

NOTE

Diamond v. Graham, the Doctrine of Consideration and Value for a Cheque

Can the payee of a cheque enforce payment against a drawer who pleads absence of consideration on the ground that the value given for it, though it moved to the *drawer*, did not pass from the payee?

In the English law of contract the general principle — according at least to the common understanding — is that consideration *must* have passed from a *promisee* who desires to enforce a promise, whether or not it has passed to the *promissor*. In applying the doctrine of consideration to bills and notes, the *Bills of Exchange Act*¹ no doubt liberalizes this rule by what is sometimes called the “sheltering” provision found in Section 27(2):²

Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to such time.

Clearly, this section enables a subsequent holder to shelter under the value given by an earlier holder — even, for example, if he is no more than a donee.³ But are the terms of Section 27(2) wide enough to make the payee a holder for value against the drawer

¹ *Bills of Exchange Act, 1882*, 45 & 46 Vict. c. 61, ss. 2, 27 to 30. The corresponding sections in the Canadian Act, the *Bills of Exchange Act*, R.S.C. 1952, c. 15, are ss. 2, and 53 to 58.

² The corresponding section in the Canadian Act is s. 54(1), which is identical with the English except as to punctuation.

³ See *Chalmers on Bills of Exchange*, 13th ed. (London, 1964), pp. 90, 102 and note 17 *ibid.*; *Easton v. Pratchett*, (1835), 1 C.M. & R. 798, at p. 808; 149 E.R. 1302, at p. 1307 *per* Lord Abinger, C.B., for the Court: “If a party gives to another a negotiable instrument, on which other parties are liable, the man who makes the gift cannot recover the bill back, and the man to whom the bill is given may recover against the other parties on the bill; but it is a very different question, whether the giver binds himself by the endorsement, so as to make himself liable thereupon to the person to whom he gives it. There is no opinion that he does, and there is a strong authority the other way, and the prevailing opinion in the profession is, that a parol promise of a gift, whether verbal or in writing, will not be binding.”

simply on the basis of value given to the drawer by a third person, himself never actually a party to the cheque?⁴

In the recent case of *Diamond v. Graham*,⁵ in the English Court of Appeal, Danckwerts, L.J., gave reasons in which he held the affirmative, and Diplock and Sachs, L.J.J., without including terms to the same effect in their own reasons, did in their opinions declare that they agreed with Danckwerts, L.J.⁶

Diamond was suing on a cheque drawn in his favour by Graham. Two other cheques in roughly similar amounts were also drawn and issued: one by Diamond to Herman; the other by Herman to Graham; and the question was whether either or both of the latter⁷ could afford sufficient consideration for the cheque which was the subject-matter of the action.

⁴ By section 27(1), in the Canadian statute s. 53(1), an antecedent debt or liability is made valuable consideration for a bill. Thus if C today sells and delivers goods to A, the liability of A to C for the price is sufficient consideration to support a cheque issued *tomorrow* by A to C.

But suppose instead that *today* X issues his cheque to A on an agreement that *tomorrow* A will issue his own cheque to C. Next day A does indeed issue his cheque to C, and C attempts to enforce payment of it. Assume that the value thus given by X to A truly does entitle C to say that "value has at any time been given for... [the] bill." Nevertheless, inasmuch as A drew and issued his cheque to C *only after that value had passed*, how then can C claim that the drawer, A, is a "part[y] to the bill who became part[y] *prior* to such time..." — i.e., prior to the time when the value was given? If A's liability to C thus depends on whether he issued [or at least delivered] his cheque before he took X's, the resulting anomaly may tend to show that section 27(2) does not really cover the kind of situation to which it is sought here to apply it, at least by Danckwerts, L.J., in *Diamond v. Graham*, [1968] 1 W.L.R. 1061 (C.A.). It is indeed never made entirely clear whether Graham delivered the cheque sued on, drawn by himself in favour of Diamond, before receiving that drawn by Herman in his own [Graham's] favour. The problem of the time element in section 27(2) is referred to only with reference to the alternative consideration for Graham's cheque: namely, the cheque drawn by Diamond himself in favour of Herman, which Diamond amended and authorized to be paid; per Diplock, C.J., at p. 1065:

"Mr. Diamond was plainly the payee of the bill who acquired possession of it as the result of the consideration which he gave to Mr. Herman. It seems to me that clearly he falls within all the requirements of the section..."

I may add that Mr. Graham became a party to the bill 'prior to such time.'

Danckwerts, L.J., at p. 1063, in his statement of the fact, simply says that "when Mr. Graham drew his cheque in favour of Mr. Diamond, Mr. Herman drew his own cheque for the amount and gave it to Mr. Graham". These two transactions are apparently, treated as contemporaneous.

⁵ [1968] 1 W.L.R. 1061 (C.A.).

