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Commonwealth National Bank v. Kennedy Company, An Unincorporated Association, Charles R. Kennedy, Jr., Black Corporation, White Partnership, Doe One Through Doe Ten, Inclusive and the Kennedy Company, A Co-Partnership, Charles R. Kennedy; Rebecca Kennedy v. Commonwealth National Bank, A National Banking Association, And Firemen'S Fund Insurance Company : Brief of Appellant

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IN THE SUPREME COURT
OF THE STATE OF UTAH

MONWEALTH NATIONAL BANK,
Plaintiff,

vs.

NEDY COMPANY, et al,
Defendants.

KENNEDY COMPANY, a
partnership, et al,
Cross-Complainants &
Appellants,

vs.

ONWEALTH NATIONAL BANK, et al,
Cross-Defendants &
Respondents.

CASE

BRIEF OF APPEL

ppeal from a Judgment of th
District Court of Salt
Honorable Bryant H. Cro

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of Davi
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COLTON
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Lake City, Utah 84101
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TABLE OF CONTENTS

Page

STATEMENT OF THE KIND OF CASE . . . 2

DISPOSITION IN LOWER COURT. 2

RELIEF SOUGHT ON APPEAL 3

STATEMENT OF FACTS. 3

POINTS URGED FOR REVERSAL 25

I. ORDER OF JUDGE MERRILL C. FAUX 25

a. FOR A NEW GARNISHMENT, AND WITHOUT SUPPORTIN EVIDENCE WAS ERROR 25

b. THAT DEFENDANT AND CROSS-COMPLAINANT CHARLES R. KENNEDY REPLACE $11,000.00 IN GARNISHMENT WAS ERROR 25

c. THE CONTINUAL THREAT OF CONTEMPT AGAINST CHARLES R. KENNEDY WAS ERROR 25

II. THE TRIAL COURT ERRED IN ITS PROCEDURE BEFORE THE JURY . . . 29

Page

a. REFUSAL TO ADMIT IN EVIDENCE A CHECK HONORED BY THE BANK SIMILAR TO THE ONE IN ISSUE ON THE QUESTION OF WRONGFUL DISHONOR. 29

b. REFUSAL TO PERMIT THAT PORTION OF THE TESTIMONY OF DANIEL WHITE, PRESIDENT OF THE BANK, TO BE READ TO THE JURY THAT THE CHECK IN QUESTION WAS DISHONORED BY MISTAKE 29

c. REFUSAL TO PERMIT BERNARD M. TANNER TO TESTIFY AS TO WHEN MRS. McCLUSKEY LEARNED KENNEDY'S CHECK HAD BEEN DISHONORED 29

d. CROSS-COMPLAINANTS WERE ENTITLED TO RECOVER FOR INJURY TO REPUTATION AND IMPAIRMENT OF HEALTH. 30

e. THE COURT'S INSTRUCTIONS WERE PREJUDICALLY ERRONEOUS 38

f. THE TRIAL WAS BASICALLY UNFAIR. 39

Page

g. THE COURT SHOWED FAVORITISM TO PLAINTIFF AND CROSS-DEFENANTS IN ITS EXAMINATION OF ATTORNEY KENT S. LEWIS AIDING HIM HIS TESTIMONY OF ATTORNEY'S FEES. 40

