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AMBIGUOUS PAYEES OF NEGOTIABLE PAPER

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It is elementary knowledge among American lawyers and business men that title to a negotiable instrument payable to the *order* of a *specfied person* does not pass under a purported negotiation thereof unless the instrument bears the authentic indorsement of the person to whose order it is drawn. The very object of making the instrument payable to the order of a particular person is to require the indorsement of the particular payee named therein. Perhaps it is not so commonly known that most of the important commercial countries of the world live under a different rule.[1]

One of the simplest illustrations of the well known American rule is as follows: William Smith, who owes John Jones $100, desires to pay the debt by check. Smith draws a check for $100 on First Bank payable to the order of John Jones, with the intention of personally delivering it to Jones, but before delivery the check is stolen from the drawer Smith by a fraudulent employee named Frank Fleece. Fleece forges the name of the payee, Jones, as indorser, and cashes it at the Corner Drug Store, the Drug Store giving Fleece the $100 in cash. The Drug Store, after placing its own blank indorsement thereon, cashes the check at the Second Bank, to whom it is paid through the local clearing house by the drawee First Bank, the First Bank charging Smith's account for $100. The legal results of this transaction under the American rule are as follows:

(1) Smith may require the drawee First Bank to recredit his account[2] for $100 because, under our theory, payment by a drawee bank to a party holding under a *forged indorsement* constitutes a mispayment. The drawer has not authorized the bank to pay anyone except parties holding under the true indorsement of the person to whose order the check was drawn.

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[1]Hudson and Feller, The International Unification of Laws Concerning Bills of Exchange (1931) 44 Harv. L. Rev. 333, 354.

[2]Cases collected in Brannan, Negotiable Instruments Law (6th ed., Beutel, 1938) 327, citing Labor Bank & Trust Co. v. Adams, 23 S. W. (2d) 814 (Tex. Civ. App. 1930); Schwartz v. Bank of Pittsburgh National Ass'n., 283 Pa. 200, 129 Atl. 52 (1925) and other cases.

(2) The drawee First Bank, having recredited the drawer's account, may recover the $100 from the recipient of payment[3] either upon the theory that the payment was made under a mistake of fact or upon the theory that the Second Bank, by virtue of presentment, warranted that it had title to the check.

(3) The Second Bank may pass the loss back to the Drug Store by suing upon the Drug Store's indorsement. The Drug Store must bear the ultimate loss unless it can recover from the fraudulent party, Fleece.

(4) The debt of Smith to Jones remains unpaid and Smith is safe in delivering Jones another check for the $100. If Smith had stopped the check and the Second Bank had sued Smith on the check, the plaintiff would have been denied a recovery.

If all the facts in the case had been the same except that the check was drawn payable to John Jones *or bearer,* we would have had entirely different legal results:

(1) The drawer, Smith, could not have required the drawee First Bank to recredit his account. Payment of a bearer check to any person in possession thereof would constitute an authorized payment and payment to the Second Bank was therefore an authorized payment. The fact that Jones' name was forged as indorser would make no difference because no indorsement was necessary.

(2) The debt of Smith to Jones would remain alive and unpaid and Smith would be obliged to pay the debt a second time. The loss would fall upon Smith unless Smith could recover from the fraudulent party, Fleece.

For the reasons shown above, it is customary for American business men to draw checks payable to the order of named persons whenever they are to be sent through the mail or by messenger to the parties sought to be paid, or whenever they are to be kept about the office for any considerable time, or whenever the circumstances are such that they may get into the hands of persons who may fraudulently cash them. Checks are seldom drawn payable to bearer or to cash, which amounts to the same thing,[4] unless they are counter checks intended for immediate delivery. To the American business man, drawing a check payable to the order of John Jones is the same thing as stamping on it in red letters: "Look out, purchaser; you are not safe in buying

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[3]Canal Bank v. Bank of Albany, 1 Hill 287 (N. Y. 1841).

[4]Negotiable Instruments Law § 9 (4).

this instrument unless it bears the authentic indorsement of John Jones; and look out, drawee bank; you are not authorized to pay this check to any person except Jones unless you are sure that it bears Jones' authentic indorsement."

Since the principle concern of this discussion is to consider how far the protection afforded the drawer in making the instrument payable to the order of a named person should be carried, it may be well to compare our rule with those of the other important commercial countries, and to consider very briefly the history of the problem.

The first reported English case deciding the effect of a forgery of the payee's signature was decided by Lord Mansfield in 1799.[5] The purchaser of goods had accepted and paid the bill drawn by the seller for the price to a transferee of the bill holding under a forged indorsement. When the assignee in bankruptcy of the seller sued the purchaser for the price of the goods, the purchaser pleaded payment, relying upon payment of the bill to the holder under the forged indorsement. The court held that the purchaser was required to pay again. Lord Mansfield said: "The instrument could not be paid without the payee's hand and the defendant has been negligent in inquiring whether it was their hand or not." A few years later the English court went so far as to hold that a title to a bill of exchange payable to the order of a particular person did not pass to a purchaser who had taken the instrument from a forger who happened to bear the same name.[6] The American cases have followed in the line marked out by the early English cases, and it remains as true as ever in the United States that no title to face order paper may pass under a forgery of the payee's signature.[7]

Mr. Friedrich Kessler, in a comprehensive article entitle "Forged Indorsement," appearing in the April, 1938 issue of the Yale Law Journal,[8] says:

> "Under the Uniform Codes on Bills of Exchange and Checks, which were drafted in Geneva in 1931 and 1932 and have been adopted in most of the Civil Law countries, a holder acquiring an instrument in good faith and without gross negligence by an

[5]Aaron Smith & Another, Assignees of Bengall & Hard v. Shepperd, Hil. 16 Geo. III, cited in Chitty, Bills of Exchange (1st ed. 1799) 126 note 4.

[6]Mead v. Young, 4 T. R. 28, 100 Eng. Rep. 876 (K. B. 1790).

[7]Where drawer had two customers named H. E. Richards and carelessly mailed the check to the wrong H. E. Richards, title was held to pass under forgery made by wrong H. E. Richards, but this was in effect on estoppel. See, Slattery & Co. v. Nat. City Bank, 114 Misc. 48, 186 N. Y. Supp. 679 (1920).

[8]Kessler, Forged Instruments (1938) 47 Yale L. J. 866.

uninterrupted series of indorsements has good title even in a case where the instrument was lost or stolen and one of the signatures forged."[9]

Returning to our two illustrative cases contrasting the result of Smith's drawing the check to the *order* of Jones and to Jones *or bearer,* we see that under the Geneva Uniform Codes, it would make no difference whether the check was drawn to *order* or to *bearer* so long as the Drug Store and the Second Bank and the drawee First Bank acted honestly and without gross negligence and the indorsements on the back of the instrument appeared to be regular and uninterrupted. It is noteworthy, furthermore, that the English Bills of Exchange Act gives us the same result as the Geneva Uniform Codes so far as demand paper drawn on banks is concerned.[10] Checks are, of course, within this category.

It is obvious that the other great commercial countries of the world give no such protection to the drawer of face order paper as is afforded under our system of law and under the Uniform Negotiable Instruments Act. Under our system we have two types of negotiable paper that are as different as black and white. American *face bearer* paper is freely transferable by any person in possession thereof, even though the holder holds under a finder or thief, and the drawee of a face bearer check is authorized to pay it to any person in possession of it;[11] but no title passes under a purported sale of *face order* paper in America unless the authentic indorsement of the payee appears on it,[12] and no bank is authorized to pay a face order check unless such authentic indorsement of the payee is shown. In the other great commercial countries of the world, face bearer paper is the same as our own, but face order paper is so different from ours that, from our American point of view, it is really semi-bearer paper or quasi-bearer paper. Under the Geneva Uniform Codes, title to face order paper passes as freely through finders and thieves and forgers as face bearer paper, so long as the chain of indorsement appears to be regular and uninterrupted and the purchaser is honest and free from gross negligence.[13]

It is not likely that many American lawyers or business men would prefer to adopt the rule of the Geneva Uniform Codes. So long as the indorsement of the payee is required, debtors will feel safe in sending

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[9]Geneva Bills of Exchange Act, Art. 16 (2); Geneva Check Act, Art. 21.
[10]See Bills of Exchange Act § 60.
[11]See Negotiable Instruments Law § 40.
[12]See Negotiable Instruments Law § § 23 and 9 (5).
[13]See Note 1 supra.

checks to their creditors by mail or by messenger. When the protection is withdrawn, they will not feel safe in doing so, as has been demonstrated by the lesser use of checks in the countries adopting the Geneva Codes.

