ARRINGTON v. KING.

Opinion delivered May 20, 1929.

1. BANKS AND BANKING—AUTHORITY OF CASHIER TO SELL AND INDORSE NOTE.—Under Crawford & Moses' Dig., § 700, as amended by Acts 1923, c. 627, § 18, a bank cashier could sell and indorse a note owned by the bank in due course without authority first given by the board of directors.
2. BILLS AND NOTES—PAYMENT TO PAYEE.—Makers of a negotiable promissory note could not assume that it was held by the payee bank and discharge their obligation by partial payments to the bank when it was no longer the holder of the note.
3. APPEAL AND ERROR—CONCLUSIVENESS OF JURY'S FINDING.—A finding of the jury upon substantial testimony will not be disturbed on appeal.

Appeal from Franklin Circuit Court, Ozark District; *J. O. Kincannon,* Judge; affirmed.

STATEMENT BY THE COURT.

Appellants prosecute this appeal from a judgment against them for a balance due upon a promissory note for $1,600, executed on June 1, 1924, to the People's Bank of Ozark, and payable on the first of December, 1924, with 10 per cent. interest.

Mrs. Emma King, appellee, having some money in the People's Bank on time deposit, and desiring to realize a higher interest than paid on such deposits, purchased from the bank the appellants' $1,600 note, on the 2d of June, 1924, which was duly indorsed by the cashier and delivered to her. She took the note and turned it over to her brother, J. C. Carter, who kept it among his private papers until just before the bank failed. Only one credit

of $100 for interest was indorsed on the note by him during the time it was in the possession of Carter. During this time, however, Arrington, appellant, claimed to have made payments, the checks being sent and made payable to the People's Bank, the payee in the note, aggregating the sum of $700. The bank was taken over for liquidation by W. E. Taylor, Bank Commissioner, on the 19th day of January, 1926. Before the bank failed, Stockton, the cashier, called on appellee's brother, Carter, saying the makers of the note desired to pay it off, and he wanted to figure up the amount due. He kept the note, and it was in the bank when the Bank Commissioner took charge. The makers paid the Bank Commissioner $1,039.24, the balance due on the note, and, upon appellee making affidavits showing the ownership of the note, it was turned over to her with said balance paid. When she received the note, however, it had, in addition to the indorsement on the face, "Paid on note as credit $1,039.24. Mrs. J. P. King, by Theron Agee," the following indorsements on the back thereof:

"Cr. on note $100, 1-24-25. Emma King," and this was in the handwriting of appellee's brother, and:

"The People's Bank, Ozark, Arkansas, by F. E. Stockton, cashier: 3-7-25, $100; 5-20-25, $100; 7-10-25, $100; 10-3-25, $150; 11-27-25, $150;" none of which were on the note when it was turned over to the bank just before it failed, at the request of the cashier, who said that the makers desired to pay the note, and he wanted to ascertain the balance due thereon, and the writing was that of the cashier, Stockton.

The deputy bank commissioner testified that the books of the bank showed only one deposit to the credit of Mrs. Emma King in the amount of $100 during 1925 and 1926, and that on January 24, 1925; also she had one deposit drawn out on June 2, 1925. That there was a record of Claude Arrington showing a deposit on March 7, 1925, of $100; March 20, 1925, of $100; July 6, 1925, of $100; October 13, 1925, of $150, and November 27,

1925, of $150, and some other small deposits during the year. Arrington filed a claim against the bank with the Bank Commissioner for $600. Mrs. King, appellee, filed with the Bank Commissioner a claim for $800, and was allowed $700 and was paid two dividends thereon, and Arrington had received two dividends on his claim.

Mrs. King and her brother, Carter, to whom she delivered the note after purchasing it from the bank, testified that it had never been in the possession of the bank thereafter until just before the failure, as above stated, when it was returned to the bank upon the request of the cashier in order that he could ascertain and notify the makers of the balance due thereon. They both testified that he had no authority whatever to make any collections on the note, and that it was not in the possession of the bank at any of the dates upon which the credits of amounts received were indorsed thereon.

