

Considering the erroneous mailing of the second check and the banking custom as to the routine handling of checks, the court further reasoned that an opposite holding would require a receiving bank to question even those persons who were known to the bank and who were presenting checks in routine business from makers also known to the bank and that such a requirement would hamper business and the banking process. This was not the intent of the legislature in passing Section 3-406.

COMMENT

(1). It was unnecessary for the court to find that a forgery had been committed. Plunkett's signature was clearly unauthorized within the meaning of Section 1-201(43) and this is all that Section 3-406 requires.

(2). The court did not state whether the plaintiff was a "holder in due course" or "other payor" under Section 3-406, thus avoiding a problem posed by the Code itself: Is the transferee of an unauthorized signor a "holder" under the Code?

Technically, it seems that such a transferee is not a holder. Under Section 3-404(1), an unauthorized signature is "wholly inoperative as that of the person whose name is signed." As a result, there is no negotiation of the instrument to the transferee under Section 3-202(1), and without this the transferee is not a holder under Section 1-201(20). See *Stone & Webster Eng'r Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358 (1962). This does not mean that "holder in due course" must be deleted from Section 3-406. The section also mentions the defense of material alteration, and even though an unauthorized signature completely undermines a person's status as a holder under the Code, a material alteration does not do so. See, e.g., Section 3-407.

The plaintiff bank, therefore, qualified for Section 3-406 protection under "other payor," not "holder in due course." In view of this fact, the second part of the court's opinion, seemingly offered as an independent ground for its decision, takes on added importance. Under Section 3-406, an "other payor" must show that he paid the instrument "in accordance with the reasonable standards of . . . [his] business."

R.G.K.

SECTION 3-407. Alteration

GOLDEN DAWN FOODS, INC. v. CEKUTA
205 N.E.2d 121 (Ohio Ct. App. 1964)
Annotated under Section 3-403, *supra*.

ARTICLE 4: BANK DEPOSITS AND COLLECTIONS

SECTION 4-103. Variation by Agreement; Measure of Damages; Certain Action Constituting Ordinary Care

ROCK ISLAND AUCTION SALES, INC. v. EMPIRE PACKING CO.
204 N.E.2d 721 (Ill. 1965)
Annotated under Section 4-302, *infra*.

SECTION 4-104. Definitions and Index of Definitions

ROCK ISLAND AUCTION SALES, INC. v. EMPIRE PACKING CO.
204 N.E.2d 721 (Ill. 1965)
Annotated under Section 4-302, *infra*.

SECTION 4-214. Insolvency and Preference

ROCK ISLAND AUCTION SALES, INC. v. EMPIRE PACKING CO.
204 N.E.2d 721 (Ill. 1965)
Annotated under Section 4-302, *infra*.

**SECTION 4-302. Payor Bank's Responsibility for Late
Return of Item**

ROCK ISLAND AUCTION SALES, INC. v. EMPIRE PACKING CO.
204 N.E.2d 721 (Ill. 1965)

On September 24, 1962, the plaintiff sold cattle to Empire Packing Co., and received its check in payment. The plaintiff immediately deposited the check with an Iowa bank which forwarded it to the defendant payor bank. Although Empire's balance was inadequate to pay the check, the defendant held it upon Empire's assurances that additional funds would be deposited. On October 2, 1962, the defendant bank marked the check "not sufficient funds" and returned it to the depository bank. The check was never paid. On December 13, 1962, Empire was adjudicated a bankrupt. The plaintiff then brought suit against the defendant payor bank to recover the amount of the check contending that because the defendant bank held the check beyond the time limit fixed by Sections 4-302 and -104(h) of the Illinois Code without paying, returning or giving notice of dishonor, it was liable for the amount of the check. The circuit court found for the plaintiff and the supreme court affirmed. In reaching its decision, the supreme court specifically rejected three of the defendant's defenses.

The defendant first contended that the amount for which it was liable was to be determined by Section 4-103(5), not Section 4-302. In support of this contention, the defendant pointed out that, unlike the other provisions of Article 4 which fix liability, Section 4-302 uses the word "accountable." The use of this word meant that the defendant had to account only for (1) whatever funds it held on deposit for Empire Packing Co., and (2) the damages, as measured by Section 4-103(5), sustained by the plaintiff because of the defendant's failure to meet its deadline. The court rejected this contention on the grounds that Section 4-302 specifically rendered the defendant accountable for the full amount of the check, that "accountable" is synonymous with "liable" and that "accountable" was used to accommodate other sections of Article 4 relating to provisional and final settlements between banks in the collection process, and to bar the possibility of a payor bank being liable to the owner of the item and to another bank.

