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Criminal Law--Common Law Forgery--Oral vs. Witten Representation of Authority

Robert William Burk Jr.
West Virginia University College of Law

opinion, states that ". . . whether the rule should extend to all criminal cases need not now be decided." *Gideon v. Wainwright, supra* at 801. A second problem is raised relevant to the stage of the proceedings at which counsel is required to be appointed. Should counsel be appointed to represent an indigent accused at the time of arraignment? There is no definitive answer to this question, but generally the determination depends upon whether or not it is a critical stage of the proceedings. See *Hamilton v. Alabama, supra.* But see 61 W. VA. L REV. 65 (1958).

By means of the decision in the principal case the United States Supreme Court has removed one of the last remnants of discrimination between state and federal defendants insofar as their constitutional rights to the assistance of counsel are concerned. The West Virginia courts appear to exercise a proper respect for the rights of an indigent accused to have the assistance of counsel. It is submitted, however, that those West Virginia courts which have not affirmatively apprised the accused of his right to counsel in the past should change this procedure in order to comply with the dictates of due process. The United States Supreme Court has consistently held that an accused cannot make an intelligent waiver of counsel unless he is fully cognizant of his rights. It should be noted in conclusion that West Virginia was one of the twenty-two states which filed briefs, as friends of the Court, urging the overruling of *Betts v. Brady,* thus lending the official sanction of the State to the holding in the principal case.

Robert Edward Haden

Criminal Law—Common Law Forgery—Oral vs. Written Representation of Authority

D stole a treasury check before it reached the hands of the payee. Upon the promise to pay five dollars from the proceeds and the oral representation that the check belonged to *D's* aunt and that *D* had authority to cash it, *D* persuaded *X,* codefendant, to get the check cashed. *X* took the check to a friend and told him either that the check belonged to *X's* aunt or that it belonged to *D's* aunt and that he had the payee's permission to indorse the check. *X* then indorsed the check with the name of the payee and the check was cashed. *D* and *X* were found guilty of forgery. *Held, affirmed. X,*

who indorsed the government check with the payee's name without the payee's authority knowing the payee's name without the payee's signature was necessary to give the instrument the appearance of validity or genuineness, was guilty of common law forgery. *D* was also guilty of forgery, if not as principal, at least as an aider and abettor. *United States v. Wilkins,* 213 F. Supp. 332 (S.D.N.Y. 1963).

The decision of the principal case raises an interesting question as to applicability of common law forgery under modern statutes. Particularly with the increasing use of credit cards and other credit devices the problem arises whether an unauthorized use of these cards or devices amounts to a common law forgery or a misrepresentation of authority.

Common law forgery has been defined as the false making or altering of a document to the prejudice of another by making it appear to be a document of that person. *In re Windsor,* 122 Eng. Rep. 1288 (1865). Blackstone defined it as "the fraudulent making or altering of a writing to the prejudice of another man's rights." *State v. Sotak,* 100 W. Va. 652, 131 S.E. 706 (1926). One of the very significant aspects of the crime is that the immediate result is a false writing. The emphasis, therefore, should be on the making of a false writing and not the false making of a writing. PERKINS, CRIMINAL LAW 291 (1957).

In addition to the necessity of a false writing, the writing must be made with the intent to defraud. Also, absent a statute to the contrary, the writing must possess some legal efficacy; or, in other words, the writing must be one which, if genuine, might injure another. It is for this reason that unauthorized duplications or executions of instruments purporting to be charge slips, doctors' prescriptions, and professional certificates do not amount to common law forgery. Annot., 174 A.L.R. 1300 (1948).

It is well settled that where an agent acts within what he honestly believes is the scope of his authority he is not guilty of forgery, even though he oversteps this authority, e.g. *State v. Sotak, supra.* It also seems to be fairly well established that one who executes an instrument purported to be executed by him as an agent, when in fact he has no such authority, is not guilty of forgery. It was held in *Regina v. White,* 2 Car. & K. 404, 175 Eng. Rep. 167 (1847), that "indorsing a bill of exchange under a false assumption

of authority to indorse it per procuration, is not forgery, there being no false making."

