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BILLS AND NOTES-IMPOSTERS IN THE LAW OF BILLS AND NOTES

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COMMENTS

BILLS AND NOTES—IMPOSTERS IN THE LAW OF BILLS AND NOTES —Two crooks, Baron and Brasch, now apparently residents of the New Jersey penitentiary, yielded to the temptation to acquire money by supposedly easy means. They selected as their victim a Miss Russell, a retired school teacher with more cash than is usual in the cases of people with her background. She seems to have had a strong leaning towards charitable contributions, and it was this trait which commended her to Baron and Brasch.

Their plan for separating her from her fortune was not particularly complex, but out of it developed a most interesting lawsuit.[1] The perpetration of the frauds started with telephone requests by Baron that Russell contribute to designated charities. Such requests fell into two classes. In the first Baron impersonated one Geller, a responsible resident of Paterson known to Russell only by reputation. Upon Russell's assent to a request, Baron would tell her that since he, as Geller, did not want his name to appear, she should make her check payable to the order of his secretary, Williams by name. In truth there was no Williams, but Brasch, calling himself Williams, would then call on Miss Russell and receive her check. Checks thus acquired were turned over to Baron who indorsed them, in the presence of Brasch, in the name of the designated payee. Brasch then indorsed them using his own name and they were cashed by, or deposited in, a bank. In normal course they were presented to the drawee bank, paid by it and charged to Russell's account.

The other class of transactions was much the same except that Baron in these instances impersonated one Grimshaw, another responsible resident of Paterson, likewise known to Russell only by reputation. In these instances Baron's supposed secretary was Wilson, equally as fictitious as was Williams. The checks in this series, enclosed in envelopes, were handed either by Russell or her housekeeper to a messenger boy[2] who in turn delivered them to Baron. They then were dealt with as were those in the first class.[3]

When Russell learned what had happened, her bank account had shrunk by $22,170. In pursuit of her understandable desire to shift the loss to the drawee bank she started the lawsuit against it to which reference was made above. The court concluded that the Williams checks had been properly paid and charged to the Russell account. As to those, Brasch was deemed to be the payee and the indorsements, actually made by Baron in Brasch's presence, were treated as made by the latter. As to the Wilson checks, however, the payee was taken to be the named party—Wilson—and they had been paid by the drawee not to Wilson and not to any indorsee of his. Those payments, therefore, were not made in accordance with the depositor's orders and were not properly chargeable to the Russell account.[4] If Russell had known of

[1] Russell v. Second Nat. Bank of Paterson, (N.J. 1947) 55 A. (2d) 211.

[2] The use of the boy was prompted, of course, by the fact that Brasch could not appear both as Williams and Wilson.

[3] One check involved in the litigation fell outside both categories. That one was inadvertently drawn by Miss Russell to the order of Grimshaw instead of Wilson. Otherwise it belonged, as the court observed, in the Wilson series.

[4] The court, of course, had no occasion to consider what might be the possibilities of the bank being able in turn to shift its loss, on the basis of money paid by mistake.

the fiction regarding Wilson, then, of course, the checks would have been payable to bearer and those payments would have been likewise proper.[5]

The all-important distinction between the two classes of checks lay in the fact that whereas the Williams checks were handed by Russell to Brasch in the belief that he was Williams, thus enabling the court to declare that Brasch was really the payee, the checks payable to Wilson were delivered by Russell to a mere messenger. As to these latter items there was no possible conflict in Russell's mind as between Wilson and Brasch, and so far as Baron was concerned he was merely a voice heard over a telephone. That Russell intended her money, represented by all the checks, to go to Geller and Grimshaw through the agency of their supposed secretaries admits of no doubt.

Few questions in the field of negotiable paper[6] are more intriguing than that involved in the principal case—when a person for a particular transaction assumes the name of another person and a check, for example, is drawn designating the payee therein by use of that name but is delivered by the drawer to the human being who has assumed that name, who really is the payee? the person named? or the person who has assumed the name?

The court in the principal case found its guide in an earlier decision by the same court, *Montgomery Garage Co. v. Manufacturers' Liability Ins. Co.*[7] often cited as a leading authority for the view opposed to that expressed by the Rhode Island court in *Tolman v. American National Bank.*[8]

In the *Tolman* case Tolman gave a check to Potter (payable to the order of Haskell) thinking Potter was Haskell and after making inquiries regarding the latter. The court declared the indorsement of Haskell's name by Potter was a forgery, hence payment by the drawee was not properly chargeable to Tolman's account. The court said: "It is a surprising doctrine that, if *A* can successfully personate *B*, he thereby escapes being guilty of forgery in signing *B*'s name on a check of *C*'s. Of course, *C* intended the money to go to him as an actual person, but only because he supposed that he was the person whom he represented himself to be."[9] Some language used by the New Jersey court in the *Montgomery Garage* case leads one to wonder whether it

[5] Though there was no Williams, Miss Russell was not aware of that fact, hence those checks were still order instruments, thus requiring an indorsement by the named payee for negotiation. Such indorsement was obviously impossible.

