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The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana - The Impostor Rule

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permitting the holder in due course to enforce any completed instrument may also limit the importance of the defense.

Further, the difference in approach to the effect of alterations indicates that the Code has lessened the importance of the defense. While the NIL stated that "any other change or addition which alters the effect of the instrument in any respect" is a material alteration which results in avoidance of the instrument, the Code provides that "no other alteration discharges any party" as against any person other than a subsequent holder in due course. The "finality" of the Code's provision leaves little room for coverage of unforeseeable types of alterations.

The wisdom of these changes is a matter of speculation. The comments accompanying the text of section 3-407 state no purpose for the changes that were made, but merely explain what the changes are. The result, or at least the tendency, of the changes is to place the holder in a better position to overcome the defense of material alteration. This undoubtedly will encourage more ready acceptance of commercial paper in business transactions.

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The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana—The Impostor Rule

An impostor is one who by impersonation of another induces a party to draw a negotiable instrument payable to the order of the impersonated person and to deliver it to him (the impostor). If the drawer[1] is deceived and surrenders possession to the impostor believing him to be the named payee, the impostor acquires title to the instrument and an endorsement by him in the name of the impersonated person to a third party is effective. Thus, when the fraud is discovered, as between the drawer, who is the first victim, and an endorsee from the impostor, who is the second victim, the former must bear the loss.[2] The Negotiable Instruments Law contains no provision governing the im-

1. Drawer is not used in the limited sense that it refers only to authors' drafts or checks; it is used in the broad sense to include the maker of a note.

2. For elaboration of this discussion, see BRITTON, BILLS AND NOTES § 151 (1943).

postor situation; the rules have been developed in the jurisprudence. The purpose of this Comment is to discuss that development in Louisiana and in other states so that a comparison can be made between the present impostor rule and the one proposed in section 3-405 of the Uniform Commercial Code.[3]

Because the impostor rule has been created by the courts, an analysis of the jurisprudence is necessary to preface a comparison of the present rule with the proposed rule in the Code. According to the majority of American jurisdictions,[4] the drawer is held to have intended to make the impostor the payee despite his assumed name. They hold that the drawer intends to deal with the actual person before him, regardless of his true identity. By application of this rule, it follows that endorsement by the impostor is not a forgery as defined by section 23 of the NIL.[5] Consequently, the instrument is not rendered "wholly inoperative."[6] The endorsement transfers title to the endorsee who takes the instrument without knowledge of the fraud.[7] When the fraud is subsequently discovered, the loss falls on the drawer who initiated the transaction rather than on the drawee or other person to whom the instrument was endorsed. The rationale for the rule seems to be that the first party who is deceived[8] should bear the loss, provided all deceived parties are innocent.[9]

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3. This section, which is discussed at page 123 *infra* embodies the proposed statutory rule.

4. Smith v. Mechanics' and Traders' Bank, 6 La. Ann. 610 (1851); Meridian Nat. Bank v. First Nat. Bank, 7 Ind. App. 322, 33 N.E. 247 (1893); Montgomery Garage Co. v. Manufacturers' Liability & Insurance Co., 94 N.J.L. 152, 109 Atl. 296 (1920); Hartford v. Greenwich Bank, 157 App. Div. 448, 142 N.Y. Supp. 387 (1st Dep't 1915), *affirmed*, 215 N.Y. 726, 109 N.E. 1077 (1915); see Annot., 22 A.L.R. 1224, 1228 (1923).

5. NIL § 23: "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority." LA. R.S. 7:23 (1950) is identical.

6. *Ibid.*

7. See cases cited 22 A.L.R. 1224 (1923).

8. Any contest over who should bear the loss when the fraud is discovered is between the first and second victims of the impostor. The first victim may be the drawer before whom the impostor appeared or he may be merely an endorser of an instrument previously made payable to him, the first victim. The second victim is the person to whom the impostor endorses after his fraudulent inducement of the first victim. Note that when the impostor endorses to the second victim he possesses at least one of the indicia of ownership, namely, possession.

