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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 Respondents

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

COMMONWEALTH NATIONAL BANK, a national banking association,
Plaintiff,

v.

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

THE KENNEDY COMPANY, a copartnership, CHARLES R. KENNEDY, REBECCA KENNEDY, his wife,
Cross-Complainants & Appellants,

v.

COMMONWEALTH NATIONAL BANK, a national banking association, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,
Cross-Defendants & Respondents.

Case No. 12786

BRIEF OF RESPONDENTS

An appeal from the Judgment of the Third District Court In and For Salt Lake County, the Honorable Bryant H. Croft, Judge

FABIAN & CLENDENIN
Albert J. Colton
Kent S. Lewis
800 Continental Bank Building
Salt Lake City, Utah 84101
Attorneys for Respondents

DAVIS AND BAYLES
Weston L. Bayles
72 East 4th South, Suite 320
Salt Lake City, Utah 84111

FIELD, DeGOFF, HUPPERT & MacGOWAN
Sidney F. DeGoff
Field Building, 745 Market Street
San Francisco, California
Attorneys for Appellants

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NATURE OF THE CASE

This is an action on a promissory note by Commonwealth National Bank against appellants. Appellants counterclaimed against Commonwealth, claiming that Commonwealth wrongfully dishonored a check, wrongfully debited the Kennedy Company Enterprise account

in the amount of $2,587.59, and for wrongful garnishment. Fireman's Fund as surety for the garnishment bond was joined as a party to the wrongful garnishment claim.

DISPOSITION IN LOWER COURT

The case was tried to a jury before the Honorable Bryant H. Croft, in the Third Judicial District Court in the State of Utah on November 22, 1971. At the beginning of the trial the parties stipulated to judgment against appellants on the promissory note in the amount of $8,500 plus interest and to dismissal of their counterclaim for wrongfully debiting appellants' account. The jury returned a verdict of no cause of action on appellants' claim for wrongful dishonor of check and awarded plaintiff $2,000 attorney's fees on the promissory note. The court dismissed appellants' counterclaim for wrongful garnishment finding the issue had been previously adjudicated by Judge Merrill C. Faux.

RELIEF SOUGHT ON APPEAL

Respondents ask that the verdict of the jury and decision of the lower court be affirmed.

STATEMENT OF FACTS

Respondents believe that appellants' statement of the facts is incomplete, unclear and argumentative and, therefore, submit their own statement of facts.

Defendant Charles Kennedy testified that on May 6, 1968, his wife drew a check in the amount of $5,000 pay-

able to Mr. Robert McCluskey and mailed it to Mr. McCluskey in Hamilton, Montana (T-398). The check was signed "Rebecca Kennedy" (Ex. D-3). The number 93-58/921 was stamped twice in the upper right-hand corner of the check. Charles Kennedy admitted that this number was stamped on the check by appellants (T-405). The number 93-58/921 is the transit number of the First National Bank located in Bozeman, Montana (T-405). The transit number for Commonwealth National Bank is 1197/1210 (T-425). Each bank in the United States has a different transit number and these transit numbers appear in the upper right-hand corner of checks and are a method of identification of the drawee bank (T-421-425). The check was not drawn on a standard bank check form but rather on a special check form made up for the Kennedy Company for advertising purposes. The form contained the name "Kennedy Company" on the top and the wording "New York, N. Y." to the left of the place where the date is normally put on a check (Ex. D-4).

Appellants had two checking accounts at Commonwealth National Bank — a personal account of Charles R. or Rebecca Z. Kennedy and an account in the name of the "Kennedy Company Enterprises", which latter account had authorized signatures on the signature card of "Charles Kennedy" and "R. Z. Kennedy" (Ex. P-12). The coded account number on the check applied to the latter account. The check was deposited by Mrs. McCluskey in her banking account at Citizen's State Bank in Hamilton, Montana (T-677). It reached Common-

wealth National Bank on May 23rd, 1968, and was returned unpaid the same day. Irene Rosa, cashier at Commonwealth National Bank testified the check was irregular for three reasons: (1) the check was signed "Rebecca Kennedy" an unauthorized signature of the Kennedy Company Enterprise account; (2) it contained an incorrect transit number; and (3) the check contained the name "Kennedy Company" while the account was in the name "Kennedy Company Enterprises" (T-429).