We come, then, to the question of how the court should hold when an ambiguity arises as to who the payee really is. Suppose William Smith owes a debt to a man named H. Davis and draws a check on First Bank payable to the *order* of H. Davis, and this check is stolen by another man who happens to bear the name H. Davis. The thief writes "H. Davis" on the back of the instrument and cashes it at Second Bank. The Second Bank has required the party to be identified and has been informed by reliable parties that the man's name is really H. Davis. Second Bank collects the amount of the check from First Bank. What result? It was decided as early as 1890 in England that no title passes under the indorsement of a man who happens to bear the name of the true payee. The drawer could therefore require the drawee First Bank to recredit his account. The drawee payer, First Bank, could require the recipient, Second Bank, to return the money. The Second Bank would bear the ultimate loss unless it could recover from the thief.

As a practical matter, it is usually true that there will have been a previous transaction giving rise to a debt which will identify the particular H. Davis by whom the instrument should have been indorsed. In the ordinary case of Smith drawing a check to the order of H. Davis, it is probably true that there is not more than one H. Davis in the world with whom the drawer Smith has recently had a business transaction creating a debt for the amount for which the check is drawn. Furthermore, the correspondence between the creditor, H. Davis, and the drawer of the check is usually available and makes clear which H. Davis, among all the people in the world named H. Davis, was to indorse the instrument. It would have been reasonable for the courts to have required the drawer to insert the business address or the position occupied by the particular H. Davis after the name of the payee in order to avoid the consequences of the drawee paying the check to the indorsee of the wrong H. Davis, but no such precise identification has been required. Having failed to require such a precise identification, should the question of who the true payee is be deemed a question of intention of the drawer, or is it a question of fact? If it is a question of intention, then it should be remembered that it is the secret subjective intention of the drawer that is to control the case. The objective appearance of the bill carries no further warning than that some H. Davis is to indorse.

In a well known English case,[14] where the court was attempting to decide whether an instrument which objectively read "payable to the order of Petridi & Co." was payable to a particular company called Petridi & Co., or on the other hand was payable to a fictitious payee within the meaning of Section 7 (3) of the Bills of Exchange Act, Lord Herschell said: "It is not a question of intention. It is a question of fact. The instrument was not payable to Petridi & Co. of Constantinople, as the forger intended the accepter to believe. The bills represented no transaction with Petridi & Co. . . ."

Whatever Lord Herschell may have thought about how the so-called *true payee* ought to be determined, the courts ordinarily talk in the opinions as if it were purely a question of intention. They tell us that the payee is the person the drawer intends to be the payee and that the payee is fictitious when the drawer so intends.

One of the situations most frequently giving rise to the ambiguous payee problem is the so-called imposter case. In this type of case, it becomes important to decide whether the matter is to be settled by groping for the intention of the drawer, or whether, on the other hand, the question is to be settled as a question of fact by looking to such surrounding circumstances as the transaction giving rise to the debt.

The following facts exemplify the typical impersonation case: William Smith owes a debt of $100 to John Jones, whom he has never seen. Smith, by correspondence with John Jones, informs Jones that he will give him a check for the $100 whenever Jones wishes it. Jones replies that he will call for the check on Tuesday. Frank Fleece, a fraudulent party, who has learned all about the matter, calls at Smith's office before Jones arrives and introduces himself as John Jones. After an exchange of courtesies, Smith draws a check for $100 on First Bank, payable to the order of John Jones, and delivers it to the man before him, whom he believes to be Jones, but who is in fact Fleece. The imposter, Fleece, writes the name of John Jones on the back of the instrument and cashes it at Second Bank, to whom it is paid through the clearing house by First Bank, the drawee, First Bank charging Smith's account for the $100.

If this transaction is to be treated as a case of ordinary forgery of the order payee's signature, the results are simple. The payment of the check will be regarded as a mispayment by the drawee bank because the drawee bank will be deemed to have paid a check to an unauthorized

[14] Vagliano v. Bank of England, 23 Q. B. D. 243, 58 L. J. Q. 357 (1889).

party, and the depositor Smith may compel First Bank to recredit his account for $100. First Bank will be permitted to recover the $100 from Second Bank, which will bear the ultimate loss unless it can recover from the forger. But the majority of cases does not treat the impersonation case described above as a case of ordinary forgery of the payee's signature. Most courts hold that title to the check passed under the indorsement of the named payee forged by the imposter. Whether the suit be brought by the depositor Smith against his depository bank for balance of deposit account, or is brought by the purchaser of the check against the drawer, the courts hold that title to the check passed despite the fact that Fleece committed a criminal forgery. The check, they tell us, was indorsed by the very man *intended to indorse.* That man was not Jones, whose name was written in the payee space. It was the imposter Fleece that the drawer *intended to indorse.* This result is achieved by an amazingly fantastic rationalization.[15]

When William Smith drew the check payable to the order of his creditor, John Jones, and handed it to the imposter who stood before him, Smith had two conflicting intents: First, an intent to require the indorsement of his real creditor, Jones; second, the intent that the man before him indorse. The next step in the supposed reasoning is for the court to convince itself that the intent that the real creditor, Jones, be required to indorse was a mere vague ultimate objective, but the intent to have the very man before him indorse was an immediate, direct intent. This direct, vigorous intent to have the imposter indorse, of course, prevails over the puny, remote, ultimate-objective type of intent that the creditor, Jones, indorse. In order to convince themselves that the right party has indorsed the instrument, one additional mental hurdle must be taken with a sort of metaphysical Russian leap. The hurdle is simply this: The imposter really was not named John Jones. His name was Frank Fleece, and if the purchaser, Second Bank, had had him identified, it would have learned that the man's name was Fleece and not Jones. But this barrier is flitted over by explaining to us that a man may adopt a name which is not really his own for a particular transaction of this sort. For example, suppose a man who was

[15]Montgomery Garage Co. v. Mfr's. Liability Ins. Co., 94 N. J. L. 152, 109 Atl. 196 (1920). Approved in Note (1920) 34 Harv. L. Rev. 76, where whole problem of impersonation is reviewed. Cases are collected in Brannan, Negotiable Instruments Law (6th ed., Beutel, 1938) 349-58. In Tolman v. American Exch. Bank, 22 R. I. 462, 48 Atl. 480, 52 L. R. A. 877 (1901) the court treated signature of imposter as an ordinary forgery and therefore nugatory under Section 23 of N. I. L. Mr. Beutel says cases are overwhelmingly to contrary at common law and cases cited show law of cases decided since N. I. L. are contra.

named Frank Fleece by his parents and whose birth certificate carried his name as Frank Fleece and who was christened Frank Fleece and whose name in the family Bible was Frank Fleece, went into the business of selling novelties from door to door, and by reason of being ashamed of his occupation, he introduced himself to prospective customers as John Jones. Now, if he sold an article to William Smith and Smith made the check payable to the order of John Jones at his request, the indorsement by Fleece of the name Jones would pass title. Fleece would have adopted the name Jones for the transaction and would not have committed a crime in so doing. And so, the court by first deciding that the direct intent to deal with the man before him should prevail over the remote, ultimate-objective type of intent, and then telling us that the imposter Fleece has adopted the name Jones for the purpose of the transaction, the result flows as inevitably as water down hill that the right payee has indorsed when Fleece has written Jones' name on the back of the check.[16]

