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## THE NEGLIGENT NOTARY PUBLIC—EMPLOYEE: IS HIS EMPLOYER LIABLE?

The State of Nebraska, like most states, has commissioned a remarkably large number of individuals as notaries public. However, few, if any, of them are exclusively notaries; in fact, most are employed by some form of business enterprise. It would appear that the relationship created by the private employment of individuals who are, in one sense, public officials, has escaped both attention and careful analysis. This article will discuss three groups of problems inherent in such a relationship. Of primary concern is the general nature and scope of the notary's duty. Of nearly equal importance is the question of whether a notary should properly be classified as a ministerial officer or as a quasi-judicial officer. Finally attention will be given to the possible theories for holding the negligent notary's employer liable.

On June 5, 1967, the Supreme Court of New Jersey filed its opinion in the case of *Commercial Union Insurance Company v. Burt Thomas-Aitken Construction Company*.<sup>1</sup> This case will serve as the focal point of the present inquiry because it is directly concerned with the broad spectrum of problems mentioned above. Furthermore, in the three reported decisions resulting from the *Commercial Union* case are found many of the relevant considerations, as well as most of the apparently common misconceptions, in this area of the law.

The plaintiff surety company founded its action on a general indemnity agreement allegedly signed by several individuals and by the construction company itself. The agreement imposed personal liability on all signatories for any loss which might thereafter be sustained by the surety on construction bonds issued for the company. This suit was instituted after the construction company defaulted on a project and the surety paid out \$75,000 on a bond. However, William Aitken, one of the defendants named by Commercial Union as a signer of the agreement, denied signing and alleged that the signature purporting to be his was in fact a forgery.

Since the signatures on the agreement were accompanied by a completed and sealed acknowledgement, the plaintiff amended its complaint to include as defendants Richard Kuiphoff, the notary

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<sup>1</sup> 49 N.J. 389, 230 A.2d 498 (1967). Implicit in this article is an attempt to determine how the *Commercial Union* case should be decided if it were to arise in Nebraska; therefore, Nebraska decisions have been utilized as the primary source of illustrations and examples. However, any substantial variation between the Nebraska decisions and the generally recognized rules in this area will be noted.

public whose name and seal appeared on the acknowledgement, and Prospect Park National Bank, his employer.

The depositions established that Kuiphoff had been an employee of Prospect Park for twenty years at the time of the acknowledgement and had for five years been a stockholder and assistant cashier. Although the notary "could not recall" whether or not at the time of his attestation he was personally acquainted with Aitken, or even whether or not he knew him at the time the deposition was taken, both the construction company and some of the individual defendants on behalf of the company were customers of the bank.

When asked if one of the bank officers had requested that he acknowledge the indemnity agreement, Kuiphoff, on the advice of counsel, refused to answer. However, it was admitted that the bank had paid the fees incidental to his reappointment as a notary public. Furthermore, Kuiphoff testified that he had originally sought and received his notarial commission on his own initiative<sup>2</sup> because it would be useful on the job in that he could notarize documents for customers of the bank. It was also established that the employee-notary attested to some thirty papers a year at the request of bank customers without charge and as an accommodation to them. Notwithstanding this admission, and for reasons which are not apparent, it was stipulated by counsel for both sides that the bank had no part, as a bank, in the transaction in question. Since the case arose on the bank's motion for summary judgment on the basis of the deposition and the amended pleadings, the question of Kuiphoff's individual liability was not placed directly in issue.

On this state of facts, the trial court decided that, "The basic fact is that [Kuiphoff] was not performing an act for the bank, but as a notary public in the exercise of his official capacity."<sup>3</sup> The trial judge was also of the opinion that there was not a sufficient factual dispute to require a jury trial on the question of whether Kuiphoff was a servant of the bank and ruled that, "...even if another officer of the bank asked him to take the acknowledgement, it would make no difference."<sup>4</sup> Therefore, the bank's motion was granted and Commercial Union appealed.

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<sup>2</sup> Like most states New Jersey provides for the appointment or commissioning of notaries by the Governor or the Secretary of State or by both. N.J. STAT. ANN. § 52:7-1.1 (1955). See also NEB. REV. STAT. § 64-101 (Supp. 1967).

<sup>3</sup> 87 N.J. Super. 287, 291, 209 A.2d 155, 158 (1965). However, before reaching this conclusion, the court had observed that: "The bank could be liable where the notary public performs a duty for the bank, in connection with a bank function and for the bank's interest." *Id.* at 290, 209 A.2d at 157.

<sup>4</sup> *Id.* at 291, 209 A.2d at 158.

The majority of the Appellate Division, Superior Court of New Jersey, began their opinion by declaring that the only question to be resolved was "... whether the alleged negligence of Kuiphoff was committed by him while he was acting in the scope of his employment."<sup>5</sup> They stated that if this question were answered in the affirmative the bank would be liable. In reversing the decision below and ordering a jury determination of Kuiphoff's agency status in making the acknowledgement, the Appellate Division relied upon the *Restatement of Agency*<sup>6</sup> as authority for the following proposition which forms the basis of their opinion:

In this modern world of competitive banking, the efforts of a bank to improve its relations with its customers would be as much a part of the business of a bank as would be the performance of "bank transactions." If the finder of fact concludes that when Kuiphoff performed his services as a notary he was actuated, in part at least, by a purpose to improve this customer relationship, his act likewise would be within the scope of his employment.<sup>7</sup>

Finally, the Appellate Division dismissed the true crux of Prospect Park's defense with the bland assertion that if the requisite elements of liability according to conventional agency doctrines were present, the bank would be liable, "...even though his act in its notarial character might be categorized as an official action."<sup>8</sup>

Understandably enough, the bank appealed this second determination. After reviewing the facts, the Supreme Court of New Jersey begins their opinion with the following, rather questionable, analysis of the distinction between Kuiphoff and the "ordinary" employee:

This situation differs, however, from the conventional one in two respects. The first is that a notary public is a public officer and as such exercises an authority the bank itself could not receive and does an act the bank itself could not do. The second is that plaintiff did not know of and hence did not rely upon a connection between the notary and the bank.<sup>9</sup>

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<sup>5</sup> 91 N.J. Super. 13, 15, 218 A.2d 892, 893 (1966).

<sup>6</sup> RESTATEMENT (SECOND) OF AGENCY § 228 (1957). This section of the Restatement defines the scope of employment by listing four tests to be used in analyzing a particular act to determine whether or not it was within the servant's scope of employment. The appellate division placed almost total emphasis on subsection (c) of § 228 which states that conduct is within the scope of employment if, "it is actuated, at least in part, by a purpose to serve the master." In their opinion, this was the only one of the four criteria the fulfillment of which was even questionable on the basis of the amended pleadings and Kuiphoff's deposition.

<sup>7</sup> 91 N.J. Super. 13, 16, 218 A.2d 892, 894 (1966).

<sup>8</sup> *Id.* at 16, 218 A.2d at 894.

<sup>9</sup> 49 N.J. 389, 392, 230 A.2d 498, 499 (1967).

