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Imposters and Fraudulent Procurement of Negotiable Instruments–Does the UCC Resolve the Pre-Code Conflict?

IMPOSTORS AND FRAUDULENT PROCUREMENT OF NEGOTIABLE INSTRUMENTS—DOES THE UCC RESOLVE THE PRE-CODE CONFLICT?

INTRODUCTION

Prior to the widespread adoption of the Uniform Commercial Code the courts drew distinctions among factual situations which in common involved an impostor's use of a negotiable instrument. The following hypotheticals, labeled for convenience as (1) the typical impostor; (2) the impostor agent; and (3) the innocent agent, illustrate three of these transactions.

The Typical Impostor. A represents to B that he is C and induces B to issue a check payable to C which B delivers to A. A indorses the name of C and obtains the proceeds.[1]

The Impostor Agent. A represents to B that he is the agent of C. Either C does not exist, or A is not his agent. B is induced by A to issue a check payable to C which B delivers to A. A indorses the check in the name of C and obtains the proceeds.[2]

The Innocent Agent. A induces B to believe that he is C. On the strength of B's representations concerning C, D delivers a check, payable to C, to B. B delivers the check to A who indorses it and obtains the proceeds.[3]

The relevant section of the Uniform Commercial Code[4] does not expressly distinguish among these factual situations although the Official Comments to the Code refer to some of the factual distinctions.[5] By an analysis of prior law and a discussion of Code policy, this note attempts to project the proper application of the Code to the issues involved.

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1. See, *e.g.*, Curton v. Farmers' State Bank, 147 Ark. 312, 227 S.W. 423 (1921); Uriola v. Twin Falls Bank & Trust Co., 37 Idaho 332, 215 Pac. 1080 (1923). In this situation the impostor often assumes the name and personality of an existing person. See, *e.g.*, North Philadelphia Trust Co. v. Kinsington Nat'l Bank, 328 Pa. 298, 196 Atl. 14 (1938). But not infrequently the assumed name is fictitious. Abel, *The Impostor Payee: or Rhode Island Was Right: I*, 1940 WIS. L. REV. 161, 180. See, *e.g.*, United States v. Bank of America Nat'l Trust and Sav. Ass'n, 274 F.2d 366 (9th Cir. 1959).

2. See, *e.g.*, Weaver v. First Nat'l Bank, 138 Colo. 83, 330 P.2d 142 (1958); Morris Plan Bank v. Continental Nat'l Bank, 155 S.W.2d 407 (Civ. App. Tex. 1941).

3. See, *e.g.*, First State Bank v. Oak Cliff Savings & Loan Ass'n, 387 S.W.2d 369 (Tex. 1965).

4. UNIFORM COMMERCIAL CODE § 3-405 [sometimes hereinafter cited as UCC].

5. See note 73 *infra* and accompanying text.

PRIOR LAW ON THE TYPICAL IMPOSTOR SITUATION[6]

On the assumption that a collectible judgment cannot be obtained against the impostor, the problem is whether to place the loss on the drawer of the instrument or on the indorsee who took the instrument from the impostor. One of these two persons, the first and second victims of the impostor's deception, will ultimately bear the loss although the initial litigation may involve other parties.[7] For example, the drawer, alleging a wrongful payment, may sue the drawee to have his account recredited. If the court determines that the drawee has rightfully paid a check, the drawer will bear the loss. If the court determines that the drawee has wrongfully paid the check, the drawee has recourse against the presenting bank on its guarantee of prior indorsements.[8] This process of recovery over, based on indorsement or warranty theories,[9] will continue along the chain of indorsements to the party who took the instrument from the impostor.[10] For purposes of simplification, it will be assumed throughout this note that the impostor, after obtaining the check, has presented it directly to the drawee for payment.

Despite the almost uniform result of placing the loss upon the drawer,[11] the courts have used a variety of reasons to justify their decisions. Although the reasons tend to overlap and are frequently used in combination with each other, they may be separately categorized and discussed as: (1) sections of the Uniform Negotiable Instruments Law; (2) the intent rationale; (3) estoppel predicated on drawer negligence; (4) the "one of two innocent persons" maxim; and (5) an underlying policy of negotiability.

A. *The Uniform Negotiable Instruments Law*

As the governing statute in most jurisdictions, the Negotiable Instruments Law[12] would appear to have offered the best source for deciding the impostor cases. Although a few courts applied the NIL,[13] most

6. For the early development of commercial law in relation to negotiable instruments see generally BRITTON, BILLS AND NOTES §§ 1-3 (2d ed. 1961); 1955 2 N.Y. LAW REVISION COMMISSION, STUDY OF THE UNIFORM COMMERCIAL CODE 9-10; Beutel, *The Development of Negotiable Instruments in Early English Law,* 51 HARV. L. REV. 813 (1938); Beutel, *Colonial Sources of the Negotiable Instruments Law of the United States,* 34 ILL. L. REV. 137 (1939).

7. 2 N.Y. LAW REVISION COMMISSION, *op. cit. supra* note 6, at 239.

