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RECOVERY OF STOLEN MONEY OR NEGOTIABLE INSTRUMENT FROM HOLDER IN DUE COURSE. *IS THERE AN INDIANA RULE?*

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It has long been considered necessary for practical business transactions that one who receives money in due course of business shall not be put on inquiry as to the title of the one paying the same. The reason frequently assigned is that money bears no earmarks, and therefore cannot be traced. But this argument is not tenable, for in many states we find that even though the money can be traced directly into the payee's hand, still no recovery may be had even though the money has been stolen, unless the person receiving the money took the same in bad faith. The real reason for such decision lies in the fact that money constitutes the currency of the nation, and by its use a civilized community is carried beyond the stage of barter.

Modern business usage has resulted in many paper transactions where no money or other medium of exchange is transferred at all, the greater portion being done by bookkeeping entries. Without the use of money or some other medium of exchange, commercial transactions would have to be carried on by means of barter and exchange such as existed in those times which are among the earliest recorded periods of civilization. If it were necessary for every creditor receiving payment of his indebtedness or every seller of goods to inquire as to whether or not the party paying him or buying the goods from him had good title to the money with which he attempts to discharge his obligations or carry out the purchase, business transactions would be seriously hampered. The suggestion that a person from whom money has been stolen might walk into any one of our large banks and by identifying such money secure the possession of the same, would seem startling. Any such proposition would be regarded as sufficient to upset modern business methods. Our system of banking would undoubtedly go through an immediate readjustment. As amazing as this proposition may seem, there are cases in the Supreme and Appellate Courts

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* See p. 207 for biographical notes.

of Indiana which involve variations of the above principle.[1] Much of the difficulty arising from the situation above described is due to the case of *Porter v. Roseman*, decided in 1905.[2] An examination of the facts of this case, the decision in which militates against the monetary history of the world, discloses a lack of proper analysis and a misconception of the legal principles involved, as well as the fundamental reasons for applying different rules to money or other medium of exchange than is applied to chattels.

In the case of *Porter v. Roseman*, we find the following facts: One Mount executed eight notes of $20 each to the plaintiff who lived in New York. The plaintiff deposited them in his New York bank for collection, which bank sent them to an Elwood bank, as agent of the plaintiff, where Mount paid them with money belonging to the defendant, his employer. The plaintiff had no knowledge of the ownership of the money used, although it appeared that previous to the execution of the notes $35 realized from the sale of certain property of defendant had been paid to the plaintiff by Mount to the knowledge of plaintiff. It appears that the money used by Mount to pay the note had been stolen from the defendant. Apparently realizing the difficulty of recovering the money in New York, the defendant purchased goods from the plaintiff and refused to pay for the same. The plaintiff then came to Indiana and sued upon the account, to which suit the defendant set off the amount of money which Mount had taken from him. The lower court permitted a set-off as to the $35 which plaintiff's agent knew belonged to the employer, but refused to allow a set-off as to the balance. The Supreme Court, in reversing the opinion of the lower court as

[1] In the case of *Stiefel & Levy v. Farmers State Bank of Stroh* (1929) __ Ind. App. __, 168 N. E. 30, the facts show that one Bower issued two checks payable to the order of the Farmers State Bank of Stroh, drawn on the Farmers Bank later consolidated with the Peoples State Bank, in payment of certain notes. Stiefel & Levy sued to recover the amount of said checks from the Farmers State Bank of Stroh on the ground that Bower had no authority to issue checks for his personal indebtedness out of money deposited in his own name at the Peoples State Bank, for the reason that Stiefel & Levy had supplied the money under an agreement whereby the title was to remain in them. The court found it unnecessary to pass upon the applicability of *Porter v. Roseman* and *Peoples State Bank v. Kelly infra*, on the ground that their action was barred by complete laches. This decision was handed down September 25, 1929.