While it may be conceded that most employees are not "public officers," and even that a bank could not be commissioned as a notary, no corporate employer is capable of "doing" any physical act. Thus their first assertion is actually diametrically opposed to the distinction the court attempts to make; in his capacity to do an act which his employer can not do, this notary-employee is indistinguishable from any other employee. In its second contention, the court fails to distinguish between the requisite elements for liability in tort and those for liability in contract. It has never been seriously contended that knowledge of the identity, or even the existence, of a tortfeasor's employer was a prerequisite to recovery against such employer pursuant to traditional tort principles. Furthermore, in regard to the contractual liability of an employer, the common law of undisclosed and partially disclosed principals would seem to substantially diminish the importance of the injured party's knowledge concerning the agent's employer. Very simply, the injured party's knowledge of the employer, and reliance thereon, are not prerequisites to liability.<sup>10</sup>

After briefly mentioning a variety of agency and tort principles, the supreme court accepts an encyclopedia definition of notaries public as public officers<sup>11</sup> before making this comment: "Thus the issue before us cannot be resolved by easy recourse to those doctrines. Rather a policy decision must be made upon the equities of this unique transaction."<sup>12</sup>

In determining that "the equities" favored the bank, the supreme court principally relied upon two conclusions. First, since the plaintiff sought only the acknowledgement of some notary and was wholly unaware of any connection between Kuiphoff and Prospect Park at the time it received and relied upon the indemnity agreement, the imposition of liability upon the Bank would result in an unexpected, and apparently "inequitable," windfall for the plaintiff. An equally viable observation—that Prospect Park could reasonably have foreseen liability of some type arising out of Kuiphoff's notarial activities and therefore by being held liable the bank would in effect be "getting what they bargained for"—was not discussed. Secondly, the court reasoned that since the notary held a public office which the bank was not eligible to hold, and

<sup>10</sup> The court dismisses these cases with the conclusion that the bank, unlike an undisclosed principal, was not a real party in interest to the transaction. This rather questionable assumption will be discussed *infra*.

<sup>11</sup> "A notary or notary public is a public officer..." 66 C.J.S. *Notaries* § 1 (1950). This definition was adopted in New Jersey in *Kip v. Peoples Bank and Trust Co.*, 110 N.J.L. 178, 164 A. 253 (1933).

<sup>12</sup> 49 N.J. 389, 395, 230 A.2d 498, 500 (1967).

exercised a "power" derived from the state rather than from his employer, the bank's "interest" in this acknowledgement was not sufficient to serve as a basis for tort liability.<sup>13</sup> In short, it was held that Prospect Park should not be liable because, "The bank could not itself take an official acknowledgement or empower an employee to do so."<sup>14</sup>

The supreme court did not directly confront the issue which had divided the two lower courts, that is, whether a conventional master-servant relationship can arise between a notary and his employer, and if so, whether it existed in this case. Instead, they offered the following comment:

We add that the private employer of a notary public might be liable for the notary's breach of duty if the employer participated in that breach, as for example if the employer should ask or encourage the notary to act without appropriate inquiry. It may also be that the private employer could be held if it led another to believe that the notary was acting for it and on its credit or responsibility. Neither of those conceivable bases of liability is suggested in the case at hand, but the situation being novel, we reserve to plaintiff the right to file within 30 days of the date of our mandate an amended complaint upon the first of those theses if plaintiff believes it can succeed upon it.<sup>15</sup>

#### THE NOTARY PUBLIC'S DUTY

In deference to the confusion surrounding the question of a notary's purpose, function, and responsibility, it is necessary to examine this area in order to comprehend the relevant issues in the notary-employer relationship. It is stated in the only comprehensive treatise on the subject of notaries and their functions<sup>16</sup> that, "The object of all the laws on acknowledgements and proof is to

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<sup>13</sup> The court's reluctance to apply the doctrine of respondeat superior stems from the following, quite typical, statement of the rationale supporting that doctrine: "[T]he employer engages another to do the work he would otherwise do himself, and for that reason it is just that his economic entity absorb the full cost of the activity he is able to expend through the employment of others." 49 N.J. 389, 394, 230 A.2d 498, 500 (1967). On the basis of this proposition, the court asserts that the bank should not be liable for an act which the bank itself could not perform. Apparently the appellate division's remarks about the importance of improving customer relations were largely disregarded by the supreme court. For a statement of the doctrine of respondeat superior itself, see *Doremus v. Root*, 23 Wash. 710, 63 P. 572 (1901); this formulation was adopted in *Emerson v. Western Seed and Irr. Co.*, 116 Neb. 180, 216 N.W. 297 (1927).

<sup>14</sup> 49 N.J. 389, 393, 230 A.2d 498, 499 (1967).

<sup>15</sup> *Id.* at 395-96, 230 A.2d at 501.

<sup>16</sup> J. O. SKINNER, A HANDBOOK FOR NOTARIES PUBLIC AND COMMISSIONERS OF DEEDS (3d ed. 1963) [hereinafter cited as SKINNER].

place a protection around the deeds or other important instruments from the point of view of the purchaser; to make it more certain that the person named in a deed or instrument intended to transfer the property or right; and to prevent frauds in conveyancing."<sup>17</sup> In one of the earliest reported Nebraska decisions concerning notaries, the evidentiary or "certainty" function of the acknowledgment was expressly recognized:

The function of an acknowledgement is two-fold: *First*, To authorize the instrument to be given in evidence without further proof of its execution. *Second*, To entitle it to be recorded... [I]t must appear that the person executing the instrument did so voluntarily.<sup>18</sup>

Without examining in detail the function of the acknowledgement, it is easily seen that both courts and legislatures have generally accorded substantial significance to the notarial seal in a very practical and realistic sense. There is an abundance of cases which result in one party suffering a substantial and totally unexpected loss for the exclusive reason that the instrument by which he received his right or interest was improperly acknowledged.<sup>19</sup> In fact, it is not unlikely that the harsh manner in which the courts have treated documents containing defective acknowledgements and those relying upon them has served, at least in part, as the stimulus for legislative action which attempts to partially abrogate the virtually absolute necessity of strict compliance with the formalistic requirements of a valid attestation.<sup>20</sup> Nonetheless, the fact remains that the acknowledgement is still of greater importance than might be expected in light of the procedures and practices of notaries generally. In short, "The validity of a real property transaction is frequently dependent on the notary's performance of his duty."<sup>21</sup>

In light of the importance of an acknowledgement, it is not surprising that the Legislature has provided a remedy for those injured by the notary's intentional misdeeds. Section 76-218, Nebraska Revised Statutes, provides:

<sup>17</sup> *Id.* at 172, § 153.

<sup>18</sup> *Becker v. Anderson*, 11 Neb. 493, 497, 9 N.W. 640, 641 (1881). The notion of protection mentioned by Skinner, *supra* note 16, is also implicit in this opinion.

<sup>19</sup> *Welton v. Atkinson*, 55 Neb. 674, 76 N.W. 473 (1898); *Keeling v. Hoyt*, 31 Neb. 453, 48 N.W. 66 (1891); *Becker v. Anderson*, 11 Neb. 493, 9 N.W. 640 (1881); *Citizens National Bank v. Denison*, 165 Ohio St. 89, 133 N.E.2d 329 (1956).

<sup>20</sup> "No deed, mortgage, affidavit, power of attorney or other instrument in writing shall be invalidated because of any defects in the wording of the seal of the notary public attached thereto." NEB. REV. STAT. § 76-217.01 (Reissue 1966).

<sup>21</sup> *In re Walter*, — Ore. —, 427 P.2d 96 (1967). See NEB. REV. STAT. § 76-216 (Reissue 1966) and cases annotated thereunder.