8. Abel, *supra* note 1, at 171. See also UCC § 3-417.

9. *Ibid.*

10. *Ibid.*

11. Abel, *supra* note 1, at 171.

12. This will hereinafter be referred to as the NIL.

13. See Security-First Nat'l Bank v. United States, 103 F.2d 188 (9th Cir. 1939); Allen Ware Pontiac, Inc. v. First Nat'l Bank, 2 So. 2d 76 (La. App. 1941); Montgomery Garage Co. v. Manufacturers' Liability Co., 94 N.J.L. 152, 109 Atl. 296 (1920);

courts agreed that it did not contain provisions applicable to the problem.[14]

The most popular section of the NIL applied by the courts is section 23,[15] which declares:

> 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.[16]

Section 23 was used by courts taking the minority position that the drawee should bear the loss.[17] The rationale used in applying section 23 was that the impostor's signature was not that of the named payee and consequently was a forgery.[18] The vast majority of courts, however, rejected this reasoning on the ground that the drawer was deemed to have intended the impostor to be the payee,[19] despite his false identity, and thus his signature is not a forgery within the terms of section 23. The inadequacy of section 23 is focused more clearly where the impostor has assumed the name of a nonexisting person because, in this instance, there is no one's signature to forge.

Some litigants attempted to persuade courts to use NIL section 9(3)[20] which made a negotiable instrument payable to bearer when the drawer made it payable to a fictitious payee whom he intended to have

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Tolman v. American Nat'l Bank, 22 R.I. 462, 48 Atl. 480 (1901); Citizens' State Bank v. Fuller, 274 S.W. 208 (Civ. App. Tex. 1925).

14. 2 N.Y. Law Revision Commission, *op. cit. supra* note 6, at 239; Note, 16 LA. L. REV. 89, 116-17 (1955); Penney, *A Summary of Articles 3 and 4 and Their Impact in New York*, 48 CORNELL L. Q. 47 (1962); Steinheimer, *Impact of the Commercial Code on Liability of Parties to Negotiable Instruments in Michigan*, 53 MICH L. REV. 171, 177 (1954). See Security-First Nat'l Bank v. United States, 103 F.2d 188 (9th Cir. 1939); McCornack v. Central State Bank, 203 Iowa 833, 211 N. W. 542 (1926); Montgomery Garage Co. v. Manufacturers' Liability Co., 94 N.J.L. 152, 109 Atl. 296 (1920).

15. See cases cited in note 13 *supra*.

16. NEGOTIABLE INSTRUMENT LAW § 23.

17. See, *e.g.*, Security-First Nat'l Bank v. United States, 103 F.2d 188 (9th Cir. 1939); Allan Ware Pontiac, Inc. v. First Nat'l Bank, 2 So. 2d 76 (La. App. 1941); Montgomery Garage Co. v. Manufacturers' Liability Co., 94 N.J.L. 152, 109 Atl. 296 (1920); Tolman v. American Nat'l Bank, 22 R.I. 462, 48 Atl. 480 (1901); Citizens' State Bank v. Fuller, 274 S.W. 208 (Civ. App. Tex. 1925).

18. See, *e.g.*, Tolman v. American Nat'l Bank, 22 R.I. 462, 48 Atl. 480 (1901).

19. See notes 24 and 25 *infra* and accompanying text.

20. See, *e.g.*, Security-First Nat'l Bank v. United States, 103 F.2d 188 (9th Cir. 1939); Montgomery Garage Co. v. Manufacturers' Liability Co., 94 N.J.L. 152, 109 Atl. 296 (1920).

no interest in the instrument.[21] This was uniformly rejected on the grounds that the drawer believed the payee to be in existence and intended him to have an interest in the instrument.[22]

B. *The Intent Rationale*

The most frequently sanctioned theory for assigning a loss occasioned by an impostor involves a determination of the drawer's intention. As a debtor of the drawer-depositor, the drawee bank is obligated to pay funds from the account to those persons to whom the drawer has ordered payment.[23] The true payee is held to be the person to whom the drawer intends payment to be made.[24] But, when the drawer has issued a check to an impostor, to whom has he ordered payment—the impostor or the person being impersonated? A majority of courts have answered this question by ascribing a double intention to the drawer: "(1) He intends to make the instrument payable to the impostor with whom he deals; and (2) he intends to make it payable to the person whom he believes the impostor to be. By the great weight of authority, the first is held to be the controlling intent. . . ."[25] Having paid the person intended (the impostor), the drawee may properly charge the drawer's account, and the impostor loss falls upon the drawer.[26] A minority[27] of

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21. NEGOTIABLE INSTRUMENTS LAW Sec. 9(3) reads as follows:
Sec. 9. WHEN PAYABLE TO BEARER. The instrument is payable to bearer—
3. When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable. . . .

22. See cases cited at note 20 *supra.*

23. See National Metropolitan Bank v. Realty Appraisal & Title Co., 47 F.2d 982 (D.C. Cir. 1931); Merchants & Manufacturers' Ass'n v. First Nat'l Bank, 40 Ariz. 531, 14 P.2d 717 (1932); Polk v. Garrison, 162 Ark. 624, 258 S.W. 631 (1924); Western Union Tel. Co. v. Bimetallic Bank, 17 Colo. App. 229, 68 Pac. 115 (1902); Miners' & Merchants' Bank v. St. Louis Smelting & Ref. Co., 178 S.W. 211 (Mo. App. 1915); Gallo v. Brooklyn Sav. Bank, 199 N.Y. 222, 92 N.E. 633 (1910).

24. Aigler, *Bills and Notes—Impostors in the Law of Bills and Notes,* 46 MICH. L. REV. 787, 790 (1948).

25. Security-First Nat'l Bank v. United States, 103 F.2d 188 (9th Cir. 1939). *Accord,* Schweitzer v. Bank of America Nat'l Trust & Sav. Ass'n, 42 Cal. App.2d 536, 109 P.2d 441 (1941). *Contra,* Tolman v. American Nat'l Bank, 22 R.I. 462, 48 Atl. 480 (1901).

