C O P Y IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA.

William Whittingham, Plaintiff vs. Federal Reserve Bank of Kansas City, Mo., a corporation, Defendant.	)	OPINION OF THE COURT.

Plaintiff brings this suit at law against the defendant to recover from the defendant the amount of a certain cashier's check issued by the Wyoming State Bank of Lusk, Wyo., made payable to the plaintiff herein, a resident of the City of Village of Pardeeville, Wisconsin, on the ground that as the agent of the plaintiff for the collection of said check the defendant violated its duty and was grossly negligent in its proceedings to collect said check, resulting in its failure to collect.

Insofar as it is necessary here to relate plaintiff in his amended petition alleges that on or about _____ date of February 1923, he caused to be placed with the defendant for the purpose of immediate collection and payment in legal tender money of the United States, the cashier's check referred to, same being for $1220.40 and plaintiff alleges that he did so by depositing said check in the Pardeeville State Bank of Wisconsin for collection on February 17, 1923, which bank immediately forwarded same to the First Wisconsin National Bank of Milwaukee for collection, the latter bank in turn forwarding same to this defendant; that the defendant negligently mailed said check, with other items, direct to the Wyoming State Bank at Lusk, which issued said check and negligently accepted in payment therefor the Lusk Bank's draft on the First National Bank of Cheyenne, Wyoming, and thereupon the Lusk Bank stamped

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its cashier's check paid; that at the time of the presentation of said cashier's check to the Lusk Bank for payment, and at the time plaintiff accepted its worthless draft in payment therefor, said Lusk Bank had in its possession sufficient legal tender money to pay said cashier's check in full; that very soon after defendant's receipt of the Lusk bank draft aforesaid, said Lusk bank failed and a receiver therefor was appointed, whereupon defendant filed with the receiver it's claim and proof of ownership of said draft. That by reason of the foregoing facts the defendant became and is liable to the plaintiff for the amount of plaintiff's cashier's check, placed in defendant's hands for collection, and for which he prays judgment, with interest and costs.

To this petition the defendant filed it's answer in which it alleges that on or about February ______, 1923, it received for collection from the 1st Wisconsin Nat'l Bank of Milwaukee for the account and credit of the Federal Reserve Bank of Chicago, of which the Milwaukee bank was and is a member, the cashier's check referred to in plaintiff's petition, in the sum of $1220.40, which the plaintiff had endorsed and deposited in the Pardeeville State Bank of Pardeeville, Wisc., which bank had forwarded said check to the said 1st Wisconsin Nat'l Bank of Milwaukee; that defendant in due course of business and without any negligence, but in the exercise of due diligence and with lawful right and authority so to do, promptly forwarded said check to said Wyoming State Bank of Lusk for payment, and thereupon received from said bank it's draft in the amount of said check which draft, however, was dishonored, and not paid because of the failure and closing of said Lusk bank, whereupon defendant charged back to the account of the Federal Reserve Bank of Chicago the amount of said check, as it had a right to do. Thereupon defendant pleads regulations J-series of 1920 promulgated by the Federal Reserve Board, and also Bulletin #184, issued by said Federal Reserve Bank of Chicago, under date of December 7, 1922, as contained in a general letter known as

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General Letter D-1, under date of January 15, 1923, likewise a general letter of authority by said Chicago bank to defendant under date of Nov. 16, 1922, and alleges that it was operating under and in pursuance of the same, and that it received and handled the check in question in conformance to said rules and regulations, and the statutes of the United States pertaining to the subject; that the 1st Wisconsin Nat'l Bank from which defendant received said check was and is a member bank of the Chicago Federal Reserve District and had full knowledge and notice of all of the rules and regulations under which defendant as a Federal Reserve Bank operated and was required to operate in the handling of said check; that defendant believed said 1st Wisconsin Nat'l Bank was the owner of said check and entitled to the proceeds thereof and dealt with said bank accordingly and that prior to the filing of plaintiff's petition in this case, the defendant had no knowledge or notice of any alleged right or claim of plaintiff in or to said check or the proceeds thereof, or of any connection between plaintiff and the Pardeeville bank or between plaintiff or the Pardeeville Bank and the 1st Wisconsin Nat'l Bank of Milwaukee.