Every officer within this state authorized to take the acknowledgement...who shall be guilty of knowingly stating an untruth, or guilty of any malfeasance or fraudulent practice in the execution of the duties prescribed for them by law...shall upon conviction be adjudged guilty of a misdemeanor...and shall also be liable in damages to the party injured.

A somewhat more equivocal provision is found in section 64-109, Nebraska Revised Statutes:

If any person shall be damaged or injured by the unlawful act, negligence or misconduct of any notary public in his official capacity, the person damaged or injured may maintain a civil action on the official bond of such notary public against such notary public, and his sureties, and a recovery in such action shall not be a bar to any future action for other causes to the full amount of the bond.

While this statute is obviously relevant to the present inquiry, it is impossible to discern what its impact might be in an actual controversy. No reported decision has ever interpreted the provision. It is not inconceivable that the final phrase, "to the full amount of the bond," might be interpreted as limiting the notary's civil liability to \$4,000.<sup>22</sup> However, in an era when real property conveyances (where defective acknowledgements most frequently result in losses) only rarely involve so small a sum, there would seem to be very strong public policy considerations in favor of adopting the interpretation that the bond is only additional assurance that those harmed by the notary's negligence will be compensated and is not, of itself, the sole source of recovery.<sup>23</sup> The interpretation ultimately given to this statute is of fundamental and far reaching importance. A misguided stroke of the judicial pen could easily prevent the recovery of the damages actually suffered at the hands of a notary whose act was wanton and recklessly negligent or even willfully fraudulent.

It is perhaps precisely because of the importance which is attached to an acknowledgement that courts have not appeared to revert to their traditional conservatism in the process of defining the limits of the class of persons to whom the notary owes a duty of care. At least this is true in the sense of a "duty" sufficient to

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<sup>22</sup> \$4,000 is the amount of the official bond required by NEB. REV. STAT. § 64-102 (Reissue 1966). However, this result seems improbable in light of the general rule on the subject. "Procedural statutes should... [not] be construed to take away...long-established and frequently used remed[ies] unless they contain a clear and direct expression of an intention to do so." 82 C.J.S. *Statutes* § 395 (1953).

<sup>23</sup> It has been held that, "The duty rests upon [the notary] regardless of the bond. The liability of the notary arises out of a breach of official duty and not out of the bond." *Lawyers Surety Corp. v. Gulf Coast Investment Corp.*, 410 S.W.2d 654 (Tex. Civ. App., 1967).



impose tort liability on the notary for his negligence. Individuals far beyond the immediate parties to a particular instrument are frequently held to be included among those who the notary could have reasonably foreseen would be harmed by his false or fraudulent action. Basically, the theory seems to be that once the improperly acknowledged instrument is executed and delivered into the hands of someone other than the notary, the notary should expect that all subsequent holders will rely on the validity of his act.<sup>24</sup> Thus his negligent or fraudulent act may result in personal liability for whatever injury results when the defective acknowledgement is eventually discovered.<sup>25</sup>

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<sup>24</sup> This position is forcefully stated in *American Surety Co. v. Boden*, 243 Ky. 805, 50 S.W.2d 10 (Ct. App. 1932): "The duty of a notary public in acting officially is not confined to the one to whom he directly renders service. His duty is to the public and those who may be affected by his act. The public has the right to rely upon the verity of a certificate, and, if one sustains injury as the proximate [result] of a willful violation of his official duty with respect to that certificate, the officer becomes liable to him.... (citations omitted)"

Where an officer, by wanton misconduct, starts on its way in the commercial world a false certificate upon which the public has the right to rely, he ought to be held responsible for all proximate consequences, not only to the person who takes immediately and directly under the instrument bearing the certificate, but to every one damaged as the proximate result of it." This language has recently been quoted as controlling authority in the case of *Butler v. Olshan*, 280 Ala. 181, 191 So.2d 7 (1966).

Justice Francis, dissenting from the supreme court's resolution in *Commercial Union*, also incorporates the Kentucky ruling into his opinion but elaborates on its ramifications as applied to that case. "The bank knew the notary's certificate affixed to the document as representation of verity which would accompany it into the channels of business, on which a member of the public could rely in entering into the transaction the instrument was designed to accomplish.... The presence of a notary's certificate justified belief that the document was *bona fide*." 49 N.J. 389, 398-99, 230 A.2d 498, 502-03 (1967). (dissenting opinion).

Although Mr. Justice Cardozo would no doubt have shuddered at this position because it is such a blatant "assault upon the citadel of privacy...." *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931), the logic of the assertion is certainly compelling. This carefully balanced blend of conventional notions of duty with public policy demands would appear to present a virtually unassailable solution to a wide variety of questions concerning notarial liability.

<sup>25</sup> An excellent example of the longevity which courts have attached to a notary's faulty acknowledgement is found in a rather complex Ohio case involving a car title used as collateral for a loan. An individual forged the owner's name to an application for a certified copy of the title and also to an assignment of the title to himself. Both the application and the assignment were notarized, although by different notaries, and the county clerk failed to mark the fraudulent title as being a duplicate. In allowing the bank to recover its loss on the

The Nebraska Supreme Court has refused to find an intervening cause effective to terminate the notary's liability where plaintiff's grantor inserted his own name as the grantee of a deed which the notary had acknowledged while incomplete and which was neither signed, completed, nor acknowledged in the presence of the original title holder. Instead, the court held that:

[I]t cannot be successfully urged that the loss would have arisen without proper regard to the notary's act... [a] third party relying upon the certificate of the notary and the apparently regular execution, acknowledgement and delivery of the deed may assume the authority of the holder of the deed to insert her name as grantee.<sup>26</sup>

It would appear that the manner in which notaries most frequently violate their responsibilities is to acknowledge the execution of a document when in fact the supposed signatory of that document has not personally appeared before them.<sup>27</sup> That such a practice is clearly in violation of the express wording of most acknowledgements<sup>28</sup> as well as the explicit statutory duty of the notary<sup>29</sup> can not be doubted. The Nebraska Supreme Court has denounced this wanton disregard of official duty as "highly culpable" and asserted that, "It should be and is denounced by all authority, honesty and reason."<sup>30</sup>

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invalid title, the court stated: "The cause of the plaintiff's loss was the sequential and wrongful acts of each notary, the clerk and Nottke. Without any one of them, the loss would not have occurred. While the respective acts of the notaries and the clerk were not joint or done in the execution of any agreement or conspiracy between any two of them... each act did combine and coalesce with the others and thus link a continuous chain of events which produced the result and, together with Nottke's fraudulent conduct, constituted the proximate cause of the bank's loss, which would not have occurred but for each independent act... The wrongful acts of the notaries, being thus conjoined and related, were material parts of the proximate cause of the damage and, being so, the actors were, in the sense of liability, joint tort-feasors and are liable to the plaintiff." *Erie County United Bank v. Berk*, 73 Ohio App. 314, 317-18, 56 N.E.2d 285, 287 (1943). See also *Commonwealth v. United States Fidelity & Guaranty Company*, 364 Pa. 543, 73 A.2d 422 (1950); *Miller v. Doak*, 352 Pa. 380, 42 A.2d 826 (1945).

<sup>26</sup> *Harrington v. Vogle*, 103 Neb. 677, 681, 173 N.W. 699, 700 (1919).

<sup>27</sup> *Miller v. Doak*, 352 Pa. 380, 42 A.2d 826 (1945); *Lowe v. Robin*, 203 Tenn. 105, 310 S.W.2d 161 (1958); *Nebraska State Bar Association v. Butterfield*, 169 Neb. 119, 98 N.W.2d 714 (1959).