26. See Comment, 59 MICH. L. REV. 1218, 1220 (1961). Some courts do not discuss the double intent of the drawer but note only that the impostor was the intended payee. See, *e.g.,* United States v. Nat'l Exchange Bank, 45 Fed. 163 (C.C.E.D. Wis. 1891); United States v. Liberty Ins. Bank, 26 F.2d 493 (W.D. Ky. 1928); Cureton v. Farmers' State Bank, 147 Ark. 312, 227 S.W. 423 (1921); Moore v. Moultrie Banking Co., 39 Ga. App. 687, 148 S.E. 311, *aff'd,* 172 Ga. 368, 157 S.E. 685 (1931); Russell v. Second Nat'l Bank, 136 N.J.L. 270, 55 A.2d 211 (1947); Montgomery Garage Co. v. Manufacturers' Liability Co., 94 N.J.L. 152, 109 Atl. 296 (1920). New York has a somewhat different rule. While using the intent theory, New York courts look to see if there were previous negotiations between the drawer and the impostor in order to determine that intent. See, *e.g.,* Cohen v. Lincoln Sav. Bank, 275 N.Y. 399, 10 N.E.2d 457 (1937).

courts have used the double intent rationale to come to an opposite result when the imposture is by mail. They reason that in the absence of face-to-face dealing, the "controlling intent" of the drawer is to deal with the person he believes the signer of the letter to be.[28] Thus, the indorsement of the impostor is unauthorized and the drawee who pays the instrument cannot charge the drawer's account.[29]

The double intent theory has been condemned by many writers[30] and some courts.[31] The critics argue that since the drawer believes the impostor and the person being impersonated to be one and the same person, the two intentions cannot be separated.[32] The drawer has only one intent, and that is to deal with the person he believes the impostor to be.[33] The reasoning thus involves an obvious use of a fiction to rationalize a result.

C. *Estoppel Predicated on Drawer Negligence*

Negligence on the part of the drawer which estops him from asserting the unauthorized signature of the impostor has also been used by several courts.[34] Under this approach, the drawer's failure to use ordinary care in determining the identity of his payee,[35] which substantially increases the risk and responsibility of the drawee, estops him from as-

27. It is generally accepted by the majority that the same intent rule applied in face-to-face transactions would also apply to transactions by mail. Note, 16 LA. L. REV. 89, 119 (1955). In United States v. Bank of America Nat'l Trust and Sav. Ass'n, 274 F.2d 366 (9th Cir. 1959), the court stated: "It would appear that the impostor rule in the law merchant first began in face to face dealings and later was extended to swindles in the mail having the same essential characteristics."

28. See American Surety Co. v. Empire Trust Co., 262 N.Y. 181, 186 N.E. 436 (1933); Mercantile Nat'l Bank v. Silverman, 148 App. Div. 1, 132 N.Y.S. 1017 (1911), *aff'd,* 210 N.Y. 567, 104 N.E. 1134 (1914).

29. *Ibid.*

30. Professor Abel notes that the dominant intent theory necessarily includes the proposition that "there are general principles governing liability in the negotiable instruments field significantly related to or dependent upon the issue of intention." He then notes that outside of the impostor cases intent is not used and that, when approached realistically, the intent rationale fails. Abel, *supra* note 1, at 208, 230-31. See Note, 23 IND. L. J. 484, 490 (1948); Comment, 59 MICH. L. REV., *supra* note 26, at 1227.

31. See Tolman v. American Nat'l Bank, 22 R.I. 462, 48 Atl. 480, 481 (1901), wherein the court, in rejecting the majority rule, said: "It is a perversion of words to say that it was intended for Potter [the impostor] simply because he had fraudulently impersonated Haskell, and led the plaintiff to believe that he was Haskell. The plaintiff did not intend to let Potter have money."

32. Note, 32 ILL. L. REV. 731 (1938).

33. *Ibid.*

34. See, *e.g.,* United States v. Nat'l Exchange Bank, 45 Fed. 163 (C.C.E.C. Wis. 1891); Boatsman v. Stockmen's Nat'l Bank, 56 Colo. 495, 138 Pac. 764 (1914); Peninsular State Bank v. First Nat'l Bank, 245 Mich. 179, 222 N.W. 157 (1928); Burrows v. Western Union Tel. Co., 86 Minn. 499, 90 N.W. 1111 (1902). See generally Abel, *The Impostor Payee: II,* 1940 WIS. L. REV. 362, 362-72.

35. See note 34 *supra.*

serting the impostor's forgery in litigation against the drawee.[36] For example, the drawer's conduct in the initial transaction between the drawer and the impostor may be considered the primary error leading directly to the loss.[37] But this same rationale of negligence has been used in one case to absolve the drawer of liability on the ground that the drawee was at fault for not ascertaining the identity of the payee.[38] As contrasted with the double intent rationale, the negligence-estoppel reasoning avoids the fiction that the impostor's indorsement is authorized as that of the intended payee.

But this approach can have only limited applicability to the impostor cases as a uniform rule of loss allocation. First, it must be determined on the facts of each case whether or not the drawer has acted negligently. He may have taken all reasonable precautions under the circumstances to identify the payee. Second, it must be determined whether or not his act was the proximate cause of the loss. The drawee may also have been negligent in not determining the identity of the payee. While negligence should determine who will bear the loss, it is obvious that negligent conduct will not be present in all cases.