9. BRITTON, BILLS AND NOTES § 151 (1943); see 8 AM. JUR., *Bills and Notes* § 602 (1937); Hafner, *Bills and Notes — Impostor Rule*, 25 NOTRE DAME LAW. 140 (1949); Steinheimer, *Impact of the Commercial Code of Liability of Parties to Negotiable Instruments in Michigan*, 53 MICH. L. REV. 171, 177 (1954);

One should be careful to distinguish between the impostor rule and the rule governing the fictitious payee situation. The latter rule is codified in section 9(3) of the NIL. Under that section, when an instrument is payable to the order of a fictitious or non-existing person, it will be considered as payable to bearer if "such fact were known to the person making it so payable."[10] Louisiana has adopted a broader rule.[11] It provides that if the initiating party's "agent or employee who supplies the name of such payee"[12] has knowledge of the discrepancy in names of the payees, then the instrument is payable to bearer. This quoted phrase includes the situation where an employee of the drawer "pads" the payroll with fictitious names; the drawer-employer merely takes the listed payroll and draws the checks without further examination.

The most evident distinction between the impostor and fictitious payee rules is that knowledge of the discrepancy on the part of the drawer, whether actual or imputed, is essential in the fictitious payee situation in order for the instrument to become bearer paper. On the other hand, in the impostor situation, the drawer has no knowledge that the named payee is not the person physically before him. In addition, the instrument does not become bearer paper, but still requires an endorsement to effect a valid transfer. Another difference in the two situations pertains to the intention of the drawer. In the fictitious payee situation the drawer intends to pay a person other than the named payee because the latter is known to be fictitious. In the impostor situation, the drawer does not have this intention since he does not know of the discrepancy between the named payee and impostor

Sutherland, *Logic, Experience, and Negotiable Paper*, 1952 WIS. L. REV. 230, 243.

10. NIL § 9: "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 . . . ."

11. Pursuant to the recommendation of the American Bankers Association in the proposed Fictitious Payee Act, Louisiana's provision regarding fictitious payees was amended by La. Acts 1942, No. 312, p. 1018 to read: "The instrument is payable to bearer: ". . .

"(3) When it is payable to the order of a fictitious or non-existing or living person not intended to have any interest in it, and such fact was known to the person making it so payable, *or known to his employee or other agent who supplies the name of such payee.*" (Amendment italicized.) LA. R.S. 7:9(3) (1950).

"The purpose of the amendment is to place responsibility upon the drawer of an instrument for the acts of his agent, who names a fictitious payee, without the drawer's knowledge. . . ." AMERICAN BANKERS ASSOCIATION, RECOMMENDED STATE LEGISLATION (1942). Idaho, Illinois, Massachusetts, and Montana had adopted identical provisions prior to the amendment in Louisiana. 2 PATON, DIGEST 1867 (1942).

12. For quoted text, see note 11 *supra*.

before him. Therefore, any intent must be imputed to the drawer in the latter situation.[13]

In making the attribution of intent the majority of courts[14] have ignored another possible intention of the drawer, namely, to deal with the named payee. The latter intention is recognized if the drawer knew or had had previous dealings with the named payee or the impostor.[15] In such a situation, the court shifts the loss to the second victim (usually the drawee bank) by holding that the dominant intention of the drawer was to deal only with the named payee. The imputing of an intent to the drawer to deal with the person before him rather than the named payee is known as the "dominant intent" theory and is employed by the majority of courts. Their reasoning is based on the equitable rule that as between two equally innocent parties to an instrument, usually the drawer and the endorsee, the burden of loss should fall on the initial victim, the drawer. Like any legal fiction, this one will not withstand close analysis, but it does effectuate an equitable result.[16] Most of the cases supporting the minority view,[17] namely, that the second victim, the endorsee, should bear the loss, are distinguishable on their facts;[18] that is, the drawer knew or had had previous dealings with the named payee and thus intended to deal only with him. An illustrative case is *Tolman v. American National Bank*,[19] in which the court held that the drawer intended to pay the named payee only and

13. The drawer believes the impostor before him to be that person whom he represents himself to be. The intention to pay that person is imputed to the drawer by a fiction so that the latter shall bear any loss occasioned by subsequent endorsement from the impostor to a good faith purchaser.

14. See cases cited note 4 *supra*.

15. See cases cited note 17 *infra*.

16. It can be argued in support of the creation of the fiction that section 61 of the NIL provides a basis therefor. That section states that "the drawer by drawing the instrument admits the existence of the payee and his then capacity to endorse." It is submitted, however, that that argument can be refuted on the ground that the drawer admits the existence of the named payee only and does not necessarily admit that he intends to pay the person physically before him regardless of his identity. Therefore, section 61 of the NIL does not seem to provide a satisfactory statutory basis for the impostor rule. For a sound criticism of the view that section 61 substantiates the impostor rule, see Comment, *Allocation of Losses from Check Forgeries Under the Law of Negotiable Instruments and the Uniform Commercial Code*, 62 YALE L.J. 417, 465 (1953).

