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occurs; by the same token, the court should have power to compel the trustee to correct an abuse which has already occurred.

It is interesting that the court relies upon the settlor's intention as its standard, rather than the less subjective "prudent man rule." In his respect, the decision accords with those in other jurisdictions.

Huber v. Calcasieu Marine National Bank[6] involved an action against the trustee for alleged maladministration of an inter vivos trust. The settlor of that trust died before the action was brought, leaving her entire estate in two testamentary trusts, one for the benefit of her only child, a son, and the other for the benefit of his six children. It was alleged and sustained that the action against the trustee of the inter vivos trust was an asset of the estate of the settlor and thus became part of the trust property of the testamentary trusts. It remained to determine the proper parties plaintiff. Applying article 2222,[7] the court held that the trustee was the proper party plaintiff and sustained an exception of no cause or right of action against the remaining plaintiffs, who were beneficiaries of the testamentary trusts. The result appears to be correct.

COMMERCIAL PAPER

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When the signature of the payee of a check is forged, certain well-settled consequences result: subsequent takers cannot become holders in due course,[1] and the drawee bank pays

6. 262 So.2d 404 (La. App. 3d Cir. 1972).

7. "A trustee is the proper plaintiff to sue to enforce a right of the trust estate, except that a beneficiary may sue to enforce such a right, in order to protect his own interest, in an action against:

"(1) A trustee and an obligor, if the trustee improperly refuses, neglects, or is unable for any reason, to bring an action against the obligor; or

"(2) An obligor, if there is no trustee or the trustee cannot be subjected to the jurisdiction of the proper court."

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1. Under R.S. 7:52, a holder in due course is said to be a "holder" who has taken the instrument under the conditions therein prescribed. R.S. 7:191 defines "holder" as the payee or indorsee who is in possession of the instrument, or the bearer thereof. But under R.S. 7:30, one becomes a holder through the negotiation to him, in the case of order paper, by the indorsement of the prior holder. Thus, the forger, not himself being a "holder" cannot negotiate the instrument in such a manner that the taker would be a holder, hence not a holder in due course. The same is true with respect to subsequent transfers of the instrument bearing the forged indorsement. *See* Fidelity Nat. Bank v. Vuci, 224 La. 124, 68 So.2d 781 (1953).

such an instrument at its peril,[2] since the drawer can demand that his account be re-credited, so long as he acts in a timely fashion.[3] If, however, the drawee bank does pay such an instrument, as to the party receiving the payment, recovery[4] may be had by the bank, since that payment is not final.[5] Thus, the line of transactions respecting the instrument unfolds in reverse, each party recovering against his own transferee.[6] The payee is said to have no cause of action against the drawee bank or collecting banks, but rather his recourse is against the drawer.[7] Though circuitous, this approach is well-established in Louisiana.[8] The payee is the last "holder" of the instrument and is the owner of it, having all rights as such.[9]

Suppose, however, that the drawer executes the check to copayees *A* and *B*, and delivers the check to *B*, who subsequently forges *A*'s indorsement and obtains payment from the drawee bank. Can co-payee *A*, who has never had possession of the instrument and thus has never been a "holder"[10] or transferee of it, bring an action against the drawer on the instrument? The

2. Couvillion v. Whitney Nat. Bank, 218 La. 1096, 51 So.2d 798 (1951); Allan Ware Pontiac, Inc. v. First Nat. Bank, 2 So.2d 76 (La. App. 2d Cir. 1941). The drawee bank in such cases will have breached its agreement with the drawer to pay out of the drawer's deposited funds solely pursuant to his order or direction. Thus, if on a check payable to "the order of *X*," *X*'s signature is forged, the check no longer is flowing according to "the order of *X*," and hence it is no longer the drawer's order.

