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BANKS AND BANKING—LIABILITY OF BANK PAYING CHECK ON PAYEE'S FORGED INDORSEMENT—FICTITIOUS PAYEE—NEGLIGENCE OF DRAWER—ESTOPPEL.

It is the general rule that the bank on whom a check is drawn makes payment thereon relying solely on the reputed responsibility of the transferers, and the other parties to it, and its apparent genuineness.¹ The drawee, therefore, on whom the check is drawn, must ascertain the identity of the person named therein as payee, and this at former's peril.² On the faith of this rule is the business of this country conducted.³

In a recent New York case⁴ the following facts were presented: One *Y* stole *X*'s passbooks of *A* bank and went with them to another state, from which he mailed the books to *A* bank along with a letter asking the withdrawal of approximately \$9,000, to be sent to him at the out-of-town address, forging *X*'s signature to the letter. The *A* bank drew a check on *B* bank for the amount payable to *X* and mailed it to *Y* along with one book which still held a small deposit and a letter addressed to *X* on *A*'s stationery. *C* bank paid the checks on *X*'s forged indorsement. When *B* bank received the check, it paid the same, relying on the genuine indorsements of *C*, *D* and *E* banks, and charged the amount against *A*'s account. *X* meanwhile discovered the theft of his books and reported such to the bank. Plaintiff surety company paid *A* the sum charged by *B* and sued on an assignment of the claim of *A* against *B*. The Court held that the check was made payable to an actual payee and not to a fictitious person; that *B* was guilty of negligence in paying the check without ascertaining the authenticity of payee's indorsement. *A*'s not identifying *X*'s signature in the letter of *Y* was not such negligence as to preclude a recovery.⁵

¹ *Crawford v. West Side Bank*, 100 N. Y. 50, 2 N. E. 881 (1885).

² *Ibid.*; *Seaboard National Bank v. Bank of America*, 193 N. Y. 26, 85 N. E. 829 (1908); *Gutfreund v. East River National Bank*, 199 N. Y. 222, 92 N. E. 633 (1910); *National Surety Co. v. President and Directors of Manhattan Co.*, 252 N. Y. 247, 169 N. E. 372 (1929); *Greenwald v. State Bank*, 125 Misc. 260, 210 N. Y. Supp. 378 (1925); *Los Angeles Investment Co. v. Home Savings Bank*, 180 Cal. 601, 182 Pac. 293 (1919); *Union Tool Co. v. Farmers' and Merchants' Bank*, 192 Cal. 40, 218 Pac. 424 (1923); *Citizens' National Bank v. Reynolds*, 72 Ind. App. 611, 126 N. E. 234 (1920); *Commercial Bank v. Arden and Fraley*, 117 Ky. 520, 197 S. W. 951 (1917); *National Bank of Commerce v. Fish*, 67 Okla. 102, 169 Pac. 1105 (1917); *State Guaranty Bank v. Doerfler*, 99 Okla. 258, 226 Pac. 1054 (1924); *Joseph Milling Co. v. First Bank*, 109 Ore. 1, 216 Pac. 560 (1923).

³ *Gallo v. Savings Bank*, *supra* note 2.

⁴ *American Surety Co. v. Empire Trust Co.*, 262 N. Y. 181, 186 N. E. 436 (1933).

⁵ *Crane, J.*, dissents on the ground that the acts of *A* in not verifying *X*'s signature in the letter and the making possible of the impersonation and fraud by the returning of the bank-book, and the forwarding of the check and personal letter addressed to *X*, were such acts of negligence on the part of *A* as should estop plaintiff from bringing the action. *Morgan v. U. S. Mortgage*

Whether the paper is to be considered as having a fictitious payee depends on the intention of the drawer and not on the actual existence or non-existence of a payee of the same name as that in the instrument. This results in the fact that the intent of the party making the check payable may make a real person fictitious and a fictitious person real.⁶ By express provisions of the statute⁷ and at common law,⁸ an instrument is not payable to bearer on the ground that the payee is a fictitious or non-existing person, unless such fact was known to the person making it so payable.