[2] 165 Ind. 255, 74 N. E. 1105.

to the balance of the stolen money, held that Mount acquired no title by the conversion and could transfer no better title than he himself possessed, that the receipt of it by the plaintiff was a conversion, as to which its good faith and innocence afforded no protection against the rightful owner. The court said it made no difference whether or not plaintiff knew whose money it was. Defendant therefore was allowed to set off the amount of the money converted by Mount. The case is an anomaly. It is a stramonium in the garden of judicial decisions. Its influence has been revealed in at least one decision of the Appellate Court, although the majority opinion is not concurred in by one vigorous dissenter.[3]

Admittedly unsupported as it is by precedent either from our decisions or those of a sister state,[4] it is interesting to analyze the case. The court relies on three decisions as supporting the proposition that Mount acquired no title by the conversion and transferred no better title than he himself possessed. The first case is that of *Alexander v. Swackhamer,* decided in 1886.[5] In that case, the defrauded seller of cattle, believing that he was dealing with a firm when in fact he was not, was allowed to recover in conversion from a good faith taker upon the theory that the contract was wholly void. The next case cited by the court is the case of *Shearer v. Evans,* decided in 1883.[6] There the court held that a person who innocently bought stolen personal property from a thief, acquired no title thereto. The property stolen in that case was wheat. The third case referred to is that of *Breckenridge v. McAfee,* decided in 1876.[7] This case holds that a person obtaining wheat by larceny obtains

[3] *Peoples State Bank v. Kelly* (1922), 78 Ind. App. 418, 136 N. E. 30.

[4] While the great weight of authority is contrary to the case of *Porter v. Roseman,* there are a few states which are in accord. Some of the cases in accord with the great weight of authority are set out in a note in 25 L. R. A. (N. S.) 631. See also *Friend & Terry Lumber Co. v. De Vine, et al.* (1921) 50 Cal. App. 102, 194 Pac. 754. In the case of *Agard v. Peoples National Bank* (1927), 169 Minn. 438, 211 N. W. 825, the court cites *Porter v. Roseman* but remarks that the great weight of authority is probably the other way. This case involved the appropriation of the principal's bank deposit standing in the name of the agent for an indebtedness of the agent. The case of *Shotwell v. Sioux Falls Savings Bank* (1914), 34 S. Dak. 109, 147 N. W. 288, is another appropriation of deposit case which approves of *Porter v. Roseman.*

[5] 105 Ind. 81, 4 N. E. 433.

[6] 89 Ind. 400.

[7] 54 Ind. 141.

no title thereto, and can confer no title upon a person to whom he sells the same. All three of the decisions are cases involving chattels. In addition to the cases above referred to, the court also cited the case of *Harlan v. Brown*,[8] which holds that where a person obtains a non-negotiable note by fraud, his transferee gets no better title than he himself had.

That the Supreme Court should have for guidance only the above decisions is either due to lack of diligence of counsel, or to a failure to distinguish between cases involving the law of chattels and those involving money. Money was designed to pass freely from hand to hand in commercial and industrial transactions. The purpose of the law merchant and of the Negotiable Instruments Law in giving certain rights and privileges to holders in due course of negotiable instruments, was to put them upon the same plane of negotiability as money. They were trying to give negotiable instruments the attributes of money. How ridiculous then must appear the *Porter v. Roseman* decision in which the chattel rule is applied.[9]

There are certain peculiar situations which arise as a result of the rule announced in *Porter v. Roseman*. It is a familiar rule of agency that an agent for the purpose of collecting money has no power to accept checks, but must accept cash unless his principal authorizes him to do so.[10] Let us consider this situation in the light of the possibilities revealed by the decision in the case of *Porter v. Roseman*. Suppose an agent for collection approaches a debtor and asks for a payment on account. If the debtor steals the money from his employer and pays it to the agent for collection, the same could be recovered under *Porter v. Roseman*. Suppose, however, that the agent for collection, when he made application to the debtor for payment, had received from him certain checks payable to bearer, which checks were taken out of the cash drawer of the debtor's employer. Under the Negotiable Instruments Law adopted in

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[8] (1892) 4 Ind. App. 319, 323, 30 N. E. 928.