CONCLUSIONS 40

CASES CITED

American Fletcher Nat. Bank & Trust Co. v. Flick, 252 N.E. 2d 839. 33

Bott v. Bott, 20 U 2d 329 . . . . . 8, 29

Desert National Bank v. Little, Roundy & Co., 13 U 265, 44 P 930 28

Godbe-Pitts Drug v. Allen, 8 U 117, 29 P 881. 28

Grannis v. Ordean, 234 U.S. 385 (1950) 26

In re Schulder, 221 P 565, 62 U 591 29

Page

Laprease v. Ramours Furniture Company, Inc. 315 F.Supp. 176 (1970) 27

Larson v. Fetherstan, 44 Wis. 2d 712, 172 N.W. 2d 20 (1969). . . 27

Loucks v. Alburquerque Nat. Bank, 418 P2d 191 (NM) 30
32

Mullane v. Center Hanover Bank and Trust Co., 339 U.S. 306 (1950) 26

Park v. Union Mfg. Co., 45 Cal. App. 2d 401, 114 P2 373. 31

Reed v. Industrial Acc. Comm, 10 Cal 2d 191, 73 P2d 191. 31

Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969) 27

Weaver v. Bank of America, 59 Cal. 2d 428, 380 P_2 644 34

Western Auto Co., v. Gurnea, 73 U 404, 274 P 863 28

Page

CONSTITUTION CITED

Constitution of Utah, Article 1
Secion 7 27

STATUTES CITED

CALIFORNIA STATUTES

Commercial Code, Sec. 4103 (1) . 39
Commercial Code, Sec. 4402 . . . 32
33
38
Corporation Code, Sec. 15006 . . 32

UTAH STATUTES

Utah Code Annotated, 1953
Section 78-32-3 8
29

UTAH RULES CIVIL PROCEDURE

Rule 26 (f) 23
29
Rule 64 D (a) (b) (1) 25
Rule 65 A (b) 26

IN THE SUPREME COURT
OF THE STATE OF UTAH

COMMONWEALTH NATIONAL BANK, a national banking association,

Plaintiff,

vs.

KENNEDY COMPANY, an unincorporated association, CHARLES R. KENNEDY, JR., BLACK CORPORATION, WHITE PARTNERSHIP, DOE ONE THROUGH DOE TEN, inclusive,

Defendants & Appellants.

THE KENNEDY COMPANY, a co-partnership, CHARLES R. KENNEDY; REBECCA KENNEDY, his wife,

Cross-Complainants and Appellants,

vs.

COMMONWEALTH NATIONAL BANK, a national banking association, and FIREMEN'S FUND INSURANCE COMPANY, a corporation,

Cross-Defendants and Respondents.

Case No. 12786

BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

This is an action to collect on a note by the bank with cross-actions for damages for wrongful dishonor of a check drawn on the Commonwealth National Bank by Charles R. Kennedy and Rebecca Z. Kennedy, co-partners doing business as The Kennedy Company, and for wrongful garnishment of the Kennedy family bank account in Salt Lake City, Utah

DISPOSITION IN LOWER COURT

Defendants stipulated to plaintiff's note of $8,500 and interest. The attorneys' fees for plaintiff and cross-complaint for defendants were tried by a jury.

Verdict for plaintiff of $ 2,000.00 attorneys' fees, and verdict against cross-complainants on wrongful dishonor of check, no cause of action. The Judge refused to allow evidence or to consider the wrongful garnishment claim.

RELIEF SOUGHT ON APPEAL

Defendants and cross-complainants seek reversal of the verdict and judgment and the refusal to allow evidence to be presented to the jury on the wrongful garnishment claim, and a new trial.

STATEMENT OF FACTS

The original action to collect a note, interest and attorneys' fees (R 1-3 was commenced by Commonwealth National Bank of San Francisco, ("Bank") against

Kennedy Company, an unincorporated association Charles R. Kennedy and some ficticious names.

Affidavit for garnishment filed with the complaint was incomplete. It alleged "...Defendants are about to dispose of, conceal, or assign their property held by Continental Bank and Trust Company." (R 5) Nothing is said about, "to defraud creditors in the affidavit." The affidavit was signed by a vice president of Commonwealth National Bank.

Writ of garnishment issued August 8, 1969, by the County Clerk, and was served August 11, 1969 (R 6-7) The garnishment tied up the family checking account in the names of Rebecca Z. or

Charles R Kennedy of approximately $20,000. (1004) without any notice whatever.