Regina v. White, supra, was relied on heavily in *Gilbert v. United States,* 370 U.S. 650 (1962). In this case the defendant, an accountant, filed tax returns for his clients and subsequently indorsed their names on tax refund checks. The procedure was to indorse the client's name followed by his own, designating himself as "trustee." The majority of the Court, in a four to three decision, held that this was not common law forgery under the federal statute. Instead it was an "agency endorsement," a situation not included in common law forgery.

The rationale of these cases holding that a true agency indorsement is not a forgery under the common law appears to be that when an agent adds his own signature to that of his principal, even though he has no authority, the instrument and the indorsement are no different from what they are purported to be. This is not a false making but is merely a false assumption of authority, an act of false pretense. *United States v. Wilkins, supra.*

It is not clear that one is guilty of common law forgery where he indorses the name of the payee of the instrument and makes oral representation of authority. Decisions on this point are scarce. In the principal case the defendants argued that according to the *Gilbert* case, the codefendant did not commit forgery when he signed the payee's name because the cashing party knew that *X* was not the payee, and saw him sign the payee's name and took the check upon oral representation of authority. Therefore, the indorsement was, in effect, an agency or "per procuration" indorsement and not a forgery. But the court drew a factual distinction between the two. In the *Gilbert* case there was a true agency indorsement, that is to say, the signing by the person charged with forgery of the name of the payee followed by his own name as agent; in the *Wilkins* case the codefendant indorsed only the name of the payee and nothing else. The court felt that when the codefendant indorsed the name of the payee, he did so with the intent to make the instrument to purport to be what it was not—a check duly indorsed by the payee. The oral representation of authority was irrelevent.

In *Selvidge v. United States,* 290 F.2d 894 (10th Cir. 1961), the defendant had been directed to indorse the name of her em-

ployer on incoming checks for deposit only and a rubber stamp was provided for this purpose. Instead she indorsed the name of the employer followed with "by" and her own name. The court stated by dicta that if she had merely indorsed the name of her principal and cashed the checks contrary to her authority, such indorsement would have constituted forgery. But when she added her own genuine signature, she was not guilty of forgery. The indorsements were what they were purported to be, the wrongful act being a false pretense or false representation of authority.

However, where the defendant orally represented that he had authority to sign his father's name, and signed and cashed a check, the Georgia court held that he was not guilty of forgery, but of false and fraudulent assumption of authority. *Morgan v. State,* 77 Ga. App. 164, 48 S.E.2d 115 (1948). This case is certainly questionable. The check itself was false and could easily defraud others who did not know of the oral statement. This was a making of a false writing to the prejudice of someone else. It was not what it purported to be—the check of the father.

Credit cards and similar devices now widely used inject new and difficult problems into the application of the common law concept of forgery. Some states, such as West Virginia, have adopted statutes dealing specifically with unauthorized use of such devices. W. VA. CODE ch. 61, art. 3, § 24a (Michie 1961). Others must rely on common law forgery or on forgery or false pretense statutes enacted prior to the widespread use of these credit devices.

It appears doubtful that those states without a specific statute would find that common law forgery was applicable to unauthorized use of credit cards. It depends primarily upon whether the unauthorized use of credit cards is treated as misrepresentation of authority or as the making of a false writing. Furthermore, there may arise a distinction between types of credit cards or devices used. For example, some require that the purchaser sign his name along with the use of the card, while others only require the card or even a number. Where the signature is required, is this a making of a false writing? Certainly it is not what it purports to be—the true signature of the owner of the credit card. But even if it is considered a making of a false writing, does the charge slip or credit card itself fulfill the common law requirement that the instrument have legal or evidentiary significance? In *People v. Searcy,* 199 Cal. App. 2d 740, 18 Cal. Rptr. 779 (1962) the defendant stole a credit

card and used it to purchase gasoline and automobile tires. The court said, by way of dicta, that in the common law sense a charge slip was not a "writing obligatory", that is to say, did not have legal significance. Then is the use of the card alone or a number a forgery? Here there may not be a writing at all. It would appear that this would have to be considered as a misrepresentation of authority and it was held in *Stokes v. State,* 366 P.2d 425 (Okla. 1961) that the unauthorized use of a telephone credit number amounted to false pretense.