The English cases are quite in accord with this rule. It has been held in the English courts that a bill payable to a real person who is not intended by the drawer to have any interest therein, is payable to bearer and the acceptor's ignorance of such fact is immaterial.⁹ But if the payee is a real person intended by the drawer to be the payee, the instrument is not payable to a fictitious person and, hence, not to bearer, and the drawer is not liable to one claiming under a forged indorsement of the payee's name, although the payee in reality had no interest in the instrument.¹⁰

If a bank discounts a check on a forged indorsement of the payee's name, such constitutes conversion¹¹ and the drawee bank cannot charge the drawer's account for such amount.¹² It is only where the drawee can claim protection upon some express representation or upon some principle of estoppel or negligence chargeable to the drawer, that the former is absolved from liability to the latter for unauthorized payment of a check or draft.¹³ The negligence of

& Trust Co., 208 N. Y. 218, 101 N. E. 871 (1913); Prudential Insurance Co. of America v. National Bank of Commerce in N. Y., 227 N. Y. 510, 125 N. E. 824 (1920).

⁶ Shipman v. Bank of State of New York, 126 N. Y. 318, 27 N. E. 371 (1891); Anderson v. Dundee State Bank, 66 Hun 613, 21 N. Y. Supp. 925 (1893).

⁷ NEG. INST. LAW, §28: "The instrument is payable to bearer:

" * * * 3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable."

⁸ Seaboard National Bank v. Bank of America, *supra* note 2.

⁹ Bank of England v. Vagliano [1891] A. C. 107.

¹⁰ North & South Wales Bank v. Macbeth [1908] A. C. 137; Vinden v. Hughes [1905] 1 K. B. 795.

¹¹ Szwento Juozupo Let Draugystes v. Manhattan Savings Institute, 178 App. Div. 57, 164 N. Y. Supp. 498 (1st Dept. 1917); Spalding v. First National Bank, 210 App. Div. 216, 205 N. Y. Supp. 492 (4th Dept. 1924), *aff'd*, 239 N. Y. 586, 147 N. E. 206 (1924).

¹² American Exchange National Bank v. Yorkville Bank, 122 Misc. 616, 204 N. Y. Supp. 621 (1924); Bennett v. First National Bank of Hollywood, 47 Cal. App. 450, 190 Pac. 831 (1920).

¹³ *Supra* note 2; Strang v. Westchester County National Bank, 191 App. Div. 787, 182 N. Y. Supp. 41 (2d Dept. 1920); McKaughan v. Merchant's Bank and Trust Co., 182 N. C. 543, 109 S. E. 355 (1921); Figuers v. Fly, 137 Tenn. 358, 193 S. W. 117 (1917).

the drawer must, moreover, be the direct and proximate cause of payment of the check on the forged indorsement.¹⁴ and must be such as to proximately affect the conduct of the drawee in the performance of his duties in order to be admissible as a defense.¹⁵ Payment of a check bearing a forged indorsement of payee's name is deemed to be negligence, rendering the bank liable¹⁶ and the doctrine of estoppel does not apply.¹⁷ By contractual obligation,¹⁸ due care must be exercised by the bank in the payment of checks and its negligence defeats the defense of negligence on the part of drawer.¹⁹

In the case of *Jordan Marsh Co. v. National Shawmut Bank*²⁰ the Court held that the duty of the drawee bank to ascertain the genuineness of the payee's indorsement is not diminished by the fact that the payment was made through a clearing house.²¹ Nor does it matter that the bank relies on the guaranty of other reliable banks as to the genuineness of the payee's signature.²²

In *Leather Manufacturers' Bank v. Merchants' Bank*²³ the Court said: "If the bank pays out money to the holder of a check upon which the name of the depositor, or of a payee or indorsee, is forged, it is simply no payment as between the bank and the depositor; and the legal state of the account between them, and the legal liability of the bank to him, remain just as if the pretended payment had not been made."²⁴

The doctrine of estoppel is fundamentally established on error of one party and fault or fraud upon the other, and a defect which would be inequitable for the party against whom it is asserted to take