[9] In commenting on *Porter v. Roseman*, the annotator of the case of *First National Bank of Birmingham v. Gibert* (1909), 123 La. 846, 49 So. 593, in 25 L. R. A. (N. S.) 631, 633, says: "It is very doubtful if the court really intended to announce the foregoing doctrine in the broad terms in which it was asserted. The decision did not require the application of this broad doctrine and the cases cited as sustaining it related to chattels, as to which the doctrine would, of course, be applicable."

[10] *Miller v. Edmonston* (1846), 8 Blackf. 291; *Kirk v. Hiatt* (1850), 2 Ind. 322.

Indiana in 1913, the employer who owned the checks could not recover the amount of money evidenced by the bearer checks transferred to the agent for collection by the debtor. In other words, under the Negotiable Instruments Law of Indiana, if a bearer instrument is stolen and given to a third party in payment of the pre-existing debt, the money thereunder could not be recovered by the original owner thereof. If, however, actual money was transferred instead of bearer instruments, the actual money could be recovered under the decision in *Porter v. Roseman.* The decision, therefore, has reduced money to a class below that of bearer negotiable instruments, and placed it in a class with chattels.[11]

The opinion in *Porter v. Roseman* indicates that the payment made was simply payment of a pre-existing debt. No distinction is attempted between payment of such an indebtedness by stolen money or negotiable paper and payment by delivering other kind of property which is either stolen or to which the transferor has a voidable title. It has been the almost universal rule that a payment of a pre-existing indebtedness by stolen money or stolen negotiable instruments defeats the right of the true owner to recover the same in the absence of bad faith. The reason therefor is the underlying purpose of the adoption of money as a medium of payment and the desirability from a business standpoint in having a definite termination of the transaction.[12] Any other result, if followed to its logical conclusion, would permit the re-opening and re-examination of payments in business dealings, completed in good faith and long since satisfied. Under any other rule of law a creditor could only accept payment of an existing obligation with the risk of having the validity of the payment questioned by one claiming to be the true owner of the money or negotiable instrument with which payment was made. A different result is reached in those cases where personal property other than money or negotiable instruments is transferred to a creditor in payment only of a pre-existing obligation. In such case, while the payment is sup-

[11] This was recognized by Judge Dausman in his dissenting opinion in the case of *Peoples State Bank v. Kelly,* where he says: "Money is designed to pass freely from hand to hand in commercial and industrial transactions. It is a circulating medium of the highest rank; but the decision in the Porter case reduces it to a rank below that of negotiable instruments."

[12] The reasoning is well set out in the dissenting opinion of Justice McCoy in *Shotwell v. Sioux Falls Savings Bank, supra,* where he says:

ported by a valuable consideration, it is generally not such a consideration as will constitute the taker a bona fide purchaser for value so as to avoid prior equities.[13]

The *Porter v. Roseman* case is highly unfortunate. It is unsupported in applying to money the qualities of chattels, without realizing the principles upon which our monetary system

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"The principle involved in this case is the same as if a thief or highway robber had paid his individual pre-existing debt with stolen money, without any notice on the part of the creditor who received it that it was stolen money, and long thereafter the owner of the stolen money should bring suit against such creditor to recover, not the same identical money, but a like amount of money, claiming that the money with which such debt had been paid was stolen money in the hands of the thief, and that the creditor had parted with no value at the time he received such money. We are of the opinion that the original owner from whom the money had been thus stolen could not recover; that, when a creditor receives cash in payment of a pre-existing debt, he is not required or bound to make inquiry as to the manner in which such debtor obtained possession of such money."

In 3 *Pomeroy's Eq. Juris.* 4th Ed. § 748, the author says:

"The rule concerning the transfer of negotiable instruments has thus been settled avowedly in the interests of commerce and mercantile business; these reasons do not apply to the purchase of land and chattels and non-negotiable securities."

