> 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.

Robert Webster
III Law, U.N.B.

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".

---

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.

This section states two questions. First, was the payee fictitious? Second, was this fact known to the person making it so payable? By the weight of authority, an instrument drawn to the order of a named payee will be considered drawn to the order of a fictitious payee if the payee is either a person unknown to the "person making it so payable" and not intended to receive or benefit from the instrument, or a person known to the "person making it so payable" to be a real person, but not intended to benefit therefrom.[5]

In this case, the payee named in the instrument falls within the first class named above, and is clearly a "fictitious payee" within the meaning of section 9(3) of the NIL. The question remaining therefore is whether the fictitious character of the payee was known to "the person making it so payable".

On this point there is a great array of decisions, expounding various "doctrines"; reaching, for the most part, similar results. Generally, the doctrines fall into one of three rationales—the "Actual Maker" test,[6] the "Nominal Maker" test,[7] and a class of cases applying no "doctrine" but rather basing their decision on the principles of agency.[8] It will reasonably appear, on close examination of the reasoning of the various approaches, that liability is finally determined on agency principles.

Under the "Actual Maker" rule, known as the Kentucky Rule, the words "person making it so payable" are held to refer to the person who actually drew the instrument, whether he was the nominal maker or not. The intent of this person, as to the fictitious character of the payee, determines whether the instrument is "bearer" in nature. In the parent case setting forth this doctrine,[6] the person who actually drew the instrument was the official signing officer of the drawer. As such, his acts were the acts of the drawer, and, within the apparent scope of his authority, binding on the drawer. This doctrine has been followed in a minority of American jurisdictions.

Under the "Nominal Maker" doctrine, known as the Missouri Rule, "the person making it so payable" refers to the "legal or ultimate maker" of the instrument. The intent of the drawer is controlling. While the intent of agents of the drawer, acting within the apparent scope of their authority, is binding as the

---

5. *Norton v. City Bank & Trust Co.* (1923) 294 F. 839; *Seidman v. North Camden Trust Co.* (1939) 122 NJL 580, 7 A2d 406; *Com. v. Globe Indemnity Co.* (1936) 323 Pa. 261, 185 A 796. 118 ALR 115, and cases cited.

6. *Mueller & Martin v. Liberty Ins. Bank* (1920) 187 Ky. 44, 218 SW 465.

intent of the drawer,[9] the drawer is not bound by the acts of an employee acting outside the apparent scope of his authority. This was the holding, and the only holding, of the Supreme Court of Missouri, in *American Sash & Door Co. v. Commerce Trust Co.*, where the "defrauding employee had nothing to do with the execution of the checks or the delivery of them" to the payees.[7]

While some courts have treated these two rules as contrary to each other, they are in fact complementary. They reduce to one rule, and its corrolary: when the agent has authority to draw an instrument on the principal, then if the agent does draw an instrument to a fictitious payee, such instrument is, as to the principal, bearer paper, and a bank paying on indorsement of such payee's name is protected (Kentucky Rule); when the agent does not have such authority, real or apparent, and obtains the principal's signature on such paper through fraud, the principal being ignorant of the fictitious nature of the payee, the instrument is not payable to bearer and a bank taking such paper gets no title thereby (Missouri Rule).[10]

In the third class of cases noted, reference is often made to one or both of these "doctrines"; however, the essential decision of the court turns on the principles of agency. Perhaps the clearest example of this is the case of *Goodyear Tire and Rubber Co. v. Wells Fargo Bank.*[8] In this case the defrauding employee was the drawer's general manager of a branch office, who caused checks to be issued by the drawer's home office on the basis of information supplied by the employee. The employee was authorized to, and did, sign the instruments as co-signer. After pointing out that "the authorities establish the proposition that the drawer or maker of the check and the 'person making it so payable' can be . . . different, and that it is the knowledge of the person making it so payable that is controlling", the California court, quoting the case of ***Los Angeles Inv. Co. v. Home Savings Bank of Los Angeles***[8] says "it is elementary that a principal will not be charged with knowledge of an agent under such circumstances (perpetration of an independent fraud on the principal); . . . . This, of course, is very different from an agent binding his principal by acts done within the scope of (his apparent) author-

7. *American Sash and Door Co. v. Commerce Trust Co.* (1932) 332 Mo. 98, 56 SW2d 1034; *Equitable Life Assurance Society v. Nat'l. Bank of Commerce* (1916) 181 SW 1176; *Globe Indemnity Co. v. First Nat'l. Bank in St. Louis* (1939) 133 SW2d 1066.

8. *Goodyear Tire and Rubber Co. v. Wells Fargo Bank* (1934) 1 Cal. App. 2d 694, 37 P2d 483; *Los Angeles Inv. Co. v. Home Savings Bank of Los Angeles* (1919) 180 Cal. 601, 182 P 293.

9. Restatement, Agency, ss. 159, 173, 177.

10. 74 ALR 822.

ity." Thus the California court, in holding the drawer liable on the instrument did not impute knowledge to the principal, but rather held the drawer liable for the acts of its agent.

There are, of course, anomalous cases following no clear application of any of these rules. Perhaps two citations from our own jurisdiction will clearly point out the confusion which has surrounded the issue. In the case of *Liberty Mutual Ins. Co. v. First National Bank of Dallas,*[11] and *Republic National Bank of Dallas v. Maryland Casualty Co. et al*,[12] on similar facts, the court reached a decision that the checks in question were not bearer instruments. Each case involved false claims submitted to the home office of an insurance company by branch claims personnel, on the strength of which the company issued checks, which were to be delivered by the employee to the "claimants". In the first case the court ruled that since only the employee had knowledge of the fictitious character of the payee, the drawer was not liable on the instrument. In the second case, the same result was reached on the ground that the fraudulent employee did not have authority to approve payment, only authority to deliver the checks.

