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Banks and Banking—Liability of Bank to Payee for Cashing Check With Unauthorized Endorsement—Effect of Signature Cards

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COMMENTS

Banks and Banking—Liability of Bank to Payee for Cashing Check With Unauthorizd Endorsement —Effect of Signature Cards*

The general rule is that a bank which cashes a check on a forged or unauthorized endorsement is liable to the payee for the amount of the check in the absence of negligence, latches, or estoppel by the payee.[1] Recovery has been allowed on several different theories. The two most widely used theories of recovery are actions for money had and received[2] and conversion.[3] A recent New Hampshire case allowed recovery after the court found that the bank was negligent in cashing a check with an unauthorized endorsement.[4] Both Professors Scott[5] and Britton[6] cite cases authorizing recovery on the theory of participation in a breach of trust.

In the recent New Mexico case of *Jomack Lumber Co. v. Grants State Bank*,[7] the plaintiff, a corporate depositor, had filed a signature card with the defendant bank that stated:

> Grants State Bank . . . is hereby authorized to recognize the signatures given below in payment of funds or transactions of other business for this account—Two signatures required.[8]

This was followed by the names and signatures of four individuals including Burton and Lockwood.

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* Jomack Lumber Co. v. Grants State Bank, 75 N.M. 787, 411 P.2d 759 (1966).

1. Annot., 100 A.L.R.2d 670 (1962), and cases cited therein. Estoppel arises when the principal holds an agent out as having authority to endorse checks in the principal's name even though the agent has no authority. For a complete discussion of the doctrine of estoppel as it applies to unauthorized endorsements, see Comment, 6 Natural Resources J. 142 (1966).

2. See, *e.g.*, Schaap v. State Nat'l Bank, 137 Ark. 251, 208 S.W. 309 (1918); Buena Vista Oil Co. v. Park Bank, 39 Cal. App. 710, 180 Pac. 12 (Dist. Ct. App. 1919); E. Moch Co. v. Security Bank, 176 App. Div. 842, 122 N.E. 879, 163 N.Y.S. 277 (1919).

3. See, *e.g.*, Standard Steam Specialty Co. v. Corn Exch. Bank, 220 N.Y. 478, 116 N.E. 386 (1917); Gresham State Bank v. O & K Constr. Co., 231 Ore. 106, 370 P.2d 726 (1962). See also, N.M. Stat. Ann. § 50A-3-419 for the Uniform Commercial Code's position on conversion of a negotiable instrument.

4. Security Fence Co. v. Manchester Fed. Sav. & Loan Ass'n, 101 N.H. 190, 136 A.2d 910 (1957).

5. Scott, Trusts § 324.3 (2d ed. 1956).

6. Britton, Bills & Notes § 118 (2d ed. 1961).

7. 75 N.M. 787, 411 P.2d 759 (1966).

8. *Id.* at 788, 411 P.2d at 760.

Six checks were delivered to the bank by Burton over a period of about one and one-half years.[9] These checks were either endorsed restrictively or were endorsed with only one signature. Disregarding the restrictive or unauthorized endorsements, the bank cashed these checks and gave the money to Burton who deposited part of the money to the corporation's checking account as a cash deposit and returned the remainder to the company cash drawer. It was subsequently determined that this cash enabled an unknown embezzler to cover shortages in the cash drawer and in the cash deposits to the company's bank account.[10]

The action in *Jomack* was on the theory of conversion. The plaintiff alleged the delivery of the checks in question and the bank's refusal to credit the amount of the checks to the plaintiff's account.[11] At the conclusion of the plaintiff's evidence the trial court sustained

9. There might be a question of estoppel in this case. At the beginning of the opinion the court said:

> About June, 1961, Marion Mead and Louis Rice, plaintiff's accountant, became suspicious of shortages in the accounts but did nothing beyond discussing the same with Frances Burton. They made no inquiry concerning the practice of cashing checks, and did not ask defendant [Grants State Bank] to discontinue the practice.