Upon oral motion without notice, Judge Stewart M. Hanson ordered the garnishment be released August 14, 1969. (R 8) An order was signed December 5, 196 nunc pro tunc as of August 14, 1969. (R 58-59)

Plaintiff filed a motion September 11, 1969, to set aside release of garnishment, for re-instatement of garnishment, and for an order directing Kennedy to replace the funds into the account at the time of garnishment. (R 20-21) Objections were filed to the motion (R 25-27) and an affidavit of defendant Kennedy. (R 28-2

Three affidavits from plaintiff Bank officials were filed as support for the motion. These were affidavits:

1. regarding an un-notarized letter, clearly inadmissable (R 31-32)

2. Affidavit explaining error in original affidavit (R 37-38)

3. Affidavit stating that defendant Kennedy had no known assets in California (R 39-41)

No facts were given to support a claim that defendant Kennedy was going to try to defraud creditors. October 21, 1969 Judge Merrill C. Faux ordered a writ of garnishment to issue (R 42). The garnishment did not catch any money. There was a debit to defendant's, Kennedy, account October 21, 1969 of $549.62. (R 1005)

The order was filed and signed November 25, 1969 (R 60) and provided, "It is hereby ordered that the release of garnishment be set aside and writ of garnishment reinstated."

Plaintiff, November 12, 1969 (R 50 filed a second motion to compel defendan Kennedy to replace the funds freed when the first garnishment was released. Thi motion was argued November 25, 1969 afte the Continental Bank branch manager and vice president testified that defendant' account showed a debit of $549.62 October 21, 1969. The Judge gave an order in Court that defendant, Charles R. Kennedy replace $11,000 in the bank account subject to the garnishment by

December 2, 1969. The order was signed and filed December 23, 1969 (R 66-67).

Plaintiff Bank, December 17, 1969, filed a motion without any supporting affidavit for an order to show cause why defendant, Charles R. Kennedy, should not be held in contempt for failure to replace the $11,000. The order to show cause was issued December 15, 1969 by Judge Merrill C. Faux. (R 63-64) Motion to quash (R 72) and affidavits of defendant Kennedy (R 73-74) and of others (R75-82) were filed. Argument was given on failure to comply with Statute 78-32-3 UCA and Bott vs. Bott, 20 U 2d 329, and failure to file and serve a written order.

January 15, 1970 (R 83) the following order was entered and filed:

> "Defendant Charles R. Kennedy appearing before the Honorable Merrill C. Faux, one of the judges of the above entitled court, on January 7, 1970, upon an Order to Show Cause why he should not be held in contempt for failure to replace $11,000 of the funds withdrawn from his garnished bank account at Continental Bank as ordered by this court on November 25, 1969, and the court finding that Charles R. Kennedy has sufficient assets to comply with said order,
>
> It is hereby Ordered that Charles R. Kennedy replace $11,000 withdrawn from his garnished bank account at Continental Bank by February 2, 1970, and that upon failure to comply with this Order, Charles R. Kennedy

appear before this court
on February 2, 1970, at
9:00 a.m.

Dated this 15th day of
January, 1970.

BY THE COURT

/s/ Merrill C. Faux "

It was from this order "petition to grant an appeal" was filed with the Supreme Court. (R 87-94) This appeal was not granted when plaintiff agreed not to press any garnishment until after judgment.

November 24, 1970, Defendant Kennedy requested interrogatories relating to the information within plaintiff's knowledge supporting plaintiff's affidavit that Kennedy was going to defraud creditors. (R 145-147)

Judge Marcellus K. Snow sustained plaintiff's objections on basis that the question of wrongful garnishment had already been adjudicated in favor of plaintiff. (R 148 & 151) Petition to grant an appeal, January 21, 1971, (R 166-176) was declined.

At the commencement of the trial November 22, 1971, Judge Bryant H. Croft, refused to consider the question of wrongful attachment and held the question was _res Judicata_,

The judgment rendered on the complaint is not in issue except for attorneys' fees. The claim of cross-complainants for wrongful dishonor of a check, arises when the Commonwealth

Bank returned a check drawn on the bank by the Kennedy Company for $5,000.00, payable to the order of Mr. Robert McCluskey. It is undisputed that there were sufficient funds in the account at all times to pay the check. The account balance was $9,617.64 at the beginning, and at the end of May was $15,682.88. The balance of the account did not get below $7,177. (R 397)