[6] A related question sometimes arises in sales of goods. See, for example, Phelps v. McQuade, 220 N.Y. 232, 115 N.E. 441 (1917), L.R.A. 1918 B, 973.

[7] 94 N.J.L. 152, 109 A. 296 (1920), 22 A.L.R. 1228 (1923).

[8] 22 R.I. 462, 48 A. 480 (1901), 52 L.R.A. 877 (1901).

[9] Id. at 463.

would not have decided the *Tolman* case, on its facts, the same as did the Rhode Island court. That language, italicized in the quotation in the footnote,[10] indicates that when the drawer of the check has made inquiries, as Tolman had, as to the existence and standing of the impersonated person, the instrument is then to be deemed payable to that named person, not to the human being who impersonates him. The decision in the principal case seems to negate any such point. Miss Russell, though she made no inquiries regarding Geller and Grimshaw, already knew who they were. Inquiries were therefore superfluous. Yet the Williams checks were deemed payable not to Geller or Williams but to Brasch who appeared before her in person as Williams, the secretary to Geller.

The imposter question may be met in a variety of situations; but no doubt the problem arises most frequently in disputes between customer-depositor and his bank, as in the principal case. It is familiar doctrine that banks ordinarily may properly charge to their depositors' accounts only those payments made strictly in accordance with their genuine orders. That means not only that the orders must be issued by the depositor or his authorized agents but also that the payments be made in the right amounts to the right persons. The drawer of the check is the one to designate such person. The only really practicable way to identify him is by the use of his name. Obviously other more certain means of identification—such as photographs and thumb prints—are not feasible.

Suppose, then, *A* wishes his bank to pay a stated sum to *X* known by *A* to be a reliable person, but the check which he makes out payable to *X*'s order is actually handed to *Y*, who has impersonated *X* in the negotiations leading to the delivery of the check. To whom may the drawee safely pay? To whom has the drawer, *A*, ordered that the money is to be paid? It is a question of intent. Clearly he was *thinking* of *X* and thus in a subjective sense *X* was intended to be the recipient of the money. But he handed the check to an actual person (really *Y*), and presumably if some caller had arrived on the scene at that moment *A* would have introduced the caller and *Y* by calling the latter *X*.

One enters into legal relations not with names but with human

[10] "But we think that the rule is where, as here, the drawer of a check delivers it, for a consideration which turns out to be fraudulent, to an imposter under the belief that he is the person whose name he has assumed and to whose order the check is made payable, a *bona fide* holder for a valuable consideration, paid to the imposter upon his indorsement of the payee's name, is entitled to recover from the drawer, it appearing that the person to whom the check was delivered was the very person whom the drawer intended should indorse it and receive the money, *and that the drawer made no inquiry before issuing the check concerning the identity or credit of the named payee*, who was unknown to the drawer." 94 N.J.L. 152 at 154, 109 A. 296 (1920). (Italics ours.)

beings, the names being useful only to identify the parties. If *A* had used what are generally recognized as more certain modes of identification—a photograph, or fingerprints, for example—whose picture or prints would have appeared on the check? At least we may be sure that they would not have been those of *X*, for *A* thought that *Y* was *X*.[11]

Suppose, then, *Y* goes down the street to the drawee bank and presents *A*'s check for payment. He persuades the bank, as he had satisfied *A*, that he is *X*, and the bank pays him. Was the payment made in accordance with *A*'s directions? If *A* had had sufficient cash in his pocket or desk so that payment might have been made in such medium instead of by check, to whom would the cash have gone? If one is warranted in saying that it would have gone to *Y*, then one has a pretty strong reason for saying that the bank's payment to *Y* was in accordance with *A*'s genuine order.

If, when *Y* appeared at the teller's window at the drawee bank, the bank's representative, perhaps doubtful as to making payment to *Y*, had called *A* on the telephone to ask whether he had given a check to one *X* and to describe him, the answers would have been first in the affirmative and then a description of *Y*, not *X*. In other words, to *A* the person *Y* was identified by the name *X*.[12] Only a very bold person would assert that the opposite view—that the payee truly was the party named—is patently wrong. At the same time, the Rhode Island court in the *Tolman* case surely was not warranted, in applying that opposite view, that "it would seem that upon so plain a proposition the decisions should be unanimous; but it is not so."[13] Speaking of the two

[11] In this connection one should consider Gallo v. Brooklyn Sav. Bank, 199 N.Y. 222, 92 N.E. 633 (1910), 32 L.R.A. (n.s.) 66 (1911). In that case a bank refused to pay the amount of a savings deposit to one who appeared with the passbook, the bank being unsatisfied that such person was the owner of the deposit. The bank did, however, draw its check on a correspondent bank in favor of its teller in the amount of the deposit. That check was then indorsed by the teller to Cona, the depositor (according to the name as recorded) and delivered to the one who presented the pass-book. Plaintiff took the check from the one in possession upon an identification of him as Cona. The drawee paid the check on presentation through *X* Bank. In truth the purported indorsement was a forgery, and plaintiff was compelled to refund the amount to *X* Bank which in turn had been required to refund to the drawee by which the check had been paid. Plaintiff then sued the savings bank which had issued the check. See also District Nat. Bank v. Washington L. & T. Co., 62 App. D.C. 198, 65 F. (2d) 831 (1933); Western Union Tel. Co. v. Bi-Metallic Bank, 17 Colo. App. 229 at 230, 68 P. 115 (1902); Keel v. Wynne, 210 N.C. 426, 187 S.E. 571 (1936); 11 UNIV. CIN. L. REV. 89 (1937).