The writer believes that the rule of the Anglo-American law, absolutely requiring the indorsement of the order payee, works better than the Continental system, which renders face order paper merely quasi-bearer paper, and that this rule should never be relaxed or qualified where it is clear who the true payee is, and that the compromise of the English Statute found in Section 60 was undesirable from a commercial standpoint. He also feels that the line of decisions called the impersonation cases introduces an improper exception to our general rule; that these cases are based upon a false analogy to the same situation in the law of sales. The sales cases involving ordinary personal property bear no warning as to the requisite of any indorsement, whereas the very word "order" on negotiable paper should be a warning to the purchaser that he cannot rely on possession alone, but must be sure the order payee's authentic indorsement is on the instrument. The reasoning of the courts in these cases is so whimsical and fantastic as to fit more naturally into Alice In Wonderland than in the covers of a law book. The minds of the judges in deciding the imposter cases fly away on wings of fancy to an invisible world, where they referee a death struggle between two invisible knights for the control of the domain of true subjective intent. They see the young, vigorous Knight of the Immediate Intent prevail over the sickly old Knight of the Remote Ultimate Intent. They then descend to the world of objective reality

[16]See opinion in Montgomery Garage Co. v. Mfgr's Liability Ins. Co., 94 N. J. L. 152, 109 Atl. 296 (1920).

with a decision which is contrary to business exigency and which further muddies a stream that was none too clear.

An even more troublesome problem concerning the necessity of the indorsement of the named payee arises when the payee named is "fictitious" within the meaning of Section 9, Subsection 3 of the Negotiable Investments Law. According to Section 9 of the N. I. L., the instrument is payable to bearer when (1) it is expressed to be so payable, (2) payable to a named person or bearer, (3) *payable to the order of a fictitious or non-existent person and such fact is known to the person making it so payable,* (4) when the name of the payee does not purport to be the name of any person, (5) when the only or last indorsement is an indorsement in blank.

A clear understanding of Section 9-3 of the N. I. L. requires some preliminary consideration of the problems of other sub-sections of Section 9.

It is obvious that there are at least two different types of paper which may be "payable to bearer"—(1) true face bearer paper, which is always "payable to bearer"[17] and (2) order paper, which may or may not be "payable to bearer" at a given moment, depending upon the indorsements.[18]

According to the usual taught law, Sub-sections 1 and 2 refer to face-bearer paper, which under Section 40 is permanently bearer paper throughout its whole commercial life. This type of paper cannot be controlled by the type of indorsement placed on it.

If William Smith makes a note payable on its face to John Jones or bearer, and Jones indorses it specially to Ames and Ames indorses it specially to Bates and Bates indorses it specially to Caldwell, and it is stolen from Caldwell by Fleece and sold by Fleece to a bona fide purchaser before maturity, the b. f. p. gets good title.

A purchaser of face bearer paper is safe in purchasing it from any person in possession thereof, even though the party in possession turns out to have been a finder or thief and the fact that the instrument bears special indorsements makes no difference.[19] The purchaser is not obliged to turn over a face bearer note and examine the indorsements, because it was the policy of the draftsman to create a type of commer-

[17]Negotiable Instruments Law § 40: "Where an instrument, payable to bearer, is endorsed specially, it may nevertheless be further negotiated by delivery. . . ."

[18]Negotiable Instruments Law § 9 (5).

[19]It is not a futile gesture to specially indorse face bearer paper because by so doing the indorser limits his own liability as an indorser to parties holding under his special indorsee. See Negotiable Instruments Law § 40, last clause.

cial paper which could be paid to any person in possession of it, regardless of the indorsements. The only limitations upon this policy are that the purchaser must act with bona fides; that he shall not have had knowledge of the fact that his transferor was a finder or thief and that he have the other statutory qualifications of an h. d. c.

The statement in 9-5, that the instrument is "payable to bearer" when the only or last indorsement is an indorsement in blank, obviously refers to paper that is not face bearer paper or true bearer paper at all. This sub-section clearly refers to *order paper;* that is, paper that is payable on its face to the order of a named person. Such paper requires the indorsement of the person to whose order it is drawn or the person to whom it may have been specially indorsed. It is intended to be controlled by the indorsements that are placed on it and intended that its nature, as to freedom of transfer, fluctuate with the indorsements placed on it.[20]

A note payable on its face to the order of Jones after having been indorsed in blank by Jones may be negotiated several times by simple delivery, but any holder, even though he take the instrument by delivery only, may indorse it specially and thereby require the indorsement of his transferee. For example, Smith makes a note payable to the order of Jones, and Jones indorses it in blank and sells it to Ames and delivers it to Ames. Title passes to Ames because the only indorsement is in blank. Now Ames sells it to Bates and delivers it without indorsement. Bates gets good title because it is still true that the only indorsement is in blank. Now Fleece steals it from Bates and sells it to Carr, an innocent purchaser. Carr gets good title because the only indorsement is in blank. Now Carr indorses it specially to Dill, from whom it is stolen by Crooks, who sells it to Ellis, a bona fide purchaser. Ellis does not get title because the last indorsement was not in blank; the last indorsement was a special indorsement to Dill and Dill's indorsement was required.

When the expression "payable to bearer" is employed, it signifies that the purchaser is safe in buying it from any person in possession of it, and that the obligor or drawee is safe in paying it to any person in possession. True bearer paper—that is, face bearer paper—is always

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[20]Smith v. Clarke, Peake 295, 170 Eng. Rep. 162 (N. P. 1794). Contra: Parker v. Roberts, 243 Mass. 174, 137 N. E. 295 (1922). Historical discussion of problem found in Brannan, Negotiable Instruments Law (6th ed., Beutel, 1938) 499. Negotiable Instruments Law § 9 (5) is almost an exact copy of Bills of Exchange Act § 8 (4), and the author of the Bills of Exchange Act says it was his purpose in writing § 8 (4) to repeal the rule of Smith v. Clarke. See Chalmers, Law of Bills of Exchange (3rd ed.) 21.

"payable to bearer," whereas face order paper may or may not be "payable to bearer" depending upon whether the last indorsement is in blank. If the last indorsement on order paper is blank, it is "payable to bearer" for the time being, but that has not changed the essential nature of the instrument. It has not become "true" bearer paper because it is for the time being "payable to bearer." As soon as a special indorsement goes on it, that special indorsee's indorsement is required.

Now, what does Sub-section 3 of Section 9 mean when it says an instrument is "payable to bearer" when it is payable to the order of a fictitious or non-existent party, and such fact was known to the party making it so payable?

A flood of questions arises in the mind of the reader who encounters this remarkable statement of law for the first time. (1) Does it mean that the instrument is true bearer paper, permanently payable to bearer, such as the bearer paper described in 9-1 and 9-2, or does it mean that it is simply temporarily "payable to bearer" under certain circumstances? (2) How does it come about that the nature of a negotiable instrument, which ordinarily must bear its character on its face, derives its character from the subjective intention or knowledge of the drawer rather than from the objective appearance of the note? (3) Why should a drawer make the instrument payable to the order of a fictitious party? What is the drawer trying to do when he makes it payable to a fictitious person rather than making it payable to his creditor? (4) Would a note payable to the order of Kitty Foyle be payable to bearer if the drawer knew she was a fictitious character? (5) What about a note payable to Theodore Roosevelt? (6) Was there a time in our legal history when it was conventional commercial practice to draw instruments payable to the order of such characters as Mother Goose or Jack Sprat, with the deliberate purpose of creating bearer paper? (7) Would a 19th century business man recognize a note payable to Silas Marner as bearer paper, and know how to deal with it? (8) Would a remote purchaser know whether a note payable to the order of Tweedle Dee could be controlled by a special indorsement?

The facts are, so far as the cases disclose, that there never was any commercial custom, in England or the United States, of deliberately creating face bearer paper by drawing it to the order of famous fictional characters, and there has never been a time in our history when bankers regarded instruments payable to the order of such fictitious characters as Humpty Dumpty as conventional face bearer paper, safely purchasable from any person in possession without regard to the indorsements found on the back.