The evidence did not establish the exact route the check followed after it first left the Commonwealth National Bank and before it reached the Citizens State Bank in Hamilton, Montana. However, at some point along the route after it left Commonwealth a sticker entitled "Federal Reserve Bank of Minneapolis" containing "unable to determine where payable" was placed on it. The evidence is also inconclusive as to the name of the bank which, apparently confused by the check, typed the notation "not drawn on 11-97" on the check, or the date when this was done.

Charles Kennedy testified the $5,000 was to reimburse the McCluskey's for their investment in silver bullion which Charles Kennedy had sold for them (T-507-508). Charles Kennedy had been introduced to the McCluskeys, an elderly couple in their 70's, in February of 1968, through a mutual acquaintance (T-662-623). The McCluskeys' total assets consisted of their home in Hamilton, Montana, some property in California, about $40,000 worth of certificates of deposit in a Canadian Bank, some

gold coins and $5,000 which they had invested in silver bullion through the Foreign Commerce Bank in Zurich, Switzerland. Charles Kennedy indicated to the McCluskeys that the investment might be a fraud and that he become their investment adviser (T-663-664). Kennedy obtained from Mrs. McCluskey a special power of attorney to handle the silver bullion investment and a general power of attorney covering "all matters whatsoever" (Ex. P-37). Dan White, the president of Commonwealth National Bank was also given co-powers with Charles Kennedy on the powers of attorney. Charles Kennedy sold the silver bullion for the McCluskeys by sending a cable to the Foreign Commerce Bank in Zurich (T-565). A check in the amount of $7,587.59, representing the return on the $5,000 investment made a little over a month earlier by the McCluskeys plus their profit of almost $2,587.59 was sent to Mr. McCluskey from the Foreign Commerce Bank on March 22nd (Ex. P-38). Pursuant to Charles Kennedy's instructions, Mrs. McCluskey sent the check to him. On May 6, 1968, Kennedy sent the $5,000 check heretofore mentioned to Mrs. McCluskey, keeping the $2,587.59 profit for himself (T-675). Mr. Kennedy also took control of the McCluskeys' gold coins and certificates of deposit during this period of time. He took the gold coins to Salt Lake City. Mr. Kennedy testified he wanted to value the coins (T-531). He also took the certificates of deposit which he planned to sell, although Mrs. McCluskey testified she did not understand what was to be done with the funds (T-666).

Before the end of April, Mrs. McCluskey began having second thoughts about the wisdom of having turned her complete financial affairs over to Mr. Kennedy, a total stranger. On April 22, 1968, she wrote to Mr. Kennedy asking that the gold coins be returned to her (Ex. P-40). On April 24, 1968, she again wrote asking for the return of the coins and indicated he was going a "little too fast" with her investments (Ex. P-41). On May 25, 1968, Mrs. McCluskey wrote to Mrs. Kennedy stating that they wanted time to "think these things out" and asked Mr. Kennedy to return their certificates of deposit and passbooks (Ex. D-28). On May 26, 1968, she wrote Mrs. Kennedy cancelling the powers of attorney she gave him and demanding he return them to her (Ex. D-30). In the May 26th letter she also questioned Kennedy making "almost $3,000 profit on the sale of the bullion". Finally, on June 6, 1968, she wrote Mr. Kennedy a nasty letter seeking return of the $2,587.59 for selling the bullion stating "Mr. Kennedy, to be frank we are not at all certain as to what services you have rendered" (Ex. P-42).

Mrs. McCluskey first received notice that the check had been returned by Commonwealth National Bank on June 20, 1968, when the Citizens Bank in Hamilton, Montana notified her by mail that her account was being charged $5,000 because the Citizens State Bank could not locate the Kennedy Company account (T-678, Ex. P-53).

The first mention of the returned check to Mr. Kennedy is in a letter bearing the notation "received

on September 3rd", notifying him that the $5,000 check had not cleared and demanding a cashier's check to replace it. On September 5th she again wrote Mr. Kennedy demanding a cashier's check on Kennedy's local bank account in Salt Lake City. Instead of complying with Mrs. McCluskey's request Kennedy boarded a plane to San Francisco, obtained a certified check from Commonwealth National Bank and presented it to an attorney in Hamilton, Montana for delivery to Mrs. McCluskey (T-530).

