UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 28 | Number 4 Article 17

6-1-1950

Negotiable Instruments -- Forgery or False Pretense -- Insurance Coverage

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Negotiable Instruments—Forgery or False Pretense—Insurance Coverage

Illogical, the laity would say, to hold that Dick Drawer of S Street had committed a forgery by signing his own name in the presence of T. Teller to a series of checks, thereby procuring all the funds deposited in Drawee Bank by Dick Drawer of I Street. Logical, they would say, to find that he had obtained the money by false pretenses. But the first result would not be too surprising in legalistic circles, since it is a generally accepted principle that "one may commit a forgery by the use of his own name if that name is used with intent to receive."[1]

At common law offenses analogous to these were classified under the general denomination of "cheat," which was a fraud effectuated by some false symbol or token.[2] Forgery, dependent upon a "writing," was called by a separate name because of its special heinousness.[3] With the enactment of statutes, beginning with 30 Geo. II, c. 24, sect. 1, it was realized that committing a fraud by false pretense was hardly less an evil.[4] Ensuing statutes defined and punished forgery[5] and obtaining money by false pretense[6] as separate offenses.

The popular conception of committing the act of forgery is by the attempted imitation in writing of another's personal act with the intent to deceive[7] while the committing of an offense by false pretense may be

[1] White v. Van Horn, 159 U. S. 3 (1895); United States v. Long, 30 Fed. 678 (C. C. S. D. Ga. 1887); *Ex parte* State *ex rel.* Atty. Gen. Williams v. State, 213 Ala. 1, 104 So. 40 (1924); People v. Rushing, 130 Cal. 449, 62 Pac. 742 (1900); Barfield v. State, 29 Ga. 127, 74 Am. Dec. 49 (1895); Thomas v. First Nat. Bank, 101 Miss. 783, 58 So. 478 (1912); Segal v. Nat. City Bank, 52 N. Y. S. 2d 727 (1944), *rev'd on other grounds*, 58 N. Y. S. 2d 261 (1945); Int'l Union Bank v. Nat. Surety Co., 245 N. Y. 368, 157 N. E. 269 (1927); People v. Peacock, 6 Cow. 72 (N. Y. 1826); Edwards v. State, 53 Tex. Cr. R. 50, 108 S. W. 673 (1908); 23 AM. JUR., FORGERY §9 (1939); 37 C. J. S., FORGERY §9 (1943). *See* Stanley v. Beavers, 164 Ga. 656, 139 S. E. 345 (1927), 12 MINN. L. REV. 180 (1928) (Defendant, found guilty of forgery, asked for discharge on habeas corpus because the name he signed to the instrument was his own. The court affirmed the conviction, saying that was a matter of defense, which should have been set up on trial. One dissenting judge said: "In view of the proof that the name signed by the accused was his own proper name . . . , I cannot reach the conclusion that he was guilty of forgery.")

This principle tends to shock even lawyers when it is extended to such a case as United States v. Nat. City Bank of New York, 28 F. Supp. 144 (S. D. N. Y. 1939). There the Veterans Administration sent by registered mail an adjusted service certificate to a veteran, but it was delivered to another person of the same name who indorsed as payee a check representing a loan secured on the strength of the certificate, and it was held forgery ". . . though he indorsed without fraudulent intent, and in the belief that he was the payee named in the check."

[2] Williams v. Territory, 13 Ariz. 27, 108 Pac. 243 (1910); 2 BISHOP'S CRIMINAL LAW §141 (9th Ed. 1923).

[3] Williams v. Territory, *supra* note 2; 2 BISHOP, *op. cit. supra* note 2, §521.

[4] Williams v. Territory, *supra* note 2; 2 BISHOP, *op. cit. supra* note 2, §411.

[5] N. C. GEN. STAT. §14-119 (1943).

[6] N. C. GEN. STAT. §14-100 (1943).