Furthermore, except for the unfortunate wording of Section 9-3, nobody would ever have supposed this to be true. The doctrine of the fictitious payee grew out of a greatly misunderstood group of cases, which will be discussed in detail, in which the court was presented with nothing more than a simple question of whether or not a particular person, the drawer, could in effect be estopped from insisting upon proof of the authentic indorsement of a person, proof of whose indorsement was impossible of production because there was in fact no such person as the person whose name the drawer had written in the payee space.

If the case history of the fictitious payee doctrine discloses no evidence of any commercial custom of intentionally creating bearer paper by drawing instruments to the order of famous characters in fiction, then what has been the motive of the drawers who have done this unusual thing? What is the drawer trying to do? A simple example will illustrate.

William Smith, who owes John Jones money which he is unable to pay, and who is attempting to induce Jones to take a note for the amount in lieu of cash, decides that the note will be more readily salable if Jones appears to be a party who has purchased the note from a former holder after due investigation, than if Jones appeared in his true light as the immediate creditor of a financially embarrassed debtor; also, that the instrument's salability will be enhanced if the note bears two indorsements rather than one. In order to create this false appearance of Jones being a transferee rather than a mere promisee, and in order to deceive the prospective purchaser into believing that the note carries the liability of two indorsers rather than one, Smith makes the note payable to the order of J. E. James, a wholly imaginary party as far as the actual transaction is concerned, and makes the initial delivery to his own creditor, Jones, with the understanding that Jones is to first write the name "J. E. James" on the back of the note and then indorse his own name. When the party in Smith's position has been sued on the note by the transferee of Jones, he has sometimes had the temerity to deny the purchaser's title, upon the theory that the J. E. James indorsement was a forgery.

Certainly justice requires that the bona fide purchaser from Jones ought to get judgment against the drawer. Surely the fraudulent drawer should not be permitted to take advantage of his own wrong by denying that the transferee obtained title under Jones' indorsement.

It is possible to justify the desired result in several ways: (1) We may say that Jones was authorized to indorse the payee's name. (2) We may say that Jones was the true payee and that Jones has indorsed. (3) We may say that the instrument was "payable to bearer" at the moment the plaintiff purchased it from Jones. (4) We may say that the drawer, Smith, who has colluded with his creditor, Jones, to create the appearance of ownership in Jones by authorizing Jones to write the name of James on the instrument, is estopped to deny that Jones owned the instrument at the time Jones indorsed it to the plaintiff.

If we are to consider nothing except the case of the purchaser against the drawer, it does not matter which theory we adopt; but, if in order to get this result in this one case, we decide that the instrument itself, which appears to be an order instrument, has become a true bearer instrument, the implications are unfortunate.

Suppose, for example, that this instrument, which appeared to be an order instrument payable to J. E. James, had been transferred several times and had finally come into the hands of Martin, who reasonably thought he had bought an order instrument; that Martin at Nelson's request indorsed it specially to Nelson, from whom it was stolen by a thief, who sold it to Parker. Now shall we say that Nelson has been deprived of his ownership by the sale to Parker by the thief simply because J. E. James turns out to be fictitious, and Parker can prove that the drawer knew that fact?

It is one thing to estop the drawer to deny that Jones had title to the instrument and power to transfer it to the purchaser; it is quite another thing to say that the instrument, which appears to be order paper, has become permanently bearer paper.

It is this failure to distinguish an estoppel against a particular person from a change in the essential nature of the instrument itself that has caused the confusion in the minds of people attempting to understand the fictitious payee doctrine.

Sub-section 3 of Section 9 of the N. I. L. is so worded as to indicate that the drawer's intentionally making an instrument payable to the order of a fictitious party goes beyond affecting the drawer personally and changes the essential nature of the instrument. If it was the intention of the draftsman of the N. I. L. to declare that face order paper really became face bearer paper by virtue of the drawer's knowledge that the payee named was fictitious, then commercial paper which is supposed ordinarily to carry its negotiability and legal character upon its face[21] is made in this instance to take its character from something

[21]Wettelaufer v. Baxter, 137 Ky. 362, 125 S. W. 741 (1910); Hull v. Angus, 60 Ore. 95, 118 Pac. 284 (1911).

that does not objectively appear on the instrument, and the nature of the instrument is to be derived from the secret intention of the drawer.

Mr. Victor H. Kulp, in an excellent article appearing in the Michigan Law Review in 1920,[22] says: "The doctrine of the fictitious payee had its origin in a series of cases that arose out of bills drawn by Livesay & Co., Bankrupts."[23] A careful examination of these cases discloses that they do not present any necessity of holding that the instrument's essential nature was changed by the drawer's knowledge that the named payee was fictitious. In each of the cases a fraudulent drawer was, in effect, personally estopped to deny that a particular party had received title where the drawer had, for the purpose of creating a false impression, put a fictitious name in the payee space. In none of these cases was it necessary for the court to decide that the paper became actually bearer paper.

The first appealed case involving the fictitious payee problem was *Tatlock* v. *Harris*,[24] decided in the year of the adoption of the United States Constitution, which by reason of being the first may justify discussion at some length.

The defendant, Harris, who owed money to Lewis & Potter, and who was about to draw a bill of exchange upon himself in order to pay it, instead of drawing the bill payable to the order of Lewis & Potter, drew the bill payable to the order of a fictitious payee, Grigson & Co., the drawer, according to the court's view of the evidence, knowing at the time he drew the instrument that there was no such company as Grigson & Co.

The drawer then made the initial delivery of the bill to his own immediate creditor, Lewis & Potter, and Lewis & Potter first wrote the name of the payee, Grigson & Co., on the back of the paper and beneath it indorsed their own name. Thereafter, the instrument was negotiated to the plaintiff for value. At the time when the plaintiff bought the instrument, it appeared to have been originally issued to some creditor named Grigson & Co., and to have been first negotiated by Grigson & Co. to the plaintiff's transferor, Lewis & Potter. The plaintiff perhaps thought when he purchased the bill: "If the drawer doesn't pay it, I can recover from Lewis & Potter, and if Lewis & Potter default, I can fall back upon this house called Grigson & Co."

[22] Kulp, The Fictitious Payee (1920) 18 Mich. L. Rev. 296.

[23] Tatlock v. Harris, 3 T. R. 174, 100 Eng. Rep. 517 (1789); Vere v. Lewis, 3 T. R. 182, 100 Eng. Rep. 522 (1789); Collis v. Emett, 1 H. Bl. 313, 126 Eng. Rep. 185 (1790); Minet v. Gibson, 3 T. R. 481, 100 Eng. Rep. 689 (1789).

[24] 3 T. R. 174, 100 Eng. Rep. 517 (1789).

Now, when the plaintiff, Tatlock, sued on the bill, the defendant had the bad grace to deny the plaintiff's title upon the theory that no authentic indorsement by Grigson & Co. had been proven.

The court, of course, held for the plaintiff. Lord Kenyon's opinion amounted substantially to this: The defendant drawer, who has issued a bill of exchange for value in such form as that it purports to require the indorsement of a party whose indorsement is impossible because the party is non-existent, and who, in good conscience, ought to pay it, cannot avoid payment by insisting upon production of proof of a signature which it is impossible to produce. The action was an action on the case.

The first count went upon the theory that the bill was payable to Grigson & Co. and that Grigson & Co. had indorsed; the second upon the theory that the bill was originally payable to Lewis & Potter; the third for money paid by plaintiff to the use of defendant; the fourth for money had and received by defendant to the use of the defendant. Lord Kenyon said:

> "On the first count our opinion does not proceed, neither is it necessary to say anything upon the second, though if it were necessary to resort to that, I confess I have an opinion on it. But the counts on which the judgment of the court is given are those for money paid and money had and received . . . it was an appropriation of so much money to be paid to the person who should become the holder of the bill."

