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Bills and Notes-Payees by Impersonation and by Assumption of a Name-Drawer's Intent and Commercial Policy

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COMMENTS

BILLS AND NOTES—PAYEES BY IMPERSONATION AND BY ASSUMPTION OF A NAME—DRAWER'S INTENT AND COMMERCIAL POLICY—Consider the following scheme for fraudulently obtaining money: *A*, a stranger to *D*, personally appears before *D*, represents himself as *B* and requests a loan. There is an existing person named *B*. For *D's* security a mortagage is produced in the name of *B*, but it has actually been penned by *A*. A check of the land records by *D* verifies that the land described in the mortgage is in fact owned by *B*. *D*, having satisfied himself as to the existence of *B*, draws a check payable to the order of *B* and hands it to *A*, the person before him. Since by the time the fraud is discovered *A* has indorsed the name *B* on the check, collected the cash and departed, the loss will fall either on the drawer, the drawee, or the indorser. Disputes in determining who should bear the loss may take the form of a suit by the drawer against the drawee for reinstatement of his account,[1] or by the drawer against an indorser upon a guarantee of prior indorsements,[2] or by the drawee against the party he paid for restitution of payments made by mistake,[3] or by the holder of the check against the drawer upon a contract of secondary liability,[4] or by the holder against the drawee upon his certification.[5] The dispute may appear in a suit by *B* for conversion of the instrument payable to him by the drawer,[6] the drawee,[7] or the indorser.[8] It may also appear in a suit by a drawer against a notary public for a breach of a statutory duty of care in

1 Cureton v. Farmers' State Bank, 147 Ark. 312, 227 S.W. 423 (1921); Meyer v. Indiana Nat'l Bank, 27 Ind. App. 354, 61 N.E. 596 (1901); Land Title & Trust Co. v. Northwestern Nat'l Bank, 196 Pa. 230, 46 Atl. 420 (1900).

2 Harsin v. Trust Co., 131 Colo. 595, 284 P.2d 235 (1955); American Express Co. v. Peoples Sav. Bank, 192 Iowa 366, 181 N.W. 701 (1921); Central Nat'l Bank v. National Metropolitan Bank, 31 App. D.C. 391 (1908).

3 Citizens' Union Nat'l Bank v. Terrell, 244 Ky. 16, 50 S.W.2d 60 (1932); First Nat'l Bank of Hastings v. Farmers & Merchants Bank, 56 Neb. 149, 76 N.W. 430 (1898).

4 Greenberg v. A & D Motor Sales, 341 Ill. App. 85, 93 N.E.2d 90 (1950); Burrows v. Western Union Tel. Co., 86 Minn. 499, 90 N.W. 1111 (1902); First Nat'l Bank v. American Exchange Nat'l Bank, 170 N.Y. 88, 62 N.E. 1089 (1902). UNIFORM NEGOTIABLE INSTRUMENTS LAW § 61 provides: "The drawer . . . engages . . . that if it be dishonored . . . he will pay the amount thereof to the holder."

5 Meridian Nat'l Bank v. First Nat'l Bank, 7 Ind. App. 322, 33 N.E. 247 (1893); Merchants' Loan & Trust Co. v. Bank of the Metropolis, 7 Daly 137 (N.Y.C.P. 1877).

6 Fiore v. Ladd & Tilton, 22 Ore. 202, 29 Pac. 435 (1892).

7 Schweitzer v. Bank of America, 42 Cal. App. 2d 536, 109 P.2d 441 (1941); Dodge v. National Exchange Bank, 30 Ohio St. 1 (1876).

8 Slattery & Co. v. National City Bank, 114 Misc. 48, 186 N.Y. Supp. 679 (N.Y. City Ct. 1920).

certifying *A* to be *B*.[9] Further, the dispute may arise as a suit by the holder of a regular bill of exchange against the acceptor on his acceptance contract.[10] Because this opening fact situation is typical, and because the ultimate issue is really the same regardless of the form of the suit, these facts will serve as a basis for initial discussion.

I. THE PROBLEM AND ITS ANALYSIS

The very nature of the instrument here involved—the check drawn to order[11]—gives rise to the basic problem: to whose order is the check drawn? Analysis of this problem will be aided by an examination of the relationship between the drawer and the drawee and of the relationship between the drawer and an indorser or the holder of the check.

The former relationship highlights the significance of the problem. When one deposits money with a bank he becomes the bank's creditor. On the basis of this relationship the law implies a contract by which the bank agrees to pay according to the order of the depositor.[12] The depositor's checks become his orders, vis-à-vis the drawee,[13] and it is only when the drawee has paid them according to the order that the terms of the deposit contract allow the drawee to charge the account of the depositor with the amount of the check.[14] In this contractual relationship, the drawee has assumed the risks of an absolute duty to identify the payee to whom payment has been ordered and any payment made otherwise is at his peril.[15] The drawee has made no reservation allow-

[9] Hatton v. Holmes, 97 Cal. 208, 31 Pac. 1131 (1893).