[7] Mann v. People, 15 Hun. 155, *aff'd*, 75 N. Y. 484, 31 Am. Rep. 483 (1878); State v. Lamb, 198 N. C. 423, 152 S. E. 154 (1930).

by a false writing, which may or may not be forged,[8] by acts or conduct,[9] by spoken words,[10] or by failing to speak when there is a duty to do so.[11] The distinction between these two crimes is that the essence of forgery is the *making* of a false writing with the intent that it shall be received as the act of another than the party signing it;[12] whereas, the essence of obtaining money by false pretense is the *acquisition* of the money[13] by reason of false representations made with the intent to cheat and defraud.

This distinction, however, becomes a subtle one when the ultimate fraudulent act is predicated on a written instrument, and some cases hold that when both offenses are of the same grade of crime,[14] the guilty person may be proceeded against for either of them at the election of the solicitor,[15] and a conviction or acquittal of one is a bar to a prosecution of the other.[16] But if a distinction is not maintained, in addition to the legislature being subjected to the imputation of having twice provided for the same crime,[17] an anomaly would result in a situation which expressly included one and not the other.[18] A construction can be given to each which will be in harmony with the statute provisions, and which will preserve the well-known and understood difference between them[19] if each situation is completely analyzed.

Though early cases pronounced this tangible distinction, and many cases have since recognized it, such distinction has not always been followed. So it was easy enough for the North Carolina Supreme Court to find ample authority for a holding that Drawee Bank sustained losses through forgery in a "first impression" case[20] involving the supposititious facts stated above. Drawee Bank had sued Insurance Co. on a

[8] State v. Hobl, 108 Kan. 261, 194 Pac. 921 (1921).
[9] Stecher v. State, 168 Wis. 183, 169 N. W. 287 (1918).
[10] *Ibid.*
[11] People v. Etzler, 292 Mich. 489, 290 N. W. 879 (1940), 25 MARQ. L. REV. 48 (1940).
[12] Goucher v. State, 113 Neb. 352, 204 N. W. 967 (1925).
[13] State v. Stewart, 9 N.D. 409, 83 N. W. 869 (1900).
[14] Persons committing an offense under N. C. GEN. STAT. §14-100 (1943) or N. C. GEN. STAT. §14-119 (1943) ". . . shall be guilty of a felony, and shall be imprisoned in the state's prison not less than four months nor more than ten years, or fined, in the discretion of the court. . . ."
[15] Harris v. State, 27 Okla. 331, 227 Pac. 845 (Cr. Ct. 1924). Loughridge v. State, 63 Okla. 33, 72 P. 2d 513 (Cr. Ct. 1937) (". . . the fact that the defendant might have been charged with forgery is no reason for his not being charged under the false pretense statute."); 2 BISHOP'S CRIMINAL LAW §612 (9th Ed. 1923).
[16] State v. Cross & White, 101 N. C. 770, 7 S. E. 715 (1888), *aff'd*, 132 U. S. 131 (1889).
[17] Mann v. People, 15 Hun. 155, *aff'd*, 75 N. Y. 484, 31 Am. Rep. 483 (1878).
[18] See Peoples Bank & Trust Co. v. Fidelity & Casualty Co. 231 N. C. 510, 57 S. E. 2d 809 (1950) where an indemnity bond was involved covering losses effected by false pretense, but expressly not covering losses effected directly or indirectly by forgery.
[19] Mann v. People, 15 Hun. 155, *aff'd*, 75 N. Y. 484, 31 Am. Rep. 483 (1878).
[20] Peoples Bank & Trust Co. v. Fidelity & Casualty Co., 231 N. C. 510, 57 S. E. 2d 809 (1950).

policy issued by the latter to recover for losses resulting from paying out the funds of Dick Drawer of I Street on checks signed by Dick Drawer of S Street, who had no account in the Bank. The indemnity bond expressly rejected coverage for losses caused directly or indirectly by forgery, but did provide insurance against losses through false pretense. By disallowing recovery, it seems there were many blocks that went to build S Street Dick Drawer's playhouse which the Court considered more as trimmings than foundation, and as a consequence disregarded many authorities, which would have warranted a contrary result.