D. *One of Two Innocent Persons Maxim*

Sometimes the rationale for placing the loss on the drawer is stated simply that as between two innocent parties, the one whose act has occasioned the loss should bear the loss.[39] Several courts have held that a drawer, who has been defrauded into issuing a check to an impostor, has set in motion the machinery which will eventually lead to a loss and, consequently, should bear the loss.[40] This reasoning, however, has been criticized as being a "pseudo-principle of law"[41] which ignores the fact

36. Abel, *The Impostor Payee: II,* 1940 WIS. L. REV. 362, 367-68. Abel notes that while delivery alone is not a sufficient representation to the third party to invoke estoppel, the conduct of the drawer might imply a representation that due care has been used to ascertain the identity of the payee and in issuing the check. *Id.* at 371. See McCornack v. Central State Bank, 203 Iowa 833, 211 N.W. 542, 546 (1926) where the court said that the drawee may assert the drawer's negligence only when it has not been negligent itself. The court then held that the plaintiff was not negligent in making the check payable to one he believed was borrowing the money, and in any event, nothing that plaintiff did contributed to the drawee's paying the check.

37. See, *e.g.,* Boatsman v. Stockmen's Nat'l Bank, 56 Colo. 495, 138 Pac. 764 (1914).

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

39. See United States v. First Nat'l Bank & Trust Co., 17 F. Supp. 611 (W.D. Okla. 1936); Milner v. First Nat'l Bank, 38 Ga. App. 668, 145 S.E. 101 (1928).

40. *Ibid.*

41. Note, 23 ILL. L. REV. 701 (1929). This writer compared the one of two innocent persons maxim to the situation where A leaves his bicycle in front of his house and B, a stranger, takes a ride and injures C. A has put it in the power of B to inflict the injury, but A should not be held liable. *Ibid.*

that the loss was occasioned by both the first and second victims since the impostor defrauded both.[42]

E. *Underlying Policy of Negotiability*

It has been contended that the preceding theories, other than estoppel based on negligence, are largely rationalizations rather than reasons, and that the underlying reason for drawer liability is actually predicated on the desirability of keeping checks negotiable.[43] The argument is basically that negotiability is required by the business community to facilitate the course of business by removing doubt or delay from the medium of exchange used in commercial transactions.[44] If the defenses available to the drawer were kept at a minimum, the result would be a freer transferability of negotiable instruments.[45]

Prior Law on the Innocent Agent and the Impostor Agent

Under pre-Code law the innocent agent and impostor-agent situations were treated similarly. Thus, for purposes of simplification, they will be treated together in this section and the logic applied by the courts to determine the loss in the impostor-agent situation discussed infra may be considered to apply to both.[46]

In the impostor-agent situation, where one receives a check by falsely representing himself to be the agent of the payee and negotiates the check by indorsing the name of the payee, the loss, as between the drawer and the drawee, in the absence of estoppel or negligence on the part of the drawer, is borne by the drawee.[47] The courts have assigned two reasons

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42. Abel, *supra* note 34, at 363.
43. *Id.* at 376-77.
44. *Ibid.*
45. *Id.* at 372-73. See also Strahorn, *The Policy or Function of the Law of Bills and Notes* (pts. 1-2) 87 Pa. L. Rev. 662, 793 (1939).
46. For an example of the rationale of the pre-Code courts in determining the loss on this particular type of factual situation, see First State Bank v. Oak Cliff Sav. & Loan Ass'n, 387 S.W.2d 369 (Tex. 1965).
47. See, *e.g.*, Nat'l Metropolitan Bank v. Realty Appraisal & Title Co., 47 F.2d 982 (D.C. Cir. 1931); Russell v. First Nat'l Bank, 2 Ala. App. 342, 56 So. 868 (1911); Buena Vista Loan & Sav. Bank v. Stockdale, 59 Ga. App. 798, 2 S.E.2d 158 (1939); First Nat'l Bank v. Pease, 168 Ill. 40, 48 N.E. 160 (1897); McLaughlin-Gormely-King Co. v. Hauser, 195 Iowa 224, 191 N.W. 880 (1923); Murphy v. Metropolitan Nat'l Bank, 191 Mass. 159, 77 N.E. 693 (1906); Int'l Aircraft Trading Co. v. Manufacturers' Trust Co., 297 N.Y. 285, 79 N.E.2d 249 (1948); Strang v. Westchester County Nat'l Bank, 235 N.Y. 68, 138 N.E. 739 (1923); United Cigar Stores Co. v. American Raw Silk Co., 184 App. Div. 217, 171 N.Y. Supp. 480, *aff'd*, 229 N.Y. 532, 129 N.E. 904 (1920); Mercantile Nat'l Bank v. Silverman, 148 App. Div. 1, 132 N.Y. Supp. 1017, *aff'd*, 210 N.Y. 567, 104 N.E. 1134 (1914); Anglo-South American Bank, Ltd. v. Nat'l City Bank, 161 App. Div. 268, 146 N.Y. Supp. 457 (1914); Armstrong v. Pomeroy Nat'l Bank, 46 Ohio St. 512, 22 N.E. 866 (1889); Land Title Bank & Trust Co. v. Cheltenham Nat'l Bank, 362 Pa. 30, 66 A.2d 768 (1949); Storti v. Industrial Trust Co., 75 R.I. 482, 67 A.2d 697 (1949); Figuers v. Fly, 137 Tenn. 358, 193 S.W. 117 (1917);

for this result. First, since the signature is not that of the named payee the courts conclude that it is a forgery and that the drawee did not comply with its obligation to pay to the order of the drawer.[48] But this "know your indorser" rationale would seem to be equally applicable to the typical impostor situation. In both cases impostors have used their false identities not only to procure the issuance of the checks but also to negotiate or present them for payment. If one is bound to know the identity of his indorser, he should be bound to do so regardless of the type of fraud perpetrated on the drawer. When the courts have faced up to this problem, they have answered it with the second rationale, which is the fictional intent rule. As contrasted with the typical impostor case, the drawer did not intend the impostor agent to be the payee. Rather, his manifested intention was to make the check payable to the principal; hence, the agent's indorsement of the principal's signature is a forgery and the drawee's payment is unauthorized.[49]