<sup>28</sup> "...[B]efore me... personally came \_\_\_\_\_, ... personally to me known to be the identical person whose name is affixed..." 1 L. LIGHTNER, *NEBRASKA FORMS ANNOTATED*, § 82 et. seq. (rev. ed. 1951).

<sup>29</sup> "Over his signature and official seal he shall certify the performance of such duties so exercised and performed under the provisions of this section..." (emphasis added). NEB. REV. STAT. § 64-107 (Reissue 1966).

<sup>30</sup> *In re Watson*, 83 Neb. 211, 119 N.W. 451 (1909).

Both the statutory condition precedent to appointment<sup>31</sup> as well as the oath required in the application<sup>32</sup> for a notarial commission are phrased in very general and indefinite terms. Thus, beyond the very obvious breach just discussed, it is not surprising that the standard of care required of the notary is expressed in the familiar tort terminology of "reasonableness."<sup>33</sup> In addition to certifying the performance of acts which he has not in fact seen performed, a number of actions against the notary have resulted from the notary's certification of acts as voluntary which he personally knows were involuntary.<sup>34</sup> A third group of decisions makes it apparent that the notary has some obligation to ascertain the true identity of persons appearing before him with whom he is not personally acquainted.<sup>35</sup> Generally speaking, civil liability can attach to any notary public who, at the very minimum, fails to actually fulfill the express wording of the attestation clauses to which he affixes his official seal.

Unfortunately, none of the courts considering *Commercial Union* felt compelled to apply these principles to the question of whether Kuiphoff was in fact negligent in the performance of his duties as a notary. However, in light of the foregoing discussion, it would ap-

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<sup>31</sup> "No appointment shall be made until such applicant shall... certify to the Governor under oath that he or she... will, if commissioned, faithfully discharge the duties pertaining to said office..." NEB. REV. STAT. § 64-101(6) (Reissue 1966).

<sup>32</sup> "I \_\_\_\_\_ do solemnly swear (or affirm) that... [I] will if commissioned faithfully and impartially discharge and perform the duties of the office of a general notary public, so help me God." Initial Application For General Notary Public, Approved and Prescribed by the Secretary of State, State of Nebraska.

<sup>33</sup> "[N]egligence on the part of an officer consists only in a failure to use that degree of care which an ordinary reasonable and prudent man would exercise under the same or similar circumstances and conditions. A reasonable effort to perform the duties pertaining to such office is all the law requires." *City of St. Louis v. Priest*, 348 Mo. 37, 45, 152 S.W.2d 109, 112 (1941).

<sup>34</sup> *Nelson v. Hammett*, 240 Mo. App. 307, 203 S.W.2d 115 (Kan. City App. 1947).

<sup>35</sup> "It will be seen that the officer must (1) either know the person to be the one described in the instrument, or, if he does not know him, (2) he must have satisfactory evidence that the person desiring to acknowledge the instrument is the one described in it and the one who executed it." SKINNER, *supra* note 16, at 169. See also Comment, *The Notary Public*, 16 BAYLOR L. REV. 388, 393 (1964): "Some jurisdictions... follow the view that if the acknowledging party is introduced to the notary by a credible person, the notary is not negligent in assuming that a person is the one whom he purports to be." For cases on this point see, *Lowe v. Robin*, 203 Tenn. 105, 310 S.W.2d 161 (1958); *Erie County United Bank v. Berk*, 73 Ohio App. 314, 56 N.E.2d 285 (1943).

pear that his apparent lack of personal acquaintance with William Aitken, together with the lack of evidence to establish any attempt to ascertain who had in fact signed the general indemnity agreement, would be more than sufficient to render him negligent in a great majority of jurisdictions.

IS THE NOTARY PUBLIC A MINISTERIAL OR A  
QUASI-JUDICIAL PUBLIC OFFICER?

Had Kuiphoff erroneously refused to honor a properly executed bank draft, or failed to credit a deposit to a customer's account, or even dropped a sack of quarters on the foot of an unsuspecting bystander, the bank would be hard pressed to avoid compensating the party injured.<sup>36</sup> Yet even assuming that Kuiphoff was negligent and that the negligent act caused the injury complained of by Commercial Union, the liability of his employer remains in doubt. The sole source of this remaining question of the bank's liability is the plethora of doctrines shrouding the concept of "public official" and the legal relationships in which such individuals may become entangled.

Throughout each of the three reported decisions in this case, there are abundant references to the question of whether Kuiphoff was a "public official." The trial court noted that, "Plaintiff contends that Kuiphoff was an agent of the bank in performing his duty in taking the acknowledgement."<sup>37</sup> And, later in the opinion, "Defendant bank contends that it cannot be liable for either the negligence or misconduct of a notary public. A notary public is a public officer."<sup>38</sup> Ultimately, the trial judge classified the acknowledgement as, "...not a bank function, but an act of a public official in his individual capacity,"<sup>39</sup> and to a great extent founded his decision upon that classification.

The appellate division recognized that, "The trial court awarded summary judgment on the theory that there was no dispute of material fact and that, legally, Kuiphoff was not performing an act for the bank, but was instead acting in his official capacity as a

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<sup>36</sup> *Supra*, note 13; "Respondeat superior is the phrase used by the courts to indicate the area within which a master is liable for the torts of servants which, although committed disobediently, are connected with the service of the employer. This is a condition imposed by the common law in return for the privilege of utilizing the services of others in household and business matters." W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 83 (1964).

<sup>37</sup> 87 N.J. Super. 287, 289, 209 A.2d 155, 156 (1965).

<sup>38</sup> *Id.* at 289, 209 A.2d at 157.

<sup>39</sup> *Id.* at 290, 209 A.2d at 157.

notary public.”<sup>40</sup> However, they refused to further consider the problem and dealt instead with the doctrine that “scope of employment” is a question for the jury. The supreme court only heightened the mystery concerning the New Jersey position on this issue by stating that, “The notary holds a public office... which the bank itself could not hold...”<sup>41</sup>

As will be seen, underlying this confusion are the opposing notions of “ministerial officer” and “quasi-judicial officer” and the question of which of these two characterizations can accurately be applied to the notary public in this factual context. At the outset it will be extremely helpful to slightly alter the focal point implicit in each of the three opinions. That is, while the courts refer to the “position” or “function” of the notary, a discussion of the basic nature and ramifications of a single particular *act* is a far more fruitful ground for logical and understandable analysis. Such a shift in emphasis is necessitated by the simple fact that the vast majority of “public officials” perform acts of both types. Thus a single individual is in the performance of some acts a “ministerial officer, but in the performance of other acts, he is a “quasi-judicial officer.” A forceful rationale for the adoption of such an approach appeared in *State v. Loechner*.<sup>42</sup>

There is scarcely a ministerial officer but that in the performance of some act required to be done exercises a discretion quasi-judicial in its nature, and regarding which the act itself can not rightfully be classed as ministerial. . . . If ministerial officers can perform nothing but ministerial acts, then it is hard to conceive of such officer, [sic] for some of the acts of every ministerial officer must require the exercise of judgment and discretion, which is the very antithesis of a ministerial act.<sup>43</sup>

Now, if the respective definitions of “ministerial” and “quasi-judicial” acts are examined, it will finally become possible to perceive the epicenter of the *Commercial Union* problem and scrutinize how it is treated by each of these courts.

