

**THE HONGKONG & SHANGHAI BANKING CORPORATION,
PLAINTIFF AND APPELLANT, VS. F.C. PETERS AND E.J. HAWKES,
DEFENDANTS AND APPELLEES.**

G.R. No. 5066. April 06, 1910

Ponente: MORELAND, J.

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MORELAND, J.:

On May 12, 1908, the defendant F. C. Peters went to the Hongkong & Shanghai Banking Corporation in the city of Manila and presented to the paying teller thereof an instrument in the form of a check, purporting to be drawn by a paymaster of the United States Navy, in favor of Peters, upon the Assistant Treasurer of the United States in the city of New York, for the sum of \$3,000 United States currency and requested that the amount thereof be paid to him by the said banking corporation. The bank refused to pay to him the sum of money named in said instrument, and he went away from the bank, returning in a short time with the defendant Hawkes. Peters then placed his name upon the back of the instrument and the defendant Hawkes did likewise, writing his name below that of Peters. Neither of the defendants placed a date upon the indorsement made by him. Thereupon payment was made in one form or another by the bank to Peters of the sum named in the instrument. On presentation by the bank, payment of the instrument was refused by the drawee, the Assistant Treasurer of the United States at New York, upon the ground that the name of the paymaster of the United States Navy upon said instrument had been forged. The instrument was duly protested as a check and the notice required by law given to both of the defendants. This action was brought by the plaintiff against both Peters and Hawkes to recover the \$3,000 paid by the plaintiff upon said instrument. The following is a copy of the instrument in question :

"No. 312342.

"CAVITE, P. I., Apr. 12, 1908.

"ASSISTANT TREASURER OF THE UNITED STATES,
"NEW YORK.

"Pay to the order of F. C. Peters, U. S. N., three thousand and 00/100 dollars (\$3,000.00).

(Signed) "R. K. VAN MATER,
"Asst. Paymaster, U. S. N."

The trial court rendered judgment in favor of the plaintiff against the defendant Peters for the full amount paid by it, less the amount theretofore realized from property of Peters, and dismissed the complaint as to Hawkes, absolving him from all liability in connection with the check. The court below based its decision in favor of Hawkes upon the proposition that he was liable, if at all, only as an indorser, and that, while under the English and American doctrine the acts of Hawkes were sufficient to charge him as indorser, nevertheless, under article 462 of the Code of Commerce of the Philippine Islands, his acts did not constitute an indorsement, because of his failure to date said indorsement as provided by subdivision 4 of said article.

The first question presented for determination by the appellant is whether or not the instrument in question is a check. The appellant urges that "the instrument in question is not a check; it embraces neither of the above essential features. It is not drawn upon funds of the drawer, but upon those of the United States; its dishonor gives the drawer no right of action against the drawee."

We do not deem it necessary for the purposes of this action to discuss or decide the general question whether this kind of instrument is or is not a check. We reach the same result in the decision of this case whether the instrument, strictly denned, is or is not a check in the general acceptance of the term. For the purposes of this action we assume it to be a check as denned by the Commercial Code inasmuch as, by a custom and usage thoroughly known to all the parties and voluntarily adopted and followed by them at the time, it had all of the qualities and performs all of the offices of a check. Law writes custom into contract.

We also find it unnecessary to pass upon the second question presented by the appellant in which he urges the proposition that even if said instrument is a check, its negotiability and transfer, together with all the forms and requisites necessary thereto, are matters wholly of Federal concern and are governed exclusively by the laws, rules, and regulations of the United States Government, and that the laws of the Philippine Islands are in nowise applicable thereto, especially where, as in this case, those laws are at variance with the laws, rules, or regulations of the United States Government.