On August 27, 1968 Commonwealth National Bank loaned appellants $8,500 evidenced by a promissory note payable on demand (Ex. P-1). On August 8, 1969, Commonwealth filed a complaint in the Third District Court against appellants to recover on the note. After filing the complaint, Commonwealth National Bank, pursuant to Rule 64D of the Utah Rules of Civil Procedure, had a writ of garnishment issued attaching the appellants' checking account at The Continental Bank and Trust Company, Seventieth South Branch. A bond and affidavit alleging the cause for the writ were filed at the time the writ was issued. The writ was served on August 11, 1969. On August 14, 1969, upon oral motion of appellants and without notice, the garnishment was released by Judge Stewart M. Hanson. On September 11, 1969, Commonwealth National Bank filed its motion for reinstatement of garnishment. Appellants filed a reply to the motion on October 15, 1969. Hearing on the motion was held on October 22, 1969, before the Honorable Merrill C. Faux.

Affidavits were filed by Commonwealth National Bank in support of the motion and by appellants in opposition to the motion. After hearing oral argument and receiving the evidence the court ordered the garnishment reinstated, finding that it had been improperly released and that the evidence supported the grounds alleged in the affidavit for garnishment. No money was ever replaced by appellants in the garnished account. Appellants in their answer to respondents' complaint, denied the promissory note and filed a counterclaim for wrongful dishonor of a check and a counterclaim for wrongful garnishment and a counterclaim for a wrongful debit to their account in the amount of $2,587.59.

ARGUMENT

POINT I.

THE JURY'S VERDICT SHOULD NOT BE DISTURBED WITHOUT A SHOWING THAT THE TRIAL COURT COMMITTED A PREJUDICIAL ERROR.

Appellants assign numerous errors to the trial court, most of them arising over the issue of the alleged wrongful dishonor of the $5,000 check payable to Mr. McCloskey. The jury in this case sat through five full days of trial and after deliberation came to the conclusion on the basis of all the evidence that the claim for wrongful dishonor of the check was without merit. Appellants object to the exclusion of certain evidence by the trial court, primarily the testimony of two witnesses. A review of the record

will show the trial court conscientiously deliberated over each of the evidentiary rulings. For appellants to prevail upon appeal they must show not only that these closely considered rulings of the trial court were in error but also that such errors were of such magnitude that "there is a reasonable likelihood that a different result would have been reached" but for the errors. *Brunson* v. *Strong*, 17 Utah 2d 364, 412 P. 2d 451 (1966); *Paull* v. *Zions First Nat'l Bank*, 18 Utah 2d 182, 417 P. 2d 759 (1966).

POINT II.

OPINIONS AND CONCLUSIONS OF DEPONENT, DANIEL WHITE, WERE PROPERLY EXCLUDED BY THE TRIAL COURT WHERE NO FOUNDATION WAS LAID AS TO THE QUALIFICATION OF THE WITNESS.

Defendants introduced at trial the deposition of Daniel White. White, a close friend and business associate of Charles Kennedy had been president of Commonwealth National Bank from 1964 to 1968 (T-620). The court refused to admit into evidence two answers which Mr. White gave in his deposition to the following questions, to which appellants object:

> Q. Do you know any reason why this check would have been returned by Commonwealth National Bank?
>
> A. No. We sent it back as we apparently did. It was an internal mistake (T-628).

Q. Now I will show you in red some typewritten ink with a little phrase typed on the front of the check as follows: "ITEM NOT DRAWN ON 11-97". Do you know how that got on the check?

A. I couldn't say how it got on there. It is typed on there obviously. I just wouldn't know.

Q. Your opinion would be that it was erroneous?

A. Yes (T-629).

Counsel for respondents objected to the admissibility of these answers on the grounds that no foundation was laid as to the qualification of the witness and that they called for conclusions of the witness. The objections were sustained.

The possession of the required qualifications by a particular person offered as a witness must be expressly shown by the party offering such witness. This follows from the nature of the situation and is universally conceded. See Wigmore on Evidence, 3rd Ed. §560, p. 640. Appellants contend that the fact that Mr. White was president of the bank qualified him to testify to the questions to which the objections were sustained. Respondent would submit that this contention is erroneous and that the title of bank president does not give a person holding such position a *carte blanche* qualification to testify as to each and every area of banking without showing that he is familiar with the particular area about which he is asked to give his opinion. Surely no one would contend that the title, President of General Motors, would give

such a person the right without further qualification to testify as to the mechanical structure of a Chevrolet automobile. A modern bank is in much the same position as any giant corporation, having many many different areas and divisions requiring particular knowledge about which all of them can be an expert. Absolutely no questions were asked by counsel for appellants as to Mr. White's qualification to answer the questions with regard to checking procedure of the bank. The only reference in the record concerning Mr. White's qualifications to give his opinion on this check is his admission during cross-examination that he was not familiar with the details of check processing which Commonwealth submits shows the validity of its argument:

> Q. Now did Commonwealth Bank wire when there was a nonpayment of a check where a check was dishonored? Did it send a wire directly?
>
> A. I don't know. I don't know what they did.
>
> Q. You mentioned earlier that it was a standard practice for a bank to wire the fact that this check . . .
>
> A. Look, I was president of the bank and I didn't get into every detail. Now, the cashier can give you an answer to the question if you want to subpoena him. It would be a lot better than mine (T-650-651).

In addition to the fact no foundation was laid as to Mr. White's knowledge in this area of banking, Mr. White testified he had no personal contact with the check (T-

651). He did not identify or state he was familiar with the signature card or the authorized signature for the Kennedy Company Enterprises account. He did not identify or review any photographs of the check showing its condition as it came into and left the bank. In summary, he had absolutely no foundation for the conclusions which the court struck from the record.

POINT III.

THE LOWER COURT CORRECTLY EXCLUDED THE TESTIMONY OF BERNARD TANNER.

Appellants introduced into evidence the deposition of Mrs. Nellie McCluskey which had been taken in Hamilton, Montana, and then attempted to impeach the credibility of her testimony by introducing testimony of Bernard Tanner. As part of appellants' offer of proof for admission of Tanner's testimony, the court received the testimony outside of the presence of the jury. Tanner would have testified that on May 25, 1968, Mrs. McCluskey told him that "the check hadn't cleared" (T-793).

The inequity of allowing Mr. Tanner to testify is readily apparent. Mrs. McCluskey was 1,000 miles away and could not be given the opportunity to explain or deny Mr. Tanner's testimony. This inequity is the reason why Rule 22 of the Rules of Evidence as adopted by Supreme Court of Utah gives the trial court the discretion to exclude such testimony. Rule 22 as pertinent states:

> "As affecting the credibility of a witness . . . (b) extensive evidence of prior contradictory statements whether oral or written may in the discretion of the judge be excluded unless the witness was so examined while testifying as to give him an opportunity to identify, explain or deny the statement."

Counsel for appellants did not bring up the subject of Mr. Tanner's testimony during the deposition of Mrs. McCluskey to give her an opportunity to deny or explain the statements attributed to her. In addition, during Mr. Kennedy's deposition counsel for Commonwealth National Bank asked Mr. Kennedy:

> Q. What other witnesses do you plan to call to trial other than Dan White?
>
> A. Mr. Bernard Tanner.
>
> Q. What will be the nature of his testimony?
>
> A. I don't know at this time. I haven't discussed it with him.

This gave appellants an additional opportunity to disclose Tanner's testimony in order that Mrs. McCluskey could be questioned further either by written interrogatory or another oral deposition. Instead, appellants chose to introduce the testimony at trial where no opportunity was possible to have Mrs. McCluskey explain the allegation. Plaintiff would submit that under such facts it was clearly within the discretion of the trial judge to exclude such testimony.

This result is not in conflict with Rule 26(f) as appellants suggest. The advisory committee's final draft

of the last sentence of Rule 26(f) of the Federal Rules of Civil Procedure from which Rule 26(f) of the Utah Rules of Civil Procedure was adopted contains the following clause:

> "[a]nd, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent."

In concluding that the Supreme Court eliminated the right to impeach testimony of a deponent by the introduction of contradictory statements where the deponent was not examined about such statements during the deposition by the elimination of the above clause, Professor Moore makes the following statement:

> "What then was the effect of the Supreme Court's action in striking this provision out of Rule 32(c). It is believed the effect is this: Contradictory statements known at the time of the deposition hearing, or which reasonably could have been known, may not be used subsequently to impeach the deponent's deposition; the deponent should have been impeached at the deposition hearing by calling contradictory statements to his attention, and giving him the opportunity to explain." Vol. 4(a), Moores Federal Procedure ¶32.10.

This reasoning is consistent with Rule 22 with the exception that it doesn't even give the trial judge the discretion to admit the contradictory statements.