The check was on a form printed by The Kennedy Company (Exhibit 3). It was dated May 6, 1968, payable to the order of Mr. Robert McCluskey, Hamilton Montana, for $5,000.00. It was drafted upon Commonwealth National Bank, San Francisco, California. It was encoded on the bottom

"1210-0097" in magnetic ink. That is the number assigned by the Federal Reser System to the Bank. (R 425) Also encode on the bottom of the check was the numbe "597". That is the number assigned by United California Bank, whose computer i used to process checks, to the Bank. (R42 Also encoded in magnetic ink on the bott of the check is the number "301271". That number is the number assigned by th Bank to the Kennedy Company account. Th transit number for Commonwealth National Bank is "11-97". (R 628) The check bor the signature of "Rebecca Z. Kennedy" (R 398) When the account was opened by Mr. and Mrs. Kennedy, Mrs. Kennedy's signature on that account, according to

the signature card, was "R.Z. Kennedy" (R 427) However, her full name and signature was known to the Bank, and Charles Kennedy has arranged with the Bank through the President, Daniel White, to honor all checks on that account, whether signed "R. Z. Kennedy" or "Rebecca Z. Kennedy". (R 627) The check contained, however, a handstamped number of another bank, "93-58", which had been assigned to the First National Bank in Bozeman, Montana. Nevertheless, the check promtly reached the Bank where it was presented for payment. (R 625) Miss Irene Rosa testified the check was dishonored because (a) it had been sent to the wrong bank--it was not drawn on

the Commonwealth National Bank; (b) the signature was irregular, and (c) the account was really named The Kennedy Company Enterprises, not The Kennedy Company. Cross-defendants then attempted to introduce into evidence a check similar in all respects to the check in issue signed by "R.Z. Kennedy", which the Bank honored in August, 1968, to prove that the check in question could not have been properly dishonored for the reasons given. The court refused to admit that into evidence. (R 638-639) It is inconceivable that the jury could have found "no cause of action" had it been informed of the existence of a similar check which arrived at the Bank during

the critical period before Mr. Kennedy discovered that his check had been dishonored. Refusal to admit such a check constitutes prejudicial error.

The court refused to permit that portion of the testimony of Daniel White, President of the Bank, to be read to the jury whenever he testified that the check in question was dishonored by mistake.

Mr. White's deposition was noticed to be taken in behalf of the Bank. On the day before the deposition was scheduled, the Bank attempted to call off the desposition but cross-complainants would not consent and therefore his deposition was taken. Mr. White testified that he was familiar with both signatures of Rebecca Kennedy,

and that Charles Kennedy has arranged for both of them to be honored by the Bank on all Kennedy accounts, regardless of what the signature cards contained; that he tol all officers of the Bank that no Kennedy check was to be returned without payment, but should be referred to him; that somehow the check in issue had not been referred to him, in disregard of his orders, and the practice of the Bank. Mr. White was then asked: "Do you know of any reason why this check would have been returned by the Commonwealth National Bank?" Objection to the question was sustained, although that is practically the same question cross-defendant asked of his own witness, Irene Rosa. The

answer stricken declare: "No. We sent it back as we apparently did. It was an internal mistake." (R 628) Clearly, Mr. White was entitled to answer that question with a "yes" or "no". But the court did not permit him even to do that. Furthermore, he was entitled to explain his answer, but he wasn't permitted to do that. It is axiomatic that the president of the Bank is the most qualified man to know whether an item should have been paid or dishonored, and whether such dishonor was mistaken or malicious. No additional qualification of such a witness on an internal banking matter is required. The failure of the court to permit him to so testify is prejudicial error. Had

the jurors been allowed to hear his testimony, it is difficult to see how they would have returned a verdict of no cause of action.