It has been asserted that the courts distinguished between the impostor agent and the typical impostor situations on the ground that the agent case is one of false status rather than impersonation.[50] This assertion would seem to mean that a wrongdoer has falsely assumed an

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Chism v. First Nat'l Bank, 96 Tenn. 641, 36 S.W. 387 (1896); Guaranty State Bank & Trust Co. v. Lively, 108 Tex. 393, 194 S.W. 937 (1917); Morris Plan Bank v. Continental Nat'l Bank, 155 S.W.2d 407 (Civ. App. Tex. 1941); Greenville Nat'l Exchange Bank v. Nussbaum, 154 S.W.2d 672 (Civ. App. Tex. 1941); Goodfellow v. First Nat'l Bank, 71 Wash. 554, 129 Pac. 90 (1913). *But see* Weaver v. First Nat'l Bank, 138 Colo. 83, 330 P.2d 142 (1958); Kohn v. Watkins, 26 Kan. 691 (1882); Eagan v. Garfield Nat'l Bank, 118 Misc. Rep. 76, 192 N.Y. Supp. 209 (Sup. Ct. 1922).

48. Russell v. First Nat'l Bank, 2 Ala. App. 342, 56 So. 868 (1911). *Accord,* Chism v. First Nat'l Bank, 96 Tenn. 641, 36 S.W. 387 (1896); Armstrong v. Pomeroy Nat'l Bank, 46 Ohio St. 512, 22 N.E. 866 (1889); Guaranty State Bank & Trust Co. v. Lively, 108 Tex. 393, 194 S.W. 937 (1917). Some courts use the same rationale but apply NIL § 23. See Land Title Bank & Trust Co. v. Cheltenham Nat'l Bank, 362 Pa. 30, 66 A.2d 768 (1949); Morris Plan Bank v. Continental Nat'l Bank, 155 S.W.2d 407 (Civ. App. Tex. 1941).

49. McCornack v. Central State Bank, 203 Iowa 838, 211 N.W. 542 (1926). See Buena Vista Loan & Sav. Bank v. Stockdale, 59 Ga. App. 798, 2 S.E.2d 158 (1939); Murphy v. Metropolitan Nat'l Bank, 191 Mass. 159, 77 N.E. 693 (1906); Rogers v. Ware, 2 Neb. 29 (1873); Strang v. Westchester County Nat'l Bank, 235 N.Y. 68, 138 N.E. 739 (1923); United Cigar Stores Co. v. American Raw Silk Co., 184 App. Div. 217, 171 N.Y. Supp. 480, *aff'd,* 229 N.Y. 532, 129 N.E. 904 (1920); Storti v. Industrial Trust Co., 75 R.I. 482, 67 A.2d 697 (1949); 16 LA. L. REV., *supra* note 14, at 119. An analogous problem to the one here being considered may be found in the law of sales. Prior to the Code, where impostors induced a sale by the fraudulent use of identity, the determination of the loss was largely determined by the seller's intent. See, *e.g.,* Phelps v. McQuade, 220 N.Y. 232, 115 N.E. 441 (1917). Where only an impostor was involved, the seller was held to have intended that person to be the purchaser and the impostor was able to pass good title to a good faith purchaser. *Ibid.* But where an impostor agent was involved he received no title and the seller was able to recover his goods. See Note, 38 IND. L. J. 675 (1963), for a thorough discussion of the impostor problem in sales.

50. Abel, *supra* note 1, at 185-87.

agency status without assuming the identity of a known agent, and that this absence of impersonation would justify placing the loss on the drawee. It is true that when the impostor represented himself to be the agent of another the courts would place the loss on the drawee rather than on the drawer.[51] But the reason for the difference in result, as enunciated by the courts, was that the drawer did not intend the "agent" to be the payee.[52] There seems little reason, however, for making the distinction that in the impostor agent cases there is no impersonation. Courts usually have not reached a difference in result in the typical impostor situation where the impostor has assumed a fictitious name of a nonexistent person,[53] a case in which there would seem to be no impersonation. Whether it is the typical impostor situation or the impostor-agent situation, there can be elements of false impersonation and assumption of status in each. This would be especially true where the agent whose identity has been assumed has a well-known reputation. Since the impostor cases have not required the element of impersonation, in the sense of the assumption of the identity of a known person, the asserted distinction between impersonation and assumption of status would seem unwarranted.

Arguably, the asserted distinction may be interpreted to mean that there is no impersonation of the *payee*. The question remains, however, what difference does the difference make? The distinction between status and impersonation does not seem, at least self-evidently, a sufficient reason for different results. In both cases a wrongdoer has duped a drawer into making and delivering a negotiable instrument and the determination of where to place the resulting loss should not be controlled by the type of misrepresentations made to the drawer.