[13] Under the law in Indiana, where there is no change of position, while payment of a pre-existing debt is a good consideration, it is not such as to constitute the taker a bona fide purchaser for value so as to avoid prior equities. This was expressly held in *Boling v. Howell* (1883), 93 Ind. 329. In that case it is stated as follows:

"The fact, conceding it to be the fact, that the notes were assigned to appellee in payment of a precedent debt, does not show that there was no valid consideration for the assignment. *A precedent debt is unquestionably a valuable consideration for a contract, but is not such a consideration as will make a grantee or assignee a bona fide purchaser against prior equities. Hewitt v. Powers,* 84 Ind. 295; *Louthain v. Miller,* 85 Ind. 161; *Fitzpatrick v. Papa,* 89 Ind. 17. As against one who has no prior equity, a precedent debt will support a contract otherwise valid. In the present case it also appears that appellee surrendered a debt not due, and extended the time of payment of a debt not due, and this brought the case fully within the rule laid down in *Gilchrist v. Gough,* 63 Ind. 576; *Kester v. Hulman,* 65 Ind. 100." (Our italics.)

The above principle has so long been established in Indiana that it is hardly deemed necessary to cite authority therefor. In citing the *Boling v. Howell* case, the Appellate Court of Indiana said in the recent case of *Heuring v. Stiefel* (1926), 85 Ind. App. 102, 152 N. E. 861:

"The doctrine of these later cases is that an antecedent debt is a valuable consideration and will support a mortgage, but it is not such a consideration as will make the mortgagee a bona fide purchaser so as to cut off secret equities."

is based. Fortunately, creditors and mercantile institutions of this state and all other persons accepting money in payment of pre-existing obligations do not realize that they are doing so at the risk of having the true owner come against them for the money received. Those who know of the decision nevertheless run the risk rather than revert to medieval methods of transacting business.

With this situation existing, the recent case of *Peoples State Bank v. Kelly*,[14] came up for decision before the Appellate Court. All of the operative facts arose after the adoption of the Negotiable Instruments Law, and while a check was involved in this particular case, there is no indication from the opinion that the question of a holder in due course of negotiable paper was involved. The case can scarcely be considered as a well reasoned one. In spite of the fact that there was a dissenting opinion, with a recommendation to transfer to the Supreme Court, neither a petition for re-hearing nor a petition to transfer was filed. The facts of the case are briefly as follows: An officer of a corporation sold the corporate assets, deposited the amount thereof to his credit at the appellant bank, and by check drawn on the appellant's bank, paid his personal indebtedness to that bank. There is no indication in the opinion of an extension of time, release of surety or other change of position upon the part of the bank. The court, relying upon *Porter v. Roseman,* held that the bank was liable to the receiver of the corporation in an action by him to recover the amount of the money paid to the appellant bank, although the bank did not know of the wrong, and acted in good faith throughout the transaction. The dissenting opinion treats the case as involving stolen money and, after criticizing the case of *Porter v. Roseman,* points out that the decision in that case reduces money to a rank below that of negotiable instruments.

As previously indicated, both of these cases involve stolen money. At the most (or at their worst) they only purport to hamper the circulation of stolen money, and not stolen negotiable instruments. In speaking of this limited application, the Appellate Court says, in the case of *Meier v. Continental National Bank*,[15]

"Appellant cites the case of *Peoples State Bank v. Kelly, Rec.* (1922), 78 Ind. App. 418, 136 N. E. 30, in support of the second reason stated, but

[14] See note 3.

[15] (1924) 83 Ind. App. 109, 143 N. E. 377.

it is not controlling in the instant case, in the application of the equitable rule involved, where one of two innocent persons must suffer by the acts of a third, as in that case, not merely a conversion was shown, as appellant states was true in this case, but the commission of a crime as well."