Defendant admits that for the benefit of the said Milwaukee bank, which which it dealt as the presumed owner of said cashier's check, it filed proof of claim for the amount of said check with the receiver of the insolvent bank at Lusk and that it did so with the consent and authority of said Milwaukee bank. That said claim was allowed and that since the allowance thereof defendant has received two dividends thereon which it promptly transmitted to the said Milwaukee bank, which were received and accepted by said bank without objection.

Defendant further pleads a general and uniform custom of long and continuous standing prevailing among all banks and bankers in the United States, including those of Illinois, Wisconsin, Nebraska and Wyoming, for banks having checks, drafts and other like paper for collection to send said instruments direct to the bank of issue for collection, and to receive and

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249

accept in payment therefor, said bank's draft instead of requiring said bank to remit by actual cash, and that in the instant transaction, defendant simply followed the universal custom in it's effort to collect the cashier's check in question.

Defendant further alleges that it appears from the face of the amended petition that plaintiff has not the legal capacity to maintain this action, and further said amended petition does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant.

From the evidence in the case, the most, if not all of which is expressly admitted in the record or stands undisputed, it appears that some time about the early part of February, 1923, the plaintiff was the owner of a note and mortgage which had become due and the mortgagee, residing at or near Lusk, Wyoming, had indicated his readiness to pay same, whereupon plaintiff placed the same in the hands of the Pardeeville Bank, in which he did business, to forward and collect. In due time and on or about February 17, 1923, the Pardeeville Bank received remittance of the amount of said note and mortgage in the form of a cashier's check of the Wyoming State Bank at Lusk, Wyo, for the sum of $1220.40, payable to the plaintiff; on or about the same day plaintiff endorsed said cashier's check in blank and gave it to the Pardeeville bank, which in return therefor gave plaintiff $20.40 in cash and a regular negotiable certificate of deposit on it's own bank for the balance of $1200.00 and plaintiff says that is all he knows about it and that he never saw or heard anything of the cashier's check after that,

It further appears that the Pardeeville Bank received the cashier's check endorsed by plaintiff, duly endorsed same itself and forwarded it to it's correspondent the First Wisconsin Nat'l Bank of Milwaukee, taking credit for the same itself and charging same to the Milwaukee bank. The Milwaukee bank receiving said check gave the Pardeeville Bank due credit for same, endorsed the same itself and forwarded check to the defendant herein, thru the

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Federal Reserve Bank of Chicago, which defendant bank in turn endorsed the check and promptly forwarded same direct to the bank of issue, The Wyoming State Bank at Lusk, Wyo. for payment. That bank upon receipt of it's cashier's check, stamped the same paid and in payment therefor issued and sent to defendant it's own draft upon it's correspondent, the First Nat'l Bank of Cheyenne, Wyo. That at the time of the presentation of said cashier's check to the Lusk bank for payment and defendant's acceptance of a draft in payment therefor instead of cash, said Lusk bank had in it's possession available for the payment of said check more than sufficient sum of legal tender money to pay said check. That defendant having received said draft as aforesaid, promptly forwarded the same to the First Nat'l Bank of Cheyenne, Wyo., the drawee, for payment, but before said draft could be presented for payment, the Lusk bank had closed it's doors and the State Bank Controller for the State of Wyoming had taken possession. Said draft was duly protested for nonpayment and returned to the defendant.