Perhaps the validity of the distinction between the impostor agent and typical impostor situations can best be tested by comparing the effects of the two types of fraud on the two classes of victims—drawers and drawees. When the instrument is negotiated or presented to the drawee for payment, it will appear precisely the same whether the wrongdoer obtained it from the drawer by representing himself to be the agent of the payee or by impersonating the payee. In each case, the wrongdoer has fraudulently indorsed the payee's name. Neither the instrument nor the circumstances of its transfer to the drawee will reveal any difference as to the means by which it was obtained from the drawer. Whether or

51. See, *e.g.*, McCornack v. Central State Bank, 203 Iowa 838, 211 N.W. 542 (1926); Strang v. Westchester County Nat'l Bank, 235 N.Y. 68, 138 N.E. 739 (1923).
52. *Ibid.*
53. See, *e.g.*, United States v. Bank of America Nat'l Trust and Sav. Ass'n, 274 F.2d 366 (9th Cir. 1959).

not the wrongdoer was initially an impostor agent or an impostor payee, his success in defrauding the drawee depends on his ability to convince the drawee that he is the payee. Thus, if the difference in type of fraud is to lead to a difference in assigning the loss, the justification must be found in the transaction between the wrongdoer and the drawer, not the wrongdoer and the drawee.

From the standpoint of the drawer, the question is raised under the pre-Code law of why should the drawer win when deceived by a person claiming to be an agent of the payee, and lose when deceived by a person claiming to be the payee? The difference in result seems arbitrary. Diffrential treatment might be premised on the ground that the drawer has a greater or lesser opportunity to prevent the one type of fraud as opposed to the other. One might argue that a drawer may verify a claimed agency status by the simple expedient of contacting the payee. By contrast, the drawer's opportunity to expose an impostor is limited, as a practical matter, to examining the identification credentials of the person claiming to be the payee. Since the accomplished impostor will be well prepared for this eventuality, the drawer's actions are unlikely to succeed in discovering the fraud. Under this reasoning, the pre-Code law leads to the anomalous result that the drawer wins when deceived by an easily discoverable fraud, and loses when deceived by a difficult-to-discover fraud.

The Uniform Commercial Code

The Uniform Commercial Code treats the impostor situation in section 3-405(1)(a):

> Impostors; Signature in Name of Payee.
> (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. . . .[54]

As applied to the typical impostor situation, the Code affirms the results of prior case law by making the impostor's indorsement effective. The important innovation, however, is that the various and dubious rationales formerly applied to this situation have been eliminated. Not only does a cursory reading of the section suggest this, but the Comments to the section specifically reject the double intent fiction.[55] This is in keep-

54. Uniform Commercial Code § 3-405(1)(a).
55. Comment 2 to Uniform Commercial Code § 3-405. See also Note, 16 La. L. Rev. *supra* note 14, at 125.

ing with the Code's consequence oriented method.[56] The question remains, however, whether the section applies to the impostor-agent and the innocent-agent hypotheticals.

At first glance it would appear that section 3-405 would solve the innocent-agent situation and reverse the prior law by placing the loss on the drawer. Indeed, one court, in deciding a case with an analogous fact situation, has so held.[57] In that case, Mrs. J approached D, a real estate dealer, and M, an attorney, concerning a loan on real estate owned by the estate of her husband's mother. Her husband was administrator of the estate. After a mortgagee had agreed to make the loan, which was to be insured by the plaintiff title company, but before the settlement date, Mrs. J informed D and M that her husband would be unable to attend the settlement. In advance of the settlement date Mrs. J, who was estranged from her husband, introduced to these men a man whom she claimed was her husband. He conveyed the property from the estate to themselves as husband and wife and they together executed a mortgage. On the settlement date Mrs. J, D, and M went to the plaintiff title company to obtain the loan. On the strength of D's and M's assurances that Mr. J had executed the papers, the mortgagee released the amount of the mortgage to the title company which in turn issued a check payable to both Mr. and Mrs. J. The check was presented to defendant and paid. It was admitted that the indorsement of Mr. J was a forgery and that it was not Mr. J who had presented himself to M and D, but an impostor. The court stated that section 3-405(1)(a) is an exception to the general rule of drawee liability for improper payment over a forged indorsement,[58] and clearly applied to the instant case.[59] The phrase "by the use of the mails or otherwise" in the Code expresses the policy that the imposture can be by any means at all, and is not limited to transactions which are face to face or by mail.[60] The court noted that this construction is supported by the Official Comments which state that the result under this section does not turn upon the type of fraud which transpired between

56. One of the major objectives of the Code is to make commercial law uniform and realistic among the states by doing away with "legal artificialities governing business transactions" and by requiring observance of reasonable commercial standards. It refers to legal effects rather than concepts or theories. Goodrich, *The New Commercial Code,* Fortune, Dec. 1949, pp. 183-84. Judge Goodrich, the author of the above article, was chairman of the drafting board and Director of the American Law Institute. Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification,* 16 LAW & CONTEMP. PROB. 141, 142 (1951).

57. See Philadelphia Title Insurance Co. v. Fidelity-Philadelphia Trust Co., 419 Pa. 78, 212 A.2d 222 (1965).

58. See UNIFORM COMMERCIAL CODE § 3-404.

59. Philadelphia Title Insurance Co. v. Fidelity-Philadelphia Trust Co., 419 Pa. 78, 212 A.2d 222 (1965).

60. *Id.* at 225.

the impostor and the drawer.[61] But a question still remains since the Code refers to an impostor who "has induced the maker or drawer . . ." to issue the instrument. It has been contended, for example, that the *Philadelphia* case stretched the meaning of "induce" to a degree not contemplated by the drafters.[62] This contention is based on the idea that Mrs. J's husband, the impostor, did not "induce" the drawer to issue the check, but was only the initiating cause of a series of events which culminated in its issuance.[63] The argument is that "induce" should be limited by definition to direct persuasion and not extended to causation, since the latter is a fact question which will lead to uncertain results.[64] Whether one agrees or disagrees with this logic, the Code, by the use of the uncertain concept of "otherwise . . . induced," has left itself open to various interpretations.