The decision in the Kelly case does not purport to consider the effect of the issuance of a negotiable instrument, if in fact the same was involved. The main defense, according to the opinion, seems to be that the indebtedness paid was that of the corporation, and that, therefore, they were only applying corporation funds to a corporate indebtedness. Upon this proposition the decision of the trial court was conclusive. Nor is there anything in the opinion to indicate that the bank was a holder in due course of a negotiable instrument, if we assume that a negotiable instrument was involved. Money is not necessarily a negotiable instrument, although certain types of bank notes may meet the requirements. The money may not have been withdrawn in the usual course of business. This is indicated by the statement of the court at page 426, as follows:

"This might have been done by showing that Zaring, who had made the deposit as stated, withdrew the money in the usual course of business, through checks issued to himself or third parties. *Miami County Bank v. State ex rel.*, (1916), 61 Ind. App. 360, 112 N. E. 40."

And later on, at page 427, in speaking of the liability of the bank for the amount which was converted by Zaring when he deposited the money with appellant in his own name, the court says:

"In that event its liability would extend to the whole amount, in the absence of evidence that it had disposed of the same under such circumstances as would exonerate it, as we have heretofore indicated. The burden is upon appellant to establish the facts that would have that effect, and the evidence not being conclusive in that regard we are bound by the determination of the trial court."

While it is difficult to ascertain what the Appellate Court had in mind in making the above statement, it would seem that they were not convinced that the appellant bank had paid out the money deposited in the usual course of business. If so, there would be no occasion for considering the effect of the Negotiable Instruments Law. The scope of the decision, therefore, should not be extended beyond holding that when stolen or embezzled money is applied to a pre-existing debt without more, the true owner can recover the same. In this connection it should be borne in mind that under the rule laid down in *Davis v. Indiana National Bank*[16] if a depositor deposits trust funds in his personal account in a bank, and the bank has no knowledge of the trust character of the funds, it may apply the deposit to the indebtedness of the depositor to the bank without liability to the beneficiary of the trust.[17]

It is difficult to see any reason for making a distinction between the case of a deposit of trust funds and a deposit of stolen funds. Therefore, the case of *Peoples State Bank vs. Kelly* seems to be inconsistent with this well recognized rule.[18] Desirable as it may seem to have Indiana place money in the class of a circulating medium of the highest rank, the decision seems to ignore that fact. The passages above quoted seem to indicate that a bank would be protected if it paid out money which had been deposited with it in the usual course of business

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[16] (1920) 73 Ind. App. 563, 126 N. E. 489.

[17] The case of *Citizens Bank v. Harrison* (1890), 127 Ind. 128, 26 N. E. 683, is distinguishable from the case of *Davis v. Indiana National Bank, supra.* In that case Mrs. Harrison was the owner of some wheat which she entrusted to her husband to sell. He sold the same for $92.15, receiving in payment therefor a check payable to himself. Mr. Harrison owed a man by the name of Finch $5, and gave the check to Finch to collect. Finch presented the check to the Citizens Bank, which bank gave Finch $5 and applied the balance of the check to a past due note of Mr. Harrison's. Mrs. Harrison, who knew nothing of the transactions, brought suit against the bank and recovered. The case is distinguishable from the *Davis v. Indiana National Bank* case in that it involves a banker's right of set-off, which cannot be invoked because there was no relation of debtor and creditor between the customer and the bank.

[18] *Newhall v. Wyatt* (1893), 139 N. Y. 452, 34 N. E. 1045. In that case the court said:

"In the case cited the plaintiff contended that his money had been virtually stolen, and could be followed and regained until it reached the hands of an innocent party, giving at the time a valuable consideration therefor, and that the discharge of a precedent debt was insufficient to afford protection against the true owner. This court refused to accede to that doctrine, arguing that money has no earmark; that, while the purchaser of a chattel or chose in action may generally ascertain the title of his vendor, that is not so as to money, the title to which in the possessor cannot usually be traced to its source; and that no case had been referred to in which the doctrine that an antecedent debt is not a sufficient consideration to cut off certain equities had been applied to money received in good faith and the ordinary course of business in payment of a debt; and that such a rule would obviously introduce confusion and danger into all commercial dealings."