[10] Heavey v. Commercial Nat'l Bank, 27 Utah 222, 75 Pac. 727 (1904). UNIFORM NEGOTIABLE INSTRUMENTS LAW § 62 provides: "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance. . . ."

[11] In the case of bearer instruments, the problems discussed herein do not arise since such instruments are payable to anyone bearing the instrument rather than to the order of some specific person, and since such instruments can be negotiated merely by delivery without any indorsement under the terms of UNIFORM NEGOTIABLE INSTRUMENTS LAW § 30. BRITTON, BILLS AND NOTES § 9 (1943).

[12] Houser v. National Bank, 27 Pa. Super. 613, 615 (1905); Harter v. Mechanics Nat'l Bank, 63 N.J.L. 578, 580, 44 Atl. 715, 715 (Sup. Ct. 1899); Shipman v. Bank of New York, 126 N.Y. 318, 327, 27 N.E. 371, 372 (1891). Abel, *The Impostor Payee: or Rhode Island Was Right*, 1940 WIS. L. REV. 161, 209.

[13] The bank is not liable on the check to the payee or an indorsee "unless and until it accepts or certifies the check." UNIFORM NEGOTIABLE INSTRUMENTS LAW § 189.

[14] Chism, Churchill & Co. v. Bank, 96 Tenn. 641, 644, 36 S.W. 387, 388 (1896); Brixen v. Deseret Nat'l Bank, 5 Utah 504, 511, 18 Pac. 43, 45 (1888).

[15] Land Title Bank & Trust Co. v. Cheltenham Nat'l Bank, 362 Pa. 30, 35, 66 A.2d 768, 770 (1949); United States Cold Storage Co. v. Central Mfg. Dist. Bank, 343 Ill. 503, 513, 175 N.E. 825, 829 (1931).

ing him to charge the drawer's account with payments made to such a payee as might be ascertained by the reasonably prudent and diligent drawee. Hence, the amount of care exercised by the drawee in identifying the payee is wholly immaterial in determining whether he can charge the drawer's account.[16] On the other hand, the drawee has not undertaken to insure the drawer against fraud.[17] Neither has he obligated himself to ascertain the true name of the person the drawer intended to pay.[18] To require of the drawee the ascertainment of fraud perpetrated on the drawer in addition to the identification of the person intended as payee at the time the drawer issued the check would subject the drawee to excessive risks and burdens in the payment of a check,[19] especially since the drawee typically has no knowledge of the circumstances in which the check was issued.[20] Thus in determining whether the payment of the check by the drawee can be charged to the drawer's account, a court is faced with only one question: to whom has the drawer ordered payment?

Although the relationship of the drawer to an indorser or holder of the check is determined by the order instrument itself

16 Land Title Bank & Trust Co. v. Cheltenham Nat'l Bank, *supra* note 15; United States Cold Storage Co. v. Central Mfg. Dist. Bank, 343 Ill. 503, 513, 175 N.E. 825, 829 (1931); McCornack v. Central State Bank, 203 Iowa 833, 839, 211 N.W. 542, 545 (1927). Abel, *supra* note 12, at 209.

17 United States v. Continental-American Bank & Trust Co., 175 F.2d 271, 272 (5th Cir.), *cert. denied,* 338 U.S. 870 (1949); Cureton v. Farmers' State Bank, 147 Ark. 312, 317, 227 S.W. 423, 424 (1921).

18 Atlantic Nat'l Bank v. United States, 250 F.2d 114, 118 (5th Cir. 1957); Employers Cas. Co. v. National Bank of Commerce, 140 Tex. 113, 115, 166 S.W.2d 691, 693 (1942).

19 "[I]n such a case the risk is not the ordinary risk assumed by the bank in its implied contract with its depositor, but a largely increased risk, as it follows that a check thus fraudulently obtained will be fraudulently used; the bank is deprived of the protection afforded by the fact that a bona fide holder of a check will exercise care to preserve it from loss or theft, which are the ordinary risks; there is thrown upon the bank the risk of antecedent fraud practiced upon the drawer of the check, of which it has neither knowledge nor means of knowledge." Land Title & Trust Co. v. Northwestern Nat'l Bank, 196 Pa. 230, 234, 46 Atl. 420, 421 (1900). *Accord,* Atlantic Nat'l Bank v. United States, 250 F.2d 114, 118 (5th Cir. 1957); Santa Maria v. Industrial City Bank & Banking Co., 326 Mass. 440, 95 N.E.2d 176 (1950).