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<sup>40</sup> 91 N.J. Super. 13, 15, 218 A.2d 892, 893 (1966).

<sup>41</sup> 49 N.J. 389, 392, 230 A.2d 498, 499 (1967) (citations omitted).

<sup>42</sup> 65 Neb. 814, 91 N.W. 874, (1902).

<sup>43</sup> *Id.* at 820, 91 N.W. at 876; *aff'd*, *School Dist. v. Ellis*, 163 Neb. 86, 77 N.W.2d 809 (1956). “The focal point of our inquiry is not, therefore, whether Yarbrough was an independent contractor in the matter of the handling of Sinclair products within the territory... but whether or not in the loading of a tank that was never used nor intended to be used, by Yarbrough or any of his agents... and in the absence of any express requirement of such contract for Yarbrough to make such loading and shipment, Yarbrough was acting as an independent contractor.” *Helms v. Sinclair Refining Co.*, 170 F.2d 289, 291 (5th Cir. 1948).

Although Mechem's widely accepted and often quoted treatise on the subject exhibits utmost caution in attempting to offer such definitions,<sup>44</sup> it does state that an act is ministerial, "... when the law ... prescribes and defines the time, mode and occasion of its performance with such certainty that nothing remains for judgment or discretion. Official action, the result of performing a certain specific duty arising from designated facts is a ministerial act."<sup>45</sup> A very slightly modified version of this definition has been adopted by the Nebraska Supreme Court.<sup>46</sup> Finally, it seems generally recognized that an officer is liable for his failure to properly perform ministerial acts.<sup>47</sup>

Quasi-judicial acts, on the other hand, have been defined as, "... those which lie midway between the judicial and ministerial ones. The lines separating them are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed *quasi-judicial*."<sup>48</sup> As to the officer's liability for the wrongful performance of such functions, the same author states, "The same reasons of public policy which operate to render the judicial officer exempt from civil liability for his judicial acts ... apply to the *quasi-judicial* officer as well, and it is well settled that the *quasi-judicial* officer cannot be called upon to respond in damages to the private individual for the honest exercise of his judgment ... however erroneous or misguided his judgment may

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<sup>44</sup> "The difficulty of dealing with questions of liability for judicial or ministerial action ... [lies] in determining whether the given act shall be considered as judicial or ministerial in its character.... No inflexible rule can be laid down by which this difficulty can be solved in every case. Each case must be determined upon an examination of all its facts. Here, too, as in other cases already considered, it is the nature of the duty and not the title of the officer which determines the liability." F. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, § 657 (1890) [hereinafter cited as MECHEM].

<sup>45</sup> *Id.*

<sup>46</sup> *Larson v. Marsh*, 144 Neb. 644, 14 N.W.2d 189 (1944); *accord*, *School Dist. v. Ellis*, 163 Neb. 86, 77 N.W.2d 809 (1956).

<sup>47</sup> "[I]t is equally well settled that where the law imposes upon a public officer the performance of ministerial duties in which a private individual has a special and direct interest, the officer will be liable to such individual for any injury which he may proximately sustain in consequence of the failure or neglect of the officer either to perform the duty at all, or to perform it properly." MECHEM, *supra* note 44, at § 664.

<sup>48</sup> MECHEM, *supra* note 44, at § 637.

<sup>49</sup> MECHEM, *supra* note 44, at § 638.

be."<sup>49</sup> The Nebraska Supreme Court has unequivocally adopted this definition and rationale in absolving county commissioners<sup>50</sup> and county treasurers<sup>51</sup> from personal liability for their "official" acts which were, at best, unreasonable.

Thus it can be seen that in theory, *Commercial Union* was contending that Kuiphoff's acknowledgement of the indemnity agreement was a ministerial act and therefore the notary (and under respondent superior, his employer) would be liable for damages caused by his negligent performance of that act. The bank predicated their freedom from liability upon the assertion that the cashier, when acting as a notary public, exercised a "discretion in its nature judicial" and fell within the shroud of absolute immunity. They contended that because he was a notary public, and notaries public are quasi-judicial public officials regardless of the nature of the act being performed, Kuiphoff was, by definition, incapable of incurring liability for the performance of his "official act." Therefore, as his employer, they too would be free from liability. Likewise, when the first court stated that the assistant cashier was "acting in his official capacity as a notary," it implicitly accepted the thesis that he was exercising the discretion which elevates an "officer" to quasi-judicial status. The second court, on the other hand, implied acceptance of the ministerial characterization asserted by *Commercial Union* by focusing its attention on the scope of employment issue—a question which is obviously irrelevant if Kuiphoff himself were not liable. The frequent references of the supreme court to "official capacity" and "official function" indicate that they too were strongly influenced by considerations of "quasi-judicial" and "ministerial" functions. Since they affirm the trial court's dismissal of the petition as to the bank, it is reasonable to assume that the supreme court characterized the acknowledgement as a quasi-judicial act.

In attempting to correctly apply these definitions to the precise situation involved in *Commercial Union*, it is of absolutely critical importance to note a qualification which has been engrafted upon the definition of "ministerial officers." This expanded definition appears in the very informative case of *Larson v. Marsh*.<sup>52</sup> "The fact 'that a necessity may exist for the ascertainment, from personal knowledge, or from information derived from other sources, of those facts or conditions upon the existence or fulfillment of which,

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<sup>50</sup> *Harmer v. Petersen*, 151 Neb. 412, 37 N.W.2d 511 (1949); *Allen v. Miller*, 142 Neb. 469, 6 N.W.2d 594 (1942).

<sup>51</sup> *School Dist. v. Ellis*, 163 Neb. 86, 77 N.W.2d 809 (1956).

<sup>52</sup> 144 Neb. 644, 14 N.W.2d 189 (1944).

the performance of the act becomes a clear and specific duty, does not operate to convert the act into one judicial in its nature.'"<sup>53</sup> That is, the duty of determining what the facts of a particular situation are does *not* require a quasi-judicial type of discretion. This distinction between discretion to refuse to act in a prescribed manner until after determining that appropriate facts are present and discretion to act in any manner the officer chooses after ascertaining whatever facts he deems relevant was expressly followed in *School District v. Ellis*,<sup>54</sup> a 1956 decision of the Nebraska Supreme Court. Since the only "discretion" vested in the notary is to determine whether or not the person appearing before him is the individual designated in the instrument there would appear to be little doubt that at least in Nebraska, and probably generally, Kuiphoff's notarization of the indemnity agreement was in fact a ministerial act.

One final point must be made. Because a notary acts almost exclusively only upon the request of another individual, the conclusion is virtually inescapable that the requesting party has a very particular or "special" interest in the "official" act being performed. That is, unless an individual hopes to secure for himself some advantage or benefit by virtue of an acknowledgement, the notary will not be called upon to exercise his power. In the case of *Larson v. Marsh*, the court enunciated the following position:

The rule is aptly stated by an authoritative text writer as follows: 'So it is immaterial that the duty is one primarily imposed upon public grounds and therefore a duty owing primarily to the public, if, notwithstanding, the individual has in it a distinctive and direct interest and the legal right to require its performance; the right of action springs from the fact that the private individual receives a special and peculiar injury from the neglect in performance against which it was in part the purpose of the law to protect him.' Mechem, *Public Officers*, 448. We think the correct rule is that where a statute imposes on a public officer the performance of ministerial duties in which a private individual has a special and direct interest, the officer will become liable to such individual for damages which he may proximately sustain in consequence of the failure or neglect of such officer to perform the duty or to perform it properly.<sup>55</sup>

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<sup>53</sup> *Id.* at 648, 14 N.W.2d at 191.