The defendant's second contention, that Section 4-302 violates the Equal Protection Clause of the Constitution since it imposes a liability on a payor bank for failing to act seasonably that is more severe than that imposed on a

depository or collecting bank for the same default, was similarly discarded. The court indicated that banks cannot be separated into payor, depository, or collecting banks, but that all banks perform all three functions. It concluded that the legislature may have found legitimate differences in these functions to warrant different treatment. As such, Section 4-302 does not create an irrational classification which violates constitutional limitations.

The defendant finally contended that Section 4-214 was an unconstitutional attempt to control the distribution of assets of insolvent national banks and that the invalidity of this section rendered Article 4 void in its entirety. In dismissing this contention, the court noted that according to the Comments to Section 4-214, this section is intended to apply to state banks even if it cannot apply to national banks. In any event, if Section 4-214 were unconstitutional, its invalidity would have no effect on Section 4-302 by virtue of the severability provision of Section 1-108.

S.L.B.

**SECTION 4-403. Customer's Right to Stop Payment;
Burden of Proof of Loss**

CICCI V. LINCOLN NAT'L BANK & TRUST CO.
260 N.Y.S.2d 100 (Syracuse City Ct. 1965)

On November 10, 1964, the plaintiff drew a \$3,000 check on the defendant bank payable to the order of Joseph Santo. On December 10, 1964, the plaintiff ordered the defendant to stop payment on the Santo check. The defendant, nevertheless, honored the check and reduced the plaintiff's bank account by \$3,000. The plaintiff then brought this action "for wrongful payment of a check . . . after receipt . . . of a timely stop payment order" under Section 4-403 of the Code and moved for summary judgment. The defendant in answer pleaded two affirmative defenses: (1) the check was void "as payment in an unlawful gambling transaction," estopping the plaintiff from any claim against the defendant; and (2) the check was given as a loan which had not been repaid or discharged and the plaintiff, therefore, had not suffered a loss as a result of its action.

The court granted the plaintiff's motion to strike the defendant's first defense on the ground that the action was not on the check, but for wrongful payment of the check pursuant to Section 4-403.

The defendant's second defense, on the other hand, was sustained and the plaintiff's motion for summary judgment was denied. The court held that "where a depositor and the maker of a check moves for summary judgment pursuant to Section 4-403 . . . it is part of the plaintiff's prima facie case to allege and . . . prove that he has been damaged by reason of the bank's wrongful payment" The plaintiff had merely stated in his claim that his bank account had been reduced by the amount of the check. This was not a "loss" within the meaning of Section 4-403.

A.S.G.

SECTION 4-406. Customer's Duty to Discover and Report Unauthorized Signature or Alteration

WUEST BROS., INC. v. LIBERTY NAT'L BANK & TRUST CO.
388 S.W.2d 364 (Ky. 1965)

Over a period of eighteen months, the plaintiff's bookkeeper forged seventeen checks totalling \$19,900. These checks were drawn on the defendant bank which returned the cancelled checks to the plaintiff monthly. When an audit of the plaintiff's accounts uncovered the forgeries, the defendant refused to make good the loss. The plaintiff instituted this action alleging that the defendant had not exercised ordinary care in honoring the forged checks. A verdict was returned for the defendant. The plaintiff, however, was awarded the amount of the first check forged.

This court sustained the trial court's finding that the defendant had exercised reasonable care and its instruction to the jury to find for the defendant if it determined that the plaintiff had been negligent in examining the cancelled checks each month, but to award the plaintiff the amount of the first check forged even if the plaintiff were negligent.

The court noted that while the Uniform Commercial Code was not in effect when the forgeries occurred, Sections 4-406(1), (2)(a), (b) and (3) are in harmony with this result and would control similar cases in the future.

S.L.B.

ARTICLE 7: DOCUMENTS OF TITLE

SECTION 7-303. Diversion; Reconsignment; Change of Instructions

KORESKA v. UNITED CARGO CORP.
258 N.Y.S.2d 432 (App. Div. 1965)

The plaintiff, an Austrian manufacturer of thermographic copying paper, sold or contracted to sell four containers of the paper to a New York buyer, Parker Whitney. The defendant, an operator of a container delivery service between the United States and Europe, issued a negotiable bill of lading to Allgemeine, a forwarding agency, for the shipment of the four containers. The document named the plaintiff's collecting agent, Bankers Trust, as consignee, required that the arrival notice be sent to Parker Whitney and further provided that delivery was to be made only on surrender of the original bill of lading. When the goods arrived in New York, the defendant delivered them to Parker Whitney without requiring the original bill and before the plaintiff had received his purchase price. In a suit by the plaintiff against the defendant to recover the value of the copying paper, the defendant contended that it had been excused from requiring the original bill before delivering the goods by an oral waiver made by the plaintiff's agent, Allgemeine, and also by a trade custom and course of dealing. The defendant specifically alleged that Abbe, Allgemeine's representative in New York, had orally requested that delivery be made in the usual manner, *i.e.*, without requiring the original bill of lading; that for the convenience of both shipper and consignee, it had