In the next case, *Vere v. Lewis*,[25] decided upon the same day as *Tatlock v. Harris*, the drawers, Livesay & Co., in order to create the false appearance that they were purchasers of a bill drawn upon the defendant, a collusive party, drew the bill payable to the order of a fictitious party, Lawrence Ashworth, instead of making it payable to themselves. They first made a fictitious indorsement of the name in the payee space and then placed their own indorsement below it and sold the bill to the plaintiff.

In this suit by the plaintiff transferee against the defendant drawee acceptor, the first count stated that the bill was drawn payable to Lawrence Ashworth and that it was indorsed by Lawrence Ashworth. The second count stated that the bill was drawn payable to bearer. The court held for the plaintiff. Lord Kenyon, C. J., Buller, J., and Ashhurst, J., thought the plaintiff should recover on the second count, which alleged that the instrument was drawn payable to bearer. This is

[25]3 T. R. 182, 100 Eng. Rep. 522 (1789).

the first judicial opinion that an instrument payable to the order of a fictitious party is "payable to bearer."

Minet v. Gibson,[26] a case similar to the last cases discussed, was taken to the House of Lords upon the following agreed special verdict:

> ". . . that Livesay & Co. drew on the defendant a bill of exchange to the order of John White, knowing that no such person as White existed and that an indorsement of the name John White was made by Livesay & Co. to Livesay & Co. and that the defendant accepted, knowing that no such person as John White existed and that the indorsement purporting to be the indorsement of White was fictitious and that the defendant had not paid the bill . . . but whether the defendants are liable the jurors are ignorant and pray the advice of the court."

The court decided that the case was controlled by *Vere v. Lewis* and held for the plaintiff, adding that the reason it was agreed to be turned into a special verdict was that it might be carried to the dernier resort.

It now becomes obvious that none of the original cases giving rise to the fictitious payee doctrine presented the court with any necessity of deciding that an instrument, appearing on its face to be an order instrument, became essentially face bearer paper simply because the drawer knew that the payee was fictitious.

All that was necessary to decide in these cases was this: A party who deliberately represents the instrument to be payable on its face to the order of a named person, e. g., John White, and who authorizes another person to write the name of "John White" on the back of the instrument, in order to mislead a prospective purchaser into believing that there was an existing former holder named John White and that the said John White has indorsed, will be personally estopped to deny that there is such a person as John White and that the said John White has indorsed the instrument.

The same result is reached by saying that such parties are personally estopped to deny that the title passed without the indorsement of the non-existent person just as if the instrument had been payable to bearer.

Granting that the facts plus the results go no further than invoking personal estoppels against particular parties in favor of particular persons, it must be admitted that the court in two of the cases says the instruments were "payable to bearer." Upon the basis of what was said in these opinions, rather than upon the basis of what was done with the narrow factual situations, a vague doctrine has grown up to the effect

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[26] 3 T. R. 481, 100 Eng. Rep. 689 (1789).

that the instruments *knowingly* drawn to the order of fictitious payees were bearer paper.

The rule was finally written into the English Bills of Exchange Act as Section 7-3 in the following words: "Where the payee is a fictitious or non-existing person, the bill *may be* treated as payable to bearer."

This same vague doctrine was written in our Act in the following words, found in Sub-section 3 of Section 9: "The instrument *is* payable to bearer when it is payable to the order of a fictitious or non-existent person, and such fact was known to the person making it so payable."

It is significant that 7-3 of the B. E. A. simply says "*may be* treated as payable to bearer." It suggests that the draftsman of the B. E. A. might have meant that the court at its discretion in a proper case could treat an order instrument as if it were payable to bearer as against certain parties and in favor of certain parties. In other words, 7-3 of the B. E. A. is susceptible of being interpreted as a statutory permission for the invocation of a personal estoppel against a drawer in favor of a purchaser or an acceptor who has been misled.

To say that Section 9-3 of the N. I. L. is a simple legislative permission to treat true order paper as if it were payable to bearer as against particular parties and in favor of particular parties is not so easy. Such an interpretation carries us a long way from the literal language of 9-3 and even forces us to ignore the immediate context.

The Statute says the instrument *is payable to bearer,* and it says this in the very section in which the form of face bearer paper is described and in a sub-section following two sub-sections[27] which clearly refer to *face bearer* or *true bearer,* and immediately before a sub-section clearly referring to face bearer paper.[28]

The arguments against assuming 9-3 was intended to make true bearer paper of instruments knowingly drawn to the order of a fictitious payee outweigh the arguments for accepting the literal language.

(1) The idea of the negotiability or freedom of transfer of an instrument being derived from the subjective mental attitude of the drawer rather than from the objective appearance of the instrument itself violates the fundamental theory upon which the whole superstructure of negotiable instruments law is built.

(2) The cases from which the doctrine of the fictitious payee is historically descended were cases involving, in effect, personal estoppels rather than being cases involving the nature of the instrument.

[27]Negotiable Instruments Law § 9 (1) and (2).
[28]Negotiable Instruments Law § 9 (4).

(3) The argument that the rule presumptively relates to true bearer paper because it is found in the section dealing with face bearer paper breaks down by reason of the fact that Section 9 also deals with face order paper. Sub-section 5 clearly refers to face order paper, which under certain circumstances becomes "payable to bearer" temporarily.

That some English jurists sensed that there was nothing more than a personal estoppel in the fictitious payee cases is shown by the following quotation from the draftsman of the B. E. A., Lord Chalmers, writing in the Law Quarterly Review[29] concerning *Vagliano's* case, involving the fictitious payee problem:

> "Some of the judges seemed inclined to the view that the case was outside the provisions of the B. E .A. . . . and that the instruments involved in this case were not bills . . . they could only be described as bills by estoppel, that is, for certain purposes and as against certain parties certain individuals were precluded by the fact of acceptance from denying that they were bills, and it by no means followed that the bankers were bound by any estoppel which might have arisen against the acceptor."

In order to understand this statement, an outline of the facts of *Vagliano's*[30] case becomes necessary. Vagliano, a London merchant, was accustomed to accept bills in favor of C. Petridi & Co., drawn by its correspondent, Vucina, payable at the Bank of England. Vagliano accepted a bill purporting to have been drawn by Vucina to the order of C. Petridi & Co., but which had in fact been forged by his own fraudulent employee, Gyka, the payee being legally "fictitious."[31] Gyka wrote the name of the "fictitious" payee on the back of the bill after it had been accepted by Vagliano, and the Bank of England paid the bill to Gyka, who absconded with the proceeds. Vagliano, who contended that payment by the Bank of England was a mispayment, sued the Bank for the amount so paid and charged to his account.

Now, while Vagliano was described as an "acceptor," and was truly an acceptor as far as the form of the bill was concerned, he was nevertheless the orderer or drawer as to the bank at which the bill was payable. By the arrangement between Vagliano and the bank, the acceptance of the bill by Vagliano constituted an authorization or order on

[29]Chalmers, Vagliano's Case (1891) 7 L. Q. Rev. 216.

[30]Bank of England v. Vagliano, [1891] A. C. 107. Excellent comment on this case is found in Byles on Bills (19th ed., Wellford, 1931) 82.

[31]The payee was not fictitious in the sense of its being imaginary but only in the sense that the bill represented no transaction with Petridi and that C. Petride & Co. had no rights in it and the fraudulent party Gyka who supplied the name of the payee did not intend that the payee have any interest in the bill.

the bank to pay the bill to the holder. The effect of the acceptance, as between acceptor and the bank at which the bill was payable, was much the same as if the acceptor, Vagliano, had countersigned or validated or "okayed" a forged check payable to the order of C. Petridi & Co. at the request of his fraudulent agent, Gyka.