<sup>54</sup> 163 Neb. 86, 77 N.W.2d 809 (1956).

<sup>55</sup> *Larson v. Marsh*, 144 Neb. 644, 648-49, 14 N.W.2d 189, 192 (1944). See also MECHAM, *supra* note 44, at § 664. "Where, however, the law imposes on the officer the performance of ministerial duties in which a private individual has a special, direct, or distinctive interest, the officer is liable to such individual for any injury which he may proximately sustain in consequences of the failure to perform the duty at all, or to perform it properly." 67 C.J.S. *Officers* § 127(b).



Had the New Jersey courts unearthed the "special interest" doctrine quoted above, their inability to correctly define Kuiphoff's act as ministerial would have been abrogated because all concerned would have been released from the haunting spectre of "public official" which runs throughout the opinions. With the application of this doctrine, the smoke screen raised by Prospect Park, (apparently effective in obstructing the view of the other participants in this litigation), would have been cleared away and due consideration given to the question of Kuiphoff's employment and respondeat superior.

#### POSSIBLE BASIS FOR THE EMPLOYER'S LIABILITY

Once it is determined that Kuiphoff would be personally liable for his negligent performance of a ministerial act (i.e., affixing his notarial seal when the indemnity agreement was neither signed in his presence nor by persons "known to him"), it is possible to focus attention on the liability of his employer. The appellate division's acceptance of the respondeat superior doctrine relied upon in Commercial Union was based upon a finding that Kuiphoff's notarial services were actuated in part by a purpose to improve the bank's customer relations. Certainly the court's observation that improving customer relations was part of the bank's "business"<sup>56</sup> is highly logical and undoubtedly accurate. The proposition is irrefutable that retaining one's customers in a competitive marketing arena is essential for mere survival, let alone for growth and prosperity. Conduct thus motivated solely by the necessities of the marketplace could hardly be classified as anything but a business activity.

However, earlier in their opinion, this second court had moved considerably closer to what in fact is the true issue in regard to Kuiphoff's agency capacity when they stated:

While it is true [because of a stipulation by counsel] that the bank was not interested in the transaction covered by the indemnity agreement, and consequently that the acknowledgement thereof was not a "bank transaction," this fact alone is not dispositive of the issue herein. Rather, the question to be resolved is whether

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<sup>56</sup> "Here, plaintiff seeks to hold the bank... solely because the bank sought to improve its relations with its own customers.... In this modern world of competitive banking, the efforts of a bank to improve its relations with its customers would be as much a part of the business of a bank as would be the performance of a 'bank transaction.'" 91 N.J. Super. 13, 17, 218 A.2d 892, 894 (1966). "The Appellate Division held that upon a finding, which the evidence would permit, that the assistant cashier was actuated in part by a purpose to improve customer relations, the bank could be charged as employer with his neglect...." 49 N.J. 389, 391, 230 A.2d 498, 499 (1967).

the alleged negligence of Kuiphoff was committed by him while he was acting in the scope of his employment.<sup>57</sup>

This excerpt illustrates what the entire opinion of the appellate division clearly assumes—that at the time of the “alleged negligence” Kuiphoff was in fact an employee of the bank indistinguishable from any other assistant cashier. The supreme court deftly avoids the issue of the bank’s connection or relationship with Kuiphoff in regard to the faulty acknowledgement. Instead they state, “Here, plaintiff seeks to hold the bank, not on the thesis that the bank was a party in interest in a contract with plaintiff, but solely because the bank sought to improve its relations with its own customers. . . .”<sup>58</sup> Thus it appears that when the supreme court rules, “We see no good reason to hold a private employer who was in no sense a party in interest in the transaction when the claimant did not look to the employer. . . .”<sup>59</sup> they are doing little, if anything, more than saying that at the time the negligent act was committed by Kuiphoff, the relationship of employer-employee did not exist between the bank and the notary. Somehow, the proverbial “cart” was given priority over what is the crucial inquiry in this factual context. That is, the “scope of employment” question is given substantially more attention than is the basic relationship of the parties involved in regard to the act performed. If Kuiphoff was not an employee of the bank in the taking of this acknowledgement, the entire question of “scope of employment” does not arise. Thus, at this point, the real issue is whether Kuiphoff *qua* notary was an employee of the bank or merely an independent contractor hired by the bank and directed to improve its customer relations by exercising his official powers.

The logical observation that a single individual may be an employee in respect to one act and an independent contractor with respect to another act, is certainly not unknown to the law.<sup>60</sup> An excellent explanation of the concept is found in *Helms v. Sinclair Refining Co.*<sup>61</sup> The case involves a suit by the driver of a gasoline transport against a refining company. The defendant company contended that its distributor, under whose supervision the plaintiff was employed, was an independent contractor and that it was therefore insulated from liability. In support of this position, the defendant was able to rely on an impressive array of previous litigation involving identical distributor contracts which had firmly estab-

<sup>57</sup> 91 N.J. Super. 13, 16, 218 A.2d 892, 893 (1966).

<sup>58</sup> 49 N.J. 389, 392, 230 A.2d 498, 500 (1967).

<sup>59</sup> *Id.* at 395, 230 A.2d at 501.

<sup>60</sup> *Marcum v. United States*, 208 F.Supp. 929 (W.D. Ky. 1962); see also cases collected at 2 A.M. JUR. Agency § 8 (1954).

<sup>61</sup> 170 F.2d 289 (5th Cir. 1948).

lished that in relation to the subject matter of the contract, the distributor was in fact an independent contractor. However, the court held the defendant to be liable under the dual capacity doctrine based upon the following reasoning:

We are aware of the fact that generally the existence of the relationship of independent contractor and employer excludes the relationship between the parties of principal and agent or master and servant. Nevertheless, there is not necessarily such repugnance between them that both relationships could not exist at the same time in connection with different phases of the work. An employee might be an independent contractor as to certain work and a mere servant as to other work not embraced within the independent contract.<sup>62</sup>

In *Commercial Union*, apparently the bank, (and the supreme court), regarded Kuiphoff's notarization as the act of an independent contractor while plaintiff and implicitly the appellate division considered it to be a function of the bank's employee. Thus it is imperative that the distinction between these two relationships be examined.

The *Restatement of Agency* states that, "A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master."<sup>63</sup> On the other hand, "An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."<sup>64</sup> It is certainly not surprising that the reporter for this section of the American Law Institute adopts the same high degree of emphasis on the concept of control in his treatise.<sup>65</sup> In discussing the liability of masters for the torts of their servants, and particularly discussing the definition of a servant, Professor Seavey notes that:

The right to control the physical movements of the employee is the most important single element in most of the situations. This does not mean de facto control, which is usually absent, but the right to control. This may be described as the element responsive to the tort principle that control creates responsibility.<sup>66</sup>

The Nebraska court has adopted this position almost verbatim. In *Gardner v. Kothe*<sup>67</sup> they reaffirmed and followed earlier rulings that:

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<sup>62</sup> *Id.* at 291.

<sup>63</sup> RESTATEMENT (SECOND) OF AGENCY § 2(2) (1957).

<sup>64</sup> RESTATEMENT (SECOND) OF AGENCY § 2(3) (1957).

<sup>65</sup> W. SEAVEY, HANDBOOK OF THE LAW OF AGENCY (1964).