Jomack Lumber Co. v. Grants State Bank, 75 N.M. 787, 789, 411 P.2d 759, 760. It seems that the court is basing this conclusion on the testimony of the plaintiff's accountant. His testimony indicates only that there was some concern over certain accounts being delinquent. Records, pp. 112-23. These accounts were never more than 120 days delinquent because checks intended to pay for February purchases, for example, were being applied to December or January purchases. When the employees were questioned about the apparently delinquent accounts, "they said they were having difficulty in getting their vouchers approved or purchase orders approved . . . which was delaying payment on those invoices." Record, p. 119. Mead and the accountant accepted this statement and did not inquire further. There is no evidence that the plaintiff ever became aware of the bank's practice of cashing checks until the shortages were discovered. Because of the testimony, it seems that the court's statement is not quite accurate. Even if the court's statement were accurate, however, the question of estoppel was never presented to the court. Estoppel was not raised as a defense in the defendant's answer nor was it clearly discussed in the defendant-appellee's brief.

10. It should be noted that the plaintiff's loss might have occurred in the same way even if the bank had required the requisite two signatures. Burton and Lockwood were both authorized to transact businss on the company's account. Lockwood was the office manager and Burton was his secretary. According to the testimony in the case, Lockwood set aside the checks which were to be cashed and Burton took them to the bank. Record, pp. 88-110. It seems that if the bank had required two signatures, Lockwood could have endorsed the checks and then directed Burton to do likewise with the same result.

11. Record, p. 4. The plaintiff also alleged that the signature card constituted a contract between the plaintiff and the bank and that when the bank cashed checks with only one endorsement or a pro forma endorsement, the bank breached the contract. The findings of the trial court do not indicate that the decision was based on this theory. *Ibid.*

the defendant's motion for a directed verdict upon a finding that there was no loss. On the plaintiff's appeal to the New Mexico Supreme Court, *held*, Affirmed.

The elements of the tort of conversion include possession of another's goods, a demand that the goods be returned, and the refusal to surrender them.[12] In *Jomack*, the bank alleged, and the court found, that there was no refusal to surrender the proceeds of the checks. "[P]laintiff received from the defendant every penny to which it was entitled and any loss suffered by it resulted from the intervening misconduct of someone else."[13] While the soundness of this position may be arguable even from the viewpoint of an action for conversion, the purpose of this Comment is to explore the possible result had the corporate depositor brought the action as one for negligence or participation in a breach of trust rather than as one for conversion.

An action for negligence would present three questions: (1) what is the duty of the bank regarding the encashment of checks payable to a corporation; (2) what effect will a signature card have on the performance of this duty; and (3) is the bank's negligence in cashing checks with an unauthorized endorsement the cause of the payee's loss resulting from a subsequent misuse of the funds?[14]

The bank's duty to use care in cashing a check is clear from the court's language in *Saf-T-Boom Corp. v. Union Nat'l Bank*.[15] "When a check is offered to a bank the obligation is upon the bank

12. Prosser, Torts § 15, at 90 (3d ed. 1964). This is a simplification of the elements of the tort of conversion. Dean Prosser says that this is a highly technical area that "almost defies definition." *Id.* at 79. Demand and refusal are not always necessary elements, nor is the intent to affect the chattel of another "necessarily a matter of conscious wrongdoing." *Id.* at 83.

13. 75 N.M. at 791, 411 P.2d at 762.

14. The term "misuse" includes situations like that in *Jomack* where the employee does not embezzle the particular dollars received from the bank but delivers those dollars to the employer, not for the use and benefit of the employer, but for the employee's use and benefit.

15. 367 S.W.2d 116 (Ark. 1963). In this case a check named the plaintiff corporation as payee. An employee of a separate subsidiary corporation using the same office as the plaintiff received, endorsed, and cashed the check. There was no doubt that the employee had no authority to endorse the check. The plaintiff had on file with the bank a signature card authorizing recognition of two signatures. The employee was not named on the card. When the action was brought against the bank which cashed the check, the bank defended on the grounds that the check was erroneously made payable to the plaintiff and should have been made payable to the subsidiary corporation; for this reason the plaintiff was not a holder for value and could not bring the action. The Arkansas Supreme Court ruled that this made no difference and that the plaintiff was still entitled to the proceeds as the named payee.

to determine if the endorsement is genuine and made by the payee or one duly authorized by the payee."[16] Where a corporation is the named payee, the proposition that "any person taking checks made payable to a corporation, which can act only by agents, does so at his peril and must abide by the consequences if the agent who endorses the same is without authority . . . ."[17] has been reiterated several times.[18]

The bank's duty to use care in cashing checks naming its corporate depositor as payee was taken for granted in *Jomack* because the court said:

> If Frances Burton had pocketed the cash received by her from the bank, the authorities would seem clearly to support a conclusion that the owner and payee of the checks could recover from the bank that cashed them for her with unauthorized or altered endorsements.[19]

Thus, it appears that a bank has a duty to use due care in cashing

16. *Id.* at 119.