17. Cohen v. Lincoln Savings Bank of Brooklyn, 275 N.Y. 399, 10 N.E.2d 457 (1937); see Tolman v. American National Bank, 22 R.I. 462, 48 Atl. 480 (1901). For an exhaustive examination of this minority view, see Abel, *The Impostor Payee: Or, Rhode Island Was Right*, 1940 WIS. L. REV. 161.

18. See note 19 *infra*.

19. 22 R.I. 462, 48 Atl. 480 (1901); see Cohen v. Lincoln Savings Bank, 275 N.Y. 399, 10 N.E.2d 457 (1937), where the court rejected the "dominant intent" view because of the lack of prior dealings between the first victim and the impostor.

that an endorsement by the impostor was a forgery of the named payee's signature under NIL section 23.[20]

Most impostor cases arise out of face-to-face transactions, however. The majority of courts[21] hold the first victim of the impostor (usually the drawer) liable for the loss in this situation. A case illustrating this view is *Montgomery Garage v. Manufacturer's Liability Insurance Co.*,[22] where the court held the drawer liable, stating that he intended to make the check payable to the person before him. The court stated that "a man's name is the verbal designation by which he is known, but the man's visible presence is a surer means of identification."[23] The court concluded that the endorsee, the second victim of the impostor, should be relieved of liability.

There is no divergence of view, however, if the person before the drawer represents himself to be the agent of the named payee. In such a case no title passes to the impostor agent because the intent of the drawer was not to pay the person physically before him but to pay the named payee whom he had not seen. Consequently, the endorsement of the impostor agent is a forgery and passes no title to a bona fide purchaser.[24]

A few cases involving impostor situations have arisen through transactions by mail. In those cases the majority view is the same as in face-to-face transactions, namely, that the loss should fall on the first victim of the impostor. The rationale is that the first victim should bear the loss because he intended to deal with the writer of the letter rather than the named payee. A case illustrative of a mail transaction is *Uriola v. Twin Falls Bank and Trust Co.*,[25] in which the court held the drawer of a check liable for the resulting loss as against a bona fide purchaser because the drawer had mailed the check without investigating the payee.[26] The minority view[27] in these mail transac-

20. For quotation of text of section 23, see note 5 *supra*.

21. See note 4 *supra*.

22. 94 N.J.L. 152, 109 Atl. 296 (1920).

23. *Id.* at 155, 109 Atl. at 297.

24. For example of both agent and principal impostor situations, see Russell v. Second National Bank, 136 N.J.L. 270, 55 A.2d 211 (1947); see UCC 3-405, comment 2.

25. 37 Idaho 332, 215 Pac. 1080 (1923).

26. See Continental-American Bank and Trust Co. v. United States, 161 F.2d 935 (5th Cir. 1947), where the court held the drawer government liable for the loss on an allotment check made payable to and endorsed by an impostor war widow to her bank. For casenotes favoring the application of the impostor rule to such an impersonal drawer in a mail transaction, see Notes, 1950 WASH. U.L.Q. 130, 25 NOTRE DAME LAW. 140 (1949); for notes contra, see 1 MERCER L. REV. 297 (1949), 7 WASH. & LEE L. REV. 94 (1949). See also dissent in United States v. Continental American Bank & Trust Co., 175 F.2d 271, 272 (5th Cir. 1949).

27. American Surety Co. v. Empire Trust Co., 262 N.Y. 281, 186 N.E. 436

tions is also the same as in face-to-face transactions, namely, that the drawer intended to deal only with the named payee. The fact that distinguishes most of these cases is that the drawer had investigated the credit or character of the named payee and thereby formulated an intention to deal only with him and not with the impostor writer.

