

1968

Pacific Metals Company Division of A.M. Castle & Company v. Tracy-Collins Bank and Trust Company and Bank of Salt Lake v. Tracy-Collins Bank and Trust Company v. Olympus Heating and Air Conditioning : Motion For Re-Hearing By Tracycollins Bank and Trust Company and Brief

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IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

PACIFIC METALS COMPANY,  
DIVISION OF A. M. CASTLE  
& COMPANY, a Corporation,  
*Plaintiff and Respondent,*

vs.

TRACY-COLLINS BANK AND  
TRUST COMPANY, a Corporation,  
*Defendant and Third Party  
Plaintiff, and Appellant,*

and

BANK OF SALT LAKE,  
*Defendant and  
Cross-Plaintiff,*

vs.

TRACY-COLLINS BANK AND  
TRUST COMPANY, a Corporation,  
*Defendant and Third Party  
Plaintiff, and Appellant,*

vs.

OLYMPUS HEATING AND AIR  
CONDITIONING, a Corporation  
*Third-Party Defendant.*

MOTION FOR RE-HEARING  
COLLINS BANK AND TRUST COMPANY  
AND BRIEF

Appeal from a judgment of the  
Third District Court of Salt Lake County,  
Honorable Stewart M. Hansen.

ENTERED  
FILED

F A F

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Clk. Sec'y

## TABLE OF CONTENTS

	<i>Page</i>
MOTION FOR REHEARING .....	1
ARGUMENT	
POINT I	
THE COURT ERRED IN ORDERING TRACY-COLLINS TO PAY THE BANK OF SALT LAKE'S COSTS ON APPEAL .....	3
POINT II, a & b	
THE COURT FAILED TO CONSIDER AND DETERMINE THE ISSUES RAIS- ED ON APPEAL .....	4
CONCLUSION .....	13

## CASES CITED

American National Bank of Denver vs. First National Bank, 277 Pac. 2d 951, 130 Colo. 557 .....	9
State Bank of Southern Utah vs. Stallings 19 Utah 2d 146, 427 Pac. 2d 744 .....	12

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vs.

OLYMPUS HEATING AND AIR  
CONDITIONING, a Corporation  
*Third-Party Defendant.*

Civil No.  
11083

MOTION FOR RE-HEARING BY TRACY-  
COLLINS BANK AND TRUST COMPANY  
AND BRIEF

COMES NOW the Appellant TRACY-COL-  
LINS BANK AND TRUST COMPANY (herein-  
after referred to as TracyCollins) and moves the  
Court for a re-hearing in the above entitled case for  
the following reasons:

1. The Court erred in ordering TRACY-COL-  
LINS BANK AND TRUST COMPANY to pay the  
BANK OF SALT LAKE'S cost on appeal.

2. (a) That the Court's decision is based on an apparent misunderstanding of the Appellant TRACY-COLLINS' position, in stating that TRACY-COLLINS maintained that PACIFIC METALS COMPANY, Division of A. M. Castle & Company, hereinafter referred to as PACIFIC METALS, had no basis for recovery because it did not give any consideration to MAYNE PLUMBING for MAYNE PLUMBING's placing PACIFIC METALS' name on the check as co-payee with OLYMPUS, and we respectfully submit that such misunderstanding accounts for its failure to consider the controlling issues raised by the appeal, namely, what damages in conversion, if any, is a non-endorsing co-payee entitled to where it owns none of the funds represented by the check and is a general creditor of the endorsing co-payee, or owns only a fractional interest therein, or where its interest in the funds represented by the check is to be determined by future negotiation between the co-payee, and

(b) The Court erred in holding that a collecting or drawee bank has an absolute liability for the face amount of the check to a non-endorsing co-payee in conversion, even though the non-endorsing co-payee owned no interest in the funds represented by the check or where it owned only a fractional interest in said funds, or where the amount that each co-payee was to receive would be determined, after delivery, by subsequent negotiation between the co-payees.

DATED this 21st day of November, 1968.

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APPELLANT'S BRIEF  
IN SUPPORT OF MOTION FOR RE-HEARING  
ARGUMENT

POINT I

THE COURT ERRED IN ORDERING TRACY-COLLINS BANK AND TRUST COMPANY TO PAY THE BANK OF SALT LAKE'S COST ON APPEAL.

