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organizations or individuals. It seems worthy of comment, however, that an express prohibition against engaging in trading operations does not appear in our new Non-Profit Corporation Act.[11]

The North Carolina act provides that non-profit corporations may be formed for any lawful purpose;[12] and in order to carry out the purposes stated in the charter, the power is given to "acquire, own, hold, improve, use and otherwise deal in and with, real or personal property."[13] There is a general grant of all powers necessary or convenient to effect the corporation's purposes,[14] plus freedom of charter amendment so long as the charter as amended contains only provisions lawful under the chapter.[15] The authority to assert lack of power to act is given to the Attorney General in an action to dissolve the corporation or to enjoin it from transacting unauthorized business.[16]

In conclusion, it appears that the trend toward liberalization of the ultra vires doctrine as regards business corporations[17] has been carried over to the non-profit field to a large extent. Perhaps excursions into the commercial world which are flagrant departures from the purposes of the corporation will continue to be enjoined; but, at the same time, it would seem to be growing easier to bring business operations within the protective veil of things incidental to the non-profit objectives stated in the charter. The business corporation and private merchant may well look with disfavor at the type of competition presented by these "non-profit" corporations.

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Criminal Law—Forgery—Use of Fictitious Name

In *Hubsch v. United States*,[1] a recent decision from the Fifth Circuit, the defendant was indicted under the National Stolen Property Act[2] on

[11] N.C. GEN. STAT., ch. 55A (Supp. 1957). Although not specifically mentioned in the case, such a prohibition is set out in the Georgia statute under which the church in the principal case was incorporated. GA. CODE ANN. § 22-401 (1935).
[12] N.C. GEN. STAT. § 55A-5 (Supp. 1957).
[13] N.C. GEN. STAT. § 55A-15(b)(1) (Supp. 1957).
[14] N.C. GEN. STAT. § 55A-15(b)(8) (Supp. 1957).
[15] N.C. GEN. STAT. § 55A-34 (Supp. 1957).
[16] N.C. GEN. STAT. § 55A-17(3) (Supp. 1957).
[17] BALLANTINE, *op. cit. supra* note 1.

[1] 256 F.2d 820 (5th Cir. 1958).
[2] 48 STAT. 794 (1934) (later codified as 18 U.S.C. §§ 2311, 2314-15 (1952 and Supp. IV 1957)). The portion of § 2314 under which defendant was indicted provides in pertinent part as follows:

> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited [shall be punished].

two counts of causing[3] falsely made and forged[4] checks to be transported in interstate commerce, knowing the same to have been falsely made and forged.

As to the first count, the following facts were found: the defendant received treatment at a hospital, representing himself to be "Alfred Weinstein"—in fact, a fictitious person; in payment for the treatment, the defendant gave a check signed "A. A. Weinstein" and drawn on a bank in another state; the check was returned by the bank with the notation "unable to locate." The court held that these facts were insufficient to constitute forgery, as required under the act,[5] and therefore that the defendant should be acquitted as to this count.[6]

With regard to the second count, these facts appeared: the defendant selected for purchase a Masonic ring at a jewelry store and asked the jeweler if he could pay for the ring by check; the jeweler replied that he could do so if he had the proper credentials; the defendant then told the jeweler that he was a Mason and a Shriner and produced from a billfold several Masonic cards from Atlanta with the name "Weinstein" thereon; the jeweler then accepted from the defendant a check in payment for the ring, with the name "Weinstein" as drawer; this check was also returned by the out-of-state bank on which it was drawn with the notation "unable to locate." As to this count, the court seemed to think the trier of facts might find that the defendant "created a fictional personality of Weinstein, the Mason who desired to purchase the Masonic ring, and on the faith and credit of a check purporting to be that of Weinstein the Mason the check was accepted."[7] If it were so found, the court concluded, it would show reliance upon the signature rather than on the person of the defendant, and a forgery would have been committed.

That a person may commit forgery by executing an instrument in a fictitious name is well settled.[8] The problem arises in determining under what circumstances the signing of an assumed or fictitious name to an

[3] One who causes the prohibited transportation is punishable as a principal under §2314 by virtue of 18 U.S.C. § 2(b) (1952). Pereira v. United States, 347 U.S. 1 (1953).