Upon defendant receiving the return of the unpaid draft it notified the Milwaukee Bank of that fact and that it had charged back against said bank the amount of the cashier's check and the Milwaukee bank in turn charged back said item to the Pardeeville bank and notified said bank accordingly, whereupon it seems that an officer of said Pardeeville bank went to the plaintiff herein and procured from him a surrender of the certificate of deposit that said bank had theretofore issued to him and cancelled the same by stamping it paid.

Full and satisfactory proof has been made of the existence and operation of all of the rules, regulations and other like matters pleaded in defendant's answer, including the prevailing universal custom among all banks and bankers of the United States for the bank having commercial or bank papers for collection against a distant bank, to send such paper direct to the bank of issue and to receive said banks draft in payment therefor, and that this custom was well known and understood by all the parties handling cashier's

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check in this case (including the Pardeeville bank) except the plaintiff himself. To him it was perhaps not known.

It is in evidence that the defendant retained the dishonored draft for the purpose of filing the same for allowance with the receiver for the insolvent bank and that it did so by and with the consent of the Milwaukee bank; that said claim was filed, proof made, and judgment rendered therefor in the name of the defendant as a general creditor. Since said allowance two 5% dividends thereon have been paid to defendant, amounting to something less than $125.00, which was duly remitted by defendant to the Milwaukee bank and by it credited to the Pardeeville bank.

Therefore, under the allegations of his amended petition and the proof in support thereof, the plaintiff claims the defendant is liable upon any one or more of the following grounds:

1. Because defendant as plaintiff's agent for the collection of said cashier's check was negligent and violated it's duty in sending said check direct to the bank that issued it and in accepting in payment therefor said banks draft instead of cash.

2. Because defendant filed it's claim as a general creditor with the receiver of the insolvent bank instead of a preferred creditor claiming the right to the money received by said bank in payment of plaintiff's note and mortgage as a separate or segregated fund for the use and benefit of plaintiff.

3. Because the defendant in filing a claim for payment of it's draft representing the proceeds of plaintiff's cashier's check, in it's own name, making proof thereof accordingly and obtaining a judgment therefor in it's own name, thereby became the absolute debtor of plaintiff for the amount of his cashier's check.

I have thus set forth an abstract of the pleadings and evidence in the case at the length I have more for the benefit of those who might wish to have an outline of it's history than because the same is necessary for the pronouncement of a decision. For, as I view the case and the transaction involved, I am firmly of the opinion that it falls clearly within the controlling principles announced in the very recent case of CITY OF DOUGLAS vs FEDERAL RESERVE BANK OF DALLAS, decided by the Supreme Court of the United States on

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June 1st of the present year, and reported in 46 Sup.Ct.Rep. at page 554; as also the decisions of our own Supreme Court in the case of National Bank of Commerce vs Bossemyer, 101 Nebr. 96, and other cases cited in the City of Douglas case, supra.

From the opinion in the case last referred to, it appears that the County of Cochise, Ariz., drew it's check on the Central Bank of Wilcox, Ariz. in favor of plaintiff, the City of Douglas, which endorsed it in blank to the First Nat'l Bank of Douglas, Ariz., and that bank credited the amount of said check to the account and in the pass book of plaintiff, on the face of which pass book was printed: "All out of town items credited subject to final payment". The Douglas bank endorsed the check: "Pay to the order of the El Paso Branch, Federal Reserve Bank of Dallas," the defendant herein and forwarded it to that bank for collection. The defendant bank in due time forwarded the check to the drawer bank at Wilcox. The latter bank debited the drawer's account with the amount of the check, stamped it paid, and returned it to the drawer and transmitted to the defendant, in lieu of cash, it's own check upon the Central Bank of Phoenix, in an amount covering this and other items. Before this check could be presented for payment both the Wilcox Bank and the Phoenix Bank failed, and said check was dishonored. The First Nat'l Bank of Douglas receiving no proceeds of the check, charged back the amount of it to the account of plaintiff. Thereupon plaintiff brought suit in the Federal District Court against the defendant Federal Reserve Bank of Dallas to recover the amount of the check on the ground that defendant was negligent in accepting the check of the Wilcox Bank in payment instead of cash.