The Appellant TRACY-COLLINS did not complain, on appeal, against the Bank of Salt Lake, nor did the Bank of Salt Lake complain against the Appellant TRACY-COLLINS. As far as the Bank of Salt Lake was concerned, TRACY-COLLINS abandoned its appeal, and this is plain, under the heading "Relief Sought on Appeal", Appellant TRACY-COLLINS stated that it sought relief from the Summary Judgment of PACIFIC METALS COMPANY and Order denying its Motion for Summary Judgment against PACIFIC METALS( as follows: "The Appellant TRACY-COLLINS seeks to reverse Plaintiff's Summary Judgment, a reversal of the Judgment denying the Defendant TRACY-COLLINS' Motion for Summary Judgment against the Plaintiff PACIFIC METALS COMPANY and an Order directing the District Court to enter Judgment in favor of the Defendant TRACY-COLLINS and against the Plaintiff PACIFIC METALS COMPANY" (Brief, page 4)

As there was no issue before this Court between TRACY-COLLINS and the BANK OF SALT

LAKE, Appellant TRACY-COLLINS did not devote a single word to the BANK OF SALT LAKE, nor did the BANK OF SALT LAKE devote a single word in its brief to its relationship with TRACY-COLLINS in this matter. Since Appellant had abandoned its appeal against the BANK OF SALT LAKE, it would not have been before the Court, except for PACIFIC METALS bringing it in on cross-appeal.

In fact, that portion of the Court's Opinion regarding the relationship of TRACY-COLLINS and the BANK OF SALT LAKE was an excursion into an area not before it.

In view of the foregoing, it is respectfully submitted that TRACY-COLLINS should be relieved of the Judgment as to costs in favor of the BANK OF SALT LAKE and that portion of PACIFIC METALS COMPANY's costs related to its appeal against the Bank of Salt Lake.

#### POINT II

WE WILL DISCUSS UNDER POINT II BOTH NO. 2 (a) AND (b) OF TRACY-COLLINS' GROUNDS FOR A MOTION FOR RE-HEARING.

The Court apparently misunderstood the position of Tracy-Collins and failed to determine the controlling issues raised by its appeal.

Tracy-Collins did not maintain, as the Court said it did, that, because Pacific Metals' name was included on the check as a courtesy and there was no

consideration running from Pacific Metals to Mayne Plumbing, Pacific Metals had no basis on which to recover.

The Court incorrectly stated Tracy-Collins' position, when it said:

“In order to avoid liability to Plaintiff Pacific Metals, Tracy-Collins contends that the general contactor, Mayne Plumbing, included Pacific Metals as a joint payee on the check only as an act of courtesy for which it is not shown that any consideration was given, and that consequently Pacific Metals has no interest thereon upon which to base its claim for recovery. The contention is without merit.”

Tracy-Collins' position was simply this: That, as Pacific Metals did not have any interest or ownership in the proceeds of the check, it could not recover against Tracy-Collins, or, if it could recover, such recovery should be limited to the extent of Pacific Metals' interest in the funds represented by the check, and that, because Olympus Heating & Air Conditioning, a corporation, hereinafter referred to as Olympus, had received all of the funds represented by the check and since Pacific Metals' interest, if any, was to be determined by future negotiation, the agreement as to ownership was void for uncertainty, and that, if the agreement was not void for uncertainty, the question of Pacific Metals' interest was a question of fact to be determined by the trial court.



In this respect, we call the Court's attention to pages 15, 16 and 19 of our brief. On pages 15 and 16 we said:

“For Plaintiff to recover against Tracy, it must establish that it owned the check or proceeds thereof, and if not, then it has no right of action against this Defendant, and its recourse is against Olympus for the agreed value of the materials supplied: American National Bank vs. First National Bank, 277 Pac. 2nd 951, 130 Colo. 557 (1954); Hi-Way Motor Co. vs. Service Motor Co., 68 Utah 65, 249, Pac. 133; Mullner vs. McCromic & Co., Banker, 69 Utah 557, 257 Pac. 658.”

It appears to Tracy-Collins that the Court proceeding on this a p p a r e n t misunderstanding of Tracy-Collins' position may account for its failure to consider the controlling issues in the case which, it is respectfully submitted, are: (1) What damages in conversion, if any, is a non-endorsing co-payee entitled to, where it owns none of the funds represented by the check and is only a general creditor of the endorsing co-payee, or owns only a fractional interest therein, or where its interest in the funds represented by the check is to be determined by future negotiation between the co-payees, after delivery of the check, where the conversion results from a mistake or unintentional act; (2) Is an agreement void for uncertainty where the co-payees' interests in the funds represented by the check are to be determined by future negotiations between the co-payees after delivery of the check?