An additional reason for excluding the testimony of Mr. Tanner is that the testimony does not contradict Mrs. McCluskey's statements. The fact that the check "has

not cleared" on May 25th does not contradict the fact that the first time she heard the check was returned was June 20th because the fact the check had not cleared would only mean that Mrs. McCluskey's provisional credit at the Citizen's Bank had not become final. It would not mean that she had been notified that the check had been returned.

POINT IV.

THE TRIAL COURT CORRECTLY DISMISSED THE WRONGFUL GARNISHMENT CLAIM.

Appellants' position that Rule 64(d) of the Utah Rules of Civil Procedure violates Utah Constitution, the United States Constitution, and Rule 65(a) of the Utah Rules of Civil Procedure, and therefore, appellants are entitled to damages for wrongful garnishment is clearly without merit. *Sniadack* v. *Family Finance Corporation of Bayview*, 395 U. S. 337 (1969), cited by appellants, is the only case decided by the United States Supreme Court concerning the constitutionality of prejudgment garnishment involved a Wisconsin statute. Because the Wisconsin garnishment statute was narrowly drawn (it did not require cause for garnishment or means for release prior to judgment) and because the case involved the garnishment of wages which the court found to be an area needing special protection, the statute was struck down as violating procedural due process. However, the court made it clear that such summary procedure may

meet the requirements of due process in extraordinary situations. Rule 64(d) requires a bond, an affidavit showing cause, and provides a means for release by defendant. In addition wages were not garnished. In summary, none of the due process problems the United States Supreme Court found objectionable in *Sniadack* are found in Utah Rule 64(d) or in this case, and respondent submits that Rule 64(d), especially in non-wage cases, is within "extraordinary situations" justifying summary procedure which the United States Supreme Court found proper in *Sniadack*.

In any event assuming that the Utah statute was unconstitutional respondent would submit that this fact would only entitle defendant to a release of garnishment and not to damages for wrongful garnishment. Wrongful garnishment requires the showing that the grounds alleged for the garnishment do not exist. *Cahoon* v. *Hoggan*, 31 Utah 74, 86 P. 763, 764; 6 Am. Jur. 2d Attachment 601. The fact a garnishment statute was declared unconstitutional would not make the garnishment wrongful. None of the cases cited by appellants involved a claim of wrongful garnishment. These cases either involved an attempt by the party whose funds were garnished to have the garnishment released or had nothing to do with garnishment.

The only party that stands to lose from the garnishment proceedings is Commonwealth National Bank and not appellants. Commonwealth has lost its security for enforcement of its judgment by the garnishment having

been released through an ex-parte proceeding without notice to Commonwealth. Under such circumstances if anybody should be heard to complain it should be Commonwealth and not appellants.

POINT V.

TESTIMONY OF MENTAL SUFFERING AND ANXIETY WERE PROPERLY EXCLUDED BY THE TRIAL COURT.

West's Annotated California Code, Commercial, Section 4402, which governs damages for wrongful dishonor of a check states:

> "A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When a dishonor occurs through a mistake, liability is limited to actual damages proved."

Section 4-402 of the Uniform Commercial Code, from which the above section was adopted, was included by the framers to restrict the common law which had allowed "per se" damages to a merchant or trader without any proof of actual damage. See Uniform Commercial Code, Comment 3. Even under the more liberal common law emotional distress did not constitute a recoverable item of damage for wrongful dishonor of a check. Michie, Banks and Banking, 5(a), §244. To accept defendants' argument that damages for mental distress and anxiety are now recoverable under the Uniform Act one must determine that the framers restricted the recovery of damages to actual damages but at the same time opened the back door to allow the recovery of the nebulous item

of mental suffering and anxiety. There is no evidence to support such a claim. Appellants claim that section 4402 sounds in tort is untrue as Comment 2 of the Uniform Act discloses:

> "2. The liability of a drawer for dishonor has sometimes been stated as one for breach of contract, sometimes as one for negligence or other breach of tort duty and sometimes as defamation. This section does not attempt to specify a theory." U. C. C. 4-402, Comment 2 (1962 Text).

Respondents would submit that it is clear from the Comments to the Uniform Act that the framers did not intend to expand the common law but rather to restrict it, and certainly did not intend to allow recovery for mental suffering and anxiety where such damages were not recoverable under common law.