The impostor rule as developed by the jurisprudence is not limited to the original parties to the instrument. For example, if the person deceived is the payee of a check who endorsed to the impostor, he is held liable as against a subsequent good faith endorsee from the impostor. Then, too, the victim might get his bank to issue a cashier's check to the impostor. In this case, even though the procurer is not a party to the instrument, nevertheless the loss will fall on him.[28] If the impostor procures a certification from a bank representing himself to be the payee, the certifying bank becomes liable as if it had drawn the check to the impostor and the innocent drawer is discharged.[29] In regard to impersonation of a non-existent person, the majority of courts hold the drawer liable on the theory that he, at least, should have known whether the named payee existed.[30]

(1933). There the drawer savings bank was induced through the mails to send a check to the impostor for $9,000, representing the deposits of one of the drawer's customers. The drafts were presented to the drawee bank and were paid. The court held the drawee liable for the loss, stating that the drawer's initial negligence did not relieve the drawee of the obligation to pay only the named payee. *Accord:* Moore v. Moultrie Banking Co., 39 Ga. App. 687, 148 S.E. 311 (1929); Mercantile National Bank v. Silverman, 148 App. Div. 1, 132 N.Y. Supp. 1017 (1st Dep't 1911), *affirmed*, 210 N.Y. 567, 104 N.E. 1134 (1914). *But see* Uriola v. Twin Falls Bank and Trust Co., 37 Idaho 332, 215 Pac. 1080 (1923). There the impostor stole a certificate of deposit and solicited a loan through the mails from the drawer with the certificate as security. The money lender sent the impostor a cashier's check in the name of the owner of the certificate; the impostor endorsed the check to a third party. The court held the money lender — the procurer of the cashier's check — liable because of his failure to investigate the payee. *Accord*, Boatsman v. Stockmen's National Bank, 56 Colo. 495, 138 Pac. 764 (1914); Peninsular State Bank v. First National Bank, 245 Mich. 179, 222 N.W. 157 (1928).

28. If a bank issues a cashier's check upon order of its depositor, it seems logical that the procurer-depositor should be held liable as against a third party if the impostor payee has deceived both parties. It is as though the depositor had drawn the instrument himself rather than having procured a cashier's check from the bank which is credited against his account. For further discussion of this analogy, see Abel, *The Impostor Payee: Or, Rhode Island Was Right*, 1940 WIS. L. REV. 161, 177.

29. Meridian National Bank v. Shelbyville First National Bank, 7 Ind. App. 322, 33 N.E. 247, 34 N.E. 608 (1893); Merchants' Loan and Trust Co. v. Bank of Metropolis, 7 Daly 137 (N.Y.C.P. 1877).

30. Meridian National Bank v. Shelbyville First National Bank, 7 Ind. App. 322, 33 N.E. 247, 34 N.E. 608 (1893). For a discussion of the problem see Abel, *The Impostor Payee: Or, Rhode Island Was Right*, 1940 WIS. L. REV. 161, 180.

Impostor Rule in Louisiana

On the basis of the few cases decided in Louisiana on the impostor problem, it would seem that the courts of this state would probably adhere to the majority view that holds the drawer liable for the loss. The most recent decision is that of *Allan Ware Pontiac, Inc. v. First National Bank*,[31] a 1941 court of appeal decision. The dictum in the case is more important than the holding for the purpose of this development, but both will be stated for clarity. The court held that the loss on a fraudulently procured check should fall on the drawee, the second endorsee from the impostors, rather than on the drawer who had been deceived initially. The court's decision was based on the peculiar facts of the case. The impostors were husband and wife, but only the husband appeared before the drawer and induced him to draw the check in question. The check was drawn payable to "H. C. and Mamie Maxwell" and was presented to the impostor husband. Both the impostor husband and wife endorsed to a third party, but the wife's signature was held to be a forgery for which the drawee was liable, unless it could establish the negligence of the drawer. The court stated, in dictum, that had the husband been the sole payee, or if both impersonators had appeared before the drawer, then title would have passed to the impostors and the drawer would have been held liable for the loss. Since the impostor wife had not presented herself to the drawer at the time the check was procured by her husband, the court refused to impute to the drawer an intention to pay her, as well as her husband, rather than the named payees. This ruling, however, indicates that the loss would probably be placed on the drawer in a typical face-to-face transaction, namely, where the impostor payee appears before the drawer personally.

Aside from the dictum in the *Allan Ware Pontiac* case, the other impostor cases indicating Louisiana's tendency to follow the majority rule are quite old. In an 1851 case[32] the Supreme Court held the drawer liable for the loss occasioned by the drawing of a check payable to an impostor in the name of the impersonated payee in payment for a forged bill fraudulently endorsed to the drawer by the impostor. The latter had then endorsed the check to the defendant drawee bank. In holding the drawer liable, the court stated that he had provided the

31. 2 So.2d 76 (La. App. 1941).