The first defense interposed by the defendant Hawkes in this case, Peters not having offered any defense whatever, is that the defendant placed his name upon the back of the check simply for the purpose of identification, which purpose was known to the plaintiff at the time the name was written and the money was paid, and that such payment was made pursuant to such an understanding. We do not believe that this defense can be sustained. Even if parol evidence, apart from fraud or mistake, were admissible to show that the contract which appears from the indorsement was not the one which was actually executed, nevertheless, the defense interposed would have to be rejected for the reason that there is no evidence in the case to support it. The only witness who testified to that point was one of the clerks of the bank named Evans. It appears from his testimony that when Mr. Peters presented the check to the bank for payment the accountant, Evans, referred the matter to Mr. Kennedy, the cashier of the bank, who, after examining it, stated to the witness that the bank would not cash the check unless Peters could secure somebody to guarantee the payment of the check who was known to the bank to be responsible; that this statement of Kennedy was transmitted to Peters by the witness; that Peters then left the bank and returned soon accompanied by the defendant Hawkes; that the check was again referred to Kennedy, who, after looking up Hawkes's account in the bank, stated to the witness that Hawkes would do as a backer of the check; that Evans then returned to the window where Peters and Hawkes were and Hawkes indorsed the check. As to the conversation had between him and the defendant Hawkes at the time Hawkes indorsed the check, the evidence is as follows:

"Q. Did you say anything to him at that time? - A. I told him to sign under Mr. Peters's signature.

"Q. Is that all the conversation that occurred between Mr. Hawkes and yourself? - A. That is all I can remember.

"Q. Then it is a fact, is it not, that at that time all that was done, so far as you can say of your own knowledge, was that Mr. Hawkes placed his signature on the back of the check and said nothing to you at all? - A. I can not say for sure whether he said anything or whether he did not say anything.

"Q. But to the best of your memory he did not? - A. Yes, sir.

"Court (asking question). Do you mean to say that he did not say anything? - A. Yes, sir.

"Q. But your impression is that he did not say anything? - A. Yes, sir.

"Q. What do you mean by your answer 'yes, sir'? What do you mean by that ? - A. I mean that he signed the check as he was told to sign it without saying anything."

On cross-examination the following questions and answers appear:

"Q. Is it not a fact that at the time that Mr. Peters and Mr. Hawkes came to the bank together Mr. Peters said to you that he brought Mr. Hawkes, and that you then asked Mr. Hawkes if he knew Mr. Peters and could identify him ? - A. I perhaps did say that in the ordinary way.

"Q. And that he could identify him? - A. That is the ordinary question which we ask in cases of that kind.

"Q. But are you sure that you did not say words to that effect ? - A. I should not like to say at all.

"Q. But the probability is that you did say that to him? - A. Yes, sir."

It is thus evident from the uncontradicted proof that Mr. Hawkes came to the bank and indorsed the check without saying anything whatever. It is also apparent that the evidence shows that the clerk of the bank said nothing to Hawkes, at least nothing about identifying Peters. All that the witness said in his testimony on that subject, upon which alone is based the contention that Hawkes indorsed simply to identify Peters, is that it was probable that he asked Mr. Hawkes if he could identify Peters, basing, as he says, that statement not upon his recollection or memory as to what actually occurred but upon a probability arising out of a custom which according to his own best recollection and memory was not followed on that occasion. This is not proof. It is, moreover, as before stated, the undisputed testimony that Hawkes himself said nothing whatever at the time. Besides, Hawkes was himself a witness on the trial of the case, with full opportunity (as it appears that no objection whatever was offered to this class of evidence) to testify to the facts which occurred at the time of the indorsement by him, and he made no reference to them. Upon this branch of the case he was silent. This makes the failure of proof above referred to all the more complete and striking.

From the evidence above transcribed, which is substantially all of the evidence upon the subject either of identity or guaranty, it is apparent that the defendant Hawkes can not be held as a guarantor. There is an entire failure of evidence to support such a liability, apart from the liability of indorsement, even if parol evidence were admissible under the circumstances of this case to show it. The talk between Peters and the bank had before the arrival of Hawkes as to the necessity of Peters' obtaining a responsible person to guarantee the check was never communicated to him. This is shown by the evidence quoted.