[4] Forgery may be defined as "the fraudulent making of a false writing having apparent legal significance." PERKINS, CRIMINAL LAW 291 (1957). The requisites of the offense are (1) a false writing (2) falsely made with intent to defraud and (3) of such a nature that it is a possible subject of forgery, *i.e.*, it must appear on its face to be a valid instrument. *Id.* at 292.

[5] The courts generally interpret the language of § 2314 quoted in note 2 as merely importing the common law of forgery. See, *e.g.*, Wright v. United States, 172 F.2d 310 (9th Cir. 1949); Greathouse v. United States, 170 F.2d 512 (4th Cir. 1948). *But see* Pines v. United States, 123 F.2d 825 (8th Cir. 1941).

[6] Although this conduct would almost certainly be punishable either under state false pretenses or worthless check statutes, federal jurisdiction to prosecute under § 2314 would be defeated.

[7] Hubsch v. United States, 256 F.2d 820, 824 (5th Cir. 1958).

[8] 2 WHARTON, CRIMINAL LAW AND PROCEDURE § 630 (Anderson ed. 1957).

instrument is sufficient to constitute the crime.[9] This Note will be limited to a discussion of the problem as it has arisen in some of the leading cases which have been decided under the National Stolen Property Act.[10]

INSTRUMENT EXECUTED IN FICTITIOUS NAME AND PRESENTED AS ONE'S OWN. If one executes an instrument in his own name and passes it off as his own instrument, he is not guilty of forgery.[11] Likewise if one executes an instrument by signing *his* assumed name and passes it off as *his* own instrument, it is not a forgery.[12] This rule is illustrated by *United States v. Greever*.[13]

In that case the defendant was charged with a violation of the National Stolen Property Act.[14] The facts were stipulated: defendant signed various fictitious names to several checks drawn on a Rhode Island bank[15] in the presence of the several payees, each of whom knew the defendant by the particular name signed on the check; the bank had no account in the name of the defendant or the fictitious drawers; the defendant represented in each case that he was the person whose signature appeared on the check and did not represent that the signatures were of anyone other than himself. The court held that the defendant should be acquitted.

INSTRUMENT EXECUTED IN NAME OF FICTITIOUS COMPANY BY ONE IN HIS TRUE NAME. A person may draw a check in the name of a fictitious company without being guilty of forgery if he signs his own name along with that of the fictitious company, and the person cashing the check knows him by that name.[16] Such were the facts in the leading case of *Greathouse v. United States*.[17] There the defendant signed

[9] Some decisions have held that the forgery is complete where a fictitious name is used, with intent to defraud, and the instrument is capable of being used to the prejudice of another—the so-called "broad rule." State v. Wheeler, 20 Ore. 192, 25 Pac. 394 (1890); State v. Lutes, 38 Wash. 2d 475, 230 P.2d 786 (1951). Others have restricted the rule so that the signature on the instrument must purport to be that of another in order to complete the offense—the so-called "narrow rule." Greathouse v. United States, 170 F.2d 512 (4th Cir. 1948); Green v. State, 76 So. 2d 645 (Fla. 1954). The use of the different rules has resulted in many seemingly inconsistent decisions. See Annot., 49 A.L.R.2d 852 (1956).

[10] Though thus limited in scope, the discussion is applicable to the common law of forgery in general. See note 5 *supra*.

[11] Martyn v. United States, 176 F.2d 609 (8th Cir. 1949); Wright v. United States, 172 F.2d 310 (9th Cir. 1949); Greathouse v. United States, 170 F.2d 512 (4th Cir. 1948); United States v. Greever, 116 F. Supp. 755 (D.D.C. 1953); United States v. Gallagher, 94 F. Supp. 640 (W.D. Pa. 1950); *cf.* United States v. Flores, 66 F. Supp. 880 (D. Virgin Islands 1946); United States v. Woods, 58 F. Supp. 451 (N.D. W.Va. 1945).

[12] United States v. Greever, *supra* note 11; *cf.* La Fever v. United States, 257 F.2d 271 (7th Cir. 1958).

[13] 116 F. Supp. 755 (D.D.C. 1953).

[14] 18 U.S.C. § 2314 (1952 and Supp. IV 1957).

[15] The checks were apparently drawn in the District of Columbia, though the opinion does not specifically state this.

[16] PERKINS, CRIMINAL LAW 297 (1957).

