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BILLS AND NOTES - FALSE IMPERSONATION - EFFECT OF ABSENCE OF PRIOR NEGOTIATIONS WITH IMPOSTOR

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RECENT DECISIONS

BILLS AND NOTES — FALSE IMPERSONATION — EFFECT OF ABSENCE OF PRIOR NEGOTIATIONS WITH IMPOSTOR — The plaintiff obtained a draft drawn on defendant bank with the plaintiff as payee, and indorsed by her in blank. The draft was for payment of a condemnation award to be sold at a discount through a broker. The plaintiff's husband, acting as her agent, went to the broker's office with his attorney. A man came in and was introduced, by one acting as his attorney, as Harry Wolter, the owner of the award. Thereupon plaintiff's husband handed the draft to his attorney, who wrote over the blank indorsements "pay to the order of Harry Wolter." There were no further negotiations. The one representing himself to be Harry Wolter was an impostor. He indorsed the draft in the name of Harry Wolter to one Jacoby, who paid value for it, presented it to the defendant bank and was paid. The defendant charged the plaintiff's account and the plaintiff now sues to recover against the bank. Jacoby was joined as defendant, being the one who would ultimately have to pay if the plaintiff was successful. *Held*, the defendant drawee bank had no right to charge the plaintiff's account for the amount of the draft. The signature was treated as a forgery since the real payee [1] intended was the one named and not the impostor, there being no prior negotiations with the impostor. *Cohen v. Lincoln Savings Bank of Brooklyn*, 275 N. Y. 399, 10 N. E. (2d) 457 (1937).

In false impersonation cases, the maker or drawer cannot be charged where the instrument is paid in reliance on a forged signature.[2] But whether or not there is a forgery depends upon whether the indorsement is made by the one the drawer intended to sign.[3] The drawer is said to have a double intent; first, to make the instrument payable to the person before him, and secondly, to make it payable to the one whom he believes the stranger to be.[4] The courts have almost unanimously declared the former intent paramount and have held the drawer liable for the check, thus reaching a result opposite to that of the prin-

[1] Where, as in the instant case, an individual purchases a draft from a bank he substitutes the bank's check in place of his own and is treated as the drawer. The special indorsee is in the role of payee. See Commercial Investment Trust Co. v. Lundgren-Wittensten Co., 173 Minn. 83, 216 N. W. 531 (1927).

[2] The Uniform Negotiable Instruments Law, § 23, states: "Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." This is but a restatement of the law before the N. I. L. See 60 UNIV. PA. L. REV. 443 (1912).

[3] Halsey v. Bank of New York & Trust Co., 270 N. Y. 134, 200 N. E. 671 (1936); 34 HARV. L. REV. 76 at 77 (1920); 11 CIN. L. REV. 89 (1937); BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW, 2d ed., 248 (1911).

[4] McKeehan, "Negotiable Instruments Law," 41 AM. L. REG. (N. S.) 499 at 503 (1902); 21 COL. L. REV. 576 at 577 (1921); 34 HARV. L. REV. 76 (1920); 22 MICH. L. REV. 61 (1923); BRANNAN, "THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED, 5th ed., 310 (1932).

cipal case.[5] Although there is some mention of estoppel,[6] the real basis of the decisions is a doctrine of actual intent.[7] The visible presence being a more certain means of identification than a verbal or written designation,[8] the drawer actually intends that the one before him is the one to whom the drawee is to pay and the drawee is merely carrying out his instructions. But, since the payee intended is really a composite of the visible person and the named payee, and since the intent that the instrument be payable to the individual present is dependent on the basic assumption that that person is the true payee, it has been suggested [9] that any rule of ascertaining which is the true intent must be arbitrary. A policy argument in favor of the majority rule is based on the business necessity of keeping commercial paper negotiable by decreasing the number of absolute defenses that the drawer may have.[10] There are a few decisions expressly contrary,[11] and the opposite result has been reached in many cases in