⁶ The reporter, in his headnote at [1968] 1 W.L.R. 1061, clearly indicates his inference that the Court were all agreed on this point.

⁷ Or, perhaps, *promises*, express or implied, to draw or deliver them.

The facts, as stated in the opinion of Danckwerts, L.J., were as follows:⁸

The series of events was this. The date of the cheque was July 26, 1960. It had originally been dated July 22, but the date was altered to July 26, as one can see. A third person, Mr. Herman, comes into the picture. Mr. Herman was a friend of Mr. Diamond, and had borrowed money from him from time to time....

Mr. Herman on Friday, July 22, 1960, wanted a sum of £1,650 for urgent commitments that he had to meet. He went to Mr. Diamond and asked him to lend him the sum of £1,650, and Mr. Diamond said that he would lend him the sum only if on the Monday following he would procure a cheque from the defendant, Mr. Graham, for £1,665. That was the pre-condition. One condition was that Mr. Graham's cheque must be in Mr. Diamond's possession by the time that Mr. Diamond's cheque was presented. So Mr. Diamond then drew a cheque to Mr. Herman for £1,650. It turned out that Mr. Herman could not get the cheque from Mr. Graham on the Monday because he was not available on that day. So the cheque having been taken to Mr. Diamond's bank, he stopped the cheque and told the bank manager not to pay it until authorized by him, Mr. Diamond.

On July 26 Mr. Herman got his cheque from Mr. Graham made out to Mr. Diamond. Mr. Graham had asked Mr. Herman who was the friend providing him with temporary relief, and he was told the plaintiff's name. So that cheque was made out to Mr. Diamond, who then paid it into his bank. Thereupon Mr. Diamond authorized payment of his cheque in favour of Mr. Herman, and at the suggestion of the bank manager the date was altered to July 26 and initialed by Mr. Diamond.

Unfortunately Mr. Graham's cheque was returned with "effects not cleared" written on it, and it was dishonoured. Apparently Mr. Graham had asked Mr. Herman, so he said, not to present the cheque to be specially cleared, but to let it go through in the ordinary manner, which would have taken two or three days, of course, before it came to be presented against Mr. Graham's account. He was very upset to find that it had come home so quickly when the funds which he had expected to meet it apparently had not arrived....

There is one thing that I have not mentioned, I think, and that is that when Mr. Graham drew the cheque in favour of Mr. Diamond, Mr. Herman drew his own cheque for the amount and gave it to Mr. Graham, but unfortunately Mr. Herman's cheque was dishonoured, and I gather that he has since become bankrupt.

The substance of the defence was stated by the learned Lord Justice as follows:⁹

The contention of Mr. Tibber on behalf of the defendant is that Mr. Diamond was not a holder for value because no value had passed directly between him and Mr. Graham, the drawer; I think that was the effect of his argument.

⁸ [1968] 1 W.L.R. 1061, at pp. 1062-4.

⁹ *Ibid.*, at p. 1064.

The Court of Appeal appears to have found sufficient value to have been given to enable Diamond's claim against Graham to succeed: *first*, in the cheque given by Diamond to Herman; *second* (the more controversial holding), in the cheque given by Herman to Graham.

The reasons of Danckwerts, L.J., were as follows:¹⁰

It seems to me that in presenting the argument which he did, Mr. Tibber was giving a meaning which the words of section 27(2) do not bear, and is not in accordance with the words of that subsection. There is nothing in the subsection which appears to require value to have been given by the holder as long as value has been given for the cheque, and in the present case it seems to me that double value was given for the cheque, first of all by Mr. Herman, who gave his own cheque to Mr. Graham in return for Mr. Graham drawing a cheque in favour of Mr. Diamond, and as it appears to me further value was given by Mr. Diamond when he thereupon released his cheque to Mr. Herman, and consequently there was clearly value for the cheque given, and therefore Mr. Diamond was a holder for value. It seems to me, therefore, the defence fails, the plaintiff succeeds, and the appeal must be dismissed. It appears to be a very short point. It depends entirely upon the words of the subsection. Mr. Tibber founded his argument upon the notes contained in *Byles on Bills of Exchange*, (1965), 22nd ed., p. 203. But in my view those notes go beyond the terms of the subsection, and consequently do not produce the result for which Mr. Tibber contended.

Accordingly, in my view the appeal must be dismissed.

The substance of Diplock, L.J.'s reasons appears to lie in the following:¹¹

I agree. It is a very short point in this case, and turns upon the construction of section 27(2) of the *Bills of Exchange Act, 1882*, read in conjunction with the definition to be found elsewhere in the *Act*:

"Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time."

