Michigan Law Review

Volume 56 | Issue 7

1958

Bills and Notes - Indorsements - Liability of Drawee Bank on Forged Indorsement

John P. Williams S.Ed.
University of Michigan Law School

BILLS AND NOTES—INDORSEMENTS—LIABILITY OF DRAWEE BANK ON FORGED INDORSEMENT—*H* applied to the plaintiff credit corporation for a loan to finance a new auto dealership. In exchange for a note and contract purportedly signed by *H* and his wife *W*, plaintiff issued a check payable to *H* and *W*. The check, after being indorsed, was paid by defendant, the drawee bank. The proceeds of the loan were used as planned, but the business subsequently failed at which time it was discovered that *H* had forged *W*'s signature on the note, the contract and the check. Plaintiff sued to compel restoration of the amount of the check to his account. *Held,* for the defendant. The proceeds of the check went to the very person intended by the drawer. Plaintiff's loss was a result of the forged note and contract, not the unauthorized indorsement. *Commercial Credit Corp. v. Empire Trust Co.,* (W.D. Mo. 1957) 156 F. Supp. 599.

The court recognized the universal rule that a drawee bank cannot charge a depositor's account for sums paid out on checks bearing forged indorsements, such payments being a violation of the bank's duty to pay only on the depositor's genuine order.[1] Since the Negotiable Instruments Law specifically requires that if there be more than one payee all must indorse,[2] forgery by one joint payee of the other's indorsement would ordinarily fall within the rule. Certain exceptions to the general proposition have developed, however, and the NIL recognizes that in some situations a party may be "precluded," or estopped from relying on the forgery.[3] One of these exceptions, apparently incorporated into the term "precluded," is the doctrine that the depositor has no right to restoration of funds which actually reach the person intended by the drawer to receive them.[4] This "person intended" test has been used primarily to prevent recovery in the "impostor" area where technically there is no forgery.[5] But it also has been employed to raise an estoppel in actual forgery situations where

1 BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 7th ed., §23, p. 442 (1948); BRITTON, BILLS AND NOTES §142 (1943). See, e.g., Midland Savings & Loan Co. v. Tradesmen's Nat. Bank, (10th Cir. 1932) 57 F. (2d) 686, cert. den. 287 U.S. 615 (1932); Los Angeles Inv. Co. v. Home Savings Bank, 180 Cal. 601, 182 P. 293 (1919).

2 NIL, §41.

3 NIL, §23. To the effect that the term "precluded" has generally been interpreted as synonymous with "estopped," see BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 7th ed., §23, p. 455 (1948); 39 A.L.R. (2d) 625 at 646 (1955).

4 BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW, 7th ed., §23, p. 445 (1948); 39 A.L.R. (2d) 625 at 649 (1955).

5 The situation here should not be confused with the superficially similar "impostor" cases in which the drawer gives a check to the payee under a mistake as to the payee's identity. When the payee indorses the instrument, most, but not all, courts will hold that the indorsement is not a forgery. Thus, the resulting loss is thrown on the drawer on the ground that the person to whom the drawer gave the check was the person whom he intended to benefit by the instrument, though there may have been some error as to the payee's identity. See 29 MICH. L. REV. 219 (1930) for a discussion of why the "impostor" doctrine will not be extended to cases where there is no mistake as to the true name of the forger.

the forger has turned over part or all of the proceeds to the single payee,[6] or where the funds are returned to the drawer without prejudicially delaying detection of the forger.[7] In such cases, the drawer clearly has suffered no loss. The principal decision, relying on rather sparse authority,[8] extends the scope of the "person intended" test to hold that one payee, who forges his co-payee's indorsement, may be the person intended to receive the proceeds. While the facts before the court did not present as clear a case of no resulting loss as do the other situations where the "person intended" doctrine has been employed, they are significantly different from those in the usual case allowing restitution from the drawee. In the more typical instance of forgery by one payee of his co-payee's indorsement, both have a real interest in the proceeds. Thus, if one payee wrongfully receives the entire sum, the drawer's obligation to the other is not ended; and the depositor will have to pay twice to discharge a single indebtedness if the bank is not forced to make restitution for its mistake. In the principal case, however, the non-signing co-payee was intended only as an accommodation maker of the note and contract and had no real interest in the proceeds which, as expected, went into the business controlled solely by the wrongdoing husband. Whether or not the contract and note were proper, there could be no disappointed payee with an outstanding claim against the drawer. Having held that the funds reached the person and purpose intended, the court went on to state that, therefore, any loss to the drawer was caused by the forged note and contract and not the improper indorsement. Application of a proximate cause analysis was probably unnecessary to the decision, and the use of causation language beyond the negligence area may lead to confusion in factual settings otherwise clearly distinguishable. One such situation, where recovery is generally allowed, concerns the dishonest agent of the drawer who

