BILLS AND NOTES:
BANKS:

A bank who is holder of a check in due course is not liable for an account of the payee in the misuse of the money.

August 15, 1941

9-20

FILE

Honorable Charles B. Butler
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated August 13, 1941, which reads as follows:

> "I would like to have your opinion based on the following facts:
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> "Bessie Moore was County Clerk here until removed in this year by the County Court for failure to make a new bond.
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> "At the time of her removal she had embezzled funds belonging to the State, County of Ripley and Doniphan Consolidated School District.
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> "Mr. Williamson was prosecuting attorney at the time she embezzled more than one thousand dollars from the sale of hunting and fishing licenses. The bonding Company paid the shortage and no prosecution was had.
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> "After I was elected prosecuting attorney the State Treasurer sent Bessie Moore, County Clerk, five hundred dollars for Doniphan Consolidated School District. Mrs. Moore took this check to Poplar Bluff, Missouri, and cashed the same at the Bank of Poplar Bluff, received two hundred fifty dollars in cash and depositing the remainder to her personal account, which she later

drew out on personal checks.

"The check issued by the State Treasurer was made to Bessie Moore, County Clerk.

"I would like to have your opinion as to the liability of the Bank of Poplar Bluff to Doniphan Consolidated School District."

I am presuming that Bessie Moore, the County Clerk of Ripley County, endorsed the check described in the request in the same way that the check was made payable, that is, "Bessie Moore, County Clerk."

A check is defined under Section 3200, R. S. Missouri 1939, as follows:

"A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check."

It has been held in this state that a check is a negotiable instrument. It was so held in John P. Mills Organization v. Bell, 37 S. W. (2d) 680, l. c. 682, pars. 1-4, where the court said:

"* * * It is the law that a check is a negotiable instrument and imports a valuable consideration. Nelson v. Diffenderffer, 178 Mo. App. 48, 51, 163 S. W. 271. * * * * * * * * * * "

It was also so held in the case of Schroeder v. Seittz, 68 Mo. App. 233.

The fact that the check was payable to Bessie Moore, County Clerk, did not charge the bank with notice that the payee held the check for the Doniphan Consolidated School District. The mere description did not notify the bank that she had no right to cash the check or that the maker was under no obligation to pay it. It was so held in an

action on a negotiable note where the word "trustee" followed the name of the grantee. The court in State v. Cox, 30 S. W. (2d) 462, l. c. 466, said:

> "We do not understand that in this proceeding we can quash a former opinion of the Court of Appeals. We are asked to quash only the present opinion. The former opinion is not involved. However, we may as well dispose of the point briefly. The ruling in that regard is said to be in conflict with the case of Sanford v. Van Pelt et al., 314 Mo. 175, 282 S. W. 1022. What was held in that case was that a conveyance of real estate with the word 'trustee' following the name of the grantee was not mere descriptio personae, but was notice that the grantee held the property in trust for some other person, whose name was not disclosed. The word 'trustee' in the note here may be said to charge the purchaser of the note with notice that the payee held it in trust for some other purpose than for its own benefit, but it would not charge him with notice that the payee had no right to the note, or that the maker was under no obligation to pay it. It is immaterial to the maker who is beneficiary in the note so long as he is liable. That is the distinction drawn by the Court of Appeals on that point (222 Mo. App. 1194, 4 S. W. (2d) 864), and it does not conflict with any ruling of this court."

It has also been held in this state that the doctrine of notice, as it affects good faith of transactions generally, does not apply to negotiable commercial paper, such as a check. It was so held in Dull v. Johnson, 106 S. W. (2d) 504, l. c. 508, pars. 4, 5-7, where the court said:

> "To constitute notice of infirmity or defect of title, the person to whom a note is negotiated must have had actual

knowledge of the infirmity or defect or knowledge of such facts that his action in taking the note amounted to bad faith. Section 2684, R. S. Mo. 1929 (Mo. St. Ann. section 2684, p. 676), Union National Bank v. Fox (Mo. App.) 9 S. W. (2d) 1070.

