Michigan Law Review

Volume 54 | Issue 7

1956

Bills and Notes - Holders in Due Course - Payment to an Impostor

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BILLS AND NOTES—HOLDERS IN DUE COURSE—PAYMENT TO AN IMPOSTOR—Drawer bank drew a check on the plaintiff bank payable to a depositor on the faith of a withdrawal order purportedly signed by the depositor but actually forged by an impostor. The impostor forged the indorsement and cashed the check at defendant bank which received payment from plaintiff-drawee bank. Two years later, upon the death of the impostor, the fraud was discovered. Plaintiff-drawee bank voluntarily reinstated the drawer bank's account and, standing in the drawer's shoes, it won a judgment to have its account with the defendant reinstated. On appeal, *held,* reversed. The policy in favor of the free circulation of commercial paper is sufficient basis in the ordinary case for placing the loss on the drawer as the first victim of the impostor's swindle. The majority rule that the impostor's indorsement in the payee's name passes title to a holder in due course is adopted without subscribing to all of the reasons advanced in its favor. *Dartmouth National Bank of Hanover v. Keene National Bank,* 99 N.H. 458, 115 A. (2d) 316 (1955).

This case is probably the first to use commercial policy as a justification for holding the drawer of a check liable when he has delivered it to an impostor. It has been recognized as the underlying principle,[1] and has been alluded to before,[2] but apparently has never been the basis of a decision.[3] Two interpretations of the result reached on the principal case are possible. One is that the court has developed a new twist to the intent theory and is saying that in every case the drawer intends to pay the impostor and that, therefore, indorsement by the impostor passes title to a holder in due course. This interpretation is suggested by the use of the broad theory of commercial policy together with the adoption of the intent theory without its double-intent ramifications. If this is the case,

[1] See the dissenting opinion in Cohen v. Lincoln Savings Bank, 275 N.Y. 399, 10 N.E. (2d) 457 (1937).

[2] Citizen's Union Nat. Bank v. Terrell, 244 Ky. 16, 50 S.W. (2d) 60 (1932); Forbes and King v. Espy, Heidelbach and Co., 21 Ohio St. 474 (1871).

[3] In Burrows v. Western Union Tel. Co., 86 Minn. 499, 90 N.W. 1111 (1902), the court came close to using commercial policy as a basis for its decision.

the court has gone farther than any other in protecting holders of commercial paper and has placed itself at the other extreme from the rule on impostors as it has evolved in Rhode Island.[4] But this interpretation is largely nullified by the court's later dictum which states that commercial policy does not justify holding the drawer liable if he has not been negligent and the drawee or indorsee has. If this qualification is meant to restrict the application of its new modification of the intent theory, the court has not gone as far as it first seemed, for then its reasoning is similar to that of cases which use the double-intent rationale, with due care by the drawer used to show his intent to pay the named payee only.[5] On the other hand, the more accurate interpretation seems to be that this qualification shows the court's reliance on an estoppel theory based on negligence. Under the intent doctrine, once the drawer's intent is determined, the exercise of care by the drawee or indorsee is immaterial.[6] The court's qualification, however, looks to the negligence of the drawee as the crucial factor, and as long as he is not negligent, the drawer will be estopped to deny the forgery. Furthermore, the court speaks of precluding the drawer from setting up the forgery as a defense. This is language of estoppel and is not used by the exponents of the intent theory.[7] Thus, if estoppel is the theory that is used, the court's reasoning resembles that of the cases which hold the drawer liable on the theory that, of two innocent persons, the one who first made possible the loss must suffer.[8]

As to the standard of care to be exercised by the parties, the court would apparently require of the drawee or indorsee only that care used by the particular community in its normal business practices.[9] However, the question of what standard of care to apply to the drawer to determine if he shall be estopped is not answered. Such a standard for the drawer would be significant, for though the negligence of the drawee or indorsee

[4] Tolman v. American Nat. Bank, 22 R.I. 462, 48 A. 480 (1901), is generally interpreted to mean that the drawer intends in all cases to pay the named payee only, and indorsement by the impostor passes no title and the drawer can recover. See Abel, "The Impostor Payee: or, Rhode Island Was Right," 1940 WIS. L. REV. 161, 362.

[5] In Mercantile Nat. Bank of New York v. Silverman, 148 App. Div. 1, 132 N.Y.S. 1017 (1911), the drawer checked on the identity and existence of payees and sent checks to them designating them by their military rank. In Cohen v. Lincoln Savings Bank, note 1 supra, the court said that the drawer had no reason to require further identification of the payee or to suspect fraud. In Palm v. Watt, 7 Hun (14 N.Y.) 317 (1876), the impostor related intimate knowledge of the family to prove his identity as a lost relation.

[6] Land Title and Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230, 46 A. 420 (1900). See McKeehan, "The Negotiable Instruments Law (A Review of the Ames-Brewster Controversy)," 41 AM. L. REG. (n.s.) 437 (1902).

[7] Halsey v. Bank of New York and Trust Co., 270 N.Y. 134, 200 N.E. 671 (1936), used the intent theory and stated that when the intended payee signs, his signature is not invalid as a forgery.

[8] United States v. First Nat. Bank of Prague, (10th Cir. 1941) 124 F. (2d) 484; McHenry v. Old Citizen's Nat. Bank, 85 Ohio St. 203, 97 N.E. 395 (1911); Montgomery Garage Co. v. Manufacturer's Liability Ins. Co., 94 N.J.L. 152, 109 A. 296 (1920).

[9] Cf. McHenry v. Old Citizen's Nat. Bank, note 8 supra.

is the important point, if they are negligent they are liable only if the drawer has used due care. Some courts would consider the issuance to the impostor as negligence per se and estop the drawer,[10] some require the negligence to be the proximate cause of the drawee's loss,[11] and some that it set off a train of events leading to the loss.[12] Though failing to set any new pattern of liability, if estoppel is the theory of the court, the decision aids the free circulation of negotiable paper by placing in the bank's or indorsee's hands the means of its own salvation, for as long as it is not negligent it will not be liable. It is hard to see how such a rule can hinder the negotiability of paper. On the other hand, if a rebuttable presumption of intention to pay the impostor is the theory, the verdict has done little to aid commercial policy for it makes the drawee liable regardless of the care it uses, so long as the drawer can argue (by showing his own use of due care) that he intended to pay the named payee only. This rationale tends to make drawees and indorsees overly cautious in accepting commercial paper for it puts the determinative factor of liability out of their control.

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[10] Santa Maria v. Industrial City Bank and Banking Co., 326 Mass. 440, 95 N.E. (2d) 176 (1950); Missouri Pacific R. Co. v. Cohn Co., 164 Ark. 335, 261 S.W. 895 (1924).

[11] Allan Ware Pontiac, Inc. v. First Nat. Bank of Shreveport, (La. App. 1941) 2 S. (2d) 76.

[12] Security-First Nat. Bank of Los Angeles v. United States, (9th Cir. 1939) 103 F. (2d) 188.