17. Standard Steam Specialty Co. v. Corn Exch. Bank, 220 N.Y. 478, 116 N.E. 386, 387 (1918). In this case checks payable to the corporate plaintiff were endorsed by an unauthorized employee. These checks were cashed for the employee by various businessmen who eventually delivered the checks to the defendant bank and deposited the proceeds to their accounts. The court said that "the good faith of the defendant [bank] and its depositors is conceded . . . ." 116 N.E. at 386. The bank was held liable to the payee for the proceeds of the checks even though there would have been no practical way for the bank to determine whether the first endorsement was genuine. The court's reasoning was that an unauthorized endorsement cannot pass title. This seems to be a holding of strict liability and it is suggested that it is precisely this type of strict liability that the court in *Jomack* was seeking to avoid.

An earlier New Mexico case, Morgan v. First Nat'l Bank, 58 N.M. 730, 276 P.2d 504 (1954), which was cited in *Jomack*, does impose strict liability with regard to forged checks. The plaintiff wrote a check for $16,117 naming E. H. Martin & Co. as payee. The money was to be used to purchase stock and the check bore a notation to that effect. This check was delivered to the payee and was either lost or destroyed. Martin forged a new check for the same amount payable to himself. He then cashed the check at the defendant bank. When Martin failed to deliver the stock, the plaintiff —the original drawer—sued the bank for cashing the forged check. The bank defended on the grounds that the plaintiff drawer lost nothing because the bank delivered the funds which the drawer intended to be delivered. The court held the bank liable saying that the secret intention of the drawer did not matter but that the payment was made on a forged instrument which could not manifest the intention of the drawer. There was no way for the bank in *Morgan* to check the authenticity of the instrument. Even if the bank had contacted the drawer, the bank would have been informed that the drawer had written a check payable to E. H. Martin & Co. in the amount of $16,117. This decision imposed strict liability on the bank and could have influenced the decision in *Jomack*.

18. See *e.g.*, Campbell Trucking Corp. v. Public Nat'l Bank & Trust Co., 105 N.Y.S.2d 870, 873 (Sup. Ct. 1951).

19. 75 N.M. at 790, 411 P.2d at 761.

checks made to a corporate payee. The question remains, however, what constitutes due care. Is merely cashing a check on an unauthorized endorsement negligence?

The question of the bank's negligence in cashing a check endorsed by an unauthorized agent has been considered in at least two cases.[20] In *Security Fence Co. v. Manchester Fed. Sav. & Loan Ass'n*,[21] the plaintiff-in-interest was a surety company subrogated to the rights of the plaintiff arising from a payment to the plaintiff because of a defalcation by the plaintiff's manager. The manager, without authority to do so, had endorsed a check payable to the plaintiff and collected the proceeds from the defendant bank. He returned the proceeds to the plaintiff's petty cash drawer and subsequently spent the money entertaining himself and company customers. In ruling specifically on the question of negligence, the New Hampshire court found that the bank had been negligent in failing to ascertain whether or not the manager had the authority to endorse the check.[22]

In *Security Fence*[23] the plaintiff was not a depositor so there was no signature card appraising the bank of persons authorized to transact business on the part of the company. If the bank is negligent in cashing a check under these circumstances, a fortiori the bank is negligent in cashing a check for an employee whom the bank knows is not authorized to cash checks because he is not named on the signature card.[24] Thus, it is meaningful to focus on the purpose of the signature card and its possible effect on the bank's liability in an action for negligence.