The second defense presented by the defendant Hawkes is that there is not a legal or enforceable contract of indorsement made by the defendant Hawkes, but that the indorsement on said check is defective for lack of date. We proceed to discuss that question:

1. There is no law in the Philippine Islands which requires the indorsement of a check to be dated.

The claim is made by the defendant Hawkes that article 462 of the Commercial Code is applicable to the indorsement of checks. The article reads as follows:

"The indorsement must contain:

"1. The name and surname, firm name, or title of the person or company to whom or which the bill of exchange is transferred.

"2. The form in which the assignor acknowledges the consideration of the purchaser, as stated in No. 5 of article 444.

"3. The name and surname, firm name, or title of the person from whom it is received, or to the account of whom it is charged, if it is not the same person to whom the bill of exchange is transferred.

"4. The date on which it is drawn.

"5. The signature of the indorser or of the person legally authorized to sign for him, which shall be stated in the subscribing clause."

Article 461 reads as follows:

"The ownership of bills of exchange shall be transferred by indorsement."

It will be seen by a glance at article 461 that article 462 is expressly limited in its application to bills of exchange. If such article is applicable to checks, then the provision making it applicable must be found elsewhere than in these articles. The contention of the defendant is that such provision is found in article 533 of said code. A single glance at said article shows clearly and conclusively that this contention can not be sustained. Article 533 is one of the articles found under Title XI of the Commercial Code. The heading of that title and its subscription are as follows:

"TITLE XI.

"Drafts, bills, and promissory notes payable to order and checks." There comes immediately thereafter the first subdivision of said title with its subscription, which follows:

"SECTION FIRST.

"Drafts, bills, and promissory notes payable to order."

It should be noted that the word "checks," while appearing in the grand division "Title XI" and its subscription, is omitted in the subdivision "Section First" and its subscription. Under this "Section First" are found only three articles, namely, 531, 532, 533, which treat, as the subscription under "Section First" would indicate, not of checks but of drafts, bills, and promissory notes payable to order.

Article 533 reads:

"Art. 533. The indorsements on drafts and promissory notes payable to order must contain the same statements as those on bills of exchange."

It is evident from the article that checks are wholly excluded from its operation. If more argument were needed to demonstrate such exclusion, it would be found in the fact that the second and last subdivision of "Title XI" treats solely of checks. It will be recalled that checks were omitted from the first subdivision of "Title XI" which includes article 533. Said second subdivision of "Title XI" and its subscription are as follows:

"SECTION SECOND.

"Checks."

This "Section Second" contains ten articles (534-543), all relating to and treating of checks exclusively, except the last, article 543, which refers to check stubs. Unless authority for the claim that article 462 is applicable to checks can be found somewhere among these ten articles, it does not exist. Counsel for the defendants does not assert that any of these articles provides for such an application. On the contrary, he admits, by implication at least, that none of said articles makes applicable to checks the provisions of article 462. He rests his claim to such application entirely on article 533. Strange to say, however, counsel for the plaintiff admits in his brief that article 462 is applicable to checks and bases that admission on the provisions of article 542. He says in his brief (English, p. 6) :

"On the contrary, the requirement as to the dating of indorsements is limited to bills of exchange (art. 462), drafts and notes (art. 533) and checks (art. 542)."

We can not permit such admission to influence our decision, for the reason that we believe he is wrong in the grounds upon which that admission is made. Article 542 follows:

"ART. 542. The provisions contained in this code relating to the several liability of the maker and indorsers, and to protests, as well as to the exercise of the actions arising from bills of exchange, shall be applicable to these instruments."

