

road Company, delivered addresses at the first session which was held on Friday evening. Mr. Ashley Sellers of the Department of Agriculture and Mr. Stanley S. Surrey of the Treasury Department delivered addresses Saturday morning and afternoon, respectively. All of these addresses appear in this issue of the Law Quarterly. Each of these addresses, except the first, was followed by discussion of the issues that were raised by the respective speakers. These discussions are also published in this issue of the Quarterly and will be found immediately following the address to which they relate.

COMMENT ON RECENT DECISIONS

BILLS AND NOTES—FICTITIOUS PAYEE—KNOWLEDGE OF AGENT IMPUTED TO PRINCIPAL—[Missouri].—Plaintiff's assignor, a corporation, authorized defendant bank to honor checks co-signed by one of its clerks and one of its officers. The clerk also had authority to negotiate checks and deliver them to payees. The clerk prepared and signed checks payable to persons to whom the corporation was not indebted, obtained the signature of an officer, and, having forged the indorsement of the payee, negotiated the checks. In due course these checks were honored by defendant and charged to the account of plaintiff's assignor. Upon discovery of the fraud and following an assignment of the claim, plaintiff brought an action to recover the amount of the checks. *Held*, the checks were payable to bearer under the Negotiable Instruments Law, and defendant was therefore not liable for their payment.¹

Section 9(3) of the Negotiable Instruments Law provides that an instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person and such fact was known to the person making it so payable.² A payee whom the maker of a check does not intend to have an interest therein is a "fictitious payee" within the meaning of this section.³ Under these circumstances there can be no recovery against a bank honoring the check for failure to discover the forged indorsement, since no indorsement is required on a bearer instrument.

Where the check is issued by a corporation acting through agents, the requirement of the N. I. L. that such fiction in the instrument be known to "the person making it so payable" raises the question whether "the person" referred to is the corporation, as legal or ultimate drawer of the check, or the agent actually signing for that drawer, since their knowledge is not

1. *Globe Indemnity Co. v. First Nat'l Bank* (Mo. App. 1939) 133 S. W. (2d) 1066.

2. R. S. Mo. (1929) sec. 2638.

3. Bigelow, *Bills, Notes and Checks* (3d ed. 1928) 96-98, secs. 150-152.

always identical. The former interpretation apparently is accepted only by Missouri,⁴ while the latter is that of a great majority of jurisdictions.⁵

Where a clerk with no authority to sign checks causes checks to be drawn to fictitious payees and signed by an authorized officer of the corporation, who has no knowledge of the fraud, it is agreed that the checks are not bearer paper, and recovery by the corporate principal from the drawee bank is permitted.⁶ The majority bases this on the fact that the officer signing the check—"the person making it so payable" under its interpretation of the N. I. L.—has no actual knowledge of the fraud.⁷ Knowledge of the clerk is immaterial.⁸ However, Missouri, which regards the corporation as "the person making it so payable," reaches the same result by holding that the knowledge of an agent will not be imputed to his corporate principal where the agent has no authority to act.⁹

Where an agent with authority to sign checks draws them to fictitious payees and then, by forging the indorsement, causes them to be negotiated, it is agreed that such checks are bearer paper; and recovery by the corporate principal from the drawee bank is denied.¹⁰ The majority reaches

4. *Equitable Life Assur. Co. v. National Bank of Commerce* (Mo. App. 1916) 181 S. W. 1176; but see dictum in *Jones v. People's Bank Co.* (1917) 95 Ohio St. 253, 116 N. E. 34.

5. Brannan, *Negotiable Instruments Law* (6th ed. 1938) 208, and cases cited.

6. *Ibid.*

7. Note (1939) 13 Ohio L. Reporter 334, 336, and cases there cited. Some of the earlier decisions in this group seem to treat the corporation as "the person making it so payable," but this reasoning becomes less forceful in later cases and for all practical purposes is repudiated by language in recent cases of the second group. Application of this doctrine by the Illinois Court in *U. S. Cold Storage Co. v. Central Mfg. District Bank* (1931) 343 Ill. 503, 175 N. E. 825, 74 A. L. R. 811, led to a change in the N. I. L. of that state to hold the principal liable if the payee was known to be fictitious by any agent or employee who supplied the name of such payee. Ill. Smith-Hurd Ann. Stats. (1935) c. 98, sec. 29 (approved 1931).

8. There is no need to consider whether the dishonest clerk's knowledge may be imputed to the corporate principal; and if there is no principal-agent relation between the officer and the clerk, the clerk's knowledge cannot be imputed to the drawing officer, whose knowledge is important under this view.