Both of these Texas cases would have been decided with opposite results under either the Missouri Rule[7] or under the authority of the *Goodyear Tire and Rubber* case. Under the bare statement of the Kentucky Rule, these two decisions seem correct. However, in both cases, the act which caused the instruments to be executed, and the act which put them into circulation, payable to fictitious payees, was one committed by the agent of the drawer, acting within the apparent scope of his authority. Therefore, the drawers in each case should have been held liable to the drawee banks on the instrument.[9]

Professor Britton, in his work on Bills and Notes, has suggested that the American courts have led themselves into confusion, as to the proper understanding of the meaning of "the person making it so payable", by failure to recognize the nature of the two problems raised in section 9(3) of the NIL. The first problem is to determine whether the named payee is in fact fictitious. The intent of the "person making it so payable" is properly raised in the solution of this problem. The second is whether the drawee may charge the account of the drawer for payment on the instrument. The drawee may charge the account, when the person who caused the check to be issued against the drawer was an agent of the drawer, acting within the apparent scope of his authority.[13]

---

11. (1951) 245 SW 2d 237.
12. (1946) 184 SW 2d 496.
13. Britton, Bills and Notes, s. 149 (1943).

Analysis of the foregoing cases, in light of Professor Britton's comments, will show two results. First, that the apparent conflict between jurisdictions as to the proper interpretation of section 9(3) of the NIL will be reconciled. Second, that the results reached by the California courts[8] are based on this analysis.

Sixteen states, including Missouri, have, by legislative action, changed the wording of section 9(3) of the NIL to read: "When it is payable to the order of a fictitious or non-existing person *or to a living person not intended to have any interest in it* and such fact was known to the person making it so payable **or was known to his employee or other agent who supplies or causes** *to be inserted the name of such payee"*, thereby clarifying the intent and construction of the statute, and eliminating the necessity of applying any doctrine of interpretation.[14]

Thus as a result either of statutory change or of application to the construction of this section of the NIL of the principles of agency, the overwhelming majority of American jurisdictions have resolved the correct rule to be, that whenever an agent of the drawer is intrumental in causing a check to be issued payable to a fictitious payee, and in so doing the faithless employee was acting within the apparent scope of his authority, the instrument is a bearer instrument, and a bank paying on it may charge the account of the drawer therefor.

Those states which have modified the NIL, as indicated above, have gone beyond Britton, and beyond the California courts. If an employee, acting entirely outside the scope of his authority, real or apparent, causes a check to be issued by his employer, with intent that the payee named therein shall not receive any benefit therefrom, the drawer will be liable on the instrument to the drawee paying on the instrument, under the amended statute. The drawer would not be liable to the drawee bank under the California decisions, since the faithless employee was not acting within the apparent scope of his authority.

This modification of the NIL is the one recommended by the American Banking Association. The effect of it is that a check, payable to a fictitious person, is payable to bearer if it is issued in the normal course of the drawer's business.

---

14. Uniform Negotiable Instruments Law s. 9 (3); 5 Uniform Laws Annotated 128; Arizona, 1951; Alabama, 1951; Arkansas, 1953; California, 1945; Florida, 1955; Georgia, 1945; Iowa, 1953; Minnesota, 1953; Missouri, 1945; New Mexico, 1945; North Carolina, 1949; Oregon, 1949; Utah, 1953; Virginia, 1956; West Virginia, 1951; Wyoming, 1951.

Under the facts of the instant case, application of any rule of interpretation or statutory modification would result in a decision that the drawer cannot recover from the drawee the amount charged against the account of the drawer. Since the employee was the signing officer of the drawer, the Kentucky and Missouri rules are satisfied, as is the modified statute. And, since the act was committed within the apparent scope of the agent's authority, the agency analysis, as set forth by Professor Britton and the California court, is satisfied. Indeed, even the anomalous jurisdictions, such as Texas, would concur on these facts, since the acts of a corporation's executive officers, though a fraud on it, are binding on the corporation, as to third parties, if done within the scope of their apparent authority.

Robert Keegan and Gordon Jackson
S.M.U. Law.

Comment:

Although it would appear from the wording of the Bills of Exchange Act that only one problem need be resolved, that the payee be fictitious or non-existent, while the Negotiable Instruments Law has the further requirement that such fact be the intention of the person making the instrument so payable, this apparent difference disappears upon an application of the two statutes to a particular set of facts. In Canada, in order to ascertain whether a payee is fictitious, a determination must first be made of the intent of the party causing such person to be named as payee, for there is no other method to determine whether the payee was intended to have an interest in the instrument. In the United States, the existence of such intent is an express requirement of Section 9(3) of the Negotiable Instruments Law. It would appear that in both Canada and the United States upon proof of intention that the payee be fictitious, then the instrument is payable to bearer.

CONSTRUCTION WORK — NEGLIGENCE — LIABILITY OF CONTRACTORS — DUTY OF CONTRACTOR — PLAINTIFF AWARE OF DANGER.

The result of the recent House of Lords decision in *A. C. Billings & Sons Ltd. v. Riden*[1] is that contractors interfering with the access to a building must use reasonable care to ensure that persons lawfully[2] entering will not be injured because of the interference. The appellant contractors while reconstructing the

1. [1957] 3 All E.R.1; see the comments by R. E. Megarry, (1957) 73 Law Q.Rev. 294 and 433 and T. L. Montrose (1958) 21 Mod. L. Rev. 76.
2. The respondent was lawfully on the premises; the question of trespassers did not arise.