6 Coffin v. Fidelity-Philadelphia Trust Co., 374 Pa. 378, 97 A. (2d) 857 (1953); Sweeney v. Nat. City Bank of Troy, 263 App. Div. 418, 33 N.Y.S. (2d) 885 (1942); S. Yanowe & Co. v. American Exch. Irving Trust Co., 226 App. Div. 530, 234 N.Y.S. 603 (1929); Beeson-Moore Stave Co. v. Clark County Bank, 160 Ark. 385, 254 S.W. 667 (1923). See 39 A.L.R. (2d) 625 (1955). On the authority of Shipman v. Bank of State, 126 N.Y. 318, 27 N.E. 371 (1891), the funds paid over to the payee may have to be the identical funds received by the forger from the forged check in order to prevent full recovery by the drawer.

7 Nat. Surety Corp. v. City Bank & Trust Co., 248 Wis. 32, 20 N.W. (2d) 559 (1945); Andrews v. Northwestern Nat. Bank, 107 Minn. 196, 117 N.W. 621 (1908), affd. 122 N.W. 499 (1909). See 25 L.R.A. (n.s.) 996 (1910). Recovery was allowed where the deposit of the proceeds of the forged check in the drawer's account enabled the forger to cover up later forgeries, Stumpp v. Farmers Loan & Trust Co., 109 Misc. 24, 178 N.Y.S. 811 (1919).

8 The only case cited by the court was Provident Savings Bank & Trust Co. v. Fifth-Third Union Trust Co., 43 Ohio App. 533, 183 N.E. 885 (1932), which in turn cited no authority for its decision. The Provident case is criticized in 32 MICH. L. REV. 261 (1933). Though also criticized, in 29 MICH. L. REV. 219 (1930), both Merchant's Nat. Bank v. Home Bldg. & Sav. Assn., 180 Ark. 464, 22 S.W. (2d) 15 (1929), and Federal Land Bank v. Omaha Nat. Bank, 118 Neb. 489, 225 N.W. 471 (1929), would seem to support the principal decision and may go further since the proceeds were not used for the ultimate purpose intended.

forges the payee's indorsement to a check issued in return for a forged note tendered by the agent.[9] By applying a causation analysis, a court could incorrectly decide that the depositor's loss resulted from the forgery of the note and thus refuse recovery even though no objective contemplated by the drawer when the check was drawn has been fulfilled. Some courts have, however, permitted restitution to the depositor on facts similar to the principal case by looking only to the drawer's act of naming joint payees and finding that that act in itself was sufficient to show both payees were "intended" or, at least, that neither was intended to control the proceeds without the consent of the other.[10] Undoubtedly the court has taken advantage of unusual facts to extend the "person intended" test into a twilight zone where unanimity of opinion is unlikely, but it cannot be said that it was without reason in so doing.

John P. Williams, S.Ed.

[9] Provident Sav. Bank & Trust Co. v. Western & So. Life Ins. Co., 41 Ohio App. 261, 179 N.E. 815 (1931); State v. Globe Indemnity Co., 222 Mo. App. 918, 9 S.W. (2d) 668 (1928); National Union Fire Ins. Co. v. Mellon Nat. Bank, 276 Pa. 212, 119 A. 910 (1923); National Bank of Commerce v. Fish, 67 Okla. 102, 169 P. 1105 (1916).

[10] City Bank v. Hamilton Nat. Bank of Washington, (D.C. Cir. 1939) 108 F. (2d) 588; Midland Savings & Loan Co. v. Tradesmen's Nat. Bank, note 1 supra. Cf. Citizens & Southern Nat. Bank v. New York Cas. Co., 84 Ga. App. 47, 65 S.E. (2d) 461 (1951); Farmers Union Agric. Credit Corp. v. Northwest Security Nat. Bank, 66 S.D. 276, 281 N.W. 505 (1938).