¹⁴ *Welsh v. German American Bank*, 73 N. Y. 424 (1878); *Shipman v. Bank of State of New York*, *supra* note 6; *Janin v. London and San Francisco Bank*, 92 Cal. 14, 27 Pac. 1100 (1891); *German Savings Bank v. Citizens' National Bank*, 101 Iowa 530, 70 N. W. 769 (1897); *Shepard and Morse Lumber Co. v. Eldridge*, 171 Mass. 516, 51 N. E. 9 (1898); *Mechanics' National Bank v. Harter*, 63 N. J. L. 578, 44 Atl. 715 (1899); *Armstrong v. Pomeroy National Bank*, 46 Ohio St. 512, 22 N. E. 866 (1889); *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826 (1897); *Schoefield v. Earl of Londesborough* [1896] A. C. 514; *Colonial Bank of Australia v. Marshall* [1906] A. C. 559; *Roberts v. Tucker*, 16 Q. B. 560 (1851); *Macbeth v. North and South Wales Bank* [1908] 1 K. B. 13.

¹⁵ *Shepard and Morse Lumber Co. v. Eldridge*, *supra* note 14.

¹⁶ *Morris v. Baumont National Bank*, 37 Tex. Civ. A. 97, 83 S. W. 36 (1904).

¹⁷ *Critten v. Chemical National Bank*, 171 N. Y. 219, 63 N. E. 969 (1902).

¹⁸ *Gallo v. Brooklyn Savings Bank*, *supra* note 2.

¹⁹ *Supra* note 17.

²⁰ 201 Mass. 397, 87 N. E. 740 (1909).

²¹ *Dedham National Bank v. Everett National Bank*, 177 Mass. 392, 59 N. E. 62 (1901); *Murphy v. Metropolitan National Bank*, 191 Mass. 159, 77 N. E. 693 (1906).

²² *Supra* note 4.

²³ 128 U. S. 26, 34, 9 Sup. Ct. 3 (1888).

²⁴ *Washington First National Bank v. Whitman*, 94 U. S. 343 (1876).

advantage.²⁵ Fault would arise from a breach of duty or an act of negligence proximately resulting in loss.²⁶

In *American Surety Co. v. Empire Trust Co.*²⁷ the Court held that the question of whether plaintiff's assignee was estopped by reason of negligence was for the jury. On appeal, however, the Court of Appeals, speaking through Lehman, J., says:²⁸ "The drawee owed the drawer the duty of paying the draft only to the payee named. The drawer owed to the drawee the duty only that it would not by act or misrepresentation facilitate a fraud upon it. Alleged negligence in delivering a draft or check to a person not authorized by the payee to receive it is 'immaterial'²⁹ where a party discounts or pays a draft without sufficient identification of the payee and upon a forged indorsement. * * * Negligent failure by the drawer to protect itself against fraud in procuring the making of the drafts does not cast upon the drawer the risk that they will be paid upon a forged indorsement."

It is held, therefore, that, as a matter of law, it is immaterial that the drawer was negligent in not discovering the forgery since there was no such duty on the drawer to ascertain such fact. The drawee's reliance on the subsequent *bona fide* indorsements does not relieve it from its liability since it is negligence on its part to rely thereon, and the drawer is not precluded from recovering.

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UNFAIR COMPETITION.

The law governing unfair competition, although still in its infancy, is rapidly approaching the point where definite judicial reaction may be satisfactorily noted as curbing unfair procedure in trade.

Fundamentally, the controversy involved trade-names.¹ The once well settled rule that an injunction would not be granted unless there was actual competition in the sale of similar merchandise

²⁵ *Morgan v. Railroad Co.*, 96 U. S. 716 (1877).

²⁶ *Supra* note 13.

²⁷ 228 App. Div. 572, 240 N. Y. Supp. 164 (4th Dept. 1930).

²⁸ *Supra* note 4, at 106, 186 N. E. at 437, 438.

²⁹ *Italics* author's.

¹ Trade-name denotes "all symbols in reference to which a reputation may be established (*e.g.*, trade-names, including geographical, corporate and personal names; devices such as collocations of colors, peculiar sizes and shapes; distinctive methods of advertising and marketing generally) which, not being subject to exclusive appropriation, are protected under the law of unfair competition as contrasted with technical trade-marks, registerable for exclusive use under modern statutes, and protectable under the common law of trade-marks." (1930) 30 COL. L. REV.. 695.