The cornerstone of this construction was laid when Dick Drawer of S Street went with Paul Payee, who possessed a check previously drawn by said Drawer, to Drawee Bank to have it cashed. Dick Drawer knew he had no funds on deposit, and there is no evidence at this time that he had ever heard of another Dick Drawer having an account there. He had signed his own name, which happened also to be the name of another, with the intent to cheat and defraud the Bank by falsely representing that he had funds to pay the check—but certainly at that point there was no forgery.[21] He stood by silently when Paul Payee was inquiring of the teller as to whether or not the check of Dick Drawer, the very person beside him, was good. And when the teller cashed the check, after verification by the bookeeping office, Dick Drawer's continued silence clearly constituted a false pretense.[22] He added another block by immediately asking about "my balence," to which query the teller informed him of the exact amount in "his" deposit. After this one visit, and as a result of the presentation of the check, his acts and conduct, his spoken words, and his failure to speak, the Bank believed that Dick Drawer of S Street was its depositor. During the next four months, this Dick Drawer came personally to the Bank many times, inquired as to "my balance," had the teller or a companion write out checks for him, signed them in the presence of the teller (never attempting to imitate the personal writing of Dick Drawer of I Street), and the Bank cashed his checks. He never pretended to be anyone other than the person living at S Street, and known as Dick Drawer; in fact, he even had the address of the account changed from I Street to S Street so as to get the bank statements himself. Finally the house toppled when Dick Drawer of I Street wanted to know why he had not been receiving his bank statements,[23] and upon investigation it was discovered that his

[21] State v. Adcox, 171 Ark. 510, 286 S. W. 880 (1926); Goucher v. State, 113 Neb. 352, 204 N. W. 967 (1925).

[22] 22 AM. JUR., FALSE PRETENSE §455 (1939).

[23] A remote question presents itself from this situation as to whether the real depositor might have been considered negligent in not communicating to the Bank his failure to receive bank statements for over three months. No case turning on that point has been found, though there is some authority that the depositor is not

account had been depleted by the well-laid plan of one with his same name. All these events, when taken together, constitute a representation that Dick Drawer of S Street owned the house he had built, and when the Bank in reliance thereon paid him money on his checks, he had committed the offense of obtaining money by false pretense,[24] and not the offense of forgery.[25]

In the instant case, the Court said it was not concerned "with the niceties which might be observed by the solicitor in choosing the subject of prosecution—whether false pretense or forgery."[26] It seems that niceties are of extreme importance since the insurance policy, under which the Bank was claiming, covered losses resulting from false pretense and did not cover losses sustained by forgery. The contract involved was a standard Bankers Blanket Bond, and the pertinent coverage sections are as follows: "(B) Any loss . . . through . . . false pretenses. (D) Any loss through accepting, cashing or paying forged or altered checks. . . . Sect. 1. This bond does not cover: (a) any loss effected directly or indirectly by means of forgery, except when covered by Insuring Clause . . . (D). . . ." A rider was attached when amended the bond: "(a) By deleting Insuring Clause (D) . . . . (c) By deleting from Sect. 1 the following: Under subsect. (a), '(D)' . . . ."[27] The effect of this rider was to withdraw the insurance on any loss effected directly or indirectly by forgery. The fact that the policy coverage included loss through false pretense and excluded loss through forgery is an indication that the parties to the policy intended a distinction between the offenses. And since the words were not defined in the policy, is it not presumable that the parties intended they should have

bound to call for his statement or initiate an inquiry as to whether or not there are irregularities in his account. McCarty v. First Nat. Bank, 204 Ala. 424, 85 So. 754 (1920).

[24] Williams v. State, 33 Ala. App. 119, 31 So. 2d 590, *aff'd*, 249 Ala. 432, 31 So. 2d 592 (1947) (two justices dissenting); 9 ALA. LAW. 199 (1948); Hoge v. First Nat. Bank, 15 Ill. App. 501 (1886); Murphy v. Hollowell, 204 Iowa 64, 214 N. W. 734 (1927); State v. Marshall, 77 Vt. 262, 59 Atl. 916 (1905); Martins v. State, 17 Wyo. 319, 98 Pac. 709 (1908).