32. Smith v. Mechanics' and Traders' Bank, 6 La. Ann. 610 (1851).

impostor with the means of deception. In a later case[33] the impostor had signed both the payee's name and his own in endorsing a check. The court held the drawer liable, stating that this was an even stronger case for the protection of the drawee than the *Smith* case because of the additional endorsement. The drawer had caused the loss by his initial negligence and was held responsible.

It may be helpful in considering the impostor rule to consult the Louisiana law of sales by analogy. A recent case involving a face-to-face sales transaction is *Port Finance Co. v. Ber.*[34] There the Orleans Court of Appeal stated in dictum that the original vendor of an automobile to an impostor could recover possession from a subsequent bona fide purchaser because the vendor had intended to sell to the person impersonated and not to the person before it.[35] The court based its conclusion on the diligence exerted by the vendor to ascertain the identity and credit rating of the impersonated vendee.[36] The court, in effect, stated that the plaintiff vendor was less negligent than the impostor's vendee.[37] This dictum can be distinguished from the typical face-to-face situations involving negotiable instruments in that here the first victim by his diligent efforts to ascertain the named payee's identity and credit rating indicated his intention to deal only with the person named. The decision seems to indicate that the Orleans Court of Appeal, at least by analogy, might be unwilling in a typical impostor case to protect the bona fide endorsee from an impostor. On the other hand, its decision

33. J. L. Levy and Salmon v. Bank of America, 24 La. Ann. 220 (1872).

34. 45 So.2d 404 (La. App. 1950).

35. The actual basis for the decision was the court's conclusion that the impostor had stolen the automobile and thus had acquired no title which he might pass to anyone. The court cited article 67 of the Criminal Code defining "theft" and stated that "if a seller (impostor here) in Louisiana obtains his goods by theft, he cannot pass title to a bona fide purchaser," quoting from Lynn v. Lafitte, 177 So. 83 (La. App. 1937).

LA. R.S. 14:67 (1950) states: "Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential. . . ."

36. The plaintiff had telephoned to a bank to check on the credit rating and personal description of the impersonated party; the court felt that this was sufficient evidence that the vendor (drawer, by analogy) intended to deal only with the named person and did not intend to pass title to the impostor before it.

37. The impostor had "paid" approximately $700 for the automobile and had "sold" it the next day to the defendant, a car dealer, for $400. The court felt that the difference in the sales price should have aroused the impostor's vendee's curiosity; the failure of the latter vendee to check the identity of his vendor was held to be negligence exceeding that of the original owner.

can be explained by virtue of the court's rather heavy reliance on the terms of a criminal statute defining theft, plus the fact that the initial victim had made an extensive effort to ascertain the payee's identity.

From this analysis of the Louisiana jurisprudence it is submitted that our courts, with the possible exception of the Orleans Court of Appeal, would follow the majority rule and hold the first victim liable for any resulting loss caused by the imposture, at least, in the typical face-to-face transaction. However, because the field has not lent itself to extensive litigation, such a conclusion necessarily must be largely conjectural.

Uniform Commercial Code[38] *Provisions and Changes*

> UCC section 3-405 states: "(1) An indorsement *by any person* in the name of a named payee is effective if:
>
> "(a) An impostor by the use of the mails *or otherwise* has induced the maker or drawer to issue the instrument to him *or his confederate* in the name of the payee; or
>
> "(b) A person signing as or on behalf of a drawer intends the payee to have no interest in the instrument; or
>
> "(c) An agent or employee of the drawer has supplied him with the name of the payee intending the latter to have no such interest. . . ." (Emphasis added.)

The changes suggested in regard to the fictitious payee situation in subsections (b) and (c) of section 3-405 are not within the scope of this Comment, but will be mentioned briefly. It will be noted that an instrument payable to a fictitious payee is not bearer paper under the Code provision as it is under the NIL.[39] However, the Code provides that endorsement *by any person* is sufficient to pass title to a bona fide purchaser; thus, the requirement of an endorsement does not hinder the negotiability to any appreciable extent. Another change is that all reference to fictitious or non-existing persons is eliminated; the test substituted by the Code is whether the signer intended the payee to have no interest in the instrument.[40] The reference to

38. UNIFORM COMMERCIAL CODE, OFFICIAL DRAFT, TEXT AND COMMENTS EDITION (1952). None of the subsequent changes adopted in the official draft have affected § 3-405.