3. Though R.S. 6:53, which permits only a one year period within which to bring suit to enforce the liability of a bank which has paid money and charged to the depositor's account on a forged or raised check has been held inapplicable to suits against a bank for payment of a check bearing a forged indorsement, *Wm. M. Barrett, Inc. v. First Nat. Bank*, 191 La. 945, 186 So. 741 (1939), the depositor is under a duty to exercise due diligence to examine cancelled checks and give immediate notification to the bank upon discovery of any *error* therein. *See* LA. R.S. 6:36 (1950). Furthermore, R.S. 6:35 provides that a statement of account rendered by the bank to the depositor is deemed finally adjusted and settled and its correctness conclusively presumed after a period of five years from the date of its rendition.

Unless the check has been "raised," however, there will be no "error" in the correctness of the account, and, as noted in the *Barrett* case, the depositor is not usually in a position to spot forged indorsements. In most cases, the unpaid payee will bring the matter to the drawer's attention.

4. Such a recovery could be based on rescission for mutual mistake of fact under Civil Code article 2301, or on breach of the vendor warranties.

5. Comment, 16 LA. L. REV. 128 (1955).

6. Thus, the party actually taking from the forger has the burden of recovering against that wrongdoer.

7. The underlying theory is that the payee has not received payment, while the drawer can demand a re-crediting of his account.

8. Fidelity Nat. Bank v. Vuci, 224 La. 124, 68 So.2d 781 (1953); M. Feitel House Wrecking Co. v. Citizens Bank & Trust Co., 159 La. 752, 106 So. 292 (1925); Fernon v. Capital Bank & Trust Co., 190 So.2d 504 (1st Cir. 1966).

9. Fidelity Nat. Bank v. Vuci, 224 La. 124, 68 So.2d 781 (1953).

10. LA. R.S. 7:191 (1950).

Second Court of Appeal faced this issue of apparent first impression in *Smith v. Louisiana Bank & Trust Co.*[11] The court held that a co-payee whose indorsement had been forged may sue the drawer *on the check*, despite the fact that he is not and never was a "holder," since title to the instrument cannot pass without the valid indorsement of both payees.[12] Thus, the non-indorsing co-payee remains the owner of his "rights" in the instrument,[13] and has, in fact, the rights of a holder[14] to sue the drawer on the instrument. The drawer is entitled to recover as against the drawee, and the transactions on the check again unfold in reverse.

While the result obtained is perhaps laudable in view of the relative equities of the parties involved,[15] the rule announced does place a strained construction on the concept of holder status—a status not afforded one who is in possession of an instrument but who has taken from or through a forger of a necessary indorsement. The court, however, carefully avoided sanctioning one viable alternative[16]—the direct action by the payee against either the drawee bank or a collecting bank[17]—thus preserving the rule of *M. Feitel House Wrecking Co. v.*

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11. 255 So.2d 816 (La. App. 2d Cir. 1971).

12. R.S. 7:41 states that "where an instrument is payable to the order of two or more payees . . . who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others." On the issue of delivery, it is arguable that delivery to one of the co-payees is constructive delivery to the other. *See* Vaughn v. Vaughn, 118 So.2d 620 (Miss. 1960).

13. The non-indorsing co-payee was held to be entitled to recover from the drawer one-half of the amount of the check—his interest as a joint payee, the court citing to *Baggett v. Rightor*, 4 Rob. 18 (La. 1843), and *Barrow v. Norwood*, 3 La. 437 (La. 1832).

14. The court, in fact, labeled the plaintiff co-payee as a "holder." Smith v. Louisiana Bank & Trust Co., 255 So.2d 816, 831 (La. App. 2d Cir. 1971).

15. The ultimate loss fell upon the forger.

16. Plaintiff might arguably have a right to recover possession of the check even though he can assert no prior possession of it. *Cf.* M. Feitel House Wrecking Co. v. Citizens' Bank & Trust Co., 159 La. 752, 106 So. 292 (1925) (dicta). And, plaintiff obviously could sue on the underlying obligation. Normally, the only benefit derived from suing on an instrument, as opposed to suing on the underlying obligation, is the possibility that the plaintiff may be a holder in due course as to whom personal defenses of the drawer or maker are not assertable. This benefit, on the other hand, does not normally flow to the payee anyway, because he is privy to the transaction from which such defenses arise.

