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## Commercial Law: Negotiable Instruments

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insurers drew a dissent by two of the Justices who felt that a good faith effort had been made to settle the claim. The case will warn any insurer not to urge arson as a defense and then make no effort to prove it.

In *LeBreton v. Penn Mut. Life Ins. Co.*,<sup>6</sup> an insured, a naval reserve officer, while on an authorized flight as part of his cross-country training, was killed when the plane crashed. The claimant's effort to establish that the deceased was not at the time a "member of the crew" so as to avoid the application of a provision limiting coverage, was found without merit by the court in a well-reasoned opinion.

### NEGOTIABLE INSTRUMENTS

*Paul M. Hebert\**

*Fidelity National Bank of Baton Rouge v. Vuci*<sup>1</sup> was an important decision clarifying the legal remedy available to an endorsee bank which cashes a check for a customer who has taken the check under a forged or unauthorized endorsement. Six checks drawn on out-of-state banks were remitted by the drawers to the payee in settlement of various invoices. An employee of the payee forged the payee's endorsement and, without authority, cashed the checks with the defendant, a bookmaker. The proceeds were lost in gambling at defendant's establishment and no portion was received by the payee. The defendant endorsed each check, presented the same to the plaintiff bank and the bank paid the sum represented by the checks to the defendant. The plaintiff bank was in good faith and knew nothing of the circumstances that resulted in defendant's lack of title. Under the usual guaranty of all prior endorsements, the checks were duly forwarded to the six out-of-state drawee banks which, upon presentation, paid the items and debited the account of the drawers. When the forgery was discovered, each of the six drawee banks made demand upon plaintiff bank for reimbursement under the guaranty of prior endorsements. The plaintiff bank did not reimburse the drawee banks, but the checks were relinquished to the plaintiff for the purpose of supporting the bank's action against the defendant for recovery of the proceeds. The court sustained the plaintiff bank's action on the theory of

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6. 223 La. 984, 67 So.2d 565 (1953).

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1. 224 La. 124, 68 So.2d 781 (1953).

breach of warranty<sup>2</sup> by the defendant endorser and on the further theory of recovery of money paid under a mistake of fact.<sup>3</sup> It was held that the plaintiff was not a "holder" of the checks within the meaning of the Negotiable Instruments Law, but that the demand made on the plaintiff for repayment by the drawee banks coupled with plaintiff's clear liability to its endorsers constituted a sufficient interest in plaintiff to permit maintenance of the suit.<sup>4</sup> A dissenting opinion maintained that the plaintiff was without interest to sue because reimbursement had not been made by the plaintiff bank to the drawees.<sup>5</sup>

The practical result of the case is highly desirable and represents a commendable willingness of the court to look through technicalities to the substance of the matter.<sup>6</sup> Unquestionably, under the circumstances, as the signature of the payee was forged and unauthorized, the defendant as the party who had cashed the check for the forger would ultimately bear the loss.<sup>7</sup> Defendant, in effect, was insisting that there should be circuitry of action in arriving at that result or that the plaintiff bank should, at least, have reimbursed the drawees prior to bringing the action. Had the plaintiff bank in this case reimbursed the drawee banks there could be no question of the right of the plaintiff bank to maintain the action. The court's decision that the plaintiff bank could not be a "holder" because of the forged endorsement of the payee does not appear to be sound on the facts before the court.<sup>8</sup> As between the endorser who takes subsequent to the forged endorsement and his endorsee, the latter literally complies with the definition of "holder" as that term is used in the Negotiable Instruments Law. Section 23 of the Negotiable Instru-

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2. NEGOTIABLE INSTRUMENTS LAW §§ 65, 66; LA. R.S. 7:65, 66 (1950).

3. Art. 2301, LA. CIVIL CODE of 1870.

4. Art. 15, LA. CODE OF PRACTICE of 1870, provides that an action can only be brought by one having a real and actual interest. The drawee banks had actually made demand on the plaintiff for reimbursement and the plaintiff's liability to the drawee banks was clear, assuming that the payee's endorsement was a forgery.

5. In Justice Hamiter's view, the plaintiff's interest to sue would arise only when reimbursement was actually made. See dissenting opinion in principal case, 224 La. 124, 135, 68 So.2d 781, 785 (1953). But this runs counter to the whole theory of the Negotiable Instruments Law, which permits suits by "holders" who are not the real party at interest. Cf. NIL § 51; LA. R.S. 7:51 (1950).

6. Justice Hawthorne in the majority opinion, 224 La. 124, 134, 68 So.2d 781, 784 (1953), stated: "We consider the defendant's contention unduly technical and one for the purposes of delay only, because there is absolutely no question under the facts of this case of ultimate liability."

7. LA. R.S. 7:23 (1950).

8. NIL § 191; LA. R.S. 7:191 (1950) defines the "holder" as the payee or the endorsee of a bill or note who is in possession of it or the bearer thereof

ments Law does not lead to a contrary result because under its terms the forged endorsement is operative as against a person who is precluded from asserting the forgery. The defendant as a subsequent endorser was clearly precluded from asserting the forgery of the payee's endorsement as a warrantor of the genuineness of prior endorsements. The result reached in the case on the grounds of unjust enrichment and breach of warranty is sound, but the plaintiff should likewise have been entitled to recover as "holder" of the checks against its endorser who had taken the checks from the party endorsing and negotiating without authority.<sup>9</sup>