It is evident that this article in no way affects the question before us. It in no way refers to or touches the form or the essential requisites of an indorsement. It has no affirmative requirements in it. It does not provide that anything shall or shall not be, or shall or shall not be done. It simply makes applicable principles of liability already laid down to a state of things already existing. It has nothing to do with the establishment of those principles of liability; neither has it anything to do with the creation of the state of things to which it applies those principles. They both come to it ready made. The article simply says in effect that if a check has been drawn, and if it has been indorsed, then certain principles of liability shall be applied to the parties to the check. But it does not say what form such indorsement shall take or what requisites it shall have. As it has nothing to do with the form of the check or with the question of what are its requisites, so it has nothing to do with the form of the indorsement. The question is, "Is it an indorsement?" without regard to whether it has one form or another, that is, without regard as to whether it is made in red ink, blue ink, or black ink. If there is an indorsement, then this article applies certain principles to the responsibility of the parties no matter whether the indorsement is in red, blue, or black ink. In short, this article does not pretend to regulate the incidental form or special features of the indorsement. The Commercial Code recognizes as valid and legal at least two kinds of indorsement, namely, the indorsement of a bill of exchange, which bill, because of its special nature, requires special features in the indorsement (art. 462), and the common law indorsement, so called, recognized by the law merchant the world over, admittedly the indorsement which is required by the Commercial Code as to bottomry and respondentia bonds (art. 722) and bills of lading (art. 708). These latter instruments, being of a nature quite different from a bill of exchange, do not require, as does said bill, any special features in their indorsement. Now, article 535 says:

"Art. 535. The check must contain:

"The name and signature of the maker, and the name of the person on whom it is drawn and his domicile, amount and date of issue, which must be written out, and if payable to bearer, to a determined person, or to order; in the latter case it shall be transferable by indorsement."

This article says that a check drawn payable to order "shall be transferable by indorsement." This is just what the code requires as to the indorsement of the bonds (art. 722) and of the bills of lading (art. 708), above referred to. Nothing whatever is said in any of these three articles, 535, 708, 722, as to what requisites are necessary to constitute such indorsement. No reference is made by any of them to article 462, and nowhere among all the articles treating of checks, bonds, or bills of lading, all negotiable instruments, is there any reference whatever to article 462. There being two kinds of legal and valid indorsements and the provisions of the Commercial Code relating to checks not specifying the kind required, then a check indorsed in either way would be validly indorsed and would bring it under article 542 respecting the responsibility of the parties to the check. This article, then, has no application until after the indorsement is completed, that is to say, until after it is in existence. It can not be contended that a provision of law which has no operation or force until a given thing is in existence can have any influence whatever on those forces or acts or forms which bring it into existence.

Moreover, the article in question, 542, clearly indicates the extent of its application. It says: "The provisions

contained in this code relating to the several liability (garantia) of the maker and indorsers, * * * Is not that reference definite and clear? It is perfectly easy to find the articles of the code which regulate and provide for the liability of the maker and indorsers of bills of exchange. They are 456, 467, 516-526. None of them refer to the form or requisites of the indorsement. The reason is that this article does not relate to indorsement, but to liability. We say again that this article does not begin to perform its functions until after the indorsement has been made. The article can not, therefore, be a cause contributing to the existence of the indorsement. Not being a cause contributing to the creation of the indorsement it can have no influence on its nature or requisites. If this article had wanted to make article 462 applicable to checks it would have read: "The provisions contained in this code relating to indorsements, etc.," and not to the "several liability of maker and indorsers." The article says further: "The provisions contained in this code relating to the several liability of the maker and indorsers and to protests, as well as to the exercise of the actions arising from bills of exchange, * * *" The articles of the code relating to protests are 502 and following articles; and those relating to the exercise of actions arising from bills of exchange are 516-526. Nowhere in this article is there a reference, direct or indirect, to article 462.

2. The legitimate rules of statutory construction do not permit the interpretation that article 462 is applicable to checks.

