

## PENACOOK SAVINGS BANK v. HUBBARD.

Money paid on a check by the drawee to a messenger of the payee under a mistake (the drawee erroneously supposing he had funds of the drawer), and paid by the messenger, without fault on his part, to the payee, cannot be recovered from the messenger by the drawee.

ASSUMPSIT, for the amount of two checks paid by the plaintiffs to the defendant. The checks were drawn by M., on the plaintiffs, in favor of W. & S., who sent them to the plaintiffs by the defendant. The plaintiffs paid their amount to the defendant, who paid it to W. & S. The specification was for money paid by accident and mistake. The mistake was in the plaintiffs' clerk erroneously supposing that the plaintiffs had funds of M., when, in fact, M.'s account was overdrawn. On a formal ruling, by which the defendant would be liable without fault on his part, a verdict was taken by consent for the plaintiffs, subject to the opinion of the court.

*Sargent & Chase* and *Butler*, for the plaintiffs.

*Rand* and *Albin*, for the defendant.

FOSTER, J. By the plaintiffs' delivery of the money to the defendant for the payee, the defendant was as fully authorized by the plaintiffs to carry it to the payee as if he had been the plaintiffs' messenger. Without fault on his part, he is not liable for doing what the plaintiffs authorized him to do. There is no legal reason for transferring from the plaintiffs to the defendant the consequences of the plaintiffs' error. Story on Agency, s. 300; *Holland v. Russell*, 1 B. & S. 424; 4 B. & S. 14; *Shand v. Grant*, 15 C. B. (N. S.) 324; *Sadler v. Evans*, 4 Burr. 1984; *Edden v. Read*, 3 Camp. 339; *Bamford v. Shuttleworth*, 11 A. & E. 926; *Cox v. Prentice*, 3 M. & S. 344; *Buller v. Harrison*, Cowp. 565; *Tugman v. Hopkins*, 4 M. & G. 389, 401; *Penhallow v. Doane's Adm'rs*, 3 Dall. 54, 87, 105, 114, 118; *Elliott v. Swartwout*, 10 Pet. 137, 153-158; *Perkins v. Eaton*, 3 N. H. 152; *Hoit v. Hodge*, 6 N. H. 104.

*Verdict set aside.*

STANLEY, J., did not sit.

---

HAYNES v. ORDWAY.

In an action brought by a surgeon against his patient for service in a surgical case, the defence of malpractice is barred by a judgment on the merits rendered for the surgeon in a suit brought against him by the patient for malpractice in the same service.