<sup>66</sup> *Id.* at § 84(c).

<sup>67</sup> 172 Neb. 364, 109 N.W.2d 405 (1961).

The primary test in determining whether the relationship of employer-employee exists is whether the alleged employer has the right of control...and the right to direct the manner in which the work is to be done....Generally most courts agree that the main test is the right of control, and that right governs....Other factors are looked to only to aid in determining whether such relationship existed in a given case.<sup>68</sup>

The Nebraska definition of independent contractor is also very close to the Restatement position. "An independent contractor is generally distinguished from an employee as being a workman who contracts to do a particular piece of work according to his own method, and is not subject to the control of his employer, except as to the results of the work."<sup>69</sup>

Even though the rules of law governing this distinction are quite firmly established, the particular factual content of *Commercial Union* does not admit to an easy application of these principles.<sup>70</sup> With respect to notaries, there is in reality very little activity to be controlled. That is, as has been established, the proper execution of a notarial acknowledgement involves the exercise of very little, if any discretion by the notary. When an individual appears before a notary, presents identification sufficient to justify a reasonable belief on the part of the notary that he is the person named in the instrument, and under sworn oath fulfills the terms of the instrument or acknowledgement by stating a particular fact or doing the prescribed act, notarization follows.<sup>71</sup> The Legislature, (and the court to the extent of defining the standard of care necessary), has created a process from which nearly any material deviation is prohibited. The process is set in motion by the individual desiring an acknowledgement to be made and completed by the notary. But it is difficult to perceive the *opportunity* for the actual

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<sup>68</sup> *Id.* at 366, 109 N.W.2d at 406.

<sup>69</sup> *Snodgrass v. City of Holdrege*, 166 Neb. 329, 332, 89 N.W.2d 66, 68 (1957), *aff'd*, *Pearson v. Schuler* 172 Neb. 353, 109 N.W.2d 537 (1961).

<sup>70</sup> For a further discussion of the crucial nature of the "right to control," see Conant, *Liability of Principals for Torts of Agents: A Comparative View*, 47 NEB. L. REV. 42 (1968). Footnotes 16 and 17 of that article are of particular interest in regard to determining whether or not the "right to control" sufficient to distinguish a servant from an independent contractor would be present in this case.

<sup>71</sup> The right of an individual to insist that the notary make an acknowledgement in such circumstances is apparently quite firm. "The rule seems to be that where a public officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, although the wording of the statute is permissive merely and not peremptory." *Larson v. Marsh*, 144 Neb. 644, 647, 14 N.W.2d 189, 191 (1944).

exercise of "control" over this process or even the existence of the "right to control" on the part of either the notary or his employer. Only the individual seeking an acknowledgement, who is free to choose whether or not to obtain notarial services and if so, what notary to approach, can realistically be said to exercise any "control" over the entire process of notarization.

Notwithstanding this dilemma, *Commercial Union* could have presented its position in a more favorable context by discussing the realities of Kuiphoff's employment with the bank. As was mentioned earlier, had he dropped a bag of quarters on the foot of a customer, the liability of the bank for the customer's injuries would be virtually beyond question. Yet, short of wholly uneconomical and unreasonably interfering safety measures, the bank was helpless to assert any "control" over such an occurrence. On the other hand, it seems highly unlikely that any employee-notary would acknowledge an instrument (or carry quarters) in the face of an absolute prohibition of such acts by his employer. In this same vein, if the president of the defendant bank had handed the general indemnity agreement, complete with signatures, to Kuiphoff and requested that he notarize it, it is unreasonable to believe that the notary would have refused and not improbable to assume that he would not have hesitated for more than a moment.<sup>72</sup> Thus, in a purely realistic light, the bank did in fact retain the requisite "right of control" which forms the basis for liability under respondeat superior in that it could have prevented the taking of acknowledgements by bank employees. Although the bank's contention that it could not "control" the "official act" of a notary public has some theoretical appeal in light of the concepts discussed in the preceding paragraph, it should not be "dispositive of the issue." Rather, emphasis and focus on the simple fact that the bank could have prevented the taking of acknowledgements by its employees

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<sup>72</sup> "Dear Ann Landers: I am a stenographer employed by a firm of lawyers. Several months ago, the firm paid the expenses involved in my becoming a notary public. Every one of my employers has, at one time or another, asked me to notarize signatures which were affixed to documents when I was not present. This always bothers me but I have been told 'It's not important. It's only a technicality....' I alone am answerable and I am becoming extremely uncomfortable about these occurrences. Any suggestions? Indianapolis.

Dear In: Tell your bosses that from now on you refuse to notarize a document unless you are present at the signing. You may be canned but a girl with such sterling character should have no trouble getting another job if her ability matches her integrity." A. Landers, *Ann Landers.... Answers Personal Problems*, The Lincoln Journal (Nebraska), March 15, 1968, at 14, col. 4. (Copyright, Publishers-Hall Syndicate).

could easily establish Kuiphoff as an employee of the bank in the taking of the acknowledgement.<sup>73</sup>

Even if the difficult question of liability under respondeat superior is resolved against the plaintiff by virtue of a finding that the bank did not have the right of control, and therefore, when taking acknowledgements Kuiphoff was an independent contractor employed by the bank to improve its customer relations, there are at least two other legal theories which might be urged in an attempt to impose liability on the bank. However, unlike respondeat superior, they are based upon the notion of "fault" or negligent conduct on the part of the bank itself rather than on the part of Kuiphoff. The New Jersey court mentions the possibility of both "negligent supervision" and "intentional misrepresentation" as a basis for allowing the plaintiff thirty days to file an amended complaint.

An interesting discussion of the "negligent supervision" theory is found in *DeVille v. Shell Oil Co.*<sup>74</sup> Citing substantial authority, which is here omitted, the court makes the following comment:

Alaska follows the general rule that the employer of an independent contractor is not responsible for the negligence of the contractor... However, there are some well recognized exceptions to this rule, including the exception here pertinent that if the employer retains supervision or control over the work of the independent contractor the employer will be responsible for harm resulting from its own negligent supervision or control.<sup>75</sup>

Obviously, the application of this principle again turns on the presence or absence of a type of "control" and, as has been shown, this is indeed a complex question in the *Commercial Union* type of situation. However, in determining whether the requisite "control" is present to hold the employer for negligently supervising his employee, a standard is utilized which is somewhat different from that which distinguishes between employees and independent contractors. That is, a particular factual situation may include sufficient

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<sup>73</sup> Had the New Jersey courts escaped the nemises of "public officer" notions, and, accepted the analysis herein proposed, the assertion of the appellate division and the dissenting justice of the supreme court that the case was properly for determination by the jury probably would have prevailed. "Whether the act was done within the scope of employment is a question of fact... Each case must be determined with a view to the surrounding facts and circumstances, the character of the employment and the nature of the wrongful act. Whether the act was or was not such as to be within the scope of employment is, ordinarily, one of fact for the determination of the jury." *Stone v. Hills*, 45 Conn. 44, 29 Am. Rep. 635 (1877). Adopted in *Nebraska, Watts v. Zadina*, 179 Neb. 548, 552, 139 N.W.2d 290, 292 (1966).

<sup>74</sup> 366 F.2d 123 (9th Cir. 1966).

<sup>75</sup> *Id.* at 125.

"control" to make the employer liable for his own negligence in failing to properly supervise the employee while not enough "control" is present to transfer the employee from the status of independent contractor to servant and thereby give rise to liability of the employer on a respondeat superior theory.