The primal type of indorsement provided for by the Commercial Code is not essentially different from the usual indorsement known to the law merchant the world over. It seems from a careful study of the Commercial Code that that code makes provisions for indorsements in special forms only where the special nature of instruments of commerce requires it. Wherever, then, we find provided by the code an indorsement having peculiar requisites and unusual features, we may confidently look for an instrument of a correspondingly peculiar nature to which that indorsement applies, and we may as confidently expect that such indorsement will be expressly restricted in its application to that kind of instrument. Bills of exchange have, under the Code of Commerce, some features not common to many other forms of commercial paper; and we find the code, therefore, providing a kind of indorsement suitable to that instrument alone. Articles 443 and 444, Title X, define a bill of exchange and provide what it shall contain in order to be admissible in suits. Articles 461 and 462 define the indorsement which shall be made upon a bill of exchange and the features which are essential to that indorsement. These articles, also, as we should expect, limit the application of that kind of indorsement strictly and expressly to bills of exchange. The next subject treated by the Commercial Code, after bills of exchange, is that of drafts, bills, and promissory notes payable to order. (Title XI, subdivision 1.) Article 531 defines drafts (libranzas), bills (vales), and promissory notes payable to order, and stipulates what features these instruments shall have in order to be such. These instruments, by their definition and requisites, approach so closely in their nature the bill of exchange, that they are required, for valid transfer, to have the same indorsement as a bill of exchange. Here again the application of article 462 to these instruments is made by express provision of the code (art. 533 above quoted). The next subject, immediately succeeding, of which the said code treats, is the check. (Title XI, subdivision 2.) Articles 534 and 535, above quoted, define a check and provide what features it shall have in order to be such. Article 535 also provides that checks payable to order "shall be transferable by indorsement." Now, the code having just come from applying, by express provision, article 462 to the several different kinds of commercial instruments mentioned, would it not be reasonable to suppose that, if the code desired that article to be applied to checks, it would say so expressly as it did in the other cases? And is not the failure of the code to so provide the very clearest indication that it did not want such article so applied? In other words, in dealing with other instruments immediately preceding the subject of checks, the code, whenever it desired article 462 to be applicable, said so expressly and in so many words. In dealing with checks it has not done so. What is the inference under the common rules of statutory construction?

It is admitted that there is no provision applying article 462 to checks, such as is found in applying it to bills of

exchange, drafts, bills, and promissory notes payable to order. The most that is claimed by anyone, and that is not claimed by the defendant Hawkes in this case, is that such an application may be figured or spelled or interpreted out of the provisions of article 542. That such article can not be reasonably construed to make such application has, we believe, been demonstrated heretofore. It remains only to say that no court ought to interpret into the law a requirement which has for its existence no shadow of reason and which serves absolutely no purpose and accomplishes no result except to render more difficult and technical the ordinary transactions of commerce and to dig one more legal pitfall into which the busy man may stumble to an expensive and fruitless litigation. Especially should it not do so when the party benefited by such interpretation does not ask it.

The legitimate rules of statutory construction do not permit the application of article 462 to checks under the facts and circumstances of this case for the further reason that the application of said article is limited to bills of exchange by express provision of law. That being so, its application ought not, ordinarily, to be extended except by provision of law equally express. Its application ought not to be extended by interpretation or construction. Article 542 admittedly does not expressly apply article 462 to checks. Its application is at least doubtful. The application of article 462, being limited by express provision of law, will not, under the circumstances of this case, be extended by article 542.

3. There is no exigency of business or commerce requiring that article 462 should be applicable to checks.

The inherent nature of the provisions of article 462 of the Commercial Code excludes any possibility that the article in question was intended to apply to checks. If that article is applicable to checks at all, then every provision and subdivision thereof is applicable. If any of them are found not to be applicable, that inapplicability must be grounded in some reason. A glance at subdivisions 2 and 3 of said article indicates clearly that they are inapplicable to an indorsement of a check. No one pretends to claim that they are applicable. Neither of the parties to this action has dreamed of asserting the applicability of those subdivisions to the check in litigation. If subdivision 4 is applicable, why should not be subdivisions 2 and 3? There is far more reason why 2 and 3 should be applicable than why 4 should be.

