Case and Comment

SOUTHERN METHODIST UNIVERSITY—UNIVERSITY OF NEW BRUNSWICK LAW SCHOOL JOINT CASE NOTES

In the Spring of 1956, the Chairman of President Eisenhower's "People-to-People Program" for Law requested that the Association of American Law Schools undertake a plan to advance understanding among the peoples of the world. One of the suggestions of the Association was the publication of reciprocal collaborative notes on a legal problem which would be written, under supervision of their professors, by law students in the United States and their counterparts in some other country.

Professor Alan M. Sinclair of Southern Methodist University School of Law and Dean William F. Ryan of the Faculty of Law of the University of New Brunswick have collaborated on such a project and their students, Gordon Jackson and Robert Keegan of Southern Methodist University, and Robert Webster of the University of New Brunswick, have prepared case notes on a hypothetical fact situation on "fictitious persons" in the law of bills of exchange. The Canadian and American notes, followed by a short comment, appear in this issue.

Stated Case: Southern Cotton Company v. Fifth National Bank

John Greenlaw is an employee of the Southern Cotton Company, and it is his job to keep the books of account, pay bills, order supplies, and serve as secretary-treasurer of the corporation.

He becomes indebted to one Harry Shoemaker and is unable to meet Shoemaker's demands from his own funds.

In desperation, he gets a blank cheque from the chequebook of his employer, fills in the name of Jonathan Tearose. At this particular time Greenlaw knows no one named Jonathan Tearose.

Greenlaw is the official signing officer of the company and he signs the cheque in his usual signature. He then takes the cheque, endorses Jonathan Tearose on the back thereof, and cashes it at the Fifth National Bank, in which the Southern Cotton Company keeps an account, and on whom this cheque is drawn.

A short time later the company finds out about their dishonest employee and the fraud he has perpetrated.

The company now brings action against the Fifth National Bank to recover the amount of the cheque for which their account has been debited.

Can the Southern Cotton Company recover this amount from the Fifth National Bank?

University of New Brunswick Law School Case Note:

In attempting to arrive at a solution of this problem in Canada, one must examine the Bills of Exchange Act which codifies the Canadian law on bills, notes and cheques.[1] This Act, having been modelled on the British Bills of Exchange Act, 1882,[2] English decisions on the subject have great persuasive authority and must be studied along with Canadian decisions. Indeed it has been said in the Ontario Court of Appeal that since section 21(5) of the Canadian Act (upon the construction of which the problem under consideration will largely turn) is identical with section 7(3) of the English statute, the decisions of the House of Lords on the latter section are binding on Canadian courts.[3] That statement should perhaps be taken with some reservation now that the Supreme Court of Canada is the final court of appeal for Canada, but it is evident that English cases must be regarded with the greatest respect.

In the case under discussion one must presume that the cheque was made payable to Jonathan Tearose or order in accordance with the general practice of companies. That being so, if there had been a genuine person by the name of Jonathan Tearose and he had really been intended as payee, the bank could not have acquired any rights against the drawer of the cheque unless it was endorsed by Tearose.[4] It could not recover against the drawer if it paid money on the faith of the forged endorsement.[5] However section 21(5) of the Bills of Exchange Act provides that where the payee is fictitious or non-existing, a bill (and consequently a cheque)[6] may be treated as payable to bearer, and such bills are negotiable on mere delivery.[7] We must then examine, first, whether Jonathan Tearose was a fictitious or non-existing person, for if he is not the bank has clearly no authority to pay the cheque.

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1. R.S.C. 1952, c. 15. Power to legislate relating to bills and notes is constitutionally vested in the Federal Parliament by virtue of s. 91 (18) of the British North America Act, 1867. The present Bills of Exchange Act was first passed in 1890.
2. 45 & 46 Vict., c. 61.
3. *See Harley v. Bank of Toronto* [1938] 2 D.L.R. 137.
4. R.S.C. 1952, c. 15, ss. 60 (3), 165.
5. *Ibid*, s. 49 (1).
6. *Ibid*, s. 165.
7. *Ibid*, s. 60 (2).