The test approved and employed in *DeVillie* originated in an earlier decision of the United States Court of Appeals for the Third Circuit: "It is apparent that where the employer has retained some element of control of the job, he should be responsible for the harmful consequences of its performance as a concomitant of the control retained."<sup>76</sup> It is in this context that the plaintiff's argument that the bank certainly could have prevented the acknowledgement from ever occurring has its greatest impact.<sup>77</sup> Finally, it should be noted that this doctrine has been expressly applied to innumerable cases involving the failure of a notary, as agent or employee of a bank, to protest or present "commercial paper" the bank had received for collection.<sup>78</sup> The New Jersey Supreme Court expresses the rationale for this application of the doctrine in the following terms:

[T]hose States which, like New Jersey, hold the bank, do so upon the thesis that the notary's failure is with respect to a duty required of the bank so that the notary failed, not as a public officer, but as an employee or agent selected by the bank to perform the bank's own obligation.<sup>79</sup>

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<sup>76</sup> *Spinozzi v. E. J. Leviono and Co.*, 243 F.2d 80 (3d Cir. 1957).

<sup>77</sup> "Again, one is guilty of negligence in failing to give instructions needed to prevent harm in the execution of work by an independent contractor. . . ." (*citations omitted*). W. SEAVY, *HANDBOOK OF THE LAW OF AGENCY* § 82(b) (1964).

<sup>78</sup> Although there is a substantial amount of authority on this point, it has been intentionally avoided for several reasons. The collection of promissory notes, bills, or bonds turned over to a bank by one of its customers is undeniably a "bank transaction" and thus is far removed from the more interesting, and infinitely more frequently occurring situation in which the employer directs the notary-employee to make an acknowledgement that is not so directly or inextricably bound up in the employer's "business." Secondly these cases have arisen from a negligent act of the notary other than the failure to identify the party, administer the oath or witness the signature. That is, they usually involve a notary who has incorrectly addressed the notice of protest or simply forgotten to send it. For a further discussion of this area, see *SKINNER*, *supra* note 16, at § 299 *et. seq.* See also, *Williams v. Parks*, 63 Neb. 747, 89 N.W. 395 (1902) and cases cited in the annotation to NEB. REV. STAT. § 64-107 (Reissue 1966).

<sup>79</sup> 49 N.J. 389, 393, 230 A.2d 498, 500 (1967). It is interesting to note that while the New Jersey court could recognize the existence of the master-servant relationship between a notary and the bank employing him in this context, they failed to perceive, or at least discuss, the identical problem in the case before them.

Fraud, or at least negligent misrepresentation, is another plausible basis for imposing liability upon the bank. Only Kuiphoff's refusal to testify as to whether or not an officer of the bank had requested that he notarize the indemnity agreement, an unwarranted refusal according to the dissenting supreme court justice,<sup>80</sup> casts doubt upon the efficacy of such theories. If it is assumed that one of Aitken's co-defendants, perhaps an officer or stockholder of the construction company, handed the signed agreement to a bank officer and asked that he have it notarized, and that officer made a similar "request" to Kuiphoff, then it may be said that Kuiphoff's acknowledgement was the direct result of an express order or direction from his employer. Such a situation would appear to be within the rule first stated in *Stone v. Hills*.<sup>81</sup>

For all acts done by a servant in obedience to the express orders or directions of the master . . . and for acts in any sense warranted by the express or implied authority conferred upon him, considering the nature of the services required, the instruction given, and the circumstances under which the act is done, the master is responsible.<sup>82</sup>

If the bank officer knew that defendant Aitken had not signed the agreement or that his signature thereon was a forgery at the time he requested Kuiphoff's services, the bank's liability would be even more certain. In the words of Professor Seavey, "No question of agency is involved where a principal knowingly tells his agent to make misstatements . . . the same liability follows if he uses a third person [presumably this would include an independent contractor] to achieve the fraud."<sup>83</sup> In fact, it is not unlikely that the notary would be absolved from any liability on the theory that he was not negligent in relying upon the identification or representation made to him by such a "credible person" as his employer.<sup>84</sup>

### CONCLUSION

Although much of the official activity of a notary public may be routine, the office itself is ancient and essential to an orderly society. The consequences of a notary's malfunctioning or ignorance may be serious and even tragic. Without full knowledge of his powers, obligations and limitations, a notary public may be a positive danger to the community in which he is licensed to act. . . .<sup>85</sup>

<sup>80</sup> 49 N.J. at 397-98, 230 A.2d at 502 (dissenting opinion).

<sup>81</sup> 45 Conn. 44, 29 Am. Rep. 635 (1877); *Adopted in Defoe v. Grantski*, 143 Neb. 344, 9 N.W.2d 488 (1943); *accord*, *Niemeyer v. Forburger*, 172 Neb. 876, 112 N.W.2d 276 (1961).

<sup>82</sup> 45 Conn. at 46, 29 Am. Rep. at 636.

<sup>83</sup> W. SEAVEY, *HANDBOOK OF THE LAW OF AGENCY* § 82 (1964).

<sup>84</sup> Comment: *The Notary Public*, 16 BAYLOR L. REV. 388, 393 (1964).

<sup>85</sup> Desmond, Chief Judge of New York State, *Forward* to J. SKINNER, *SKINNER'S NOTORIES MANUAL* at ii (3d ed. 1963).



Our particularly commercial world has a definite need for impartial witnesses to acknowledge the performance of certain acts. Yet the great utility which the notary public might have in this context is drastically diminished, if not eliminated, by practices which, according to the reported cases, are slovenly and in flagrant violation of the conditions of their appointment.

This situation can be remedied, and the necessity for accuracy and veracity impressed upon those commissioned as notaries, by the more frequent imposition of tort liability. The Nebraska statutes and cases cited herein establish that recovery from both the notary and his employer is certainly possible; the veil of "public officialdom" behind which the notary may seek to conceal his misdeeds is far too thin to afford protection. Tort claims are certainly a time-honored method of reducing the incidence of frustrated expectations and financial losses and there is no reason to believe that they would not have this same impact in the realm of notaries public.

Initially a determination must be made as to whether or not the notary has in fact been negligent. However, violation of the express wording of an acknowledgement, or of the oath of office, will generally be sufficient evidence to establish negligence. Yet this is only a partial solution. If the abuses of the myriad of clerks, bookkeepers and secretaries who are also notaries are to be more effectively curbed, recovery must also be had from their employers.

There are of course some situations in which the employer would be entitled to insulation from such claims. If he were wholly and "reasonably" unaware that the employee was a notary, or that the employee ever made acknowledgements during business hours, there would appear to be no rational basis upon which to ground liability. And, if the individual seeking the acknowledgement did not transact any business whatsoever with the employer, and was neither a present nor a prospective "customer" of the employer, any "good will" or benefit which might inure to the employer as the result of the employee's notarizations would seem too insignificant to serve as a basis for the imposition of liability. However, if the employer requested the acknowledgement, or advertised that notarial services were available at his business establishment, he should be treated no differently than any other "master" so inattentive as to employ incompetent "servants." In general, the employer should be liable for the loss caused by the defective acknowledgement of his employees whenever he has knowingly permitted an employee to exercise notarial powers while within the scope of his employment. Only in the rarest of circumstances will the gain or advantage which is the touchstone of respondeat superior be absent.

*J. Michael Gottschalk '69*