While there are special reasons why the date should appear in the indorsement on a bill of exchange as provided by article 462, the reason assigned why such date should so appear is the very reason why it should not appear in the indorsement of a check. Article 466 provides that "drafts not issued to order can not be indorsed, nor those which have fallen due or are damaged." That article further provides that "the transfer of ownership by the means acknowledged in the common law shall be licit; if, however, an indorsement is made it shall have no further force than that of a simple cession." It is evident from the provisions of this article that a person who indorses a bill of exchange before it is due binds himself as an indorser of the instrument by virtue of making the contract of indorsement. It is also evident that a person who indorses the instrument after it is due does not bind himself as an indorser, but merely as an assignor under the common law. The obligations of an assignor and of an indorser are materially different. Therefore a person who takes a bill of exchange after it becomes due is entitled to know which of the persons whose names appear upon the back of the bill when he takes it are in reality indorsers and which are merely assignors. In order that he may know this important fact, it is necessary that he know when each one of the persons made the indorsement which his name signifies. To give him such knowledge article 462, subdivision 4," provides that every person writing his name on the back of a bill of exchange must date his indorsement. The date on the indorsement is the means by which a purchaser of the bill after it becomes due shall know who is liable as an indorser and who is liable as an assignor. This is the only reason for the requirement that the indorsement on a bill of exchange must be dated. It is evident without argument that no such reason exists in the case of a check. A check has no time within which it must be paid. It is payable on presentation. There is no interval during which the drawee of the check may prepare for its payment. It must be paid instantly by him on

presentation. There is no time, so far as the question we are now discussing is concerned, during which a person who indorses a check makes the contract of assignor under the common law. A person writing his name across the back of a check is always an indorser no matter when he does it. A person who writes his name across the back of a check ten years after the check is drawn is just as liable as indorser as he would have been had he indorsed it on the very day of its issue; so that it makes no difference to a subsequent holder of a check on what dates were made the indorsements which appeared upon the check when he took it. The only thing about which the holder needs to be careful to protect himself is the five-day limit fixed by statute within which the check must be presented for payment. This five-day limit dates from the date of the check and not from the date of the indorsement. The date on which the indorsement is made is of no consequence whatever in this connection.

The provisions of article 462 were made applicable to drafts and promissory notes payable to order because and only because they are in their nature so closely allied to a bill of exchange as to make such application necessary. The provisions of said article were not made applicable to checks because a check in many of its essential features is so different from a bill of exchange as to make such application not only unnecessary and useless but positively harmful.

The intention of the Code of Commerce was to furnish certain rules and regulations, in the form of law, within which commerce and business might be carried on with safety to the property and to the investment of every person engaged therein. In the pursuit of this purpose it was not intended, by any of those rules or regulations, to impede the free intercourse of men in business with requirements which have no reason for their existence or which serve no useful purpose. The object of the code was to give every opportunity possible for the free, easy, quick, and safe transaction of business, requiring no acts which were useless and no forms not essential. To require the indorsement of a check to be dated is to require something wholly unnecessary, useless, and burdensome. It would make no business transaction more safe. It would furnish no additional protection to any business man. It would serve no purpose for which laws are made. Its sole effect would be injurious because it does nothing¹ but create one more useless restriction on business intercourse, introducing into the administration of the law of commerce one more technicality, now altogether too numerous, behind which those may take refuge who seek to evade their just responsibility.

If we should indulge the construction of article 542 adopted by the court below, we should be going counter to the known intent and purpose of the Commercial Code.

We accordingly hold that the defendant Hawkes is liable as an indorser.

For the reasons above expressed it is adjudged and decreed:

- That the plaintiff have judgment against the defendants, F. C. Peters and E. J. Hawkes, in the sum of three thousand five hundred pesos (P3,500), with interest thereon at the rate of six per centum per annum from the 13th day of May, 1908, together with costs.
- That the plaintiff is hereby authorized and empowered to apply as a payment on the judgment herein given the sum of nineteen hundred thirty-five pesos (P1,935), the sum of money belonging to defendant Hawkes now held by plaintiff, with the interest thereon at the rate of six per centum per annum from the 23d day of May, 1908, in reduction of said judgment.
- That the judgment of the court below be modified in accordance herewith. So ordered.

Johnson, Carson, and Elliott, JJ., concur.

Arellano, C. J., and Mapa, J., dissent.

DISSENTING**TORRES, J.,**

The undersigned, while respecting the opinion of the majority, is, nevertheless, obliged to follow the provisions of the Code of Commerce, among others articles 534, 535, 461, 462, and 463, and must therefore dissent because, in my opinion, the judgment should be affirmed with the costs against the appellants.

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