[5] Montgomery Garage Co. v. Manufacturers Liability Ins. Co., 94 N. J. L. 152, 109 A. 296, 22 A. L. R. 1224 at 1228 (1920); First Nat. Bank of Fort Worth v. American Exchange Nat. Bank, 170 N. Y. 88, 62 N. E. 1089 (1906); Land Title & Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230, 46 A. 420, 50 L. R. A. 75 (1900); Boatsman v. Stockmen's Nat. Bank, 56 Colo. 495, 138 P. 764 (1914); Holub-Dusha Co. v. Germania Bank of City of N. Y., 164 App. Div. 279, 149 N. Y. S. 755 (1914); Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619 (1886); McHenry v. Nat. Bank, 85 Ohio St. 203, 97 N. E. 395 (1911); Heavey v. Commercial Nat. Bank, 27 Utah 222, 75 P. 727 (1904); Missouri Pac. Ry. v. Cohn, 164 Ark. 335, 261 S. W. 895 (1914).

[6] The estoppel is said to be based on the rule that where one of two innocent persons must suffer a loss, that loss should fall on the one who was at fault in the first instance and made the loss possible. United States v. Nat. Exchange Bank, (C. C. Wis. 1891) 45 F. 163 at 167; McHenry v. Old Citizens Nat. Bank of Zanesville, 85 Ohio St. 203, 97 N. E. 395 (1911); 15 N. C. L. REV. 186 at 189 (1937), discussed and criticized the rule.

[7] Discussion of the doctrine may be found in 34 HARV. L. REV. 76 (1920); Smith, "The Identity of the Payee," 4 KAN. B. A. J. 285 at 290 (1936); 22 MICH. L. REV. 61 (1923); McKeehan, "Negotiable Instruments Law," 41 AM. L. REG. (N. S.) 499 (1920).

[8] Robertson v. Coleman, 141 Mass. 231, 4 N. E. 619 (1886). The impostor may be said to assume the name on the check as his for the purposes of the transaction. 22 MICH. L. REV. 61 (1923).

[9] 15 N. C. L. REV. 186 at 190 (1937).

[10] This view was expressed in the dissenting opinion of the principal case, 275 N. Y. 399, 10 N. E. (2d) 457 at 465 (1937). See also, Smith, "The Identity of the Payee," 4 KAN. B. A. J. 285 at 291 (1936). The policy argument on the other side, as pointed out by the majority opinion in the instant case [10 N. E. (2d) 457 at 463], is that, by declaring the named payee as the real payee, takers of the instrument can disregard everything except what actually appears on the face of the instrument.

[11] Tolman v. American Nat. Bank, 22 R. I. 462, 48 A. 480 (1901), criticized in McKeehan, "The Negotiable Instruments Law," 41 AM. L. REG. (N. S.) 499 at 502 ff. (1920); Keel v. Wynne, 210 N. C. 426, 187 S. E. 571 (1936), noted in 15 N. C. L. REV. 186 (1937); Simpson v. Denver & R. G. Ry., 43 Utah 105, 139 P. 883 (1913); Rolling v. El Paso & S. W. Ry., (Tex. Civ. App. 1910) 127 S. W. 302; Miners & Merchants' Bank v. St. Louis Smelting & Refining Co., (Mo. App. 1915) 178 S. W. 211.

which the situation tends to negative an intent that the impostor was intended as the real payee and which may be said to be exceptions to the rule which charges the drawer. Hence, where the impostor claims to be the agent of the named payee,[12] or where the named payee is already known to the drawer or maker,[13] or is more specifically designated as by accompanying the name of the payee with some office held by the one bearing that name,[14] or where the real name of the impostor is identical to that of the named payee although it is obvious that he is not the one intended,[15] or where the negotiations with the impostor have been carried on by correspondence instead of face to face,[16] courts have exonerated the drawer or maker from liability on the instrument. The court in the instant case devised a further exception to the general rule, namely, that when there have been no "previous dealings" between the drawer and the impostor, the drawer could not be said to have intended the impostor to be payee. The argument is that when there have been no such previous dealings the drawer could not be said to have fixed the personality of the impostor in his mind and, hence, would not have intended the impostor as the one to whom the check was to be paid. It would seem to be true that unless there is some intimacy between the drawer and the impostor, the only intent is that the named payee is the real payee, and the question of double intent does not arise. How much intimacy is required before the case must fall within the general rule is hard to tell. If the court meant by "previous dealings" a series of negotiations prior to the particular dealing at which the check was handed over, such a rule would be flatly contradictory to that generally held. If it meant that at the particular time the check was handed over, there must be some dealings before the impostor receives it, the question is, how much dealing? In *Simpson v.*

[12] 52 A. L. R. 1326 (1928); McCornack v. Cent. State Bank, 203 Iowa 833, 211 N. W. 542 (1926); 11 CIN. L. REV. 89 (1937).

