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Negotiable Instruments: Damages for Dishonor

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If the facts in this case are to be considered as falling within article VI, section 4½, it would be an insurmountable task for the plaintiff to comply with the majority opinion's requirement that prejudice resulting from the error be shown. This prejudicial error could only be brought to the attention of the court by an affirmative showing that a juror was biased or otherwise unfit, or that the juror in question contributed to the adverse verdict.

As the dissent points out:

> "It is well settled that affidavits or evidence of any character concerning the mental attitude of either concurring or dissenting jurors which tend to contradict, impeach, or defeat their verdict are inadmissible. Even affidavits or testimony of third persons offered to prove admissions of jurors to impeach the verdict are not countenanced. In fact, the authorities are uniform . . . affidavits or oral evidence of jurors may not be received to contradict, impeach or defeat their verdict, except to show that the verdict was secured by chance."[14]

As illustrated above, except when a verdict is rendered by chance, to show error through an attack on the means by which the verdict was attained is in direct conflict with a fundamental concept of the law.[15] The majority of this court does not disclose by what method the required prejudice might be shown. It is obvious that it should not be the intention of the Constitution or the judiciary to maintain that the only accessible means for showing such prejudice should be violative of a well settled and practical doctrine. Such an anomaly cannot be sustained; yet such a result is inevitable unless another means is open.

It is submitted that when there are two actual or apparent colliding intents in the law, the courts should adopt that interpretation which allows them both to have their intended effect. This can be achieved in this case by construing article VI, section 4½, as the Legislature seemingly intended, "to cure reversals for technical errors and omissions, and not to abridge the accepted safeguards essential to a fair trial."

By this strict construction the right to peremptory challenge would retain its statutory power of providing litigants a means of securing an impartial jury, without resorting to methods which, by their nature, would question the jury verdict. Such construction would afford the litigant his right to peremptorily challenge without the dangerous alternative of upsetting jury verdicts. Only by such interpretation will the present untenable position be rectified.

—*John M. Shelton.*

NEGOTIABLE INSTRUMENTS: DAMAGES FOR DISHONOR.—Prior to state legislation on the subject, California and a decided majority of American courts[1] allowed a businessman to recover substantial damages from a bank that had wrongfully dishonored his check. The businessman was not required to allege and prove actual damage to his credit or reputation as a result of the dishonor. A presumption that substantial damages had been sustained arose when the businessman proved that the bank had dishonored his check when he had sufficient funds on deposit to honor it.[2]

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[14] 45 Cal.2d ——, 288 P.2d 26 (1955).

[15] Toomes v. Nunes, 24 Cal.App.2d 395, 75 P.2d 94 (1938); Phipps v. Patterson, 27 Cal.App.2d 545, 81 P.2d 437 (1938); Gray v. Robinson, 33 Cal.App.2d 177, 91 P.2d 194 (1939); Johnson v. Gray, 4 Cal.App.2d 72, 40 P.2d 575 (1935).

[1] Reeves v. First Nat'l Bank, 20 Cal.App. 508, 129 Pac. 800 (1912). Additional cases are collected in 4 A.L.R. 948 (1919).

[2] The terminology normally used is that the presumption applies to a trader, but the term trader means a businessman. Peabody v. Citizens State Bank, 98 Minn. 312, 108 N.W. 272 (1906).

The statutory damages to be awarded for dishonor of a depositor's check by a bank under California Civil Code section 3320 was a question of first impression before the court in the recent case of *Abramowitz v. Bank of America.*[3] The plaintiff depositor was purchasing an automobile by installments as provided in a conditional sales contract. The depositor gave a check to the vendor in payment of a monthly installment pursuant to the said contract. The defendant bank, evidently as a result of mistake or error, dishonored the check. Since the depositor was otherwise unable to pay, the vendor repossessed and sold the automobile as provided in the conditional sales contract. The court held the damages collectible by the depositor to be the market value of the automobile, relying upon California Civil Code section 3320 as prescribing the liability of the bank. Section 3320, enacted in 1917, provides:

> "No bank shall be liable to a depositor because of the non-payment through mistake or error and without malice of a check which should have been paid unless the depositor shall allege and prove actual damages by reason of such non-payment and in such event the liability shall not exceed the amount of damage so proven."

The court stated that the effect of section 3320 was to abolish the common law presumption of damage to a businessman, citing a previous case for support.[4] The court in the principal case, and the case cited for support, failed to classify the plaintiffs in the actions as businessmen. Since the presumption has never been applied to a non-businessman the decisions may be considered dicta. Regardless of this, however, it may be assumed that the presumption has been abolished in California.

