the government as are placed upon the private employer. See Borchard, "Government Liability in Tort," 34 Yale L. J. 129 (1924). Such a tendency is already marked in the field of Workmen's Compensation wherein employees of state and municipal units are afforded protection against accident. The expected result is that the double standard implicit in the ancient concept of immunity of government has become increasingly untenable. In the words of Judge Wanamaker contained in *Fowler* v. *City of Cleveland*, 100 Ohio St. 158, 126 N.E. 72 (1919): "The whole doctrine of immunity given to a sovereign state was based upon the assumption of the divine right of kings—a king can do no wrong, he is infallible, or, if he do wrong, no subject has any right to complain. This doctrine has been shot to death on so many different battlefields that it would seem utter folly now to resurrect it, even by the judgment of a court of last resort."

ROBERT G. ROSENBERG

NEGOTIABLE INSTRUMENTS

RECOVERY BY DRAWEE BANK OF PAYMENT ON A CHECK WITH FORGED INDORSEMENTS

Defendant bank, a purchaser for value, indorsed guaranting prior restrictive indorsements and received payment of a check drawn by the plaintiff on itself payable to four payees. The indorsements of three of the payees were forged by the fourth. The plaintiff brought an action for the recovery of the money paid out on the check. *Held*: the plaintiff may recover unless precluded because of waiver, estoppel, or laches on its part. Whether recovery is barred is a jury question. *State Planters Bank & Trust Co. of Richmond, Va.* v. *Fifth-Third Union Trust Co. of Cincinnati*, 56 Ohio App. 309, 10 N.E. (2d) 935 (1937).

The Uniform Negotiable Instruments Law was passed by the Ohio legislature in 1902. Only a few of the many questions which may arise under the act have been passed on by our appellate courts. Heretofore there has been no direct adjudication by any Ohio appellate court on the question of the right to the recovery of payment by the drawee on an instrument with a forged indorsement although the question arose in the *Provident Savings Bank* v. *The Fifth-Third Union Trust Co.*, 43 Ohio App. 533, 183 N.E. 885 (1932). In that case it was unnecessary to directly pass on the question as the drawee was held unable to recover on other grounds.

It is well established that the drawee bank may recover the money paid out to one whose title is dependent on a forged indorsement. *Levy* v. *First National Bank*, 27 Neb. 557, 43 N.W. 354 (1889); *First National Bank of Minneapolis* v. *City National Bank of Holyoke*, 182 Mass. 130, 65 N.E. 24, 94 Am. St. Rep. 637 (1902); *The First National Bank of Chicago* v. *The Northwestern National Bank of Chicago*, 152 Ill. 296, 38 N.E. 739, 43 Am. St. Rep. 247, 26 L.R.A. 289 (1894); *First National Bank in Miles City* v. *Fed. Reserve Bank of Minneapolis*, 88 Mont. 589, 294 Pac. 1105 (1931); *Cosmopolitan State Bank* v. *Lake Shore Trust & Savings Bank*, 343 Ill. 347, 175 N.E. 583 (1931). Recovery is based on either of two theories. (1) The mere presentment for payment is at common law an implied warranty upon which recovery may be predicated. *Insurance Co. of North America* v. *Fourth National Bank of Atlanta*, 12 Fed. (2d) 100 (1926); *First National Bank in Miles City*. v. *Fed. Reserve Bank of Minneapolis*, *supra*. (2) Money paid out under a mistake of fact may be recovered. *State* v. *Broadway National Bank*, 153 Tenn. 113, 282 S.W. 194 (1926); *Farmers' National Bank of Augusta* v. *Farmers' & Traders' Bank of Maysville*, 159 Ky. 141, 166 S.W. 986 (1914). That the drawee in the principal case was also the drawer does not preclude recovery. *American Express Co.* v. *Peoples' Sav. Bank*, 192 Iowa 366, 181 N.W. 701 (1921); *Farmers' Bank & Trust Co. v. Farmers' State Bank of Brookport*, 148 Ark. 599, 231 S.W. 7 (1921); *State* v. *Broadway Nat. Bank*, *supra*. Little support can be found under the Negotiable Instruments Law for allowing such recovery. Section 66 is not applicable even though the instrument is indorsed on presentment to the drawee. That section expressly states that the warranty created accrues to the benefit of a holder in due course. There is no negotiation by presenting an instrument for payment. The drawee meets its obligation by making payment. It does not purchase the instrument. The drawee does not become a holder in due course. Brannan on Negotiable Instruments, 5th edition, p. 748; *Figures* v. *Fly et al.*, 137 Tenn. 358, 193 S.W. 117 (1917); *Wells Fargo Bank & Union Trust Co.* v. *Bank of Italy et al.*, 214 Cal. 156, 4 Pac. (2d) 781 (1931); *Nat. Bank of Commerce of Lincoln* v. *Farmers' & Merchants' Bank of Lincoln*, 87 Neb. 841, 128 N.W. 522 (1910).

Under the doctrine of *Price* v *Neal*, 3 Burt. 1354 (1762), of which section 62 of the Negotiable Instruments Law is a legislative qualification, the drawee is bound to know the signature of the drawer. It may not recover payment because of a mistaken belief in the validity of the signature of the drawer. As to the validity of the drawer's signature

it acts at its peril. This does not place too great a burden upon the drawee for it is in a better position to determine such validity than is a stranger who purchases the instrument after it has passed through many hands. The drawee bank has on file a signature of the drawer of the check with which it may make comparisons. But as to determining the validity of the indorsers' signatures such is not the case. The drawee has no device to aid it short of contacting all of the supposed indorsers. Such an additional burden placed on the drawee would greatly impede the use of checks as the drawee would be incurring a great risk every time it honored an indorsed check. The drawee, as was pointed out in the principal case, is not bound to know the signatures of the indorsers. It does not, by making payment, warrant the validity of the indorsements. *First Nat. Bank in Miles City* v. *Fed. Reserve Bank of Minneapolis, supra; Nat. Bank of Commerce* v. *First Nat. Bank of Coweta*, 51 Okla. 787, 152 Pac. 596, L.R.A. 1916 E p. 537 (1919); 29 Ohio Jur. 1060.

The indorsement of the defendant in the principal case guaranteed prior restrictive indorsements but there were no such indorsements. Had the indorsements guaranteed all prior indorsements the presenter would have been liable on that contract. *Fallick et al.* v. *Amalgamated Bank of New York et al.*, 232 App. Div. 127, 249 N.Y.S. 238 (1931); *Real Estate-Land Title and Trust Co.* v. *United Sec. Trust Co.*, 303 Pa. 273, 154 Atl. 593 (1931); *District Nat. Bank of Washington, D. C.*, v. *Washington Loan & Trust Co.*, 65 Fed. (2d) 831 (1933). For such indorsement is a contract of guaranty even though there is no negotiation to the drawee.

The court in the principal case referred to one in the position of the defendant as a holder. Section 191 states that "a 'holder' means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof." From this it can be seen that one claiming under a forged indorsement cannot qualify as a holder.

The holding in the instant case is on firm ground both in principle and in precedent.

JEROME H. BROOKS