39. NIL § 9(3).

40. For examples of the application of the Code rule, see UCC 3-405, comment 3.

the "drawer" in section 3-405(b) indicates that the Code rule is limited to drafts, whereas under the NIL provision there was no such restriction.[41] Subsection (c) of section 3-405 enlarges section 9(3) of the NIL to include the situation where the employee of the drawer procures the drawing of the check. As pointed out previously, this change has already been incorporated into the Louisiana statute.[42] Thus, the "padded payroll" cases[43] are included among those wherein the drawer employer bears the loss as opposed to the drawee bank or other endorsee.

The effect of the codal provision on the present impostor rule is more a codification of an established rule than a change, though the reasoning has been changed. The proposed rule rejects the theory of those cases distinguishing between face-to-face and mail transactions;[44] instead it extends the majority rule in face-to-face transactions to the mail situation, placing the loss on the drawer.[45] Perhaps the greatest change proposed is the abolition of the "intent" fiction. Under the Code provision the intent of the drawer is not a consideration. The mere fact that the impostor deceived the drawer, whether by mail or in a face-to-face transaction, is a sufficient basis for holding the latter liable. Furthermore the Code provides in essence that delivery to the impersonator is not essential; the instrument may be delivered to his "confederate" with the same result. It is only necessary that the impostor induce the drawer "to issue the instrument . . . in the name of the payee"[46] to him or his confederate.

It should be noted that effective endorsement *by any person* renders the instrument negotiable almost to the same extent as bearer paper under section 9(3) of the NIL.[47] Of course, the necessity of the impostor's affixing his signature prior to ne-

41. NIL § 9(3), quoted note 10 *supra*.

42. LA. R.S. 7:9(3) (1950), quoted note 11 *supra*. For changes proposed by the UCC in fictitious payee situations, see UCC 3-405, comments 3-5. See BRITTON, BILLS AND NOTES § 149 (1943); Comment, *Allocation of Losses from Check Forgeries Under the Law of Negotiable Instruments and the Uniform Commercial Code*, 62 YALE L.J. 417 (1953); Sutherland, *Logic, Experience, and Negotiable Paper*, 1952 WIS. L. REV. 230, 241.

43. See page 117 *supra*.

44. An illustrative case holding the drawee liable when the impostor had deceived the drawer by mail is Mercantile Nat. Bank v. Silverman, 148 App. Div. 1, 132 N.Y. Supp. 1017 (1st Dep't 1911); *accord*, American Surety Co. v. Empire Trust Co., 262 N.Y. 181, 186 N.E. 436 (1933). *Contra*, Halsey v. Bank of New York & Trust Co., 270 N.Y. 134, 200 N.E. 671 (1936).

45. See UCC 3-405, comment 2.

46. UCC 3-405(a).

47. For text of section, see note 10 *supra*.

gotiating the instrument might be considered as a deterrent factor, but only to a slight degree. It is not necessary that the original impostor endorse the instrument; thus, an agent of, or thief from, the impostor could validly endorse to a bona fide purchaser. In other words, after his impersonation of the named payee for the purpose of procuring the drawing of the instrument, the impostor is no longer an essential party to effectuate a valid passage of title to a bona fide purchaser. The Code provision is limited to the original parties to the instrument and does not cover the situation where the first victim is the endorser of an instrument payable to him or the procurer of a bank's certification. Of course, the extension of the rule to newly-drawn instruments would cover the majority of cases, but there seems to be no logical reason why it should not also be extended to pre-existing instruments. It is suggested that section 3-405 should state, in effect, that the loss should fall on the *first victim* of the impostor, thereby removing the present restriction to drafts.

The omission from the Code of any reference to the intent of the drawer is perhaps the soundest modification proposed in the existing law. Under the present rule the intent of the drawer is presumed so as to place the loss on him. The Code provision merely codifies the result of the cases that utilize this fictional intent, but it furnishes a sounder basis for such conclusions.[48] In effect, subsection (a)[49] states, as a matter of policy, that the bona fide purchaser from the impostor will be protected no matter what the drawer's intention was and no matter who has endorsed the instrument. It follows logically from this fact that if the intention of the victim is omitted from consideration then the mode of communication between him and the impostor becomes immaterial. Apparently, the only essential role played by the impostor is to induce the drawer of the instrument to make it payable to the payee whom he represents himself to be.