This interpretation of the statute is in accord with the decisions in other jurisdictions under a similar statute.[5]

The statute may be interpreted so that the depositor is given an action in contract or tort at his election. The court in the principal case allowed the option by interpreting "actual damages" as used in section 3320 to be that provided for in California Civil Code section 3333. Section 3333 allows damages for the proximately caused detriment incurred by the plaintiff whether contemplated by the parties at the time of the contract agreement or not;[6] whereas in contract, the damages are restricted to those contemplated.[7] This interpretation is amply supported by a very well reasoned analysis of all the damage sections in the California Civil Code in *Siminoff v. Jas. H. Goodman & Co. Bank.*[8] The unfairness and danger of limiting the action to contract is shown in *Meyer v. Hudson Trust Co.*,[9] where the dishonoring bank was held not to have contemplated that dishonor of a check would cause abandonment of a contract between the payee of the check and the depositor. The abandonment resulted because, after the dishonor, the payee would only accept cash which the depositor was unable to furnish. Even with the tort action available, California[10] and some states[11] hold

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[3] 131 Cal.App.2d 892, 281 P.2d 380 (1955).

[4] Allen v. Bank of America, 58 Cal.App.2d 124, 136 P.2d 345 (1943).

[5] Woody v. First Nat'l Bank, 194 N.C. 549, 140 S.E. 150 (1927); First Nat'l Bank v. Ducros, 27 Ala.App. 193, 168 So. 704 (1936); Waggoner v. Bank of Bernie, 220 Mo.App. 165, 281 S.W. 130 (1926).

[6] CALIF. CIV. CODE § 3333 provides: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

[7] Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51, 87 Pac. 1093 (1906).

[8] 18 Cal.App. 5, 121 Pac. 939 (1912).

[9] 181 App.Div. 69, 168 N.Y.S. 387 (1917).

[10] Hartford v. All Night & Day Bank, 170 Cal. 538, 150 Pac. 356 (1915).

[11] Wheeler v. Bank of Edenton, 209 N.C. 258, 183 S.E. 269 (1936); Western Nat'l Bank v. White, 62 Tex. Civ. App. 374, 131 S.W. 828 (1910); Bank of Commerce v. Goos, 39 Neb. 437, 58 N.W. 84 (1894).

that the arrest or criminal prosecution of the depositor for passing a "bad" check is not proximately caused by the banks' act of dishonoring the same "bad" check.

The dictum in the principal case is a fair and reasonable interpretation of section 3320, but the practical effect of it is to diminish the liability of banks to their businessman depositors and disrupt a well established and emphatically stated common law rule.

Prior to legislation upon the question, the courts of California and other states[12] often repeated and found wise guidance in the presumption of injury to a businessman. The presumption is based upon the fact that it is almost impossible for a check to be dishonored without reflecting on the character and credit of the drawer,[13] and the accompanying delay also always inflicts damage to credit.[14] This impeachment of credit must be an actual injury to the depositor, but from the nature of the case he cannot furnish independent and distinct proof thereof, any more than it is possible for one charged with the commission of a crime to show especially in what manner he has been injured.[15] The general experience of men in such transactions[16] is that substantial damages are the natural and probable consequence of the act of dishonor,[17] so a presumption arises.

Today, the banks' responsibility and effect on our business life is ever increasing due to the increased usage of its facilities. Because of the decentralization of community life we seldom acquire personal knowledge of our fellow citizens' reputation, but in the business world the facilities for determining the credit of others has been increased and such credit information is easily obtained. Thus the slightest smear on a credit reputation is rapidly broadcast and impersonally received. The result is a tendency to refuse credit on the slightest provocation. What then is the justification for the passage of a statute that limits a bank's liability to actual proof of damages by the depositor when such proof was not considered practically possible before?

The statute as enacted by the California Legislature was in substance the same statute approved and recommended by the American Bankers Association to the various State Bankers Associations as desirable for enactment in their respective states.[18] The reasons posed by the Association of Bankers, evidently to the various state legislatures, to affect enactment of their formulated statute should provide an answer to the question of legislative justification in enacting the statute.[19]

The first reason advanced by the Association for abolishing the common law presumption is:

> ". . . But the fact is often contrary to the presumption and probably in the majority of instances where a customer's check is refused payment through error, the mistake is promptly corrected, an explanatory letter is written by the banker and no actual damage results to the customer."[20]

The fact, if contrary to the presumption, should be apparent in the assessment of damages under the instructions given by most courts that the damages assessed must

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[12] Siminoff v. Jas. H. Goodman & Co. Bank, 18 Cal.App. 5, 121 Pac. 939 (1912); Atlanta Nat'l Bank v. Davis, 96 Ga. 334, 23 S.E. 190 (1895); Johnson v. National Bank, 213 S.C. 458, 50 S.E.2d 177 (1948).