Concerning the impostor-agent situation, the question is whether the impostor has "induced the maker or drawer to issue the instrument to him . . . in the name of the payee." A liberal construction of the Code[65] would seem to place the loss on the drawer. This interpretation is buttressed by the Official Comments. "The position here taken is that the loss, regardless of the type of fraud which the particular impostor has committed should fall upon the maker or drawer."[66] Several problems remain, however.

The first is whether or not the instrument in question was "issued" to the impostor agent. "[U]nless the context otherwise requires, . . . 'Issue' means the first delivery of an instrument to a holder or a remitter."[67] A "holder" is "a person who is in possession of . . . an instrument . . . drawn, issued or indorsed to him or to his order or to bearer or in blank."[68] It appears that these definitions are of only limited

61. *Ibid.* The court also noted that it did not need to inquire into the drawer's negligence.
62. Comment, 11 VILL. L. REV. 427, 430 (1966).
63. *Ibid.*
64. *Id.* at 431.
65. UNIFORM COMMERCIAL CODE § 1-102. Purposes; Rules of Construction; Variation by Agreement.
(1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
(2) Underlying purposes and policies of this Act are
(a) to simplify, clarify and modernize the law governing commercial transactions;
(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
(c) to make uniform the law among the various jurisdictions.
66. Comment 2, UNIFORM COMMERCIAL CODE § 3-405. See note, 51 IOWA L. REV. 434, 438 (1966). See also Note, 16 LA. L. REV. *supra* note 14, at 126.
67. UCC § 3-102(1)(a).
68. UCC § 1-201 (20).

utility in determining whether or not the instrument was "issued" to the impostor. Taken together, they seem to declare that an instrument is "issued" if it is delivered to a "holder," and that one is a "holder" if the instrument was "issued" to him. In spite of their circularity, however, these definitions do suggest that "issue" means a delivery of an instrument to one who receives some right in the instrument. If this interpretation is correct, it is arguable that "issue" is misused in section 3-405. By the inclusion of this section in the Code, an impostor can effectively negotiate an instrument, although he receives no rights in the instrument. In the sense of a delivery to one receiving some right, an instrument could not be "issued" to an impostor. This type of hair-splitting was anticipated in the Code by the use of the phrase "unless the context otherwise requires."[69] It would seem that the context here would require "issue" to be defined as "delivery." This would avoid confusion in both the typical impostor and the impostor-agent situations by making their indorsements effective after the instrument has been delivered to them.

The next problem is whether or not the impostor agent is truly an impostor. Although the Code contains several sections of definitions,[70] it does not define this term. One case, noting that there is no legal definition of the word, stated:

> [A]t no time did we find that the court has ever sought or tried to establish a legal definition of who or what is an impostor; a reference to Webster's New International Dictionary, Second Edition, unabridged, gives the lay definition of the word to be: "one who imposes upon others; esp., a person who assumes a character or title not his own, for the purpose of deception; a pretender." This would seem to be a legally satisfactory definition.[71]

In the hypothetical case under consideration, the impostor agent, by assuming to be an agent, has assumed a "character or title not his own." He has done so as a "pretender" in order to deceive. Quite clearly he is an impostor, and UCC section 3-405(1)(a) would seem to determine the loss.[72]

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69. See UCC §§ 3-102, 1-201.

70. Beutel notes that the Code has about 170 specially defined words. Beutel, *The Proposed Uniform (?) Commercial Code Should Not Be Adopted,* 61 YALE L. J. 334 (1952).

71. United States v. Continental-American Bank & Trust Co., 79 F. Supp. 450, 454 (1948). The definition is substantially the same in Webster's Third New International Dictionary, Unabridged (1966). For a discussion of the difference between a forger and an impostor, see Annot., 81 A.L.R.2d 1365, 1367 (1962).

72. This, of course, is in the absence of negligence. It is assumed for the purposes of this example that neither party was negligent. It might also be noted at this

The Official Comment to this section, however, states that:

> "Impostor" refers to impersonation, and does not extend to a false representation that the party is the authorized agent of the payee. The maker or drawer who takes the precaution of making the instrument payable to the principal is entitled to have his indorsement.[73]

Because the comments may be given weight in interpreting the Code,[74] this "addition"[75] to the text casts doubt upon the general applicability of the section. Two problems become evident.

First, has the drawer taken a "precaution" by making the instrument payable to the principal? It would seem that the most obvious thing to do when dealing with an agent is to make the check payable to the principal. Why should the check be made payable to the agent? The drawer makes it payable to the principal not as a precaution, but because that is what the agent has asked him to do.

Second, it has been noted that no meaningful factual distinction exists between the impostor-agent situation and the typical-impostor situation.[76] Under prior law a form of distinction was created by the use of

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point that one case has stated that negligence is not a controlling factor under UCC § 3-405. Philadelphia Title Insurance Co. v. Fidelity-Philadelphia Trust Co., 419 Pa. 78, 212 A.2d 222 (1965).