[17] 170 F.2d 512 (4th Cir. 1948).

several checks "Woodruff Motor Sales, Inc., J. W. Greathouse." He represented to the person cashing the checks that Woodruff Motor Sales was the name in which he did business. In fact the motor company was completely fictitious, and neither it nor the defendant had an account at the bank on which the check was drawn. The court held that no forgery had been committed.[18]

The court recognized that forgery can exist when the name used is a fictitious one, as treated in the succeeding section of this Note; here, however, although the defendant signed the name of a fictitious company, the check was accepted on the strength of his apparent authority as agent, and not in reliance on the name of the company. One treatise explains:

> An additional point is to be noted in cases in which one fraudulently purports to act as agent for another. If he has no power or authority to act in this capacity, the other will not be bound; but if the signature contains both names and shows that the signer was purporting to act as agent for the other, the writing is not a forgery. Strictly speaking there is a false writing in such a case because it purports to be the instrument of the principal whereas it is not so in fact; but since any reliance will be upon the implied warrant of authority clearly manifested by the writing, rather than upon any deceptive appearance of the writing itself, it is felt not to come within the type of wrong which forgery is designed to punish. This is the theory back of the holding that signing a note in the name of a fictitious firm, purportedly made up of the writer and another person, is not forgery though done with intent to defraud. The writing binds the man who wrote it and is false merely in the implied warrant of authority to bind the other.[19]

INSTRUMENT EXECUTED IN FICTITIOUS NAME AND NOT PRESENTED AS ONE'S OWN. One may sign a fictitious name to an instrument and pass the instrument off as that of the fictitious person. If it is not signed in the presence of the person defrauded, and it is passed without reference to any particular person, this has been held to constitute forgery.[20] An example is where an individual draws a check in a fictitious name, payable to himself, and negotiates the check to a person who knows him by his true name.[21] Or, the defendant may fill in a fictitious name as payee on a traveler's check and negotiate it purely

[18] "[T]he charge of forgery in this case is not sustained by the fact that the defendant, with intent to defraud, drew the checks in his own name upon a bank in which he had no funds, or that he signed the name of Woodruff Motor Sales, Inc., whether that was the name in which he did business, as he claimed, or was merely the name of a non-existent corporation, as indicated by other testimony." Greathouse v. United States, 170 F.2d 512, 514 (4th Cir. 1948).

[19] PERKINS, CRIMINAL LAW 297 (1957).

[20] Rowley v. United States, 191 F.2d 949 (8th Cir. 1951); Jones v. United States, 234 F.2d 812 (4th Cir. 1956).

[21] Jones v. United States, *supra* note 20.

on the strength of the countersignature and without emphasis on his *own* individuality or identity.[22]

When a fictitious name is signed in the presence of the one defrauded, it would seem that something more is required in order to constitute forgery. The person represented by the fictitious name must take on personality or character separate and apart from the person actually presenting the check, so that credit can be extended to such personality.[23] The principal case seems to be the only case under the act involving this type situation.

In the *Hubsch* case, the court recognizes the existence of a "broad rule" and a "narrow rule" defining forgery,[24] and in ruling on the sufficiency of the indictment, expressly rejects the "narrow rule." However, in ruling on the question of guilt under the facts of the case, the court makes no attempt to fit the facts into either rule. Instead the court apparently used as a test the rationale adopted in the early English case of *Regina v. Martin,*[25] that where the payee in accepting the check has relied on and given credit to the *person* presenting the check, as distinguished from the *name* or *signature,* there has been no forgery.[26]

It would seem that the court correctly applied this theory to the facts as developed under both counts of the indictment. When the hospital representative accepted defendant's check in payment for treatment received, the name "Weinstein," if it meant anything to the hospital, was important only in so far as it represented the man presenting it; that is, the individual who had received the treatment.[27] But the jeweler was not satisfied with accepting the check written by the defendant, a mere stranger. He accepted the check written by the defendant only after the defendant had shown him credentials identifying "Weinstein" as a particular personality—a Mason and Shriner from Atlanta. Relying on the faith and credit of a check purporting to be signed by "Weinstein," the jeweler accepted the defendant's check. Clearly the reliance was not placed on the *person* presenting the check (the defendant), but on the *signature* as creating a valid obligation.

