H was G's servant. If the two situations are different, the difference must lie in other reasons, and it is these that actually control the decision. The alleged principle degenerates merely to an adornment for a result already reached by such other means.

But all the blame should not be visited on the judicial branch of Georgia's government. The legislature is an equal participant, thanks to the Civil Code of 1910, sec. 4537.⁸ In various cases the court has cited this section and followed it with approval. But without apparent exception these expressions of approval were in cases where the same result would have been reached without the statutory aid.⁹ Where, however, the statute and the common law would apparently lead to opposite results, it is interesting to

6. *Washington Loan & Banking Co. v. Stanton* (1924) 157 Ga. 885.

7. *Atlanta National Bank v. Burke* (1888) 81 Ga. 597. Compare *Ander-son Banking Co. v. Chandler* (1921) 151 Ga. 408, where the innocent buyer of an altered instrument was not allowed to enforce it according to its new tenor against a party prior to the alteration who, however, had put it in the power of a third party to make the alteration.

8. "When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury must bear the loss."

9. For example: *Newsome v. Harrell* (1916) 146 Ga. 139, where the defendant asked his son to write a letter making a certain offer to the plaintiff. The son made an error but the defendant signed it and sent the letter without reading it, and was now held to its terms. *Summerford v. Davenport* (1906) 126 Ga. 153, where the defendant executed a negotiable promissory note payable to B, and handed it to B, prior to receiving from B the consideration expected for it. When B failed to furnish it, the defendant refused to pay the note to its holder at maturity, thereby forcing the plaintiff, an innocent endorser, to take it up. The plaintiff recovered. *Burch v. American Grocery Co.* (1906) 125 Ga. 153, where the defendant had made many purchases from the plaintiff, such deals being regularly arranged by the defendant's clerk. The latter, immediately after he was discharged but before the plaintiff heard of the discharge, made a purchase which the defendant now refuses to live up to. It was held, however, that he was bound. It is plainly apparent that all these obviously correct results are in no way dependent on the existence of the statutory provision, but would have been reached in the same manner independent of it, simply under the common law.

note that the court seems regularly to reject the statute and to follow the common law rule, merely stating (often not at all convincingly) that "the statute did not apply." For example, in *Citizens Bank v. Union Warehouse Company*¹⁰ the defendant, a warehouseman, issued his negotiable receipt for cotton stored with him. On the receipt he did not specify grade or weight of bales. He knew that a buyer of such a receipt would assume that the bales were of a certain weight and grade, as a result of the non-specification. In fact they were inferior in both respects. The plaintiff did buy the receipt and did so assume, thanks to the wrongful conduct of the seller of the receipt. He now seeks to visit the resulting loss on the defendant. If the alleged common law principle (or its statutory echo) might ever be properly invoked, it would seem to be here. But the court declared that the statute was "not applicable," saying:¹¹

"The warehouseman did not put it into the power of the bailor to enlarge his obligation arising from his contract. The only thing which he put into his power to do was to assign these receipts and to confer on his assignee his rights, and to subject the warehouseman to his obligation under the contract of bailment."

Certainly the warehouseman did not *authorize* the bailor to do what he did; to say that he did not *empower* him to do it comes close to begging the question. With at least as much plausibility it can be said that he enabled the third person (the bailor) to do something that he otherwise could not have done. And that in turn comes close to saying that he put such a result in the power of the third party.

Another illustration of where the statute was declared to have no application is *Bank of Oglethorpe v. Swindle*.¹² There the dispute was as to ownership of a negotiable note. A was the undisputed owner of the note at the time of its maturity. Soon thereafter he intrusted it to B (indorsed in blank), to collect and to turn the proceeds over to him. Instead B pledged the note to C, who claims it against A. The first part of the opinion is wholly orthodox. He who has no title can ordinarily confer none as against the true owner. Whatever may be the exceptional rule as to negotiable instruments before maturity, after maturity they are like other property, and B has not created in C any rights capable of standing against A. The court then deals with C's contention that he is entitled to protection under Code sec. 4537. That section is declared not to apply by the following reasoning: Before maturity the owner's rights could be cut off in this manner. After maturity it bore on its face an indication that it was not being received "in due course." Hence its buyer took with notice or knowledge of a suspicious circumstance and consequently was not such an "innocent person" as was alone protected under sec. 4537.

10. (1923) 157 Ga. 434.

11. At p. 451.

12. (1922) 155 Ga. 69.

To sum up, the code section is the frailest of reeds to those whose case needs supports. It is an extra ornament to those who have already won their victory. So expressed it seems a harmless sort of thing. But it is submitted that it is in reality a potential active mischief-maker by distracting attention from the consequential to the inconsequential. In short, it is nothing more than a legal red herring.

E. W. PUTTKAMMER.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE'S CONTROL OF ITS WILD LIFE.—[United States] It is a matter of some surprise that Justices Holmes and Brandeis did not join in the dissenting opinion of Mr. Justice McReynolds in the twin cases of *Foster-Fountain Packing Company et al. v. Haydel et al.* and *L. O. Johnson, Jr., and Sea Food Company et al. v. E. J. Haydel et al.*,¹ the first of which involved a statute of Louisiana which regulated the exportation of shrimps and the other the exportation of oysters. The opinions in these cases are written by Mr. Justice Butler.

It appears from the opinions that the shrimps reside in the Louisiana marshes but that nearly all of the canning establishments are situated at Biloxi, Mississippi; that Biloxi has long constituted an important center of the shrimp and oyster industries and is largely dependent upon the Louisiana marshes for its supplies. It also appears that about ninety-five per cent of the shrimps taken from the waters of Louisiana are taken for consumption outside the state. A shrimp bran is made from the heads and hulls in Louisiana, but practically all of it is shipped to Biloxi where it is used to make fertilizer. It is worth less than one per cent of the value of the shrimp. Not more than half the hulls and heads removed in Louisiana is used for any purpose.

The state of Louisiana, however, appears to be anxious to build up its packing industries and evidently with that end in view has passed a statute which declares that all shrimps and parts thereof in Louisiana waters are the property of the state and grants the right to take, can, pack and dry shipments to residents and also to corporations domiciled or organized in the state, operating a canning or packing factory or drying platform therein. It makes it unlawful to export from the state any shrimp from which the heads and hulls have not been removed, but in order that all its inhabitants "may enjoy the state's natural food products," the act makes it lawful to ship unshelled shrimp to any point within the state. Any person, therefore, can catch shrimps within the state but he can only ship them beyond its borders after the heads and hulls have been removed and no shells, heads or hulls are allowed to be exported. A similar statute seems to exist in the case of oysters.

The Supreme Court holds that these statutes are unconstitutional and constitute an interference with interstate commerce.

1. (1928) 49 Sup. Ct. Rep. 6.