"What defense do plaintiffs interpose against the note for $38.63? Apparently, in the trial court they proceeded on the theory that, since Thomas B. Johnson purchased said note the following morning after it was executed, and that since C. L. Prock stayed in the office of Ralph Johnson a part of the time and frequently dealt with the Johnsons, the presumption arose that defendants and C. L. Prock were partners or were acting in concert. The only testimony that we are able to find in the record upon which such assumption might be based is that of I. E. Dull, when referring to a trade that he had made, as follows: 'Mr. Prock represented me in the deal and Ralph Johnson represented the other party. Mr. Prock stayed up there in Johnson's office.' This statement is too vague to have any probative force. The good faith of the transaction is the only subject of inquiry. In the case of Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 149, 40 Am. St. Rep. 373, the court said:

"'In general one will be charged with notice of a fact who has information which should put him upon inquiry if, by following up such information with diligence and understanding, the truth could have been ascertained. It is now well settled in this state, however, that the doctrine of notice, as it affects the good faith of transactions generally, does not apply to negotiable commercial paper. "Both upon principle

> and authority," says Wagner, J., "and from the experience of jurists and commerical men, and the interests of the affairs of business life, it is safe to say that the liberal doctine which promotes the free circulation of negotiable instruments is the best, and that the good faith of the transaction should be the decisive test of the holders of rights." Hamilton v. Marks, 63 Mo. (167) 178. Since the decision in that case it has been settled law in this state "that the consideration of negotiable paper in the hands of a bona fide holder for value before maturity cannot be inquired into. Mala fides alone can open the door to such inquiry. Gross negligence even is not sufficient; actual notice of the facts which impeach the validity of the note must be brought home to the holder." Mayes v. Robinson, 93 Mo. (114) 122, 5 S. W. 611.'
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> "'Mere knowledge of facts which would ordinarily put one on inquiry will not do * * * and it is well settled that mere suspicion that a negotiable note is without consideration, or was obtained by fraud, brought home to the transferee before he acquires the note, will not be sufficient to defeat a recovery.' First National Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636, 638; Reeves & Son v. Letts, 143 Mo. App. 196, 128 S. W. 246."

One of the earliest cases in this state in reference to the descriptive name of the payee on a promissory note was the case of Fletcher v. Schaumburg, 41 Mo. 501, where the court said:

> "This was an action brought by the plaintiff against the defendant on a negotiable promissory note. The note was given by the defendant for the purchase of land sold in partition

> by the sheriff, and made payable two years after date to 'James Castello, Shff.,' and negotiable and endorsed by the payee before maturity. The endorsement on the back of the note had the designation 'Shff,' appended to Castello's name, but there was nothing to show that the plaintiff as endosee had any other notice that the payee held it in a fiduciary capacity, or that in its sale he was committing a breach of trust. The defendant resisted the payment of the note and claimed an interest in the proceeds as one of the distributees for whose benefit the land was sold. In the Circuit Court, the defendant's counsel asked the court to declare the law to be that the note itself with the endorsement thereon was sufficient to impart notice to the plaintiff that the money was payable to the sheriff Castello in his official capacity as such, which declaration the court refused to give, and then found for the plaintiff.
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> "The instrument sued on is simply a negotiable promissory note made payable to Castello, and the abbreviation 'Shff.' added to his name is merely descriptive. There is nothing in the body of the note or the endorsement to apprise any one that it belonged to any other person than the payee, or that he held it in any capacity other than as his individual property. To have given the instruction prayed for by the defendant would have been going farther than any case that we are aware of has ever gone, and would have overturned principles of law long settled."

The bank in this case was a holder in due course of a check made payable to Bessie Moore, County Clerk, and so endorsed by her. The fact that she received Two Hundred Fifty Dollars in cash and deposited Two Hundred

Fifty Dollars to her personal account cannot be used against a holder of a check in due course. The statutes of the State of Missouri, especially Section 3067, R. S. Missouri 1939, define a holder in dur course. The transaction in your request, under the above definition, shows that the bank took the check as a holder in due course.