The checks were sent by Arrington and Jeffers payable to the order of the People's Bank for the amounts credited and indorsed "People's Bank, by F. E. Stockton, Cashier," for the different amounts indorsed as payments on the note by Stockton, the cashier, when it came into his possession just before the bank failed.

The court submitted the question of the agency of the bank and Stockton, the cashier, to collect the interest on the note for Mrs. King, telling them that she could not recover the amounts paid by the makers if the bank or Stockton was her agent at the time of the collection, and that if it was not her agent, nor held out as such agent by her at the time the payments were made, she could recover the balance due on the note, less the dividends received from the Bank Commissioner, which should be credited thereon. The jury returned a verdict for appellee for the balance due, and from the judgment thereon this appeal is prosecuted.

D. L. Ford, for appellant.

G. C. Carter, for appellee.

KIRBY, J., (after stating the facts). The appellants insist that the court erred in not giving their requested peremptory instruction, and that the verdict of the jury is not supported by the evidence. In support of this assignment they insist that appellee acquired no title to the note which the payee bank, through its cashier, sold and delivered to her, because such sale and delivery was made without authority given the cashier by the board of directors to make such sale.

There is nothing in appellant's contention that the sale and indorsement of the note to appellee was void, being made by the cashier without written authority from the board of directors authorizing it. Under the law as amended the cashier could sell and indorse this note owned by the bank, in due course, without any authority first given by the board of directors of the bank and reflected in a written record made thereof. Section 700, C. & M. Digest, § 34 of act 113 of 1913, was amended by § 18, act 647 of 1923, leaving out entirely the words "indorse, sell," and the court, construing this amending act, expressed doubt of the intention of the Legislature to repeal the statute, and limited the requirement to pledges of the bank's paper as collateral security, saying:

"* * * But we are of the opinion that it may be inferred from the language in the first part of the section that pledges of collateral security for loans or rediscounts of the bank's paper are prohibited and made void without the prior action of the board authorizing it, and we so hold, regardless of the loose manner in which said section is drawn." *Grand National Bank of St. Louis* v. *Taylor,* 176 Ark. 1, 1 S. W. (2d) 818.

The undisputed testimony shows that the appellant's note had been sold and indorsed by the bank and delivered to appellee by its cashier, and was not in the possession of or owned by the bank when either of the amounts paid by the maker to the bank and later credited on the note was made. It was also undisputed that the checks sent

by Arrington, one of the makers of the note, in making the payments thereon, were made payable to the order of the People's Bank, to which they were sent. These amounts, as the bank records show, were credited to the account of Arrington on the dates of their payment, and he was doubtless given deposit tickets showing such credits; in any event he made claim against the bank after its failure for the money so paid, and received dividends upon the amount of the allowance. The fact that appellee also made a claim, after the bank's failure, for these amounts and was paid dividends thereon, could only have tended to show that the bank was acting as agent for her in the collection of the money, but the jury found in her favor on that point, upon substantial testimony amply supporting their verdict. She only recovered a judgment for the balance due on the note after crediting the amount of the dividends paid to her by the Bank Commissioner of the insolvent bank on the claim for the amount of the payments made by the maker of the note which were credited to him on the books of the bank.

There was no error in this instruction, since the failed bank was responsible to the maker for the amount paid in and credited to him on the books, which could be reduced by the amount of the dividends paid from the assets of the bank, upon the claim of appellee, to whom the maker claimant was bound to pay the same. The makers of the negotiable promissory note could not assume that it was still held by the bank to whom it was given, and discharge their obligation by partial payments to the bank, when it was no longer the holder thereof. *People's Savings Bank* v. *Manes,* 136 Ark. 215, 206 S. W. 315; *Miles* v. *Dodson,* 102 Ark. 422, 144 S. W. 908, 50 L. R. A. (N. S.) 83.

As already said, the jury found against appellants on the question of the authority of the bank to receive the payments on the note for appellee, the owner, upon substantial testimony, if not the preponderance of the evidence, and its finding cannot be disturbed.

We find no error in the record, and the judgment is affirmed.