73. Comment 2 to UNIFORM COMMERCIAL CODE § 3-405.

74. It is noted in the Comments to the Title of the present Code that the Comments are designed to aid in construction in order to promote uniformity. Comment to Title, UNIFORM COMMERCIAL CODE; see FARNSWORTH & HONNOLD, CASES ON COMMERCIAL LAW 9 (1965). UNIFORM COMMERCIAL CODE § 1-102 (1952) stated that:

> (3) In construing and applying this Act to effect its purposes the following rules apply:
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> (f) The comments of the National Conference of Commissioners on Uniform State Laws and the American Law Institute may be consulted in the construction and application of this Act but if text and comment conflict, text controls. . . .

This section was later eliminated. UNIFORM COMMERCIAL CODE (1957). It has been suggested that the Comments be given as much weight as an able treatise. FARNSWORTH & HONNOLD, *supra* at 10.

One case has considered the effect of the Comments. While noting that the Comments are not direct authority, the court did say that they were persuasive. Burchett v. Allied Concord Financial Corp., 74 N. Mex. 575, 396 P.2d 186, 188 (1964). But the court also gave a warning. "By giving approval to this Comment, we do not in any sense mean to imply that we thereby are expressing general approval of all of the Comments to the various sections of the Uniform Commercial Code." *Id.* at 190. "Nuances concerning the precise weight which may be given the Comments must await further litigation testing the issue." FARNSWORTH & HONNOLD, *supra* at 10.

75. There are many instances where the Comments either contradict the Code or, more often, add something which is not in the text. FARNSWORTH & HONNOLD, *supra* note 74, at 10. For a short general history of the comments and their use in relation to the text see Braucher, *The Legislative History of the Uniform Commercial Code,* 58 COL. L. REV. 798, 808-09.

76. See note 53 *supra,* and accompanying text.

the intent theory.[77] As has been noted, the use of the intent fiction as a factor to be considered in determining loss has been eliminated by the Code.[78]

From the standpoint of the drawer under prior law, a strange situation existed. When dealing with an impostor the drawer was held to have intended that person to be the payee and was required to bear the loss.[79] When dealing with a purported agent, however, the drawer was free to ignore the consequences of his act and the loss was shifted to the drawee or the second victim of the fraud.[80] From the standpoint of the second victim the situation was even more confusing. The determination of whether or not he was to bear the loss also depended on whether or not the drawer had dealt with an impostor or an impostor agent. The problem, however, was that the second victim could not know the nature of the transaction which transpired between the impostor and the drawer. Thus the amount of care which the drawee was required to exercise depended upon a transaction of which he was unaware.

As already noted, this difference in decisions was based primarily on the drawer's intent.[81] The Code, in rejecting the intent fiction, has attempted to promulgate a uniform rule for loss allocation when one deals with an impostor. One would think that a drawer would be held to one standard of conduct in drawing a check and that an indorsee would be held to a certain standard of conduct in taking a check. This does not appear to be the result. The typical impostor situation and the agency situations are similar in that someone, representing himself to be another, has duped a victim into drawing a check payable to a person with whom the impostor has no connection. From the standpoint of either the drawer or the indorsee there is no meaningful distinction. The text of the Code has not distinguished among "impostors." By the use of undefined terms and distinguishing the case of the false representation of agency in the Comments, the Code has perpetuated a doubtful distinction.

CONCLUSION

Because of the national character of commercial transactions, the need for uniformity of decision is apparent.[82] Under the law which was

77. See note 49 *supra,* and accompanying text.
78. See notes 55-56 *supra,* and accompanying text.
79. See note 26 *supra,* and accompanying text.
80. See note 47 *supra,* and accompanying text.
81. See note 49 *supra,* and accompanying text.
82. BRITTON, BILLS AND NOTES § 3, at 12. See also Gilmore, *On the Difficulties of Codifying Commercial Law,* 57 YALE L. J. 1341 (1948). For a discussion on codification, its purposes, and the problems of the NIL in this area, see generally BRITTON, *supra* at § 3.

in effect prior to the Code, the usual impostor situation on the one hand, and the innocent-agent and the impostor-agent situations on the other, were treated differently on the basis of tenuous and unwarranted distinctions. The Code perpetuates the problem by uncertain terminology of the text and a dubious distinction in the Comments. In applying the Code, the courts may therefore reach opposite conclusions based upon the same factual situation. Because such a result is in direct conflict with the stated principles and purposes of the Code,[83] the problem warrants the attention of the Permanent Editorial Board which was established by the National Conference of Commissioners on Uniform State Laws and the American Law Institute to propose amendments when commercial policy and practices make such proposals desirable.[84]

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83. See notes 56 and 65 *supra*.

84. The Board will function under an agreement between The American Law Institute and the National Conference of Commissioners on Uniform State Laws dated August 5, 1961. Paragraph SEVENTH of that Agreement is:

> It shall be the policy of the Board to assist in atttaining and maintaining uniformity in state statutes governing commercial transactions and to this end to approve a minimum number of amendments to the Code. Amendments shall be approved and promulgated when—
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> (a) It has been shown by experience under the Code that a particular provision is unworkable or for any other reason obviously requires amendment; or
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> (b) Court decisions have rendered the correct interpretation of a provision of the Code doubtful and an amendment can clear up the doubt; or
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> (c) New commercial practices shall have rendered any provisions of the Code obsolete or have rendered new provisions desirable.

UNIFORM LAWS ANNOTATED, UNIFORM COMMERCIAL CODE, ARTICLES 1-3, Explanation pp. X-XI. See also Henson, *Introduction, Recent Developments in the Uniform Commercial Code,* 19 BUS. LAW. 557 (1964).