An additional reason existed for excluding evidence of mental suffering and anxiety in this case. The mental suffering claimed was by a partner (Charles Kennedy) while the wrongful dishonor was of a check of the Kennedy Company, a partnership (T-597). In the case of *Loucks* v. *Albuquerque National Bank*, 76 N. M. 735, 418 P. 2d 191 (1966), a case very similar to the one herein, the New Mexico Supreme Court held that partners were not entitled to recover for injuries or illnesses claimed because of wrongful dishonor of a partnership check. In rejecting the claim of a partner to recover for damages of an ulcer

which he claimed was caused for dishonor of a partnership check, the court stated:

> "No duty was owed to him personally by reason of the debtor-creditor relationship between the bank and the partnership." Pg. 197.

The court after reviewing several different legal situations in which a partnership is a legal entity, including the fact that it is recognized as one under the Uniform Commercial Code (U. C. C. 1-201) the court met the contention that a partnership is not considered a legal entity in all situations:

> "We also appreciate that a partnership is not considered a distinct legal entity to the extent that a natural person or corporation is so regarded in the law, but here we are dealing only with the question of separateness as a customer or depositor of the bank, and its rights to any damages flowing from wrongful dishonor of its checks drawn on its account. The relationship between a bank and its depositor is a contractual relationship of a debtor and a creditor . . . As shown above, a partnership can enter into a contractual relationship of debtor and creditor, as a customer of the bank, in accordance with the express provisions of the Uniform Commercial Code.
>
> 'While a partnership at common law was not considered a distinct entity from the partners comprising it, the modern tendency is the other way, i.e., to treat a partnership as an entity distinct from and independent of the individuals composing it. 20 R. C. L., ¶80456 and cases under Note 16;' *Gleason* v. *Sing*, 297 N. W. at 722."

The main theme of the *Loucks* opinion is that for purposes of banking accounts, partnerships are separate legal entities and, therefore, each partner shouldn't be able to recover for alleged partnership injury. Respondents submit this is sound reasoning and urges this court to follow *Loucks*.

POINT VI.

THE COURT CORRECTLY INSTRUCTED THE JURY CONCERNING THE SIGNATURE CARD AGREEMENT.

Jury Instruction 10 concerned the question of signatures on the signature card. The issue before the court was not whether Charles Kennedy's wife was an authorized signature on the account as appellants contend, but rather whether the signature "Rebecca Kennedy" was an authorized signature when the signature card was signed "R. Z. Kennedy". There was no evidence in the record that there was any agreement between the bank and the appellants to honor checks signed differently from the signature on the signature card. The evidence in this record is to the contrary. Dan White, president of the bank, and appellants' witness testified:

> Q. Mr. White, did you ever have any conversation with Mr. Kennedy that the bank was to pay check No. 8000, drawn by his wife, in this fashion with her full first name?
>
> A. I never had any conversation with Mr. Kennedy that I can remember where I agreed to

specifically pay the check identified by number and amount.

The record contains no other reference to the honoring of checks in forms of signature other than on the signature account and therefore respondents would submit Instruction 10 correctly states the law applicable to the case.

CONCLUSION

This is the 21st court appearance that this case has required. Many of the appearances were required by respondents to obtain discovery in compliance with lower court orders which appellants had refused to obey. Certainly this has proved a burden on the courts and caused a span of three years from the filing of the complaint to the date of trial. Finally, when the trial date arrived and the facts were presented to the jury, the jury returned a verdict of no cause of action on appellants' counterclaim for wrongful dishonor of the check. Respondents submit that the evidence was so overwhelmingly in favor of the bank that the jury could not reasonably have returned any other verdict. The evidence was clear and uncontradicted that the check should have been returned because it had an incorrect signature, an incorrect account name and an incorrect transit number. The evidence was also clear from Mrs. McCluskey's testimony and from letters introduced into evidence that she terminated her account with Kennedy before she knew about the returned check and therefore Kennedy suffered no damages in any event. There was no evidence introduced to the contrary. Re-

spondents submit that the evidence and matters raised by appellants on appeal were correctly decided by the trial court, but even if an error was committed on any of the matters it would not justify a reversal in light of the overwhelming evidence in support of the verdict. Respondents further submit that appellants' constitutional attack on Rule 64 of the Utah Rules of Civil Procedure governing garnishment is clearly without merit and irrelevant to the claim of wrongful garnishment.

For the above reasons, respondent asks that the judgment of the lower court be affirmed.

Respectfully submitted,

FABIAN & CLENDENIN

Albert J. Colton

Kent S. Lewis

800 Continental Bank Building
Salt Lake City, Utah 84101

Attorneys for
Plaintiffs and Respondents