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LIABILITY OF INTERVENING INDORSERS TO A PURCHASER FROM A REACQUIRER

Under the law merchant¹ and Sec. 50² of the Negotiable Instruments Law, a party who reacquires an instrument cannot charge any of the intervening indorsers. The obvious purpose of this rule is to prevent circuitry of action, *viz.*, if the reacquirer were permitted to recover from an intervening indorser, the latter could then recover from such reacquirer upon his liability as a prior indorser.

Although the above rule is uniformly applied where the reacquirer attempts to recover from the intervening indorser, neither the law merchant nor the Negotiable Instruments Law adopts a specific rule as to the liability or non-liability of an intervening indorser to an indorsee or purchaser from a reacquirer. There is a dearth of case law on the issue, but the cases which have been found upon the point reveal a decided split.

Four cases have been found wherein it was decided that the indorsee or purchaser from the reacquirer could not recover from the intervening indorser. These cases adopt the principle that the indorsee or purchaser from the reacquirer acquires only that title which the reacquirer had and, since the reacquirer could not have recovered from the intervening indorser, the indorsee or purchaser may not recover. These courts reach this conclusion by reasoning that the purchaser from the reacquirer takes with notice of the fact that his vendor is a reacquiring party who could not have recovered from the intervening indorser. This notice is supplied from the fact that the vendor appears on the instrument as an indorser prior to the intervening indorser.

The first case to pass upon the point was *Howe Mach. Co. v. Hadden*,³ in 1878. In this case, decided before the adoption of

1. For example, see *Carstens v. Little*, 5 Ill. 410 (1843); *Decreet v. Burt*, 7 Cush. 551 (Mass. 1851); *Moore v. Cross*, 19 N. Y. 227 (1859); *Cady v. Shepard*, 12 Wis. 713 (1860).

2. Section 50 of the Negotiable Instruments Law provides:

Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same. But he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

3. *Howe Machine Co. v. Hadden*, 12 Fed. Cas. 710, No. 6,785 (C. C. Ind. 1878).

the Negotiable Instruments Law, the plaintiff, the indorsee from the reacquiring payee, contended that there was a presumption that the defendant, the intervening indorser, was an accommodation indorser for the payee. The court held that this presumption existed only where the defendant's indorsement was in blank and could not be invoked here because the defendant had indorsed specially back to the payee. The court further held that the special indorsement back to the payee was notice to the plaintiff that the payee had repurchased the instrument and, since the plaintiff derived his title through the payee who could not have recovered from the defendant, the plaintiff could not recover. (The facts did not disclose whether the transfer to the plaintiff was made before or after maturity.)

In *Adrian v. McCaskill*,⁴ another case decided prior to the Negotiable Instruments Law, the court held that the indorsee from the reacquirer could not recover from the intervening indorser. Here the plaintiffs took the instrument after maturity and the defendant had indorsed in blank. The court said:

The plaintiffs were affected with, and bound by, notice of what appeared upon the note itself, and they took the note from the original payee, bearing upon its face the fact that he was the first indorser, and that the defendants were his indorsees. . . . Though plaintiffs had no "actual notice," we have already seen that they were charged, in law, with notice of facts apparent upon the face of the paper which they purchased from Patterson [payee].⁵

The plaintiffs contended that under the law merchant they could have stricken out all indorsements subsequent to the defendants' and filled in their names as indorsees of the defendants'; therefore, they should be permitted to recover, though they had not stricken out the subsequent indorsements. The court stated that, although the plaintiffs could have done this if they had had no notice of the reacquisition by the payee, they could not have, in good faith, filled in the indorsement where they had notice of the relation between the payee and the defendants.

The principle of the *Adrian* case was followed and somewhat extended in *Ray v. Livingston*,⁶ which was decided after the adoption of the Negotiable Instruments Law. In this case the payee repurchased the instrument from the defendant who had

4. 103 N. C. 182, 9 S. E. 284 (1889).

5. *Id.* at 187, 9 S. E. at 285.