Once we recognize the fact that the so-called acceptance of Vagliano was an authorization or order on the bank to pay, we see that Vagliano's case is typical of most of the American cases involving the fictitious payee.[32]

In the famous case of *Detroit Piston Ring Co. v. W. C. & H. Savings Bank*,[33] the executive officer empowered to sign checks for the Piston Ring Co. instrusted a pretty secretary named Helen Culbert to prepare the bi-weekly payroll checks. Helen got the habit of adding to the list of checks for bona fide employees checks payable to non-existing persons, dead people and former employees. The executive officer so far trusted Helen that he signed these checks without comparing them with the pay list or time cards or anything else. Helen, of course, made fictitious indorsements of the fictitious names and the drawee bank paid these fictitious payee checks to various bona fide purchasers and charged the account of the Piston Ring Co. In suit testing the right of the drawee bank to charge the depositor's account, the court held that the payment of such checks as were drawn to fictitious parties were mispayments because the executive officer actually signing the checks did not know the payees were fictitious and Helen's knowledge was not the drawer's knowledge, because she was acting adversely to the interest of her principal. Thus, a loss of $28,000 was thrown upon the drawee bank, which, in reality, resulted from the drawer's carelessness.

In a Kentucky case,[31] we get the same result. A fraudulent claim clerk fabricated many claims against the State of Kentucky and gave a list of claims to the auditor, including fabricated claims of fictitious persons. The auditor issued warrants to the State Treasurer authorizing the Treasurer to issue checks to these fictitious persons. The Treasurer drew checks on a Frankfort bank, payable to the fictitious parties whose names were supplied by the auditor, to whom they had been supplied

[32]Cases collected in C. J. S., Bills and Notes, § 129, note 70; Brannan, Negotiable Instrument Law (6th ed., Beutel, 1938) 208-14; 4 Williston on Contracts, (rev. ed., Williston and Thompson, 1936) § 1139, p. 3269, note 13. Space does not permit the inclusion of the names of the large number of cases included in these collections, a good many of which will be discussed in full.

[33]252 Mich. 163, 233 N. W. 185 (1930).

[34]Commonwealth for use of Coleman v. Farmers Deposit Bank of Frankfort, 264 Ky. 839. 95 S. W. (2d) 793 (1936).

by the fraudulent claim clerk. The Frankfort bank which paid these checks bore the loss because the Treasurer who actually drew the checks did not know the payees were fictitious.

The *Piston Ring. Co.* case and the Kentucky case represent the overwhelming weight of authority.[35] There are a few cases which take the view that the party who supplies the name is the party whose knowledge is controlling, where more than one party is involved in drawing the check.[36] The executive officer who simply moves his fingers in making the signature is not the "party making the check so payable"; the party who actually decides who the payee is to be is the party whose knowledge is controlling. That party is the agent or employee intrusted to supply the name. Where the depositor has not merely intrusted the agent to supply the name of the payee, but has actually given the agent power of attorney to draw checks, and the agent pursuant to such authority has knowingly drawn checks payable to the order of "fictitious" payees, the instruments have been generally held "payable to bearer."[37]

In order to protect the banks under such circumstances—and there seems little doubt, aside from the literal words of the N. I. L. and agency law, that the banks ought to be protected—the American Bankers Association has proposed that Sub-section 3 of Section 9 of the N. I. L. be amended to read as follows:

> "The instrument is payable to bearer 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.*" (The new portion is in italics.)

Some states have already adopted this proposed amendment. If the Act had been so amended, the result of the *Piston Ring Co.* case and the Kentucky case would of course have been changed.

A glance at the portion of the proposed amendment set out in italics discloses that the amendment goes beyond simply declaring that the knowledge of the agent supplying the name is the knowledge of the drawer. It adds a legislative declaration that an instrument is payable to bearer when it is payable to the order of a *real living human being* whenever the drawer or agent or employee supplying the name intends that the party to whose order the instrument is made or drawn, even

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[35]See note 32, supra.

[36]See collection of cases in Brannan, Negotiable Instruments Law (6th ed., Beutel, 1938) 221.

[37]Snyder v. Corn Exchange Bank, 221 Pa. 599, 70 Atl. 876 (1908). Cases collected in Brannan, Negotiable Instruments Law (6th ed., Beutel, 1938) 556. Problem discussed by Kulp, The Fictitious Payee (1920) 18 Mich. L. Rev. 296 at 305.

though a living person, shall not have any interest in the instrument.

The type of case obviously aimed at in this new portion of the amendment is exemplified by *National Fire Insurance Co. v. Mellon National Bank*.[38] In this case a fraudulent agent of the Fire Insurance Company picked out the name of a living human being who was an actual policy holder in the insurance company, and represented to the company that this person's house had burned down and requested the executive officer to draw a check to the order of this policy holder for the amount of the loss. Upon faith of fabricated proofs of loss, the executive officer drew the check, which was cashed by the fraudulent agent after forging the payee's name, and was paid, upon presentment, by the drawee bank. At the time the executive officer drew the check, he did not know that the agent supplying the name intended that the payee should have no interest in the check, but the agent knew it.

Under the N. I. L., as it now exists, the loss falls upon the bank, according to the *National Fire Insurance Co.* case and according to the majority rule, but under the proposed amendment, the loss would fall upon the drawer. As much as the writer approves of the proposed change which renders the knowledge of the party supplying the name the knowledge of the drawer, the proposed amendment seems too sweeping in making fictitious parties of real people. The bankers, having acquired the sympathy of most persons familiar with such cases as the *Piston Ring Co.* case and the Kentucky case, have consciously or unconsciously overreached in this second proposal. Under the cloak of a much needed reform as to one problem, they may be creating another problem which would do more harm than the reform does good.

The whole problem of the instrument which is payable to a living person not intended to have any interest therein needs explaining. That explanation carries us back to our old friend, *Vagliano's* case,[39] which was discussed above. In that case the court held that a party "not intended by the drawer of a bill to have any interest in it," although a real living person and client of the acceptor, was a fictitious payee within the meaning of Section 7-3, as truly as if the drawer had made up the name out of a more imaginative head.

When it appeared that the payee, C. Petridi & Co., was an existing company and that the bill had been drawn by the fraudulent party, Gyka, to the order of C. Petridi & Co., for the very reason that Vagliano was accustomed to accept bills drawn to C. Petridi & Co.'s order, and by

[38] 276 Pa. 212, 119 Atl. 910 (1923).

[39] See note 30, supra.

so accepting to authorize the Bank of England to pay them, the Lords began to struggle with their souls over the problem of how a real person could cease to be a real person and become a fictitious person because of the drawer's intent that he should have no interest. Lord Herschell said it was not a question of intention; it was a question of fact. The instrument was not payable to C. Petridi & Co. of Constantinople. It represented no transaction with C. Petridi & Co. or any other existing person, and if Petridi & Co. came into possession of the bills and indorsed them away, it would have been a criminal forgery.

And so, in effect, the English law come to this, as far as the cases we have been considering are concerned: When a drawer voluntarily makes an instrument payable to the order of either a non-existent person, for the purpose of creating a false appearance, as in *Minet v. Gibson*,[40] or is tricked by an employee or other third party supplying the name into making it payable to either a non-existent person or to a real person, who because he was not a creditor of the drawer would have no right to indorse it, then the indorsement of the payee is not required in order for the first true purchaser or his transferee to acquire title.

In other words, whenever the named payee is a person who is not a creditor or other person entitled to indorse the instrument away, the necessity of his indorsement is dispensed with as truly as if he were non-existent.

Most of the cases involving the fictitious payee problem, decided under the N. I. L., have arisen out of situations in which the drawer or officer empowered to draw checks or other negotiable paper, has intrusted an agent or employee to supply the name of the payee and the agent or employee has supplied a "fictitious" name. The agent has then made a fictitious indorsement of the fictitious name, and then after making his own indorsement has cashed the check at a second bank or store and absconded with the proceeds. The suits have usually been between the depositor-drawer and the drawee bank which has paid the holder, and concern the right of the drawee-payer bank to charge the drawer's account, the bank introducing the problem of Section 9-3 by contending that the check was payable to bearer.