The case was tried without a jury, resulting in a judgment for defendant, which was later affirmed by the Circuit Court of Appeals, and still later reaffirmed by the Supreme Court of the United States in it's opinion just referred to and in which it appears that plaintiff assigned as error the holding of the Circuit Court of Appeals "that defendant was not in such rela-

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tionship with plaintiff as to permit plaintiff to recover for defendants negligence."

Mr. Justice Stone, in writing the opinion in the case, after stating the facts substantially as above recited, refers to what is known as the "New York rule", in respect to the liability of a bank having commercial paper for collection and what the courts have held thereunder; also to what is known as the "Massachusetts rule" in respect to the same subject matter, and what the courts have held under that rule; also to the particular theory advanced by the plaintiff on which it claims the right to recover, and that advanced by the defendant on which it claims plaintiff cannot recover, and then says:

"It is not necessary to decide any of these questions here, for when paper is endorsed without restrictions by the depositor, and is at once passed to his credit by the bank to which he delivered it, he becomes the creditor of the bank; the bank becomes the owner of the paper and in making the collection is not the agent for the depositor," (citing numerous cases.)

"Such was the relation here between the plaintiff and the Douglas bank, unless it was altered by the words printed on the passbook to the effect that out of town items were credited "subject to final payment". The meaning of this language, as the cashier of the Douglas bank testified, and as the court below held, was that if the check was not paid on presentation, it was to be charged back to plaintiff's account. The check was paid, and the drawer and indorsers discharged." (citing numerous cases.)

"Without these words, the relationship between the plaintiff and the bank was that of indorser and indorsee; and their use here did not vary the legal rights and liabilities incident to that relationship, unless it dispensed with notice of dishonor to the depositor."

and there is no evidence of that, either in that case or the case at bar.

"While there is not entire uniformity of opinion, the weight of authority supports the view that upon the deposit of paper unrestrictedly indorsed, and credit of the amount to the depositor's account, the bank becomes the owner of the paper, notwithstanding a custom or agreement to charge the paper back to the depositor in the event of dishonor", (citing numerous cases, including that of National Bank of Commerce vs. Bossmyer, 101 Neb. 96.)

"Plaintiff having thus surrendered it's rights in the paper, only rights arising out of its contract with the initial bank remained. If those rights were affected by the act or omission of defendant, they were affected only because that contract so stipulated. Defendant's duties arose out of its contract with the initial bank, or out of its relation to that bank as owner of the paper. Hence there was no relationship between plaintiff and defendant which could be made the basis of recovery for defendant's want of diligence."

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This case, it seems to me, covers in all substantial respects the transaction in the case at bar, except that in the case at bar which occurred between plaintiff and the initial bank at the very inception of the transaction offers a much stronger reason for the application of the rule announced than in the ordinary case. The evidence in the case at bar is that plaintiff, having possession of the cashier's check, endorsed the same in blank without any restrictive terms or conditions whatsoever, and gave it to the Pardeeville bank, which in return therefor gave to plaintiff $20.40 in cash and a regular negotiable certificate of deposit on its own bank for $1200.00, without any qualifications or conditions whatever attached thereto. In my opinion, that constituted a complete purchase and sale of the cashier's check. The bank thereby became the absolute owner of the check and the plaintiff the absolute owner of the cash and the certificate of deposit, each to do with their respective instruments whatsoever they liked.

But it is said that it is in evidence that the cashier's check was given to and accepted by the bank of Pardeeville for collection. It is my candid opinion that no such idea was ever expressed or thought of by either plaintiff or the bank at the time the instruments were exchanged, but that that theory is an after-thought suggested by the bank after it discovered the failure to collect the proceeds of the cashier's check and in the attempt to have that theory prevail persuaded the aged plaintiff to surrender his certificate of deposit back to the bank.

