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Book Review (reviewing Melville M. Bigelow, Laws of Bills, Notes, and Checks (1928))

Arthur H. Kent

BOOK REVIEWS

BILLS, NOTES AND CHECKS. By Melville M. Bigelow. Third Edition, by William M. Lile, 1928. Boston: Little, Brown & Co., pp. lxix, 599.

Teachers and students of the law of negotiable instruments as well, no doubt, as legal practitioners, have felt the lack of any up-to-date text upon this important and difficult field of the law. The successive editions of Professor Brannan's annotations to the Negotiable Instruments Law have indeed been an invaluable aid, but have not met the need for a comprehensive textbook treatment. The appearance of this new edition of Professor Bigelow's well-known work would therefore be welcome, even if it were nothing more than a conventional annotation of the text of the second edition. Fortunately Professor Lile has not contented himself with that. He has realized that the uniform act and its judicial construction have produced changes in the law so important that a new edition, to be of value, must completely revise the existing work and introduce much new material. The result is that, save for certain resemblances in general structure and outline, the new edition is the author's own work, and has but little in common with the 1900 edition.

It must be said at the outset that the author has done his work well. The new book manifests throughout a sure grasp of the legal materials, the result of Professor Lile's long experience as a teacher of the subject and of years of thoughtful reflection. So much new material has been added that the new edition contains more than double the number of chapters and pages of the old. A new chapter has been added dealing with common-law instruments, affording the reader at the outset a background for contrasting negotiable and non-negotiable instruments. The chapter on conflict of laws, as it relates to negotiable instruments, has been dropped in this edition. Especial emphasis has been laid upon the nature of the indorser's contract, the concept of the holder in due course, real (or, in the terminology of the author, absolute) defenses, the discharge of the instrument, and the discharge of parties thereto.

One feels, after reading this book, that Professor Lile is overmodest when, in the preface, he describes his style as diffuse, and perhaps dogmatic and tutorial. He confesses that the book is written primarily to assist students. Were it the fact, however, that the volume were no more than a series of dogmatic lectures, endeavoring to render simple and easy for students a subject which at the best is technical and difficult, it would be of no great value. The fact is that the book is written in a clear and interesting style, and that the author has quite consistently refrained from efforts to simplify the law at the price of giving a distorted and inaccurate picture of it. The extensive footnotes display scholarship of a high

order, and are certain to be of substantial value to the practitioner. Typical of them may be cited the note discussing the effect of Negotiable Instruments Law section 87, which deals with notes payable at a specified bank; the note to section 228 of the text, relative to the burden of proof of loss or no loss, where there has been unreasonable delay in the presentment of a check; and the note on page 150 analyzing the effect of the death of the drawer of a check. Care has been taken to discuss the application of the Negotiable Instruments Law to all important points, and to point out the many defects and obscurities existing in that statute. Also worthy of praise is the effort made by the author to cite in his notes valuable articles in law reviews dealing with controversial matters.

The mechanical features of the book leave little to be desired. It is unusually free from typographical errors. The full text of the Negotiable Instruments Law is set forth in an appendix. The table of contents and index are so carefully prepared as to assist the reader rather than to annoy him by inaccuracy and incompleteness. A complete table of cases is provided. The only cloud on the picture is the failure to include dates in the citation of cases.

Criticisms to be made to Professor Lile's work are not so serious as to detract materially from its general excellence. One wonders why the author, in his otherwise valuable preliminary chapter on non-negotiable securities, conveys the impression that an instrument is either a negotiable mercantile specialty or else is relegated to the position of an ordinary chose in action, by failing to point out that many cases have recognized the existence of non-negotiable commercial paper, having on the one hand certain characteristics of common-law choses in action and on the other certain qualities peculiar to negotiable paper, such as presumption of consideration. Again, in discussing the question whether a drawer or maker owes any duty of care to subsequent holders not to issue an instrument otherwise complete containing blanks facilitating alteration, Professor Lile asserts rather dogmatically that he owes no such duty, and further that there is no sufficient ground for creating a duty. That the case of *Young v. Grote* is no authority for the contrary view, as has often been erroneously supposed, is undoubtedly true. Moreover, the correctness of the author's statement of the state of the authorities and the tendency of the more recent cases is not challenged. But it is believed that his analysis does not recognize the force of the substantial arguments which may be made for imposing such a duty of care, within reasonable limits, in favor of subsequent holders. To say, as he does on page 422, that the drawer's negligence is not the proximate cause of the holder's loss is either to beg the question or to restate, without justifying, the results some of the cases have reached. Too great reliance is placed by Professor Lile upon the analogy to ordinary tort situations. Special considerations arising out of the peculiar nature and functions of negotiable paper, which might well warrant a departure from ordinary tort doctrines in these cases, are unnoticed. One

is grateful, however, to the author for not falling into the common *non sequitur* that the recognition of a duty of care in these cases would *ipso facto* compel makers and drawers of instruments to use protectographs, chemically treated papers and other modern commercial devices for the prevention of alteration.

The discussion in section 477, and note, of the question when a bank which has credited proceeds of discount of paper is deemed to become a purchaser for value of such paper likewise seems somewhat superficial. It is assumed without much discussion that the rule properly applicable to these cases is the so-called rule in Clayton's Case,[1] "first money in is first money out." That doctrine arose originally in cases involving the application of payments as between debtor and creditor, where the interests of innocent third parties are not involved. It is by no means clear that the doctrine ought to be applied to cases where it will operate to deprive a defrauded maker or drawer of a meritorious defense, where such application is not necessary to protect the discounting bank from loss. If this extension of the doctrine be warranted, it is for some reasons of practical necessity which are not pointed out by the author. Among the cases cited in the note as supporting this rule is the case of *National Bank of Commerce v. Morgan,* 208 Ala. 65, 92 So. 10. This is a miscitation, as that case contains one of the strongest arguments which have been made against the "first money in is first money out" rule. It may be noted in passing that the above problem is discussed in the chapter on Notice of Equities rather than in the chapter on Purchase for Value, where it logically belongs.

One other criticism of substance is that the author is not always accurate in his use of the term "accommodation indorser." On page 169 he seems to treat it as synonymous with irregular indorser. In section 251 he would apparently apply the term only to indorsers receiving no consideration for their indorsements. This is, of course, inaccurate.

In fairness to Professor Lile, it must be pointed out that limitations of space no doubt prevented him from discussing as fully as he desired some of these problems, and that only minor criticisms can be made of the actual content of his book. While it by no means satisfies the need for a creative work which will do for the underlying theory of the law of negotiable instruments what Dean Wigmore's classic work has done for the law of evidence, Professor Lile's work is a valuable addition to the all too scanty literature on this subject. So successful has he been here in clothing an old skeleton with new flesh that we may well indulge the hope of further and more extensive contributions from his pen in this field.

ARTHUR H. KENT

UNIVERSITY OF CHICAGO LAW SCHOOL

[1] 1 Mer. 572 (Ch. 1816).