Miss Rosa testified "We typed on the check 'Item not drawn on 11-97'". (R 437) Later she testified when the check was received "Item not drawn on 11-97" was already on the check, and in her opinion this raised a question as to whether the check should be paid. When Mr. White was asked the same question: "Do you known how that got on the check?", he answered, "I couldn't say how it got there. . .I just wouldn't know." Question: "Your opinion would be that it was erroneous?" Answer: "Yes." The

last question and answer were stricken. (629) Although the question was leading, that particular objection had been waived when his deposition was taken. Therefore, there was no reason not to allow the President of the Bank to testify to the same matters to which Miss Rosa was called upon to testify for the Bank.

Mr. White was then shown a communication which was mailed by the Bank to The Kennedy Company (not to the Kennedy Company Enterprises) which stated: "on this date we charged your account with the unpaid item described below: Drawn by The Kennedy Company, Drawn on 93-58." Reason for non-payment is incorrect ABA number. Mr. White was then asked if that

was a correct reason for failing to honor the check. Mr. White answered: "Well, I wouldn't say it is correct because there is enough identification on the check to pay, and the stamp and the name of the bank and clearing house number down here (indicating)." (R 627-628) The court struck the answer and told the jury to disregard it, although plainly his testimony on the point was at least as competent as Miss Rosa's and should have been admitted.

The court (R 832) prejudicially erred in refusing to permit Mr. Tanner to testify as to when Mrs. McCluskey learned that Kennedy's check has been dishonored.

On the question of damages, one of the key issues was the loss of the McCluskey account. Mrs. McCluskey testified in her deposition taken by the Bank that she became disenchanted with Mr. Kennedy at the end of May, 1968, but that she didn't learn the check had been dishonored until June 20, 1968. The Bank then claimed that the loss of the McCluskey account was not caused by the dishonored check. Cross-complainants offered to prove by Mr. Tanner's testimony that Mrs. McCluskey in a conversation on May 25, 1968, with Mr. Tanner said she was disappointed or disillusioned with Mr. Kennedy because his check hadn't cleared. (R 793). This testimony was offered to prove that Mrs.

McCluskey must have known at least as early as May 25, that the Kennedy check drawn on the Bank had been dishonored on or about May 22, 1968, and that her change of attitude toward Mr. Kennedy was directly related to the Bank's wrongful dishonor. The trial court refused to admit such testimony, on the ground that since cross-complainants had offered Mrs. McCluskey's deposition into evidence, they could not impeach her. This ruling is contrary to Rule 26 (f) which provides in part that: "At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or any other party". The ruling was extremely prejudicial, as the loss of the

McCluskey account was a substantial portion of the total damages claimed by cross-complainants.

The rulings of the Judge before the jury herein reviewed, and the oral examination of attorney Kent S. Lewis by the Judge to aid Lewis in proving attorneys fees before the jury (R 917-920) all had a prejudicial effect upon the jury towards cross-complainants. This prejudicial attitude of the trial Judge is also portrayed in the summary given by the Court (R 710-721) and the motion for a mis-trial by Mr. Bayles.(R 729-731)

POINTS URGED FOR REVERSAL

I. Order of Judge Merrill C. Faux:

a. for a new garnishment, and without supporting evidence was error;

b. that defendant and cross-complainant Charles R. Kennedy replace $11,000.00 in garnishment was error;

c. the continual threat of contempt against Charles R. Kennedy was error.

Rule 64 D (a), (b) (1), Utah Rules of Civil Procedure provides for abuse of the constitutional rights of "Due Process". It permits an injunction without hearing to prevent an individual to use his own bank account. This in commercial life today ruins the individuals credit and gradually chokes the life blood out of commerical trade. It permits the clerk of the court to issue the unconstitutional

injunction, tying-up funds (by name of garnishment) in a manner that is stronger than an injunction issued by a judge. Rule 65 A (b) provides temporary restraining order or injunction issued by a judge of the court without notice may be set aside without notice. Why should the clerk of the court be given stronger authority for injunctive purposes without notice than a judge?

The right to be heard is worthless without notice, Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950). Due process requires an opportunity to be heard, Grannis v. Ordean, 234 U.S. 385 (1950).