That the execution of a signature card imposes a limitation on the manner in which a bank may handle the depositor's account, is apparent in most instances from the wording of the instrument itself. The precise nature of this limitation presents a more difficult ques-

20. Security Fence Co. v. Manchester Fed. Sav. & Loan Ass'n, 101 N.H. 190, 136 A.2d 910 (1957), and Industrial Plumbing & Heating Supply Co. v. Carter County Bank, 25 Tenn. App. 168, 154 S.W.2d 432 (1941).

21. 101 N.H. 190, 136 A.2d 910 (1957).

22. The issue of negligence was squarely presented because the surety company, as one subrogated to the rights of another, could not recover unless there was a finding of negligence.

23. 101 N.H. 190, 136 A.2d 910 (1957). This case was cited in the appellant's brief in *Jomack* on the question of damages. Brief for the Appellant, p. 105. Despite the fact that the case is directly in point, the court seems to have overlooked it entirely.

24. In *Jomack*, Burton was one of the persons named on the signature card as authorized to transact business for the company. The signature card required two signatures for the transaction of business; each of the checks in question bore either a pro forma endorsement or only one signature.

tion. Does the signature card limit the manner in which transactions can be conducted to a *signature* by an authorized person on every instrument, or does it limit only the persons authorized to transact business? The failure to distinguish between these two questions led the New Mexico Supreme Court into the anomalous position of denying any effect to a signature card.[25] In *Cooper v. Albuquerque Nat'l Bank*,[26] directors of a trust fund executed a signature card naming certain persons and requiring two signatures for the transaction of business. All the checks involved in the suit were payable to the trust but were endorsed with only one signature and deposited to the account of the association responsible for the trust. In discussing the effect of the signature card, the court said:

> Appellees cite no direct authority to support their statement that the signature cards revoked or superseded the authority previously given to Peke to deposit checks made out to the Trust Fund to the Association's account. In the absence of any authority to support this contention . . . we are of the opinion that Peke had the necessary authority . . . to deposit Trust Fund checks directly to the Association's account.[27]

The court then cited *Glens Falls Indem. Co. v. Palmetto Bank*[28] as authority for the proposition that the "signature card is executed for the benefit of the bank" for the purpose of helping the bank to detect forgeries and to identify the persons authorized to transact business on the account.[29] However, in *Glens Falls* the court was only answering the question on whether the signature card limits the manner of transacting business to signatures on the checks. The *Glens Falls* case answered negatively saying:

> I do not construe the signature card to mean that no business could be transacted with the bank without the signature of either Link or Henry. If this were true no money could have been deposited in the bank unless some instrument were signed by one or the other. If Link received a check payable to Watts Mills and deposited this check, this would constitute a transaction of business on the mill's

25. See Comment, 6 Natural Resources J. 142 (1966).
26. 75 N.M. 295, 404 P.2d 125 (1965).
27. Cooper v. Albuquerque Nat'l Bank, 75 N.M. 295, 303, 404 P.2d 125, 131 (1965).
28. 23 F. Supp. 844 (W.D.S.C. 1938), *aff'd*, 104 F.2d 671 (4th Cir. 1939).
29. *Id.* at 849. Even if this were the position generally adopted by the courts regarding the purpose of a signature card, it would appear that the only reason that the bank needs to detect forgeries and identify persons authorized to transact business on the account is because the bank has a duty to the depositor to do so.

> account with the bank. He could have done this without signing anything.[30]

The reasoning of the *Glens Falls* court on this issue is persuasive. But the proposition that the signature card does not limit the authority of the named persons to conducting certain transactions on their signature only, should not be the basis for saying that it does not limit the *persons* who are to transact business on the account.

It must be noted that the court in *Jomack* seems to have retreated from the position taken in *Cooper* regarding the purpose and effect of signature cards. The *Jomack* court concluded that the bank had acted wrongfully and that the bank would be liable to the payee if the employee had pocketed the money.[31] *Jomack* seems to be following the better view of the purpose of a signature card enunciated in *Industrial Plumbing & Heating Supply Co. v. Carter County Bank*.[32] In that case the signature card authorized only one employee to transact business on the company account. An employee not named on the signature card delivered a check with a pro forma endorsement to the defendant bank and received the cash proceeds. In discussing the purpose of a signature card the court said:

> The card was executed conferring authority to protect the bank and the customer in all transactions requiring the signature of an agent in the transaction of business. It is as important to the bank to protect itself against the unauthorized signature of an agent in the endorsement of a check as in the drawing of a check, and the purpose was to protect both the bank and the depositor in every transaction between them requiring an agent's signature.[33]

Earlier in the opinion the court had stated that:

> The card did not afford protection to the bank alone, and give no protection to the customer. The customer had a right to rely upon the bank's following and carrying out the instructions given upon the card which it had required. The bank was not justified in disregarding the express instructions contained upon the card and acting upon appearances.[34]

30. *Id.* at 849.
31. See text accompanying note 19 *supra*.
32. 25 Tenn. App. 168, 154 S.W.2d 432 (1941).
33. 154 S.W.2d at 435.
34. *Id.* at 434.

Thus, the more correct viewpoint seems to be that the signature card is executed for the purpose of protecting the depositor, as well as the bank, from defalcations by persons not authorized to transact business on the depositor's account. When a bank ignores or fails to use this information and pays out corporate funds either already in the account or by cashing a check payable to the corporation on an unauthorized endorsement, the bank is prima facie negligent, as the court in *Indrustrial Plumbing* held. "The bank was negligent in not ascertaining the agent's authority to endorse the check, the evidence of authority was available in the bank's records . . . ."[35]

In *Jomack* the central issue was the matter of causation. The New Mexico court recognized that the bank had committed a wrong in cashing the improperly endorsed checks: "in the present case, although there was a wrong, there was no damage as a result thereof . . . ."[36] The court's difficulty was with the problem of whether the bank's wrong was the cause of the plaintiff's injury. It is likely that this difficulty was present because the suit was an action for conversion. The plaintiff had alleged that it had delivered the checks to the bank and that the bank had refused to credit the account.[37] The court was unable to find that the bank was still holding funds belonging to the plaintiff when the proceeds from the checks were either credited to the plaintiff's account or returned to the cash drawer even though the deposit or return of these funds was not for corporate purposes but for the embezzler's own purpose, that is, to conceal the loss of money already misappropriated and to make possible further misappropriations.

If the action were based on the theory of negligence, however, the bank's wrongful act would more easily be seen as the proximate cause of the plaintiff's injury. In an action for negligence, the New Mexico test for causation is one of foreseeability: "The rule is universal that the injury resulting from any act of negligence must, however, have been such as a reasonably prudent person should have anticipated."[38] Although the court in *Jomack* held that "any loss suffered by it [the plaintiff] resulted from the intervening misconduct of someone else,"[39] in *Reif v. Morrison* the supreme court said:

35. *Id.* at 435.
36. 75 N.M. at 791, 411 P.2d at 762.
37. Record, p. 4.
38. Reif v. Morrison, 44 N.M. 201, 206, 100 P.2d 229, 232 (1940).
39. 75 N.M. at 791, 411 P.2d at 762.

> If the occurrence of the intervening cause upon which defendant would rely, might reasonably have been anticipated, such intervening cause will not interrupt the connection between the original cause and the injury.[40]

That a bank can reasonably be expected to foresee the subsequent misuse of funds paid out on an unauthorized endorsement did not present a difficult problem for the New York court in *Campbell Trucking Corp. v. Public Nat'l Bank & Trust Co.*[41] In that case a corporate resolution was on file with the bank naming two officers authorized to sign checks on the corporation's account. An employee not named in the resolution, but authorized to endorse items for deposit with a rubber stamp—or upon its unavilability by hand—presented a check to the bank which named the corporation as payee. The check had been endorsed with the corporate name in blank but was not endorsed by any employee authorized to withdraw corporate funds from the bank. The bank cashed the check and delivered the funds to the employee. The New York court held that:

> The endorsement here in blank of the corporate name, without the addition of the name of a corporate officer authorized to sign checks or to endorse paper, as well as the absence of the superior employee's endorsement *was a clear indication that this check was not being handled in regular fashion and to warn the bank that it was being diverted.*[42]

This appears to be a sound approach, for what is an employee to do with funds to which he is not entitled? An employee not authorized to handle corporate money is presumably not directed to use it for corporate purposes. Without authorization to have corporate funds, an employee can only be expected to use the funds for his own purposes.