The decision not only lays down a rule contrary to that of other Courts which have considered the problem, but changes its own rule of damages for conversion, it opens the door to possibilities of fraud and collusion, namely that both a collecting Bank and a drawee Bank or either of them it liable, in conversion, to a non-endorsing payee for the face amount of the check, irrespective of the extent of its interest or ownership of the funds represented by the check. That is, for example, even though a non-endorsing payee had only a \$100.00 interest in a \$10,000.00 check, it is nevertheless entitled to collect the face amount of check against either the collecting Bank or the Drawee Bank if the check is honored without its endorsement. This is the Court's ruling, and for this it will be cited. In setting out the facts as the basis of the Opinion, the Court recognized that Pacific Metals did not own all of the funds represented by the check, stating in its Opinion that after the checks were issued by Mayne Plumbing payable to Olympus and Pacific Metals as co-payees, they then divided the proceeds according to their respective interest therein. The Court said:

“Thenceforward the practice was followed of issuing the checks in that form, both payees endorsed the checks and divided the proceeds according to their respective interest therein.” (Under-scoring added)

While we do not agree with the Court's statement “that they divided the proceeds according to

their respective interest therein", because the division was effected by negotiation after the checks were issued and delivered, however, since it makes no difference in so far as this motion is concerned, we will assume, for the purpose of this argument, that the Court stated the facts correctly in this regard. The important fact, we submit, which the Court recognized, was that Pacific Metals did not own all of the funds represented by the check.

In view of the fact that the Court recognized and held that Pacific Metals did not own a 100 per cent interest in the funds represented by the check, how can a ruling be justified that the non-endorsing payee may recover the face amount of the check?

Whether the Court intended to or not, it laid down a rule of absolute liability, holding that a non-endorsing payee may recover the face amount of the check, irrespective of his interest therein. In this respect, we direct the Court's attention to paragraph 4 and 5 of its Opinion.

The rule, announced by other Courts, is that a non-endorsing payee's right of recovery, in conversion, is limited to its interest or ownership in the funds represented by the check, after its negotiability had been destroyed.

There is another supposition that appears to have led the Court into error, that is, that it was dealing, from the beginning to the end, with a negotiable instrument, whereas, in fact, it was not

dealing with a negotiable instrument since the check's negotiability had been destroyed.

The rule is that, where one of the co-payees fails to endorse, the negotiability of the checks is completely destroyed, and, in honoring such a check, the holders acquired only the interest of an assignee of a non-negotiable instrument — that is the interest of the endorsing payee. Here, Tracy-Collins acquired the interest of Olympus, the endorsing payee; yet, notwithstanding, the Court has deprived Tracy-Collins of Olympus' interest in the check and that in view of the fact that Olympus received from Tracy-Collins the face amount of the check, including Pacific Metals' interest, if any.

In support of Tracy-Collins contention that the non-endorsing payee, Pacific Metals, could only recover to the extent of its interest or ownership in the funds represented by the check, in our brief, the Court's attention was directed to a Colorado case and two decision of this Court, and although we believe the Utah cases are in point, we will discuss only the Colorado case, which the Court cited, with approval, in both its majority and minority opinions, since it deals specifically with the rights of non-endorsing payees and the extent of a collecting and a drawee Bank's liability in honoring such a check.

The Colorado Court in *American National Bank of Denver vs. First National Bank*, 130 Colorado 557, 277 Pacific 2d 951 (1954) was con-

fronted with the same problem we have here, except that the maker sued the Drawee Bank and the Drawee then sued the Collecting Bank. In holding for the maker and Drawee Bank, the Court limited the maker's and Drawee Bank's right of recovery to the amount of non-endorsing payee's ownership in the funds represented by the check. It further held the check's negotiability had been destroyed because of non-endorsement and that the Collecting and Drawee Banks acquired the interest of the endorsing co-payee as an assignee only, and that each of the co-payees' interest in the check was to be determined by the Trial Court. The Court said:

“We understand that by our ‘Negotiable Instruments Law’ we adopt the common-law rule providing that where a check is payable to the order of two or more persons who are not partners, all of them must endorse unless the ones so doing has authority to endorse for the other payees, and this joint endorsement is necessary for a complete negotiation. Under the common law, as well as by our ‘Negotiable Instruments Law’, where one of the payees fails to endorse, the negotiability of the check is completely destroyed. *Mills v. Pope*, 90 Mont. 569, 4 P. 2d 485; *Rosecky v. Tomaszewski*, 225 Wis. 438, 274 N.W. 259; *Bonuso v. Shroyer Loan & Finance Co., Inc.*, D.C. Mun. App., 37 A. 2d 760; *Newton County Bank v. Holdeman*, 223 Mo. App. 164, 9 S.W. 2d 852. *The holder of the check, after this failure to endorse, acquires the interest of an assignee only, and as such his interest in the proceeds of the check are to be determined.*”