The most closely related factual situation in English and Canadian jurisprudence appears to be the case of *Clutton v. Attenborough & Co.*.[8] There Attenborough's clerk induced them to sign a cheque in favour of George Brett for services rendered. The clerk had invented the name, and no George Brett had had business relations with Attenborough's. The House of Lords held that the cheque was payable to a non-existing person and accordingly to bearer. Indeed even if there had been a person called Jonathan Tearose, since Greenlaw who prepared the cheque and signed it never intended him as payee, the cheque would still be regarded as payable to bearer. For as Lord Herschell said in *Vagliano Bros. v. Bank of England:*

> It seems to me, then, that where the name inserted as that of payee is so inserted by way of pretence only, it may, without impropriety, be said that the payee is a feigned or pretended, or, in other words, a fictitious person.[9]

The basic difference between *Clutton v. Attenborough & Co.* and the case under discussion is that Attenborough's actually signed the cheque and were, therefore, drawers of it. Here Greenlaw signed the cheque. Can his signature be regarded as that of the company?

In the given case, it appears that Greenlaw has authority to sign cheques to discharge the company's obligations. But the cheque to Tearose was not made to pay any debt of the company, but rather to obtain money for Greenlaw. The company would argue that Greenlaw has exceeded his authority, that he had no power to write cheques for this purpose.

The company's argument might well succeed were it not for the relationship of the bank to the company. But the company has, in effect, said to the bank that cheques signed by Greenlaw are their cheques, and the bank is bound to honour them and will be liable for failure to do so.[10] The fact that Greenlaw has exceeded his actual authority is of no avail to the company, since to the bank it appears that Greenlaw is acting within the apparent scope of his authority. The liability of a principal for the acts of an agent acting within the apparent scope of his authority is well settled in Canadian jurisprudence. The rule is that the principal is

> the person who has selected the agent and must, therefore, be taken to have had better means of knowing what sort of a person he was than those with whom the agent deals on behalf of his principal; and the principal, having delegated the performance of a certain class of acts to the agent, it is not unjust that he, being the person who has appointed the agent, and

8. [1897] A.C. 90.
9. [1891] A.C. 107 at p. 153.
10. *Marzetti v. Williams* (1830) 1 B. & Ad. 415; 109 E. R. 842.

> who will have the benefit of his efforts, if successful, should bear the risk of his exceeding his authority in matters incidental to the doing of the acts, the performance of which has been delegated to him.[11]

For these reasons, it would appear that the bank was entitled to debit the company's account for the amount of the cheque. Southern Cotton Company should, therefore, not recover the amount.

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Southern Methodist University Law School Case Note:

The question raised by this set of facts involves interpretation of section 9(3) of the Uniform Negotiable Intruments Law, which has been adopted in all American jurisdictions. Being a codification of the common law, many involved problems of construction must be left to the courts for decision.

The American courts hold that an order instrument paid on a forged indorsement cannot be charged against the account of the drawer,[1] unless the drawee-bank can prove either that the instrument was a "bearer" instrument and payable on presentment,[2] or that the drawer is estopped to deny its validity.

When checks are bearer instruments and transferable by delivery, indorsement of the name of a designated payee, whether forged or not, is superfluous, and may be disregarded as immaterial.[2] The admission of the drawer of the "existence of the payee and his then capacity to indorse"[3] does not estop the drawer from charging the bank with paying on a forged indorsement of the named payee, unless the drawer had knowledge that the payee was fictitious and was in effect estopped as a party to the fraud.[4]

The drawee-bank therefore must prove that the instrument is a bearer instrument. The applicable section of the NIL is section 9(3), which says that "the 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".

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11. *Craig v. Sauvé* [1940] 1 D.L.R. 72, at pp. 72-73, citing Collins, M. R. in *Hamlyn v. John Houston* & *Co.* [1903] 1 K. B. 81, at pp. 85-6.

1. Uniform Negotiable Instruments Law s. 23; *Allan Ware Pontiac v. First Nat'l. Bank* (1941) 2 So2d 76; *Tolman v. American Nat'l. Bank* (1901) 22 R.I. 462, 48 A 480, 52 LRA 877, 84 Am. St. Rep. 850; *Grand Lodge A.O.U.W. v. State Bank.*

2. Uniform Negotiable Instruments Law s. 30 (5ULA 457, note 15); (1941) 92 Hon. 8th, 142 p. 974, LRA 1915 B. 815; *Prugh, et al v. Linwood* (1951 Mo.), 241 SW2d 83.

3. Uniform Negotiable Instruments Law s. 61.

4. 146 ALR 840, and cases cited.