Michigan Law Review

Volume 51 | Issue 1

1952

BILLS AND NOTES-NEGLIGENT CONDUCT BY DRAWER PREVENTING HIS CLAIM THAT DRAWEE PAID ON A FORGED INDORSEMENT

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BILLS AND NOTES—NEGLIGENT CONDUCT BY DRAWER PREVENTING HIS CLAIM THAT DRAWEE PAID ON A FORGED INDORSEMENT—*X* and *Y*, owners of a joint savings account with the plaintiff bank, delivered their bankbook to Z with a withdrawal receipt signed by both depositors in the amount of $75. Z fraudulently altered the receipt, a form used only in paying directly to a depositor, by raising the amount to $5,000, and then presented the bankbook and altered instrument to a teller employed by plaintiff, asking for $5,000. The teller, unwilling to give Z the money, was then instructed to alter the receipt so as to give it the appearance of a check. Then on behalf of plaintiff, without attempting to communicate with *X* and *Y*, the teller drew a check on the defendant payable to *Y*'s order in the amount of $5,000 and gave it to Z. Z forged *Y*'s indorsement; defendant paid the check, routed through Z's bank, in the regular course of business and charged plaintiff's account. The plaintiff, after *X* and *Y* had recovered, brought this action to recover its loss, claiming defend-

ant had paid on a forged indorsement. In the lower court plaintiff's negligence was found to preclude its recovery. On appeal, *held,* affirmed. When drawer's negligence causes drawee to pay on payee's forged indorsement, drawer cannot recover the charge to his account. Negligence and causation are questions of fact for the jury. *Connecticut Sav. Bank of New Haven v. First Nat. Bank and Trust Co.,* 138 Conn. 298, 84 A. (2d) 267 (1951).

Due to a contractual relationship, a drawee bank may charge to a drawer's account only payments made in strict accordance with the genuine orders of the drawer. Payment to someone other than the payee on his forged indorsement is not in accordance with the drawer's orders and, if the drawer's account is debited, he is entitled to restored credit. The drawer's negligence, however, may prevent this restoration.[1] Two basic fact situations are presented illustrating what conduct will estop the drawer from asserting the forgery: first, the drawer's negligence in not discovering an employee's use of forged indorsements as a means to defraud, and, second, the drawer's negligence in causing a check to be delivered to someone not entitled to it. When an employee has forged indorsements as a means to defraud, many courts have not relieved the drawee of liability even though the drawer was negligent in not discovering the scheme. The reasons usually given for this view are that the drawer owes the drawee no duty to discover such fraud[2] and that the fraud was not the proximate cause of the drawee's loss.[3] On the other hand, there is authority which prevents the drawer's recovery if his negligence was, in fact, a proximate cause of the loss.[4] The second situation, where the drawer negligently causes a check to be delivered to an unauthorized person, has also produced a conflict of authority. If the drawer negligently causes a check to be delivered to someone with the same name as the intended payee, the drawer has been barred from recovery if the payee's name is forged, on the grounds that his negligence substantially contributed to the wrongful appropriation.[5] In the principal case, the court thought that the questions of negligence, in delivering the check to an unauthorized person, and causation were for the jury. However, in a somewhat similar case, *American Surety Co. of New York v. Empire Trust Co.,*[6] the New York Court

[1] BRITTON, BILLS AND NOTES §143 (1943). See Uniform Negotiable Instruments Law §23.

[2] Fitzgibbons Boiler Co. v. National City Bank, 287 N.Y. 326, 39 N.E. (2d) 897 (1942). Cf. Hillside Dairy Co. v. Cleveland Trust Co., 142 Ohio St. 507, 53 N.E. (2d) 499 (1944).

[3] Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N.E. 740 (1909).

[4] Detroit Piston Ring Co. v. Wayne County and Home Savings Bank, 252 Mich. 163, 233 N.W. 185 (1930) (negligence in not detecting fraud held jury question); Defiance Lumber Co. v. Bank of California, 180 Wash. 533, 41 P. (2d) 135 (1935) (negligence in not scrutinizing employee's actions held bar to recovery).

[5] Weisberger Co. v. Barberton Sav. Bank, 84 Ohio St. 21, 95 N.E. 379 (1911); Slattery and Co. v. National City Bank, 114 Misc. 48, 186 N.Y.S. 679 (1920), noted in 21 COL. L. REV. 576 (1921) and 30 YALE L.J. 628 (1921). See also Citizens' Union National Bank v. Terrell, 244 Ky. 16, 50 S.W. (2d) 60 (1932). Cf. State Bank of Chicago v. Mid-City Trust Savings Bank, 295 Ill. 599, 129 N.E. 498 (1920).

[6] 262 N.Y. 181, 186 N.E. 436 (1933).

of Appeals held that the drawer owned no duty to the drawee on which negligence could be based. In this case a thief, who had stolen the depositor's bankbook, sent a letter to the drawer-bank in Lockport, New York, purporting to be from the depositor, requesting that $9,000 be mailed to him in Michigan. Without attempting to communicate with the depositor, the bank drew a check on the drawee in favor of the depositor and mailed it with the bankbook and a letter addressed to the depositor. After receiving the envelope, the thief cashed the check, identifying himself by means of the bankbook and the enclosed letter. The court reasoned that while the drawer assumed the risk that its obligation to its depositor might not be satisfied if it sent the check to an unauthorized person, it did not assume the further risk that the drawee would pay the check to someone other than the payee or to someone on a genuine indorsement. As in both of these cases, when a transaction appears irregular and several thousand dollars are involved, sound business practice requires that the bank communicate with its depositor. Many of the cases imply that a drawer, through his own negligence, is able to place the burden of detecting a fraudulent scheme on his drawee.[7] However, some of the more recent decisions[8] indicate that the drawer's duty to the drawee may be widening to require more care on his part in issuing checks when he has some indication of fraudulent practices. In view of our complex commercial world, such a trend, illustrated by the principal case, seems most desirable.

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[7] See cases collected in 99 A.L.R. 439 (1935).
[8] See note 4 supra.