“We conclude that when defendant Hereford, being charged with the absolute and specific duty of determining that the payees in the check endorsed the same if it was to become a holder in due course, neglected so to do, and accepted the check with the endorsement of Frontier Motor Co. *only thereon, it acquired only such interest in the check as Frontier Motor Co. had therein.* Hereford acquired an assignment of Frontier’s interest in the check and could not, without the endorsement of the co-payee, transfer title thereto as a negotiable instrument. *At best Hereford acquired an interest in a non-negotiable chose in action.*” (emphasis added)

And again the Court said:

“We have hereinbefore determined that the check in question never was negotiated. It was, in fact, a non-negotiable chose in action; no Bank through which it was channeled became a holder in due course, and their liability as endorsees is not to be measured by our “Negotiable Instruments Law”, but rather with those rights arising out of an assignment of a non-negotiable instrument. *At best, Hereford was entitled to retain only the financial interest that Frontier Motor Co. had in the check in question.* (emphasis added.)

The Herford (Bank) was the Collecting Bank and was sued by the Drawee Bank, and the Court will particularly note that Hereford was entitled to retain the interest the endorsing payee had in the check.

The above case, we submit, lays down the prop-

er extent of recovery to an non-endorsing payee and is in keeping with the well-recognized rule that in conversion, the prevailing party can recover, only that amount necessary to compensate him for his actual pecuniary loss.

To permit a non-endorsing payee to recover more than his actual financial interest in the funds represented by a check not only violates the rule of compensatory damages for mistaken and unintentional conversion, but opens the door for fraud and collusion.

In the case of State Bank of Southern Utah vs. Stallings Utah 2nd 146, 427 Pac. 2nd 744, to which the Court's attention was called by the Respondent Bank of Salt Lake, this Court held that, in the absence of an assignment, a check in and of itself did not effect an assignment of the funds represented by the check. In this case, the record is clear that there was no assignment by Olympus to Pacific Metals either in whole or in part of the funds represented by the check. Olympus had no claim against Tracy-Collins, and as to what portion of the funds represented by the check Pacific Metals was entitled to receive was to be determined by future negotiations between the co-payees after delivery. It is submitted that it cannot be determined what interest, if any, Pacific Metals had in the funds represented by the check. In this respect, it should be kept in mind that Olympus did not part with the control of either the funds represented by the check or the check it-

self, and that in the past the checks were delivered to Olympus by the maker. In this respect, the Court, at page 746 in the State Bank of Southern Utah case quoted with approval a decision of the Supreme Court of the State of Washington as follows:

“In order to work an equitable assignment there must be an absolute appropriation by the assignor of the debt or fund sought to be assigned to the use of the assignee. The intention of the assignor must be to transfer a present interest in the debt or fund or subject matter; if this is done the transaction is an assignment; otherwise not. 5 C.J. 909.

“The assignor of a chose in action must part with the power of control over the thing assigned; if he retains control, it is fatal to the claim of the assignee, 5 C.J. 912. See, also, *Hossack v. Graham*, 20 Wash. 184, 55 P. 26.”

### CONCLUSION

The Colorado Court's decision, we submit, lays down the correct rule as to the extent of recovery for a non-endorsing payee in line with the well-recognized rule as to damages for conversion; namely, that a non-endorsing payee's right of recovery is limited to its actual financial interest in the funds represented by the check.

To hold otherwise is to promulgate a rule of damages for conversion contrary to that of all the authorities who have ruled on the question, including this Court's prior decisions, and the decision will be cited for the proposition that a collecting or



drawee bank or either of them are subject to an absolute liability to a non-endorsing co-payee for the face amount of the check regardless of its interest therein, even though it owns only a small fraction of the proceeds represented by the check. It changes the rule of compensatory damages for conversion resulting from a mistake or unintentional act.

For the reasons, stated, we urge that the Court should, and we believe that it will want to re-consider its decision and order a re-hearing and grant the relief sought by appellant, Tracy-Collins, on its appeal.

Respectfully Submitted,

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