Prejudgment seizure of property under Wisconsin's prejudgment proceedure was held unconstitutional because it deprived a wage earner of the enjoyment of earned wages without an opportunity to hear, Sniadach v. Family Finance Corp. of Bay View, 395 U.S. 337 (1969). The Sniadach rule applied to a bank account, Larson v. Fetherstan, 44 Wis. 2d 712, 172 N.W. 2d 20 (1969). Prejudgment Summary proceedings cannot be applied to recovery of household furniture under the Sniadach rule, Laprease v. Ramours Furniture Company inc., 315 F.Supp. 716 (1970). Prejudgment taking of property is in violation of the Constitution of Utah Article 1, Section 7, This section provides that no persom shall be deprived of life,

liberty or property, without due process of law.

A defendant's denial of having taken any action to defraud creditors in any manner and denial of any intent to defraud creditors placed the plaintiff's second affidavit of claim of fraud or intended fraud at issue, which the Court refused to consider in accordance with due process of law. Godbe-Pitts Drug vs. Allen, 8 U 117, 29 P 881; Desert National Bank v. Little, Roundy & Co., 13 U 265, 44 P 930; Western Auto Co., v. Gurnea, 73 U 404, 274 P 863.

The Order to Show Cause issued in this case against defendant did not give the court any jurisdiction and was void

because it did not comply with the statute UCA 1953, Sec. 78-32-3; In re Schulder, 221 P. 565, 62 U, 591; Bott v. Bott, 20 U 2d 329, 437 P2d 684.

II. The trial court erred in its procedure before the jury as follows:

a. refusal to admit in evidence a check honored by the bank similar to the one in issue on the question of wrongful dishonor.

b. refusal to permit that portion of the testimony of Daniel White, President of the Bank, to be read to the jury that the check in question was dishonored by mistake.

c. refusal to permit Bernard M. Tanner to testify as to when Mrs. McCluskey learned Kennedy's check had been dishonored.

This ruling is contrary to URCP Rule 26 (f) which provides "At the trial or hearing any party may rebut any relevant

evidence contained in a deposition whether introduced by him or any other party". The ruling prevented cross-complainants from showing that the disturbance with the McCluskey people arose after the dishonor of the check was known by Mrs. McCluskey in as far as the McCluskey deposition which cross-complainants read into evidence.

d. Cross-complainants were entitled to recover for injury to reputation and impairment of health.

On the precedent of Loucks v. Alburquerque Nat. Bank, 418 P2d 191 (NM), the court refused to submit to the jury the question of damages to cross-complainant's reputation and health proximately caused by the bank's wrongful dishonor, and

refused to admit evidence on that point. It was the court's ruling that neither Charles nor Rebecca Kennedy were the Bank's customers, but only the Kennedy Company, a co-partnership, and it could suffer no such damages. The decision is predicated on the doctrine that a partnership is a separate entity from the partners who comprise it. However, the case at bar must be decided under California law, and separate entity doctrine has been repudiated in California. Park v. Union Mfg. Co., 45 Cal.App. 2d 401, 114 P2d 373; Reed v. Industrial Acc. Comm., 10 Cal 2d 191, 73 P2d 1212. Consequently, although the account was opened by Charles and Rebecca Kennedy, dba The Kennedy Company

they as individuals are and remain the "customers" of the Bank under Sec. 4402 of the Commercial Code of California. This conclusion is strengthened by reference to California Corporation Code, Sec. 15006, which provides in part that: "A partnership is an association of two or more persons to carry on as co-owners a business for profit." The foregoing comes from the Uniform Partnership Act, likewise adopted in Utah (Utah Code 48-1-3). "Customer", as used in Commercial Code Sec. 4402, means "_any person_ having an account with a bank." This definition is broad enough to include the individual partners, and the holding in _Loucks_; (_supra_) to the contrary should be rejected.

On the question of damages, Sec. 4402 of the Commercial Code provides as follows: "A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. Where the dishonor occurs through mistake liability is limited to actual damages proved."