Applying this reasoning to *Jomack*, it would seem that the bank should have been able to foresee that the funds received by an employee who cashed improperly endorsed checks might be misused in some way; if the bank can reasonably be expected to foresee the injury to the payee, then its negligence is the cause of the payee's loss. The decision in *Security Fence*[43] provides further support for this

40. 44 N.M. 201, 205, 100 P.2d 229, 231 (1940).

41. 105 N.Y.S.2d 870 (Sup. Ct. 1951).

42. *Id.* at 872. (Emphasis added.)

43. 101 N.H. 190, 136 A.2d 910 (1957). See text accompanying note 21 *supra* for the facts of this case.

reasoning. The New Hampshire court determined that the bank was negligent in cashing the instrument and held that:

> the payment of money order by the bank upon the unauthorized endorsement of the agent clearly furnished the opportunity for misappropriation of the funds. Thus the bank may not reasonably be relieved of responsibility upon the theory that its conduct was not causal of the loss.[44]

In *Security Fence* the employee placed the funds in the company's petty cash box and later misused the same money. But in *Jomack*, the funds received from the checks were not themselves embezzled, instead they were used to conceal prior and subsequent defalcations. The same rule should apply, however, because unless some funds were available to enable the embezzler to balance the books, the defalcations could not have continued. Moreover, the funds were used, not for corporate purposes, but for the employee's own purposes.

The decision in *Industrial Plumbing* also supports the conclusion that the bank's negligence in failing to follow the instructions on the signature card is the proximate cause of the payee's loss.[45]

> When the agent withdrew and appropriated the money, the burden was not upon the plaintiff to trace the money further and show by the proof that the agent did not place the money in the register of the company and then withdraw it. The bank in wrongfully cashing the check caused the loss.[46]

Utilization of the negligence theory suggests an answer to the hypothetical problem posed at the end of the opinion in *Jomack*. The court suggested that if the bank were held to be the cause of the loss under the facts of *Jomack*, the bank may be held liable as the cause of the loss where the employee, after cashing checks on an unauthorized endorsement, is held up by a robber and the money received from cashing the check is stolen while the employee is on the way back to the store. This result would not be likely in an action for negligence because the robber is an independent intervening cause. While the bank may reasonably be expected to foresee the possibility of the embezzlement of the money which it delivered to an employee not authorized to receive it, it is difficult to foresee

44. 136 A.2d at 913.

45. 25 Tenn. App. 168, 154 S.W.2d 432 (1941). See text accompanying note 33 *supra* for the facts of this case.

46. 154 S.W.2d at 435.

the independent intentional tort of a third party not involved in the transaction.

It was suggested earlier[47] that the court was reluctant to find liability in *Jomack* because of its desire to prevent the extension of bank liability for conversion in cases like *Security Fence*[48] and *Morgan*[49] where the bank has acted without fault. Use of negligence as the basis of recovery requires proof of some degree of fault. To impose liability on the bank under this theory would require: (1) the bank's possession of a signature card, or other instrument, informing it of the persons to whom it may deliver the depositor's money; (2) the bank's failure to use this information; and (3) the loss of the payee being within the risk—that is, that the loss and the manner in which it occurs be reasonably foreseeable. These requirements should obviate the court's fears of imposing strict liability on banks for cashing checks where there is no practical way of determining the scope of the employee's authority.

Another theory for recovery suggested by Professors Scott[50] and Britton[51] is that the bank is liable for participation in breach of trust. This theory is applicable where "the bank holds fiduciary funds on deposit known by the bank to be such, and permits the fiduciary to withdraw such funds . . . ."[52] The issues in an action brought under this theory are (1) whether the funds on deposit are in fact fiduciary funds and (2) whether this fact is known to the bank or is so clear from the circumstances that it should be known.

Section 33-1-1 of the New Mexico statutes[53] defines a fiduciary as any "partner, agent [or] officer of a corporation." It would follow from this definition that the funds of a corporation which can deal only through its agents are fiduciary funds, and knowledge of the corporate character of the funds should impart knowledge of their fiduciary character. However, since the New Mexico statute[54] requires either the bank's bad faith or actual knowledge of the agent's breach of trust to impose liability on the bank for participation, the central issue becomes what constitutes actual knowledge.