through checks issued to the depositor or third parties, even though the money was stolen. This seems to be a misapplication of the chattel rule which the court has been following. It is well settled that in case of a stolen chattel resold by the buyer in good faith without any knowledge of the theft prior to notice of the true owner's claim, such owner can hold the buyer in conversion even though the stolen chattel simply passed in and out of his hands in good faith before the action was brought.[19] In that sense the *Peoples State Bank v. Kelly* decision seems to recognize the proposition undoubtedly prevalent in the minds of the ordinary business men of this state, that one is protected who has given present value for stolen money, or who has disposed of such stolen money in good faith and in such a way as to amount to a change of position. If such is the purport of the decision, it does not blindly follow *Porter v. Roseman*, although the dissenter seems to think that they were merely following that case.

In connection with a study of these few cases, it is interesting to review the opinion of Lord Mansfield rendered in 1758 in the case of *Miller v. Race*.[20] In this case one Finney possessed a note payable to himself or bearer on demand. By reason of a robbery, the note was lost and later reached the hands of the plaintiff, who received it for a valuable consideration without knowledge of the fact that it was stolen. In the meanwhile, Finney learned of the robbery and wrote to the bank of England to have payment stopped on the note. When the note was later presented, payment was refused, and the teller retained the note. Plaintiff thereupon sued and recovered judgment, but a question of law as to whether or not, under these circumstances, the plaintiff had any right to recover was reserved. Lord Mansfield, the English judge who had so much to do with the establishment of the law of negotiable instruments, heard the case and arguments, and the reporter makes this interesting comment

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[19] In *Robinson v. Skipworth* (1864), 23 Ind. 311, Robinson bought a stolen horse at public auction, kept him for several months and sold him in good faith, without notice of plaintiff's claim or knowledge that the horse had been stolen, but he was held liable to the plaintiff for the value thereof. In the case of *Peoples State Bank v. Kelly, supra*, the court, while following the chattel rule, urged the conclusion that the bank receiving the stolen money would not be liable if it paid out the same in due course of business to the depositor or to third parties. Accord, *Sharp v. Parks* (1868), 48 Ill. 511.

[20] 1 Burr. 457, 97 Eng. Rep. 398.

immediately prior to what he sets out as the decision of the court. This comment reads as follows:

> "Upon this argument on Friday last Lord Mansfield then said that Sir Richard Lloyd had argued it so ingeniously that though he had no doubt about the matter it might be proper to look into the cases he had cited in order to give a proper answer to them and therefore the court deferred giving opinion to this day. But at the same time Lord Mansfield said he would not wish to have it understood in the city that the court had any doubt about the point."

In *Porter v. Roseman,* it is not specified as to whether bank notes were stolen or actual coin money. In the case of *Miller v. Race,* a bank note was involved, and the contention urged by the defendant was that there was a distinction between bank notes and ordinary coin money in that as to coin money it passed freely from hand to hand, and whoever had it in good faith and for valuable consideration had title thereto, but whoever had the bank note, if they did not get the same from one who possessed title, did not have such a title as would prevent recovery. Lord Mansfield, according to the reporter, did not wish it understood in the City of London that he had any doubt whatsoever, but that title had been conveyed to the bank note, even though it had been stolen from its true owner. He did not wish to inject into commercial transactions any such element of doubt or uncertainty as had been injected into the commercial transactions of this state by the decisions in the cases of *Porter v. Roseman* and *Peoples State Bank v. Kelly.* It would be indeed fortunate if our court could reconsider the principles announced in these two cases, overrule those decisions, and establish firmly a sound principle of commercial law in accordance with that announced by Lord Mansfield as early as 1758 and concurred in by the great weight of authority.

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