[22] Rowley v. United States, 191 F.2d 949 (8th Cir. 1951).

[23] The principle was recognized in England at least as early as 1765 in the case of Rex v. Dunn, 1 Leach C.L. 57, 168 Eng. Rep. 131 (1765). For an old, but excellent, discussion of the principle involved, see Brown, *The Forgery of Fictitious Names,* 30 AM. L. REV. 500, 513 (1896).

[24] See note 9 *supra.*

[25] 5 Q.B.D. 34 (1879).

[26] In that case the defendant signed a fictitious name to the check, but the payee, in accepting the check, did not notice that the name was not that of the defendant. The defendant was well known to the payee and it was clear that the payee accepted the check as that of the defendant. It was held that the defendant was not guilty of forgery. Regina v. Martin, *supra* note 25.

[27] As the court pointed out: "It does not appear that the Hospital would have declined to accept the check had it been signed by Hubsch in his own name or in any other name." Hubsch v. United States, 256 F.2d 820, 824 (5th Cir. 1958).

It is submitted that the test applied in the *Hubsch* case is in accord with the technical rules of forgery, and that it is a valid test in determining whether, under the particular fact situation, the crime of forgery has been committed by the use of a fictitious name. However, it may be questioned whether an area already beset with technicalities and dubious distinctions should be further complicated by revitalizing a test which originated in the days when forgery was a capital offense.

HENRY E. FRYE

Sales—Liability of Remote Vendor on Implied Warranty

Plaintiff,[1] a manufacturer of refrigerated biscuits, purchased "Snow Ice" (an integral part of its biscuits sold for human consumption) from a distributor, who had bought the product from the defendant ice manufacturer. Upon finding glass in the ice, plaintiff, at considerable expense, destroyed the biscuits and biscuit dough and recalled the biscuits made the previous day with the glass-contaminated dough. Plaintiff sued the ice manufacturer in federal district court to recover these expenses. The biscuit company, conceding the lack of contractual privity with defendant and foregoing the negligence theory, contended defendant was liable under Texas law by reason of the *Decker*[2] case. In that case it was held that a non-negligent manufacturer who processed and sold contaminated food to a retailer for resale and human consumption was liable to a consumer for injuries sustained by him as a result of eating such food. The court, after noting a trend of the Texas courts away from the *Decker* holding, distinguished that case and held it inapplicable on the ground that it involved a consumer eater whereas the principal case involved a consumer non-eater.[3] The lack

[1] Gladiola Biscuit Co. v. Southern Ice Co., 163 F. Supp. 570 (E.D. Tex. 1958).

[2] Jacob E. Decker & Sons. Inc. v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942). "Liability in such a case is not based on negligence, nor on a breach of the usual implied contractual warranty, but on the broad principle of the public policy to protect human health and life." *Id.* at 612, 164 S.W.2d at 829. Thus privity of contract between plaintiff and defendant is not necessary under the *Decker* rule.

[3] The court may have been influenced by the so-called general rule that there is no implied warranty of fitness for food where the sale is made by one dealer to another dealer for purposes of resale, as distinguished from a sale by a dealer to a buyer for immediate consumption. Howard v. Emerson, 110 Mass. 320 (1872); Emerson v. Brigham, 10 Mass. 197 (1813); Moses v. Mead, 1 Denio 378 (N.Y. 1845); 1 WILLISTON, SALES § 242 (Rev. ed. 1948); Perkins, *Unwholesome Food as a Source of Liability*, 5 IOWA L. BULL. 6, 17-18 (1919); Annot., 15 L.R.A. (n.s.) 886 (1908); Annot., 22 L.R.A. 195 (1893); Annot., 14 L.R.A. 494 (1891). Texas has experienced difficulty with this rule, and there are inconsistent cases dealing with it. Comment, 32 TEXAS L. REV. 557, 564-66 (1954).

Other jurisdictions hold that the sale by one dealer to another dealer for purposes of resale carries with it an implied warranty that the goods are wholesome and fit for food. Annot., 1917F L.R.A. 472. A recent case is Draughon v. Maddox, 237 N.C. 742, 75 S.E.2d 917 (1953), 32 N.C.L. REV. 351 (1954).

No matter which line of cases is accepted, the implied warranty of merchantability would be equally available in the dealer-to-dealer sale for purposes of resale