9. "In determining whether the checks were payable to bearer under our statute we are not concerned with * * * [one's] authority in the company's other activities, but solely with his agential powers in the execution of checks; and as to that he had none." *American Sash & Door Co. v. Commerce Trust Co.* (1933) 332 Mo. 98, 116, 56 S. W. (2d) 1034. Missouri further divides the execution of checks into signing and circulating, and imputes guilty knowledge acquired during the performance of either act to the principal to bar recovery; but a distinction is made between an agent with discretionary power to make or withhold delivery and a mere messenger-boy. This distinction is used to explain divergent results in two apparently similar cases: *Equitable Life Assur. Co. v. National Bank of Commerce* (Mo. App. 1916) 181 S. W. 1176; *American Sash & Door Co. v. Commercial Trust Co.* (1933) 332 Mo. 98, 56 S. W. (2d) 1034; and see Brannan, *op. cit. supra* note 5, at 222.

10. *Globe Indemnity Co. v. First Nat'l Bank* (Mo. App. 1939) 133 S. W. (2d) 1066; Brannan, *op. cit. supra* note 5, at 214.

this result by treating the fraudulent agent who signed the check as "the person making it so payable" whose knowledge of the fiction is required under the N. I. L. and then ruling that since the act of drawing the check is within the apparent scope of the agent's authority the principal is estopped from denying the validity of the check as a bearer instrument.¹¹ Since it takes the position that the person who must have knowledge of the fiction is the ultimate drawer, the corporation, Missouri denies recovery by imputing the knowledge of the dishonest agent to his principal. This is the reasoning of the instant case.

The court in its opinion fails to distinguish between *knowledge* acquired by an agent while pursuing a course adverse to the interests of his principal, which knowledge will not be imputed to the principal,¹² and the *act* of an agent done within the scope of his authority for the consequences of which the principal will be liable although the act was done to defraud him.¹³ It is the latter principle which prevents recovery where an authorized agent makes checks payable to fictitious payees; and hence only under the majority view of who is "the person making it so payable" can section 9(3) of the N. I. L. be applied without doing violence to accepted principles of agency.¹⁴

In the instant case the requirement of two signatures to give validity to the check does not affect the result under either view, since liability or knowledge need come from only one of several possible sources and once attached remains absolute.¹⁵

J. J. T.

CONSTITUTIONAL LAW — FEDERAL PRIVILEGES AND IMMUNITIES — STATE TAXATION — COLGATE *v.* HARVEY OVERRULED — [United States].—Kentucky passed a statute¹ imposing upon its residents a tax of fifty cents per hundred dollars on bank deposits held without the state and a tax of ten cents per hundred dollars on those held within the state. Appellant's decedent had

11. *Mueller & Martin v. Liberty Insurance Bank* (1920) 187 Ky. 44, 218 S. W. 465; *American Hominy Co. v. Millikin Nat'l Bank* (D. C. S. D. Ill. 1920) 273 Fed. 550; *Phillips v. Mercantile Nat'l Bank* (1894) 140 N. Y. 556, 35 N. E. 982, 37 Am. St. Rep. 596, 23 L. R. A. 584; *Snyder v. Corn Exch. Nat'l Bank* (1908) 221 Pa. 599, 70 Atl. 876, 128 Am. St. Rep. 780.

12. *American Nat'l Bank v. Miller* (1913) 229 U. S. 517; 1 Restatement, *Agency* (1933) sec. 282.

13. *Gleason v. Seaboard Air Line Ry.* (1929) 278 U. S. 349.

14. This distinction is recognized by the Kentucky Court in *Mueller & Martin v. Liberty Insurance Bank* (1920) 187 Ky. 44, 49, 218 S. W. 465; and is followed with some confusion of terms in *Los Angeles Inv. Co. v. Home Savings Bank* (1919) 180 Cal. 601, 182 Pac. 293, 5 A. L. R. 1193. And see *Comment* (1924) 24 Col. L. Rev. 671.

15. *Goodyear Tire & Rubber Co. v. Wells Fargo Bank & Union Trust Co.* (1934) 1 Cal. App. (2d) 694, 37 Pac. (2d) 483; *Pennsylvania Co. to the Use of Royal Indemnity Co. v. Federal Res. Bank* (D. C. E. D. Pa. 1939) 30 F. Supp. 982. As to the commercial advisability of letting the fraudulent intent of one of several signers determine the character of the instrument, see *Brannan*, op. cit. supra note 5, at 217.

1. Ky. Carroll's Stats. (Baldwin's Rev. 1936) sec. 4019a-1.