[25] The Court cited Nat. Bank v. Marshburn & Cobb, 229 N. C. 104, 47 S. E. 2d 793 (1948), in its opinion in the case under discussion, and said: "We think with reason, . . . [this case] . . . commits the Court to this view," *i.e.*, that the loss was sustained by forgery. That case was decided on the principle that if one of two innocent parties must suffer a loss occasioned by some third person, the negligent one must sustain it. The court, by analogy, said the same principle would apply if the check involved had been forged, but it excluded forgery as a ground of the decision.

[26] It is of interest to know that Dick Drawer of S St. was indicted and convicted of obtaining money by means of false representations and false pretenses at the January Term 1947, in the Superior Court of Edgecombe County, North Carolina, and sentenced to prison for a term of three to five years. On April 24, 1947, he was ordered released on findings of the State Hospital that he had the mental age of four years. This all occurred prior to the institution of the action under discussion.

[27] Transcript of Record, pp. 16-18, Peoples Bank & Trust Co. v. Fidelity & Casualty Co. 231 N. C. 510, 57 S. E. 2d 809 (1950).

their popular meanings?[28] Furthermore, the settled law in this and other jurisdictions is that an indemnity bond is construed strictly against the party issuing it and in favor of the party purchasing it.[29] Therefore, by giving proportionate importance to all the facts, by recognizing the clear distinction between false pretense and forgery, by looking more closely to the intent of the contracting parties, and by applying the rule of construction in regard to contracts of this nature, the Court might well have allowed a recovery by the Bank on its indemnity bond because of a loss effected by false pretense. It seems that the Court fell a little short of the mark when it found a "falsely written" instrument, immediately labelled the loss as the result of forgery, and concluded that it was outside the coverage of the policy. It is conjectured that the Court had a feeling that the Bank was grossly negligent[30] in becoming ensnared in the framework of S Street Dick Drawer's playhouse, and thus it should not be allowed to recover.

The Court's decision denying recovery to Drawee Bank is inevitable conceding that its finding of forgery is correct. But this finding is questioned; for while it is true that one may be guilty of forgery if he signs an instrument and passes it as the instrument of another whose name is identical, here the essence of forgery is not present because the case is devoid of evidence that the checks were represented or purported as being made by any other than Dick Drawer of S Street. However, this Dick Drawer by false pretenses obtained money from the insured Bank, and it should be allowed to recover on its indemnity bond.

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Racial Restrictive Covenants—Damage Recovery for Breach—Shelley v. Kraemer Held Inapplicable

Since the United States Supreme Court ruled in *Shelley v. Kraemer*[1] that state courts could not enforce racial restrictive covenants by injunction, there has been widespread speculation as to other methods whereby

[28] In giving a construction to the terms in the policy, the court should seek the usual meaning as it is employed in its common usage. Laird v. Employers Liability Assurance Corp., 2 Del. 216, 18 A. 2d 86 (Ct. Oyer & Ter. 1941); Royal Ins. Co. v. Jack, 113 Ohio St. 153, 148 N. E. 923 (1925). In the latter case, the court said: "We are constrained to give that construction to the word 'theft' that is understood by persons in the ordinary walks of life, and not the definition given it by the Kansas Court—one unknown to the laity." VANCE ON INSURANCE §279 (2d Ed. 1930); 13 APPLEMAN INSURANCE LAW & PRACTICE §7384 n. 56 & n. 62 (1943).

[29] 13 APPLEMAN, *op. cit. supra* note 28, §7401 n. 1 (1943); 44 C. J. S. INSURANCE, §297(c)(1) *et seq.*, and citations (1943).

[30] It is elementary that liability attaches if the drawee bank disburses the depositor's money other than on the depositor's order, however carefully the bank acted. 7 AM. JUR., BANKS §506 n. 10 (1937).

[1] 334 U. S. 1 (1948).