In most of the cases the employee who has supplied the names of the payees has chosen to supply an imaginary name rather than the name of a "living person not intended to have any interest in the check." In the *Detroit Piston Ring Co.* case, Helen Culbert, the employee, padded the payroll with imaginary names of imaginary em-

[40] 3 T. R. 481, 100 Eng. Rep. 689 (1789).

ployees and dead people, and the check-drawing officer made checks payable to the order of these imaginary parties. In *Commonwealth for use of Coleman,* the fraudulent claim clerk apparently fabricated claims against the state in favor of imaginary persons and the State Treasurer drew checks to the order of these imaginary persons. In the *Caledonian Insurance Co.* case,[41] the employee procured the issuance of a policy of insurance on an imaginary building in favor of an imaginary person, and upon faked proofs of an imaginary fire, obtained from the check-signing officer of the insurance company an instrument payable to an imaginary policy holder. In the *Grand Lodge of Kansas* case,[42] the agent obtained the check-signing officer of the insurance association a check payable to an imaginary Alice Evans, the imaginary beneficiary of a policy on the life of her imaginary deceased husband.

In some of the cases the fraudulent employee intrusted by the check-signing officer to supply the name of the payee has furnished the name of some regular customer of the drawer or the drawer's company, whom the drawer knew and reasonably supposed was entitled to such a check, but who had, in fact, no claim for the amount of the check against the drawer at the time the instrument was drawn. This type of fraud is, of course, more likely to deceive the party actually drawing the check than the type where an imaginary name is used. In the *U. S. Cold Storage Co.* case,[43] the fraudulent employee, Meister, in furnishing to the check-drawing officer the names of the parties entitled to checks, carefully selected names of regular customers whom the officer would naturally suppose were entitled to checks. In the *Rancho San Carlos* case,[44] the fraudulent employee supplied the name of another employee whom the officer empowered to draw might reasonably suppose had a claim for the amount of the instrument. In the *Fletcher American National Bank* case,[45] the fraudulent agent, Preston, supplied to the check-drawing officer the name of Lindenmeyer and Sons, from whom the drawer constantly bought paper. Here it was ordinary routine to sign checks payable to the order of Lindenmeyer and Sons, but Linden-

[41]Caledonian Insurance Co. of Edinborough, Scotland v. National City Bank of New York, 208 App. Div. 83, 203 N. Y. Supp. 32 (1924).

[42]Grand Lodge of Kansas A. O. U. W. v. Emporia National Bank, 101 Kan. 369, 166 Pac. 490 (1917).

[43]U. S. Cold Storage Co. v. Central Mfg. District Bank, 343 Ill. 503, 175 N. E. 825 (1931).

[44]Rancho San Carlos Inc. v. Bank of Italy National Trust & Savings Ass'n, 123 Cal. App. 291, 11 P. (2d) 424 (1932).

[45]Fletcher American National Bank v. Crescent Paper Co., 193 Ind. 329, 139 N. E. 664 (1923).

meyer and Sons had no claim at the time the check was drawn and the party supplying the name did not intend Lindenmeyer and Sons to have any interest in the check.

Now, if our legislatures are to be asked to pass the American Bankers Association's proposed amendment, which makes the knowledge of the agent or employee supplying the name of the payee the knowledge of the drawer, shall all checks payable to the order of "parties not intended to have any interest in the instrument" be treated alike? The cases likely to arise may be divided into five classes:

(1) The agent may supply a fiction-book name or an imaginary name.

(2) The agent or employee may supply the name of a real living person who is a total stranger to the drawer and who has therefore never had any transaction of any sort with the drawer.

(3) The agent or employee may supply the name of some party who has had an occasional transaction with the drawer and whom the drawer knows by name and whom the drawer may reasonably think might have a claim, but who in fact does not.

(4) The agent or employee may supply the name of a regular customer or regular client or a party who so habitually sells goods to the drawer or does services for the drawer that drawing checks in favor of such person is routine and yet the party whose name is supplied may have no claim against the drawer for the amount of the check at the time it is signed by the drawer.

(5) The agent or employee may supply the name of a person who actually has a claim against the drawer, at the moment the check is drawn, for the exact amount of the check, and yet the agent or employee at the time he supplies the name may intend that such payee have no interest.

It seems that most people's reaction to the cases of the types of 1, 2 and 3 is that it is the drawer rather than the bank which should, in justice, bear the loss. They approve of the reform sought to be accomplished by the proposed American Bankers Association's amendment so far as these three types of cases are concerned.

They are very likely, however, to view the wording of the amendment with genuine concern when they think of its possible application to cases of the type of class 5. Suppose the chief executive officer of X Corporation tells an employee to make a list of persons entitled to checks on the first of the month and to make out checks payable to the order of these persons and prepare them for his signature. The employee supplies him with sixty-three names and sixty-three checks payable to the order of the sixty-three persons, all of whom have bona fide claims against the drawer, and the checks are filled out for the correct amounts; but the employee plans to forge the payee's name to three of these checks—that is, the agent or employee does not intend that these three persons have any interest in these three particular checks. If we read the proposed amendment literally, it is possible to say that these three checks were "payable to bearer." Such a rule would go far to wipe out the whole protection afforded the drawer in using face order paper. While it is perhaps true that no such result is intended, yet it ought to be clear, from the history of the interpretation of the N. I. L. that it is dangerous to trust the language of this amendment to the hands of literalists. Dean Ames was considered a "viewer with alarm" when he predicted that some literalist would some day render a decision like that of *Gulbranson-Dickinson & Co. v. Hopkins*,[46] but his gloomy prophecy came true. Men who believe that the right way to learn the law of the N. I. L. is to "read the Act," regardless of the history of the problem the section attempts to settle, are likely to read the amended section and hold that the loss should fall on the drawer as to the three checks, with relation to which the employee intended the payee should have no interest.

It is very doubtful whether the American lawyer and business man would, with his eyes open, pass an amendment to the N. I. L. which rendered instruments of the class 4 type of case "payable to bearer." When X Co. constantly purchases paper from Lindenmeyer and Sons and makes a check payable to the order of Lindenmeyer and Sons as a matter of routine almost every month, is it not true, from a practical standpoint, that Lindenmeyer and Sons is factually the payee of a check drawn to the order of Lindenmeyer and Sons, despite the fact that Lindenmeyer and Sons happened to have no claim for the exact amount of the check, or for any amount, at the moment the drawer signed? Should such a check be held payable to bearer simply because the employee had a secret intent that Lindenmeyer and Sons was intended by him to have no interest in the check?

Of course this whole matter ought to be determined as a practical problem of fair distribution of proper risks between the drawer and the

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[46] 170 Wis. 326, 175 N. W. 93 (1919). This case has no direct connection with our immediate problem but is a good example of the bad result of attempting to interpret the Negotiable Instruments Law literally.

drawee bank, or as between drawer and purchaser. No heaven-made solution is found in Section 9-3, which declared the rule of cases that had nothing to do with the specific problem. It must be admitted that *Vagliano's* case was a typical case of the type described as class 4, and that the English court protected the bank at the expense of the orderer. While American courts have paid lip service to *Vagliano's* case, there is no established body of American authority committing us to the view that a check is payable to bearer when the drawer has made it payable to the order of a regular customer, simply because the fraudulent employeee planned to forge the check.

It will be noted that the proposed amendment, in declaring the rule that the knowledge of the agent or employee supplying the name is the knowledge of the drawer himself, confines the rule to agents and employees. There seems to be no good reason why this rule should not be appiled whenever any person, whether an agent or not, is intrusted to supply the name, even though the party intrusted be a stranger. For example, in *United Cigar Stores Co. v. American Raw Silk Mill Co.*,[47] a total stranger came to the drawer and solicited a donation to a nonexistent cause. The stranger introduced himself as Lieutenant Peterson, and represented himself as a solicitor for the cause of the Navy Tuberculosis Camp. The drawer, moved by emotions of patriotism and pity for the poor tubercular sailors, decided to make a donation. He asked Lieutenant Peterson to whom the check should be made payable. The stranger, Peterson, told the drawer to make it payable to Lieutenant R. G. Parks, whom he said was treasurer of the fund. The drawer complied with the stranger's request. There was no such person as Parks and there was no Navy Tuberculosis Camp. Peterson, of course, wrote Parks' name on the back of the check and cashed it. Now, in such case, why should the drawee bank lose rather than the drawer? It was more unbusinesslike to trust the stranger than to trust an agent or employee.