[13] *Ibid.*

[14] Janin v. London & San Francisco Bank, 92 Cal. 14, 27 Pac. 1100 (1891).

[15] Schaffner v. Ehrman, 139 Ill. 109, 28 N.E. 917 (1891).

[16] Lorick v. Palmetto Bank & Trust Co., 74 S.C. 185, 54 S.E. 206 (1906).

[17] Third Nat'l Bank v. Ober, 178 Fed. 678 (8th Cir. 1910).

[18] 1 PATON, DIGEST 1117 (1940).

[19] *Ibid.*

[20] *Ibid.*

be reasonable as per individual case, in reference to the injury suffered by the depositor to his reputation and credit standing;[21] or temperate damages, which are defined as that such as would be reasonable compensation for the injury;[22] or damages reasonably and fairly in the natural course of things.[23] In *Hilton v. Jessup Banking Co.*,[24] the practical effect of such an instruction is shown by the jury's assessment of ten dollars damages. The attempt of the dishonoring bank to rectify the damage is praiseworthy morally but is not an answer to an action at law for the wrong done, and the presumption operates regardless of it, as in other tortious acts.[25] The courts provide an adequate recognition of the banks' effort to rectify their error by admitting such acts in evidence to mitigate damages.[26] The effect of such an admission is shown in *Wood v. American National Bank*[27] where the court approved the trial court's setting aside of the jury assessed damages of $750 and entering a $50 judgment.

The second reason the bankers give to support their position is:

> "The application of the rule, therefore, works an injustice to the bank which is often mulcted in damages out of all proportion to the imaginary injury inflicted."[28]

An investigation of the cases in which the excessiveness of the damage is in issue provides an analysis of this reason. The cases noted are limited to those in which the highest damages were awarded to the depositer. In *Wiley v. Bunker Hill National Bank*[29] actual damage to the depositor's business was not shown, but his business amounted to $150,000 yearly, and the court, because of this, approved the trial judge's reduction of jury assessed damages of $25,000 to $10,000. The court in *Johnson v. National Bank*[30] thought the trial judge had not abused his discretionary power in permitting a verdict of $1,250 to stand because of direct evidence given of damage to the depositor's credit. Damages of $1,000 was given in *Commercial National Bank v. Latham*[31] when the only damage shown was plaintiff's testimony that she was so mortified she did not know what to do, but this was done without the aid of a presumption. The instruction given by the court in *Berea Bank & Trust Co. v. Mokwa*[32] allowed the plaintiff such sum as would reasonably compensate him for any loss of time or loss or impairment of credit. The jury awarded $750 damages.

Since the cases above are the *upper* limit of the damages awarded, let us balance the scales with decisions of low damage awards where the excessiveness of the damages was not in issue. The jury in *Weaver v. Grenada Bank*[33] with the use of the presumption assessed damages at nothing. The trial court declined to accept this award and a further verdict of five dollars was reversed by the appellate court as nominal and not substantial. Dishonor of checks totaling $703.75 drawn by the head of a military academy in *Spearing v. Whitney-Central Nat'l Bank*[34] resulted in use of the presumption and $300 damages. The reviewing court in *State Bank v. Marshall*[35] reversed the

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[21] McFall v. First Nat'l Bank, 138 Ark. 370, 211 S.W. 919 (1919).
[22] Hilton v. Jessup Banking Co., 128 Ga. 30, 57 S.E. 78 (1907).
[23] Berea Bank & Trust Co. v. Mokwa, 194 Ky. 556, 239 S.W. 1044 (1922).
[24] See note 22 *supra*.
[25] Spearing v. Whitney-Central Nat'l Bank, 129 La. 607, 56 So. 548 (1911).
[26] *Ibid.*
[27] 100 Va. 306, 40 S.E. 931 (1902).
[28] See note 18 *supra*.
[29] 183 Mass. 495, 67 N.E. 655 (1903).
[30] See note 12 *supra*.
[31] 29 Okla. 88, 116 Pac. 197 (1911).
[32] See note 23 *supra*.
[33] 180 Miss. 876, 179 So. 564 (1938).
[34] See note 25 *supra*.
[35] 163 Ark. 566, 260 S.W. 431 (1924).