[12] It is interesting at this point to speculate as to how the drawee bank would stand if *Y* had lost the check and it had been found by *X* who then, on presentment to the drawee, received the money.

[13] 22 R.I. 462 at 463, 48 A. 480 (1901).

possible intents, the one indicated by the physical being, the other by the name, the New York Court of Appeals[14] said: ". . . Nevertheless an examination of the cases in other jurisdictions can leave no doubt that, as Brannan points out, in most jurisdictions it has been held that 'the first is the controlling intent' . . .[15] though a minority sustain the view that the latter is controlling."[16]

It would seem that in order for the controlling intent to be fixed by the physical being not only must there have been some business contact with him but also the contact must have been such that it may have produced in the mind of the person whose intent is in question a mental picture of that physical being. If the contact was wholly by telephone, for example, the drawer of the check in our hypothetical case could only describe a voice. In the principal case, Miss Russell had no face to face dealings with Brasch when he was supposed to be Wilson, the supposed secretary of Grimshaw. Her conversations over the phone were with Baron, and she delivered those checks to a messenger boy. The New Jersey court accordingly concluded that her controlling intent was indicated by the name she used to identify the payee. The other checks were delivered to Brasch in person, and as to those her controlling intent was fixed by the physical being.

In the *Cohen* case, the New York court concluded that while there had been some face to face dealing between the parties, it had been too fleeting to warrant finding an intent to pay the imposter.[17] This makes one wonder whether the statement by the same court in an

[14] Cohen v. Lincoln Sav. Bank of Brooklyn, 275 N.Y. 399 at 408, 10 N.E. (2d) 457 (1937), 112 A.L.R. 1424 (1938). See notes in 38 COL. L. REV. 171 (1938); 37 MICH. L. REV. 126 (1938); 86 UNIV. PA. L. REV. 526 (1938).

[15] The court here cites Montgomery Garage Co. v. Manufacturers' Liability Ins. Co., 94 N.J.L. 152, 109 A. 296 (1920); Land Title and Trust Co. v. Northwestern Nat. Bank, 196 Pa. 230, 46 A. 420 (1900), 211 Pa. 211, 60 A. 723 (1905); reference is made also to 22 A.L.R. 1228 (1923), 50 L.R.A. 75 (1901) and 52 A.L.R. 1327 (1928).

[16] The court here cites the Tolman case, 22 R.I. 462, 48 A. 296 (1920).

[17] In Mohr v. Lawyers Trust Co., 282 N.Y. 770, 27 N.E. (2d) 48 (1940), the court found sufficient dealings between the drawer and the imposter to warrant a conclusion, despite the Cohen case, that the payee was the crook. See also Imperial Motors v. Bank, (City Ct. of Queens Co. 1946) 65 N.Y.S. (2d) 86; Fidelity and Deposit Co. v. Union Trust Co., (D.C. N.Y. 1941) 37 F. Supp. 3.

Another interesting case of impersonation, understandable on the basis of the decision in the Cohen case, is Simpson v. Denver & R.G.R. Co., 43 Utah 105, 134 P. 883 (1913), 46 L.R.A. (n.s.) 1164 (1913). In that case railroad pay checks, prepared in advance, were delivered to employees as they filed through the paymaster's car, each man as he approached the window calling out his name. Two imposters in the line thus obtained checks intended for, and payable to, real employees. It was held that the payees were the persons whose names were designated in the checks, not the imposters. It appeared that those named payees were not personally known to the paymaster.

earlier case[18] that "The fact that the vendor deals with the person (the imposter) personally rather than by letter is immaterial, except in so far as it bears upon the question of intent," means much. Of course such difference in fact bears upon the matter of intent. But is it not true that when the dealings are by correspondence the very foundation for forming an intent directed by the physical being is lacking? In such situations the imposter is merely a name, as he is merely a voice when the dealing is by telephone.

In the principal case the dealings between Miss Russell and the imposter Brasch (as Williams, the secretary) were pretty fleeting, at least as to the first check. One may wonder whether a New York court, having the *Cohen* case in mind, would have found them sufficient on which to predicate an intent to make the check payable to Brasch by the name of Williams.[19]

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[18] Phelps v. McQuade, 220 N.Y. 232 at 234, 115 N.E. 441 (1917).

[19] The essence of the imposter situation is the impersonation. It must not be confused with instances of fictitious persons, such as that involved in Strang v. Westchester County Nat. Bank, 235 N.Y. 68, 138 N.E. 739 (1923), nor with instances of assumed names as in Hartford Accident & Indemnity Co. v. Middletown Nat. Bank, 126 Conn. 179, 10 A. (2d) 604 (1939), a case in which there was not only an assumed name but a pretense of rendition of services.

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