In *General Motors Acceptance Corporation v. Daigle*<sup>10</sup> the court reached a highly undesirable result which may operate to limit greatly the status of automobile finance companies as holders in due course of chattel mortgage paper. Specifically, the court held that the plaintiff finance company was charged with knowledge of infirmities in the instrument taken by it on August 10, 1953, because (1) the title certificate showing the infirmity (*i.e.*, that car was a used car and not new as recited in the bill of sale) was not issued until August 18, 1953, and that was the date that the title to the car was marketable; (2) a purchaser of a financing note is not a holder in due course until the whole transaction is completed by issuance of the certificate of title; (3) that, as of August 18, 1953, a comparison of the bill of sale and mortgage papers with the title papers would have disclosed the infirmity; and (4) because the finance company having previously financed the car for another purchaser had papers in its possession which would have shown that the car was a used car and not a new car as set forth in the bill of sale and chattel mortgage. While the court disposed of the case on the factual ground of finding "knowledge" or "notice" of the infirmity in the instrument on the part of transferee, it nevertheless appears that the case applies a standard of care which ignores the effect of Section 56 of the Negotiable Instruments Law.<sup>11</sup> The Certifi-

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9. BRITTON, BILLS AND NOTES 749, § 158, 661, § 142 (1943), relied upon by the court does not contemplate a situation in which the endorser who is ultimately liable is the defendant in an action brought by his endorsee.

10. 225 La. 123, 72 So.2d 319 (1954).

11. NIL § 56; LA. R.S. 7:56 (1950) provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." This provision was intended to repudiate the minority common law rule that negligence amounted to bad faith. For discussion, see BRITTON, BILLS AND NOTES 407 *et seq.*, § 100 (1943).

cate of Title Act<sup>12</sup> should not be construed as limiting the concept of negotiability, yet this is the net effect of the decision. Though the legislature moved promptly to change the result of this decision by passing Act 228 of 1954, it is doubtful that the statute covers all of the broad implications of the *Daigle* case.<sup>13</sup> In applying the Certificate of Title Act to determine the plaintiff's status as a holder in due course, the court gave that act an interpretation that was probably never intended and, in fact, is in conflict with the very purpose of the statute.<sup>14</sup> Certainly, there was no actual knowledge of the transferee that there had been a false representation as to the car being a new car. It is inconceivable that the transaction would have been financed had that been known. Furthermore, to impose a duty to consult its own records involving the same car in a previous transaction is unrealistic and unduly burdensome.<sup>15</sup> The failure to engage in such an extraordinary procedure should not be classified as "bad faith" on the part of a transferee. The instant case comes perilously close to the repudiated doctrine that negligence is bad faith. The plaintiff purchased the note on August 10, 1954, without actual knowledge of any infirmity in the instrument and should have been accorded the protection of a holder in due course under Section 52 of the Negotiable Instruments Law.<sup>16</sup> A clear distinction between the purchaser of the note and the

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12. LA. R.S. 32:706 (1950).

13. La. Acts 1954, No. 228, amending LA. R.S. 32:706 (1950), added the proviso to the original section "that neither the foregoing nor any other provisions of this Vehicle Certificate of Title Law shall be construed to have the effect of delaying, suspending, or preventing the negotiation of a note secured by a chattel mortgage on a vehicle from being complete until the purchaser shall have obtained a certificate of title to said vehicle, the actual intention and effect of this law being that such chattel mortgages shall be complete and effective as to all persons from the date of notation of same by the commissioner on the face of the certificate of title for such vehicle, or, in the case of mortgages given by automobile dealers to secure so-called floor plan loans, from the time they are entered by the commissioner on the register of the floor plan mortgages, all in accordance with the provisions of R.S. 32:710 B." It is obvious that the statute was intended to overrule the basic premise of the *Daigle* case, but the statute does not affect the imputed notice the court found present as a matter of fact.

14. One of the very purposes of the Vehicle Certificate of Title Law is to furnish greater security to persons lending money on the security of chattel mortgages on automobiles. It was never intended that the rights of a transferee under the Negotiable Instruments Law are to be held in abeyance, as it were, until the certificate of title was complete.

15. To require an automobile finance company at its peril to recall a previous sale of the same automobile when a subsequent transaction involving the sale of the same car as a new car arises, is virtually to exact that an index or filing system of serial and motor numbers be maintained for such a limited purpose.

16. LA. R.S. 7:52 (1950).

marketability of title to the automobile which secured the note should have been drawn in this case. Had that been done, the opposite result should have been reached and the lower court's decision affirmed.

## Criminal Law and Procedure

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### CRIMINAL LAW

#### *Attempted Perjury*

Article 27 of the Criminal Code<sup>1</sup> covers an attempt to commit any crime, and the penalty is fixed at one-half of that for the intended offense. The elements of this inchoate crime are a specific intent to commit the basic offense and the doing of an act "tending directly toward the accomplishment of that object." This offense embraces the conduct of one who is apprehended while his criminal undertaking is still incomplete, or the situation where completion of the offense was rendered impossible by some unknown circumstance.

In *State v. Latiolais*<sup>2</sup> the defendant had been charged with perjury, and a verdict of attempted perjury returned by the jury.<sup>3</sup> Defense counsel argued that there was no separate crime of attempted perjury, since the basic perjury definition was so broad that it covered the mere making of a false statement, with intent to use it in a judicial or official proceeding.<sup>4</sup> Any act that went beyond the zone of preparation, according to this reasoning, was either perjury or no crime at all. In overruling this contention, Justice Hawthorne pointed out that an attempted perjury verdict would be appropriate in a case where the completed crime was rendered impossible by some "extraneous circumstance," such as the fact that the one administering the false oath was not authorized or qualified to administer it.<sup>5</sup> This situation is clearly embraced within the attempt article, which specifically states that "it shall be immaterial whether, under

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1. La. R.S. 14:27 (1950).

2. 74 So.2d 148 (La. 1954).

3. La. R.S. 15:406 (1950).

4. La. R.S. 14:123 (1950).

5. 74 So.2d 148, 150 (La. 1954).