17. Some jurisdictions permit such an action. *See* Annot., 100 A.L.R.2d 671 (1965).

Citizens Bank & Trust Co.[18] handed down forty-seven years ago. Where the *drawer* seeks a direct recovery[19] from a collecting bank, sound policy reasons may exist which dictate that no action should lie.[20] If like policy considerations exist[21] where the payee seeks to recover from the drawee or collecting bank, the opinion does not express them.

Permitting a payee to whom an instrument was never delivered and who is not the holder thereof nor has had at any time a true possessory interest therein to sue on the instrument has a curious aspect: such a payee must be assumed to have legal title to the instrument, for Louisiana jurisprudence has in the past denied a right of action on the instrument in such cases in the absence of a showing of holder status or legal title.[22] The advantages that such an approach may have over allowing a direct action by the payee against the collecting or drawee bank are imperceptible.[23] The majority of jurisdic-

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18. 159 La. 752, 106 So. 292 (1925). There the drawer drew a draft payable to the order of the plaintiff, payable through Canal Bank & Trust Company, and delivered it to plaintiff's collection agent, who then indorsed plaintiff's name without authority and deposited the draft for collection to its account in the defendant bank.

19. As, for example, where the check is stolen prior to delivery to the named payee, and payment is subsequently obtained via a forged indorsement of the payee's name.

20. The court in *Stone & Webster Engineering Corp. v. First Nat. Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358 (1962), held that such an action did not lie, since the theoretical appeal of avoiding circuity of action was overshadowed by the possible avoidance by the drawer of defenses assertable by the drawee. One such defense arises by virtue of the drawer's duty to exercise due care in the examination of his monthly statements and returned items. To allow the drawer to recover against a collecting bank would perhaps violate the principle that a depositor has no claim to any specific assets in his bank, but only a contract right against it. *See* Note, 36 HARV. L. REV. 879 (1923).

The *Stone & Webster* view, which is said to be the minority view, was cited favorably by the Fourth Circuit Court of Appeal in *Gregory-Salisbury Metal Products, Inc. v. Whitney Nat. Bank*, 160 So.2d 813 (La. App. 4th Cir. 1964).

21. The opinion in *Stone & Webster* left open the question of the payee's rights against the collecting bank. 184 N.E.2d 358, 363 (1962).

22. Foltier v. Schroder & Schreiber, 19 La. Ann. 17 (1867); Estate, Inc. v. Southern Land Title Corporation, 230 So.2d 341 (La. App. 4th Cir. 1970). *Cf.* Fidelity Nat. Bank v. Vuci, 224 La. 124, 68 So.2d 781 (1954).

23. Part of the theory of requiring the entire transaction to circuitously reverse itself is that the collecting or "cashing" bank may recover from the forger by virtue of the indorsement warranties of R.S. 7:66. *Smith v. Louisiana Bank & Trust Co.*, 255 So.2d 816, 819 (La. App. 2d Cir. 1971). Whether realized by the court or not, this remedy is indeed illusory:

tions[24] do allow the direct action against the bank or person collecting from the drawee, either on a conversion theory or as for money had and received. In such jurisdictions the fact that the check in question did not reach the hands of the payee is usually immaterial.[25] Such an approach would be preferable from the drawer's point of view since he avoids needless litigation, and if it is assumed that the forger is rarely held accountable, the loss is usually borne by the "cashing" bank anyway.