[13] Rossi v. National Bank, 71 Mo. App. 150 (1897); Cundy v. Lindsay, 3 App. Cas. 459 (1878). See also Gallo v. Brooklyn Sav. Bank, 199 N. Y. 222, 92 N. E. 638 (1910), where drawer of check had doubts whether person before him was the right one.

[14] Mercantile Nat. Bank v. Silverman, 148 App. Div. 1, 132 N. Y. S. 1017 (1911), affd. 210 N. Y. 567, 104 N. E. 1134 (1914). But see, Lanasa v. Griswold, 151 Md. 26, 133 A. 840 (1926), noted 25 MICH. L. REV. 188 (1926).

[15] Mead v. Young, 4 Term Rep. 28 (1920); Beatie v. Nat. Bank, 274 Ill. 571, 51 N. E. 602 (1898); Thomas v. First Nat. Bank, 101 Miss. 500, 58 So. 478 (1912). But *contra*, Slattery & Co. v. Nat. City Bank, 114 Misc. 48, 186 N. Y. S. 679 (1920), noted in 21 COL. L. REV. 576 (1921).

[16] Palm v. Watt, 7 Hun (N. Y.) 317 (1876); Mercantile Nat. Bank v. Silverman, 148 App. Div. 1, 132 N. Y. S. 1017 (1911). The exception is approved in 32 MICH. L. REV. 402 at 403 (1934). No distinction was made when the negotiations were by correspondence in Boatsman v. Stockmen's Nat. Bank, 56 Colo. 495, 138 P. 764 (1914); Hoffman v. Am. Exchange Nat. Bank, 2 Neb. (Unoff.) 217, 96 N. W. 112 (1901). The exception is criticized in 34 HARV. L. REV. 76 (1920); 39 HARV. L. REV. 651 (1926); 25 MICH. L. REV. 188 (1926). *Quaere*, in a jurisdiction where the distinction is made, what would be the result where the impostor succeeded in defrauding over a telephone? 11 CIN. L. REV. 89 (1937), suggests that this situation is more analogous to correspondence than to "face to face" meeting.

Denver & Rio Grande Ry.,[17] a paymaster of a railroad, paying two thousand men in one day, handed out a check, intended for an employee, to an impostor who filed by in line. The court held there was no intent to pay the impostor who was physically present. This seems to be a clear case of lack of intimacy.[18] In such a case the physical being of the impostor would not be noted. Where, however, as in the instant case, the impostor is formally introduced to the drawer of the check, his personality is most likely impressed on the mind of the drawer and thus the concept of double intent does arise. If the drawer in such a case were asked to describe the one whom he intended as payee, he would very probably describe the physiognomy of the impostor. It is submitted that the court reached a result inconsistent with the accepted doctrine of double intent in laying down a requirement of previous dealings and went too far in holding that there had not been sufficient dealings in this case for the drawer to have an intent to make the impostor payee.

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[17] Simpson v. Denver & R. G. Ry., 43 Utah 105, 134 N. 883 (1913). For like cases, see Rolling v. El Paso & S. W. Ry., (Tex. Civ. App. 1910) 127 S. W. 302; Miners & Merchants' Bank v. St. Louis Smelting & Refining Co., (Mo. App. 1915) 178 S. W. 211.

[18] However, the court might have placed its decision on another ground, namely, that the paymaster, although he countersigned the checks, was but a clerk to distribute them, and that even if his intent was that the impostor be payee, that intent was of no importance since the paymaster was not the drawer.