Still further, the instrument may be received by anyone authorized by the impostor to receive it for him. This again is logical because delivery by the drawer does not have any effect

48. For concurrent views, see Steinheimer, *Impact of the Commercial Code on Liability of Parties to Negotiable Instruments in Michigan*, 53 MICH. L. REV. 171, 177 (1954); Sutherland, *Logic, Experience, and Negotiable Paper*, 1952 WIS. L. REV. 230, 243; Comment, *Allocation of Losses from Check Forgeries under the Law of Negotiable Instruments and the Uniform Commercial Code*, 62 YALE L.J. 465 (1953).

49. UCC 3-405(a).

on his intention. The drawer must bear the loss because he has drawn the instrument to the impostor under his assumed name, and not because he *delivers* it to the actual impostor rather than the latter's agent.

However, if the impostor represents himself to be the agent of the named payee, his endorsement of the named payee's signature will remain a forgery under the Code. "Impostor," in section 3-405(a), "refers to impersonation, and does not extend to a false representation that the party is the authorized agent of the payee."[50] Yet from the standpoint of the second victim, there seems to be no valid reason why he should not be relieved from liability when the first victim neglects to identify the impostor agent, when, on the other hand, the second victim is relieved if the drawer fails to detect the impersonation of the payee himself.[51] This apparent inconsistency may be explained, in part, by the ease with which one can pose as another's agent without detection when compared to impersonating the person himself.

The effective endorsement *by any person* provided by the Code seems to be an adequate provision to enable anyone who obtains the instrument from the impostor to endorse effectively. The policy is to protect the innocent second victim (endorsee); hence, once the drawer has been swindled, he must bear the loss as against any bona fide endorsee. Further, there would seem to be no adequate argument in favor of the protection of the impostor against a thief. The Code demands that the endorsee require a regular chain of endorsements. It is submitted that this provision is sounder than the "bearer paper" rule in regard to fictitious payees in NIL section 9(3).[52] The Code provision affords easier detection of fraud by the endorsee because of the necessity of endorsement by the impostor.

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50. UCC 3-405, comment 2. See also UCC 3-404: "(1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.

"(2) Any unauthorized signature may be ratified for all purposes of this article. Such ratification does not of itself affect any rights of the person ratifying against the actual signer." For the text of the corresponding article of the NIL, see note 5 *supra*.

51. For criticism of this omission, see Comment, *The Fictitious Payee and the U.C.C. — The Demise of a Ghost*, 18 U. OF CHI. L. REV. 281 (1950).

52. For text, see note 10 *supra*.

Conclusion

The failure of the Code to provide for "pre-existing" instruments, that is, instances where the initial victim is the endorser of a check made payable to him by a third party drawer, appears to the writer to be a serious omission. There seems to be no logical reason why protection should not be affored to an endorsee of an instrument when the first victim of the impostor is the payee or simply a prior endorser.[53] The fact that the first victim is an original party to the instrument, namely, the drawer or maker, should not affect the liability of subsequent endorsees from the impostor. It is submitted that the impostor should be able to pass valid title to a good faith endorsee simply because he has induced the first victim[54] to deliver it to him in the name of the impersonated payee.

On the whole, however, the provision of the Code is an improvement over the present law in regard to impostors because the replacement of a fictional doctrine with statutory liability will provide a more sound basis in the law. First, by providing statutory liability, the likelihood of uniformity in the jurisprudence will be enhanced. Second, the courts will not be compelled to substantiate a fictional rationale, a fact which should lend credence to the decisions. The placing of the loss on the initial victim seems justified so long as the second victim-endorsee is not guilty of greater negligence than the drawer. Although the proposed statute makes liability dependent upon the use of care by the drawer only, this method of determining liability seems justified in view of the Uniform Code's primary purpose of insuring negotiability of the instrument.

Huntington Odom

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53. The second victim (endorsee) will be protected if the impostor procured the instrument from the original maker or drawer. But, if the impostor defrauds the payee of a check, for instance, and induces him to endorse to the impostor, the latter will acquire title and the endorsee from the impostor will be protected. The inconsistency here does not seem justified because the first victim has been deceived in both cases and the second victim is innocent in both cases. The latter party should not be afforded protection in the one instance and denied it in the other.

54. "First victim" includes drawer, maker, endorsing payee, endorsee, *etc.*