The Uniform Fiduciaries Act[26] provides liability as against a bank with respect to negotiable instruments drawn by a known fiduciary where the bank takes such an instrument with actual knowledge that the fiduciary is committing a breach of his fiduciary obligations in drawing or delivering the instrument or where the bank is possessed of knowledge of such facts that taking the instrument amounts to bad faith.[27] And, if the fiduciary draws a check upon his principal's account payable to the drawee bank and delivers it to the bank as payment of or security for a personal obligation of the fiduciary, the bank will be liable to the principal, if in fact the fiduciary has by so drawing or delivering the check, committed a breach of his fiduciary obligations.[28] In *Guaranty Bank & Trust Co. v. C & R Development Co.*,[29] the board of directors of a corporation authorized

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R.S. 7:66 states that the warranties run to "all subsequent *holders in due course*" a status which the court itself admits that the collecting bank cannot obtain, due to the forged indorsement. *Id.* at 820. (Emphasis added.) Thus the only viable theory of recovery for the collecting bank will be that of recovery of money paid under a mistake of fact under Civil Code art. 2301. This is the very remedy most jurisdictions give the payee as against the collecting bank. Though the court in the instant case states that "[i]n the *Vuci* case (68 So.2d 781), the cashing bank was allowed to recover against the forger [of the indorsement] under a breach of warranty, LSA-R.S. 7:65, 7:66 . . . ," in fact, that case holds that since the collecting bank was not a holder it could *not* maintain such an action. *Fidelity Nat. Bank v. Vuci*, 224 La. 124, 130, 68 So.2d 781, 783 (1953).

24. It is stated in 10 AM. JUR. 2d *Banks*, § 632 (1963), at 599-600: "Although there are a few scattered cases to the contrary, the general rule established by nearly all courts is that a bank . . . which, or an individual who, has obtained possession of a check upon an unauthorized or forged indorsement of the payee's signature, and has collected the amount of the check from the drawee, is liable for the proceeds thereof to the payee . . . ."

25. *See* House-Evans Co. v. Mattoon Transfer & Storage Co., 275 P.2d 268 (Okla. 1954).

26. LA. R.S. 9:3801-14 (1950).

27. LA. R.S. 9:3805 (1950).

28. LA. R.S. 9:3808 (1950).

29. 260 La. 1176, 258 So.2d 543 (1972).

one Clark, a shareholder, director, and officer of the company, to sign corporate checks as one of the company's two directors required to so sign.[30] Clark, who was personally indebted to the drawee bank on loans relating to a separate business venture, allegedly induced the other authorized cosigner to sign six corporate checks, none of which contained the name of the intended payee, after which Clark inserted the drawee-bank's name as payee. The proceeds of the checks were then applied to the payment of Clark's indebtedness to the bank. The bank, which had mailed monthly statements to the corporation along with the cancelled checks, apparently was unaware that Clark's co-signer had signed the checks prior to the insertion of the bank's name as payee. The Louisiana supreme court held that the bank was in *bad faith* within the meaning of R.S. 9:3805 and 3808 when it received the *first*[31] of the six checks, since it was both the drawee bank and the payee of that check. This fact, said the court, gave the bank clear evidence of a probable misappropriation and gave rise to a duty to inquire as to the validity of the payment. To the bank's argument that the statute has no application where there are two fiduciaries, the court observed that the Statute's definition of "fiduciary" includes "any . . . persons acting in a fiduciary capacity,"[32] and that it could not be said that the co-fiduciary had not violated fiduciary obligations by signing the checks in blank.

PUBLIC LAW

ADMINISTRATIVE REGULATION: LAW AND PROCEDURE

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The statute governing the issuance of certificates and permits to motor carriers contains no provision with respect to

30. The corporation originally gave Clark authority to issue checks on his signature alone. The bank, however, demanded a co-signer.

31. In the absence of prior Supreme Court interpretation of the Uniform Fiduciaries Act, the court relied upon the decision in *Maryland Casualty Co. v. Bank of Charlotte*, 340 F.2d 550 (4th Cir. 1965), which held on similar facts that the bank was liable on all but the first of a series of checks under the same provisions of the Act.

32. LA. R.S. 9:3801(2) (1950).

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