There is another type of case in which the problem of the fictitious payee is sometimes discussed by the court and in which the court sometimes says that the instrument is payable to bearer because the payee is fictitious. Little attention has been given to these cases because a discussion of the problem is not really necessary to the decisions. *First National Bank of Portland v. U. S. National Bank*[48] is an example. A

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[47] 184 App. Div. 217, 171 N. Y. Supp. 480 (1918).

[48] 100 Ore. 264, 197 Pac. 547, 14 A. L. R. 479 (1921). Other cases of this type shown in Brannan, Negotiable Instruments Law (6th ed., Beutel, 1938) 220.

fraudulent party who may have been named Smith or Wilson or Johnson, but who passed in the community by the name of Shea, forged a corporation's name as drawer of a check on First Bank, payable to the order of Shea wrote the name "Shea" on the back of the instrument and cashed it at a store. The store cashed it at the U. S. National Bank, to whom it was paid by First Bank. The drawee First Bank having recredited the account of the drawer, sued the recipient of payment, U. S. National Bank for money had and received under mistake. The defendant, of course, pleaded the *Price v. Neal* defense. The plaintiff denied that the defendant had acquired title to the instrument under the indorsement of Shea, upon the theory that this indorsement was a forgery. The court held that the defendant had acquired title to the instrument, invoked the usual *Price v. Neal* doctrine and therefore held for the defendant. While the court said that the instrument was payable to bearer because the payee was fictitious and the forging drawer knew it, it was not necessary to say this. The same result could have been achieved by saying that the forger had adopted the name Shea for the purpose of this transaction and that the true payee of the forged check had indorsed it. It would seem better to avoid the vague doctrine of the fictitious payee in this type of case.

Still another type of case is that of the remitter purchasing a draft, and the drawer drawing it payable to the order of the name supplied by the remitter, the remitter furnishing a fictitious name or the name of a party intended by the remitter to have no interest therein, and the actual drawer having no knowledge that the payee is "fictitious."

In a recent California case,[49] the court held that such an instrument was payable to bearer. This case, of course, represents the minority rule of cases decided under the N. I. L. as unamended in that the actual drawer had no knowledge that the payee was fictitious. In jurisdictions adopting the American Bankers Association's proposed amendment, however, the draft would be clearly payable to bearer.

The problem of the fictitious payee is sometimes improperly raised in cases of instruments payable to estates. An instrument payable to the order of Christian Hansen (sic) Estate[50] was held payable to bearer by the Minnesota Court as late as 1928, but both Mr. Kulp[51] and Mr.

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[49]Union Bank & Trust Co. v. Security First National Bank, 8 Cal. (2d) 303, 65 P. (2d) 355 (1937), 25 Calif. L. Rev. 616.

[50]Hansen v. North Western Nat. Bank of Minn., 173 Minn. 453, 221 N. W. 873 (1928).

[51]Kulp, The Fictitious Payee (1920) 18 Mich. L. Rev. 296 at 298.

Beutel[52] agree that such instruments should be held payable to the order of the personal representative. Although the case is approved in an A. L. R. note,[53] Mr. Beutel suggests that the writer of the note overlooked section 191 of the Negotiable Instruments Law. Mr. Kulp further states that an instrument drawn to the order of a deceased person in ignorance of his death should be treated as payable to order of the personal representative. Mr. Kulp gives Lord Chalmers, author of the B. E. A., as authority for this statement.[54] We may assume that Mr. Beutel and Mr. Kulp would agree that an instrument payable to the order of an estate could be held payable to bearer if there was no such estate or the estate was not intended by the drawer to have any interest in the instrument or the estate was legally fictitious.

The problem of the fictitious payee is again improperly raised in connection with instruments payable to the order of a business name or a company name where there is, in one sense, no such company incorporated or unincorporated. For example: John Jones is the owner of a business conducted in the name of Jones Sales Co. Having sold goods to Smith, Jones requests that the check for the price be made payable to the order of Jones Sales Co. Such a check should be treated as order paper indorseable by Jones[55] Of course a company name or a business name might be legally fictitious, if imaginary, or because the drawer intended the company to have no interest.

In seeking a solution of the problems which actually have arisen in the cases, the writer would prefer the following rules to the "new wine in old bottles" form of expression in the American Bankers Association's proposed amendent:

I. When the maker of a negotiable note or the drawer of a negotiable bill of exchange or check, in order to create the false appearance of a previous indorsement or negotiation, issues the instrument to his immediate creditor or to an accomplice, in such form that it appears to be payable on its face to the order of a named person, who is in fact fictitious or imaginary, or who although a real person has no right to the instrument, such maker or drawer may be estopped to require the indorsement of the named payee as against the drawee or bona fide purchaser who has no knowledge that the payee is fictitious or imaginary or non-existent or that the payee is a real person having no rights in the instrument.

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[52]Brannan, Negotiable Instruments Law (6th ed., Beutel, 1938) 226.
[53]Note (1929) 60 A. L. R. 605.
[54]Chalmers, Bills of Exchange (6th ed.) 24.
[55]Bryant v. Castman, 7 Cush. 111 (Mass. 1851).

II. When the maker of a negotiable note or the drawer of a negotiable bill or check, in issuing the instrument, intrusts an agent or employee or any other person to supply the name of the payee to whose order the instrument is drawn, and such agent or employee or other person so intrusted supplies the name of a non-existent or imaginary or fictitious person or the name of a real person having no right to the instrument, the maker or drawer may be estopped to require the payee's indorsement as against a drawee who has no knowledge that the payee is imaginary or fictitious or who has no knowledge that the named payee had no rights in the instrument, or may be so estopped as against an innocent purchaser of the instrument.

But this rule shall not apply when the payee is a creditor of the maker or the drawer for the amount of the instrument, nor in case the payee is a regular customer of the maker or drawer whom the maker or drawer might, under standards of ordinary business prudence, reasonably suppose was entitled to the instrument.

III. When an agent of a maker of a negotiable note or the agent of the drawer of a negotiable check or bill of exchange is given actual power to make or draw the instrument[56] rather than being merely intrusted by the drawer to supply the name of the payee to whose order the instrument is made or drawn, and such agent makes or draws the instrument to the order of an imaginary or fictitious or non-existent person or to the order of a real person having no rights in the instrument, whether a regular customer of the maker or drawer or not, the maker or drawer may be estopped to require the indorsement of the payee as against a bona fide purchaser or drawee having no knowledge of the fact that such named payee was fictitious or imaginary or non-existent or having no knowledge that the real person had no rights in the instrument.

IV. The payees of instruments payable to the order of estates or business names shall not be deemed fictitious so long as the personal representatives of such estates or the owners of such businesses are creditors for the amounts of the instruments or are regular customers of the drawer or are parties having a right to the instruments, and such paper is to be controlled by Section 8 of the N. I. L.; but instruments payable to the order of an estate may be deemed fictitious within the meaning of rules 1, 2 and 3, if there is no such estate having a claim against the drawer and an instrument payable to the order of a busi-

[56]Snyder v. Corn Exchange Bank, 221 Pa. 599, 70 Atl. 453 (1908).

ness name may be deemed fictitious if there is no person doing business in that name who has any claim against the drawer for the amount of the check unless he is a regular customer of the drawer.

V. Instruments payable to "cash" or to "bills payable" or to designations not purporting to be the name of any person or corporation or partnership or other business shall not be deemed fictitious but shall be deemed face bearer paper within the rule of Section 9-4.

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