The West Virginia statute makes the unauthorized use of a credit card or telephone code number a misdemeanor, while forgery is a felony. A question arises as to whether a case could be built for common law forgery in addition to the statutory credit card offense. The West Virginia court has stated that an act or transaction may constitute two offenses which may be separately charged and punished. *State ex. rel. Lovejoy v. Skeen,* 138 W. Va. 901, 78 S.E.2d 456 (1953). Although it is an open question, it has been suggested that language such as that in the *Skeen* case would appear to allow prosecution under a common law offense, and failing in a conviction, it would allow a separate trial for a statutory offense. 65 W. VA. L. REV. 54 (1962). Even if this be the case, the difficulty remains of trying to fit unauthorized use of credit cards into the crime of common law forgery.

The Model Penal Code attempts to alleviate the problems that may arise in this area. Forgery is defined as

> "a person who makes or utters a forged writing or other object with the purpose to deceive or injure anyone is guilty of forgery. Utter means issue, authenticate, transfer, publish, or otherwise give currency to a forged writing or object. A thing is forged if it is so made or altered as to convey a false impression as to authorship, authority, date, or other aspect of authenticity; a writing is not forged merely because it contains other representations." MODEL PENAL CODE § 223.1 (Tent. Drafts No. 11, 1960).

In commenting on the proposed section, it is stated by the drafters that the purpose of the section is to change the rule that where an instrument purports to be executed by an agent, there is no forgery even if the agent knew he lacked authority. The section is also intended to include almost any writing including doctor's prescriptions, professional certificates, and credit cards.

It seems that the Model Code is impatient with the fine distinctions which define common law forgery from other offenses. The proposed statute leaves little room for doubt as to what constitutes forgery. However, as it now stands, the majority of courts which determine forgery under the common law definition would probably treat unauthorized use of credit cards and other credit devices as a misrepresentation of authority or false pretenses rather than a true common law forgery.

Robert William Burk, Jr.

Damages—Detinue—Liability Under Redelivery Bond for Depreciation of Chattel

P, chattel mortgage holder, brought this action against *Ds*, sureties on redelivery bond, seeking damages for depreciation of an automobile detained under the bond. From a judgment awarding the damages plus costs, *Ds* appealed. *Held*, affirmed. While the sureties on the redelivery bond were not liable for deficiency remaining after the property was surrendered to the chattel mortgage holder and sold at auction, they were liable for depreciation in the value of the automobile while it remained in possession of the purchaser in the original action pending determination thereof. Such depreciation had to be recovered in a subsequent action rather than in the original action. *Commercial Credit Corp. v. McAdams*, 129 S.E.2d 429 (S.C. 1963).

The principal case presents the interesting questions of whether depreciation is a proper element of damages in a detinue action and, if so, whether it may be recovered in the original claim and delivery action, or rather, in a subsequent proceeding upon the bond. The problem largely stems from the many and varied interpretations given to redelivery bond statutes throughout the several jurisdictions.

The general rule is that in an action of replevin, where the plaintiff has finally secured possession of the property, the plaintiff may recover damages for detention and any costs incident thereto. These damages are usually measured by interest and depreciation in value. *Armstrong & Latta v. City of Philadelphia*, 249 Pa. 39, 94 Atl. 455 (1915). Following this same concept, where a return in specie of the property is ordered, damages will be given not only