The theory now advanced serves as a most striking illustration of the truth of the old proverb that actions speak louder than words; and that the character of the endorsement of the check by plaintiff to the bank, and his receiving therefor from the bank part cash and a negotiable certificate of deposit for the balance, constitutes a transaction between the parties entirely inconsistent with the theory of a bailment for collection. Besides, it would seem that such an oral agreement between plaintiff and the initial

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bank, particularly if unknown to the defendant, would not alter in any way the legal effect of plaintiff's unrestricted endorsement. That much, apparently, is either expressed or plainly inferred from the most, if not all; of the decided cases.

The same view as announced in the case of City of Douglas, supra, seems to have been expressed by our own Supreme Court in the National Bank of Commerce vs. Bossmyer, 101 Nebr. 96, above referred to. In that case, the court said:

"While there is some conflict in the authorities, the better view is that the deposit of a check or draft in a bank with a general endorsement, and the giving of credit for its amount by the bank to the depositor, in the absence of other evidence as to the intention of the parties passes the title to the bank and makes it a holder for value, entitled to recourse on prior endorsements upon the protest of the paper. In other words when such a state of facts is proven, there is a prima facie case made that the title has passed, and the fact that it, the receiving bank, may charge back the protested draft does not affect the relation. In Higgins vs. Hayden, 53 Neb. 61, before the enactment of the Negotiable Instruments Act, it was held that a bill of exchange drawn to the order of a bank by its customer, the amount of which was placed to his credit, and on which the customer drew and the bank paid checks, became the property of the bank, such conduct being inconsistent with the theory of a bailment for collection."

It may be proper here to note that "other evidence" as to the intention of the parties in transferring the paper, appearing in the above quotation, means other written words as part of, or connected with, the indorsement itself appearing on the face of the instrument, tending to alter or modify the otherwise unrestricted endorsement. This much clearly appears from other parts of the same opinion as well as from other decided cases.

Plaintiff, in support of his action herein, seems to rely strongly upon the case of Malloy vs. Federal Reserve Bank of Richmond, 264 U. S. 160. There would seem to be at least two important distinctions between the case referred to and the case at bar. The first is, that it nowhere appears in the Malloy case, supra, that the endorsement of the paper by the depositor with the initial bank was an unrestricted endorsement, or that anyone connected with the transaction claimed that it was such. About the only indication we are afford-

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ed as to the character of the endorsement is the following statement taken from the opinion of the court in its statement of the facts in the case.

"It was properly endorsed and deposited with the Perry Banking Company of Perry, Fla.,for collection and credit."

The 2nd distinction is, as was said by Justice Stone in the City of Douglas case, supra, in stating the distinction between that case and the Malloy case, - that in the Malloy case "a local statute relieved the bank receiving paper for collection from any liability except that of due care in selecting a sub-agent for collection and in transmitting the paper to it, and it was held that the owner of the paper might proceed against the sub-agent for negligent failure to collect the paper". The question of unrestricted endorsement or the legal affect thereof did not arise in the case.

The plaintiff has not sought either to plead or prove a like local statute of Wisconsin, and, so far as the court is aware, none exists.

Because of the legal affect of plaintiff's unrestricted endorsement in the case at bar, he has never been able to reach that point or situation in the case where the alleged negligence of the defendant could be considered as was done in the Malloy case.

It may be proper to observe that the City of Douglas case, decided on June 1st of the present year, met with the approval of the entire bench of that court, including, of course, Justice Sutherland, who wrote the opinion in the Malloy case.

I am of the opinion that plaintiff has shown no relationship between himself and the defendant herein which could be made the basis of recovery for defendant's alleged want of diligence. And that if plaintiff has a cause of action at all arising from the transaction in question, as probably he has, it is against the Pardeeville bank for the restoration of his certificate of deposit.

Plaintiffs action will be dismissed and judgment for defendant for costs.

(SGD) A. C. TROUP,
Judge.

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