"Value" is defined in section 2 as meaning "valuable consideration." "Valuable consideration" is described in section 27(1) as including: "Any consideration sufficient to support a simple contract." Here there clearly passed between Mr. Diamond and Mr. Herman "consideration to support a simple contract."...

Plainly this was a bill, an unconditional order in writing, and it was for the bill that consideration was given to Mr. Herman. "Holder" is defined in section 2: "'Holder' means the payee or endorsee of a bill or note who is in possession of it." Mr. Diamond was plainly the payee of the bill who acquired "possession of it." Mr. Diamond was plainly the payee of the bill who acquired possession of it as the result of the consideration which he

¹⁰ *Id.*

¹¹ *Ibid.*, at pp. 1064-5.

gave to Mr. Herman. It seems to me that clearly he falls within all the requirements of the section.

I should add that Mr. Graham became a party to the bill "prior to such time."...

Mr. Tibber has argued, as my lord has said, that one must not read the words in their literal meaning, but subject to a qualification that it applies only where the consideration has passed directly between one party to the bill and another party to the bill. I can see nothing in the authorities which requires that qualifications, and I can see nothing in common sense or justice which requires that qualification in circumstances (though they must be rare) such as existed in this case.

I too would dismiss the appeal.

It will be observed that Diplock, L.J., expresses a general concurrence in the reasons of Danckwerts, L.J., but that, in his own reasons, he refers in terms only to the consideration passing from Diamond, the plaintiff, to Herman. There is nothing which need be understood as a reference to *Herman's* cheque to *Graham*; neither is this necessarily implied in his rejection of the argument that the consideration must have passed 'directly between one party to the bill and another party to the bill': the cheque from *Diamond* to *Herman* had not passed between 'one party to the bill and another party to the bill', and it was consideration enough for the success of the action. It would appear, therefore, that the meaning of Diplock, L.J.'s judgment depends on the scope to be given to his general words of concurrence.

The opinion of Sachs, L.J., was as follows:¹²

I agree. Not only has the defendant got nowhere near establishing that he did not become a party for value to this cheque, but upon the evidence it is abundantly clear to my mind that there was valuable consideration given for it within the meaning of section 27(1)(a), and in addition that the value was given for it within the meaning of section 27(2).

Accordingly the appeal must be dismissed.

The Editors solicited the opinion of the learned editor of *Paget on Banking* and *Byles on Bills of Exchange*, Mr. Maurice Megrah,¹³ who replies as follows:

The plaintiff Diamond sued the Defendant Graham on the latter's cheque in favour of the Plaintiff; the Defendant appears to have argued that he received no consideration for the cheque from the Plaintiff and that, therefore, he was not liable on it.

The argument does not appear clearly from the judgments, nor is it certain on what passage from *Byles* the Defendant relied. All three judg-

¹² *Ibid.*, at p. 1065.

¹³ Of Gray's Inn, Barrister-at-law. The introduction to Mr. Megrah's comments is by Professor S.A. Scott of the Faculty of Law, McGill University.

ments seemed to be concerned to show that the cheque in issue was one for which value had at some time been given, within the meaning of s. 27(2) of the *Bills of Exchange Act, 1882*, and that, therefore, Diamond was a holder for value. This is probably right, on the basis that the intervening party, Herman, had given his own cheque to Graham in exchange and thus Diamond was a holder for value of a cheque for which value had been given. However, the Court then concluded that no defence could be raised against a holder for value, though none of the judgments dealt with the rights of a holder for value — which, in my view, at any rate, are in English law somewhat problematic.

Neither the *Bills of Exchange Act, 1882*, nor case decision defines holder for value or states what are his rights. Nevertheless it has long been accepted that, as stated in Byles [at p. 203],

“Between immediate parties — that is... between the payee and drawer... — the only consideration is that which moved from the plaintiff to the defendant, and the absence or failure of this is a good defence to an action (*Churchill & Sim v. Goddard*, [1937] 1 K.B. 92, at p. 110 of which Lord Justice Scott said: ‘But as between immediate parties the defendant is entitled to prove absence of consideration moving from the plaintiff as a defence to an action on the bill...’).”

The only basis on which Graham in the present case could be said to have received consideration for his cheque was that he received Herman’s cheque; but this could have been consideration for Diamond only if Herman had been acting as his (Diamond’s) agent.

What Danckwerts, L.J., meant, in his reference to Byles, I do not know, but it seems to me to be impossible to argue (except as in my previous paragraph) that because Diamond was a holder for value within the meaning of s. 27(2) — which does not require that he himself should have given value — he had an indefeasible right on the cheque against Graham. I am interested to note that Falconbridge, at p. 608 of his sixth edition, says:

“If the holder has personally given value he is a holder for value against all earlier parties, even those who received no value. If he gave no value personally, he is not a holder for value against his immediate transferor...”.

Is this not the same thing as is in Byles?