In construing this identical language, the Supreme Court of Indiana, in American Fletcher Nat. Bank & Trust Co. v. Flick, 252 N.E. 2d 839, said at p. 845:

> Suffice it to say, that insofar as the fact before us require construction of Burns § 19-4-402, we construe it to permit recovery of monetary compensation for any actual or consequential

> harm, loss or injury proximately caused by a wrongful dishonor. See Loucks v. Albuquerque National Bank (1966), 76 N.M. 735, 418 P.2d 191. We believe in this respect that lables such as 'actual' or 'consequential' are less than meaningful in the sense of the compensability of harm, injury or loss proximately caused by wrongful dishonor.

In Weaver v. Bank of America, 59 Cal 2d 428, 380 P_2 644, the wrongful dishonor section of the Civil Code (sec. 3320) read as follows:

> No bank shall be liable to a depositor because of the nonpayment through mistake or error, and without malice, of a check which should have been paid unless the depositor shall allege and prove actual

> damage by reason of such nonpayment and in such event the liability shall not exceed the amount of damage so proved.

In holding that section premitted a cause of action to be stated in tort or contract, and that damages for loss of reputation and impairment to health are recoverable under that section, the court said at pp. 436-48:

> Section 3320, enacted two years after Hartford, emanated from a uniform law drafted by the American Bankers Association and was incorporated in the law of seventeen states. The Association issued a statement justifying the statute upon the ground that plaintiffs suffered little or no damage in the majority of instances in which the common law presumed

> substantial damages, and that banks thus were being 'mulcted in damages' out of proportion to the injury inflicted.

Assuming the purpose of the statute to be the repeal of the common-law presumption of damages, such purpose would not be thwarted by recognition of compensatory damages for actual loss of reputation and impairment of health. . .

> The purpose of the common law presumption was to permit substantial recovery although specific damages could not be shown due to the difficulty of proof. If a concomitant amelioration of the standards of specificity and proof does not accompany the repeal of the presumption, a statute designed to prevent injustice to banks will be carried beyond the point necessary

to that end; it will,
instead, inflict in-
justice upon the
depositor. . .

In brief, we see no
reason for according to
an institution so basic
to the contemporary society
as a bank a special non-
statutory exemption from
general tort liability.
Such immunity would neces-
sarily rest upon the
outmoded concept that the
chain of causation would
break in this case because
of the intervening, but
foreseeable, act of a
third party. We can no
more adopt that unrealistic
approach than we can grant
the bank exoneration upon
the similarly contrived
ground that injury to
reputation and impairment
of health did not, within
the meaning of section 3320
of the Civil Code, inflict
'actual damage' upon plaintiff.

Present Sec. 4402 is a watered-down version of former Sec. 3320. Since injury to reputation and impairment of health were recoverable under Sec. 3320, *a fortiori*, they are recoverable under Sec. 4402, which allows the recovery of all "damages proximately caused".

e. The court's instructions were prejudicially erroneous.

Instruction No. 8 reiterates the court's improper ruling that only The Kennedy Company is entitled to claim damages on the counterclaim.

Instruction No. 10 implies the signature card controls withdrawals, any agreement with the Bank to the contrary notwithstanding. That is not the law.

Any rule or regulation may be modified by agreement between the parties, and it is the agreement which controls. (Commercial Code Sec. 4103 (1)) In the case at bar the evidence was uncontradicted that, by agreement with the Bank, Rebecca Z. Kennedy, of whom the Bank had a facsimile signature on hand, was an authorized signature on the account.

f. The trial was basically unfair.

In addition to the foregoin prejudicial error, the court displayed considerable animus toward Kennedy, and advised him that his relationship with the McCluskey's was offensive to the Court.

g. The court showed favoritism to plaintiff and cross-defendants in its

examination of attorney Kent S. Lewis aiding him his testimony of attorney's fees.

CONCLUSIONS

In view of all of the foregoing, we respectfully submit that the judgment and all proceedings should be set aside and a complete new trial be ordered to hear questions of wrongful garnishment, wrongful dishonor, all damages, and attorney's fees.

Respectfully submitted,

Weston L. Bayles
of Davis and Bayles
and
Sidney DeGoff
of Field, DeGoff, Huppert
and MacGowan
Attorneys for Appellants