It will be recalled that courts have stated that the purpose of the signature card is to inform the bank of persons authorized to trans-

47. See note 17 *supra*.
48. 101 N.H. 190, 136 A.2d 910 (1957).
49. 58 N.M. 730, 276 P.2d 504 (1954). See note 17 *supra* for the facts of this case.
50. 3 Scott, Trusts § 324.3 (2d ed. 1956).
51. Britton, Bills & Notes § 118 (2d ed. 1961).
52. *Ibid.*
53. N.M. Stat. Ann. § 33-1-1 (1953).
54. N.M. Stat. Ann. § 33-1-4 (1953).

act business on the account.[55] Thus, the bank has knowledge not only of the persons with whom it may conduct business, but also of the persons authorized to conduct business with the bank in the name of the corporation. It would be incongruous for a corporation to file a signature card restricting to certain named persons the authority to transact corporate business in the account and then give the authority to someone not named on the card and hope that the bank would breach its duty and allow the employee not named to transact corporate business. When an employee not empowered by the signature card to transact corporate business attempts to cash a check payable to the corporation, the presumption is that the employee has in fact no power to do so and in attempting to cash the check is breaching a trust. When the bank gives its assistance by cashing the check, it must be held to have participated in the breach.

The teller who cashed most of the checks for Burton in *Jomack* testified that she knew of the existence of the signature card and of its contents and that she knew this at the time of cashing the checks in question.[56] As a result, the bank had actual knowledge that Burton was exceeding her authority in attempting to cash the checks payable to the corporation. Such conduct must be deemed a participation in a breach of trust.

In assessing the wisdom of imposing liability on the banks, the necessity of encouraging the free exchange of money must be weighed against the corporation's need to be able to rely upon banks following instructions in handling the corporation's account. A corporation can only deal through agents, and to lessen the possibility of losses through defalcations by its employees, it must be able to limit the number of persons empowered to handle its financial transactions, thereby enabling the corporation to fix the responsibility for losses on only a few persons. This limitation can be effective only if the banks are encouraged to deliver corporate funds to persons authorized to receive them. Nothing will provide more effective encouragement for the banks to do this than imposing liability on them for losses incurred as the result of their disregard of the corporation's instructions on the signature card. Moreover, if the banks are permitted to become lax in fulfilling these obligations, commercial intercourse would be impeded rather than fostered. Corporations, unable to rely upon the banks following their instructions would be dissuaded from utilizing both banks and ne-

55. See text accompanying note 33 *supra*.
56. Record, p. 135.

gotiable instruments to their fullest extent. The requirement that the banks make use of their own records to determine the corporation's instructions and the imposition of liability for their failure to do so would tend to promote rather than discourage the free exchange of money.

There has been some indication that the banks in New Mexico have tended to disregard signature cards executed by their depositors. The subtle change in the court's position on the purpose of signature cards evidenced in *Jomack* should provide some warning to banks that a practice of disregarding signature cards will not always be tolerated.[57] While in most cases the courts are reluctant to impose liability for a practice previously tolerated, the New Mexico court may do so in a well argued case.

An action based on either the theory of negligence or participation in breach of trust would seem to meet with greater success in a case like *Jomack* because liability based on either theory is essentially a "fault" liability. The requirement of some degree of culpability on the part of the bank would attenuate the court's fears about extending the bank's liability for conversion which does not necessarily involve "fault" of any degree. While it may be said that it does not matter which theory is used because the forms of action have been abolished, one noted commentator has made the observation that:

> Forms of action are dead, but their ghosts still haunt the precincts of the law. In their life they were powers of evil, and even in death they have not wholly ceased from troubling. In earlier days they filled the law with formalism and fiction, confusion and complexity, and though most of the mischief which they did has been buried with them, some portion of it remains inherent in the law of the present day.
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> In no branch of the law is this more obvious than in that which relates to the different classes of wrongs which may be committed with respect to chattels. In particular the law of trover and conversion is a region still darkened with the mists of legal formalism, through which no man will find his way by the light of nature or with any other guide save the old learning of writs and forms of action and the mysteries of pleading.[58]

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57. See text accompanying notes 25-35 *supra.*
58. Salmond, *Observations on Trover and Conversion*, 21 L.Q. Rev. 43 (1905).