The St. Louis Court of Appeals in the case of United States Fidelity & Guar. Co. v. Mississippi V. T. Co., 153 S. W. (2d) 752, in paragraphs 6, 7, l. c. 757, in defining a holder in due course, said:

> "The relationship between a depositor and a bank or trust company is ordinarily that of debtor and creditor. At least since the case of Paul v. Draper, 158 Mo. 197, 59 S. W. 77, 81 Am. St. Rep. 296, the legal effect of a deposit is a loan to the bank, and this is equally so whether the deposit is of trust moneys or funds which are impressed with no trust, provided the act of depositing is no misappropriation of the fund. If the deposit is of trust funds, the bank simply becomes indebted to the depositor in his fiduciary capacity. This is not only the law in our State but prevails generally. 3 R. C. L. section 149 p. 521. And it has been repeatedly held by our courts, as in the case of Farmers' Trust Co. v. Tootle-Lacy Nat. Bank, 332 Mo. 82, 56 S. W. 2d 769, that the deposit of trust funds creates only the relation of debtor and creditor between the bank and the trustee.
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> "And while commenting on these general principles of law it is well to bear in mind the provisions of our negotiable instrument statutes, Chapter 14, section 3016 et seq., R. S. 1939, Mo. St. Ann. section 2629 et seq., p. 643 et seq., and especially the following sections:

> "'Sec. 3067 (section 2680). Holder in due course. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.'"

In the same case the court cited a case decided by our Supreme Court which was the Gate City Bldg. & Loan Ass'n. v. National Bank of Commerce, 126 Mo. 82, 28 S. W. 633, 47 Am. St. Rep. 633, 27 L. R. A. 401, wherein the facts of the case were commented upon as follows, page 759:

> "'In the case of Gate City Bldg. & Loan Ass'n v. National Bank of Commerce, 126 Mo. 82, 28 S. W. 633, 47 Am. St. Rep. 633, 27 L. R. A. 401, we have a decision of our Supreme Court which we think controls. The secretary of the building and loan association received $4,000 by way of a check from a customer, payable to the association. The secretary, Harris, indorsed the check, and deposited it to his personal account in the Bank of Commerce. The bank credited his account, collected the check from the clearing house, and thereafter Harris drew out the money on his personal checks, embezzled the money, and absconded. The loan association made demand on the bank for the return of the money, and sued for its recovery in an action for money had and received. There the court said:
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> "'"The law of the case seems to be within a narrow compass. There is not a

> particle of evidence tending to prove that the bank did not act in perfect good faith in this transaction, in respect of which it occupied no fiduciary relation to plaintiff. It does not appear from the evidence to what purpose the proceeds of the check were ultimately applied by Harris--it may have been to his own or to those of the association--nor is this a matter of any importance upon the present issue. The bank was not responsible for the proper application of those proceeds by him. R. S. 1889, section 8691. The check was a negotiable instrument. Famous, etc., Co. v. Crosswhite, 124 Mo. 34 (27 S. W. 397, 26 L. R. A. 568, 46 Am. St. Rep. 424). The credit given to the account of Harris was the same as if the money had been paid him on the check and had been immediately placed back by him and credited on his own account. Benton v. German American Nat. Bank, 122 Mo. 332 (26 S. W. 975); Oddie v. (National City) Bank, 45 N. Y. 735 (6 Am. Rep. 160); 2 Morse on Banks and Banking (3d Ed.) section 451. The bank thereby became a purchaser for value, in the ordinary course of business, of the instrument, and entitled to collect the proceeds thereof to its own account if it acquired plaintiff's title by indorsement. So that the only question is: Did Harris in his official capacity as secretary have power to transfer the check by indorsement. * * * If the association has met with any loss by reason of a misapplication of that fund, it must be charged to a breach of the trust imposed in one of its officers, and the neglect of duty by the others."'"

The holding in the case cited was to the effect that where the bank acted in perfect good faith in the transaction it occupied no fiduciary relation to the plaintiff, which under the facts in your request, would have been the Doniphan Consolidated School District.

CONCLUSION

In view of the above authorities it is the opinion of this department that the Bank of Poplar Bluff, not benefiting or being a part of the fraudulent transaction set out in your request, is not liable in any way to the Doniphan Consolidated School District by reason of cashing a Five Hundred Dollar check from the state treasurer payable to Bessie Moore, County Clerk. The fact that the check was originally sent by the state treasurer for the Doniphan Consolidated School District does not alter the situation.

Respectfully submitted

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Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

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