6. 204 N. C. 1, 167 S. E. 496 (1933).

indorsed in blank. The payee then sold the note before maturity to the plaintiff without indorsing the instrument a second time. The court did not rely upon any specific section of the Negotiable Instruments Law, but cited the *Adrian* case with approval and stated the proposition that the possession of a negotiable instrument raised a presumption of ownership, and that where a prior party obtains possession of a note for the second time and sells it by reissuance, it will be presumed that the prior party obtained the note by negotiation back to him by indorsement in blank when his name does not appear on the note the second time, and the purchaser is charged with notice thereof. Thus, at least in North Carolina, it is well settled that no purchaser from a reacquirer, either before or after maturity, may recover from an intervening indorser, unless the purchaser can affirmatively prove that the reacquirer, in fact, did not repurchase the instrument, but was acting merely as the agent of the defendant or that the defendant indorsed for the accommodation of the vendor.

The recent case of *Denniston's Admr's et al. v. Jackson et al.*⁷ adopted the principle of the *Adrian* and *Ray* cases to preclude recovery by an indorsee from a reacquirer against an intervening indorser. The court did not stress the notice factor, but, rather, stated:

We conclude that the better theory is that of the clean slate, or fresh start, when a note finds its way back into the hands of the payee and that a subsequent holder had no greater right than he from whom the instrument is acquired; thus an indorser, intermediate of the first and second indorsement by the payee or another, cannot be regarded as in the line through which the holders can trace his title.⁸

The view that an intermediate indorser is liable to a purchaser from a reacquirer has been adopted in four cases. Two of the cases were decided before the adoption of the Negotiable Instruments Law and in all four cases the reacquirer transferred the instrument to the plaintiff prior to maturity.

In *Palmer v. Whitney*,⁹ the intermediate indorser had indorsed in blank on the same day the payee had indorsed to him. The court held that there was a presumption that the intermediate

7. 304 Ky. 261, 200 S. W. 2d 477 (1947).

8. *Id.* at 267, 200 S. W. 2d at 480.

9. 21 Ind. 58 (1863).

indorser had indorsed as an accommodation for the payee, and therefore was liable to the plaintiff, a purchaser from the payee. The court, in its opinion, did not make the point clear, but apparently the defendant would have prevailed had he been able to enter evidence which would have rebutted the presumption that he was an accommodation indorser. If this is true, then the case is not authority for the proposition that an intermediate indorser is unequivocally liable to a bona fide purchaser from a reacquirer.

The first square holding that the intermediate indorser is liable to the purchaser from the reacquirer was rendered in *West Boston Sav. Bank v. Thompson*.¹⁰ The court said:

The mere fact that a note, before its maturity, comes in the usual course of business into the hands of the payee after having been once negotiated by him, does not destroy its negotiability, nor defeat the right of a bona fide holder to recover against all who are parties to the note at the time it is negotiated to him.¹¹

After the Negotiable Instruments Law was adopted in Massachusetts, the court in *State Finance Corp. v. Pistorino*,¹² cited the above quotation from the *West Boston Bank* case with approval and held that the purchaser from the reacquirer could recover from the intervening indorser. However, the court partially based its decision upon the holding of a Massachusetts case¹³ wherein it was held that any holder could fill in his name as indorsee under a blank indorsement and strike out all indorsements subsequent to the blank indorsement. Thus, in the principal case where the defendant's indorsement was in blank, the court could have reached the same result without resort to the *West Boston Bank* case.

In *Persky v. Bank of American Nat'l. Ass'n.*,¹⁴ the court accepted the view that the intermediate indorser is liable to the

10. 124 Mass. 506 (1878).

11. *Id.* at 515.

12. 245 Mass. 402, 139 N. E. 653 (1923).

13. *Parker v. Roberts*, 243 Mass. 174, 137 N. E. 295 (1922). In this case the court held that the payee who indorsed in blank was liable to plaintiff who did not have to show title through indorsements subsequent to the payee's, but could strike out these indorsements and fill in his name as indorsee from the payee. It should be noted that this decision is peculiar to Massachusetts, for the correct interpretation of Sections 34, 40 and 9(5) of the Negotiable Instruments Law leads to an opposite result. For an extensive analyses see BRITTON, *BILLS AND NOTES* 248 (1943).

14. 235 App. Div. 146, 256 N. Y. Supp. 572 (1932).