20 Cureton v. Farmers' State Bank, 147 Ark. 312, 317, 227 S.W. 423, 424 (1921). It has been argued that because the drawee has no knowledge of the circumstances in which the check was issued, he is not misled by the drawer's conduct, and his duty is to ascertain the true name of the impostor and to pay the money to the person whose true name is the same as that inserted as payee. The argument is that the drawee's risks are not increased by the fraud because now he has two chances—determining the identity of the indorser and determining the genuineness of the indorsement signature—to discover that something is wrong with the check. National Metropolitan Bank v. Realty Appraisal & Title Co., 47 F.2d 982, 984 (D.C. Cir. 1931); Armstrong v. National Bank, 46 Ohio St. 512, 523, 22 N.E. 866, 868 (1889). But this is true only if the drawee is already under the duty to ascertain the true name of the person with whom the drawer dealt. *Cf.* cases cited in note 18 *supra* holding the drawee does not have such duty.

rather than by an extrinsic contract, the problem and its significance are again the same. By operation of law, the check is a contract by the drawer to pay the stated sum of money in the event that it is not paid by the drawee.[21] In the opening fact situation, the fraudulent inducement will absolve the drawer of liability upon his contract of secondary liability, except as against a holder in due course.[22] The latter status requires, *inter alia,* that the holder has acquired the instrument by negotiation.[23] Negotiation of an order instrument necessitates an indorsement by the payee.[24] Hence, in order to determine if the indorsement is by the payee, the court must again ascertain to whom the drawer has ordered payment.

Because the problem arises in the context of consensual relationships[25] the solution depends substantially on the intent of the drawer.[26] Admittedly there are many cases in which the literal language of the court suggests that other analyses are available. For example, it has been asserted that liability depends upon whether the negligence of the drawer, the drawee, or the indorser is the proximate cause of the loss,[27] or that as between two innocent parties the one causing the loss must bear its consequences,[28] or that section 23 of the Negotiable Instruments Law, by making

21 UNIFORM NEGOTIABLE INSTRUMENTS LAW § 61 provides: "The drawer by drawing the instrument . . . engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

22 UNIFORM NEGOTIABLE INSTRUMENTS LAW § 55 provides that one obtaining an instrument by fraud has a defective title; this includes the impostor payee since he has no intention of repaying the loan. Section 57 provides that a holder in due course is immune to any defense based upon the defect of title of prior parties, while § 58 provides that in the hands of any other holder the negotiable instrument "is subject to the same defenses as if it were non-negotiable." Hence, if the holder is not a holder in due course, the drawer's defense of fraud is a good defense. BRITTON, BILLS AND NOTES § 125 (1943).

23 UNIFORM NEGOTIABLE INSTRUMENTS LAW § 52(4). Pensacola State Bank v. Thornberry, 226 Fed. 611 (6th Cir. 1915).

24 UNIFORM NEGOTIABLE INSTRUMENTS LAW § 30 defines negotiation of an order instrument as indorsement by the holder plus delivery. Where the check is held by the payee, his indorsement is required before a subsequent holder can become a holder in due course. Fourth Nat'l Bank v. Lattimore, 168 Ga. 547, 148 S.E. 396 (1929).

25 Abel, *supra* note 12, at 223.

26 Cohen v. Lincoln Sav. Bank, 275 N.Y. 399, 403, 10 N.E.2d 457, 459 (1937); Halsey v. Bank of New York & Trust Co., 270 N.Y. 134, 138, 200 N.E. 671, 673 (1936).

27 Peninsular State Bank v. First Nat'l Bank, 245 Mich. 179, 222 N.W. 157 (1928); Harmon v. Old Detroit Nat'l Bank, 153 Mich. 73, 116 N.W. 617 (1908); Kelley v. Planters' & Merchants' Nat'l Bank, 135 S.W. 1142 (Tex. Civ. App. 1911).

28 Central Nat'l Bank v. National Metropolitan Bank, 31 App. D.C. 391, 404 (1908); Milner v. First Nat'l Bank, 38 Ga. App. 668, 145 S.E. 101 (1928). It has been argued that this explanation is a meaningless cliché which obscures the real problems. Abel, *supra* note 12, at 363.

forgery inoperative to pass title, places the loss on the drawee or the indorser.[29] However, a close examination of the cases asserting negligence or innocence as criteria reveals that usually the courts have assumed that the person who indorsed as payee was not the payee intended by the drawer.[30] Furthermore, such criteria are often only make-weight factors which the courts stir into their opinions as a further, sympathy-evoking justification for their result.[31] Finally, section 23 is not relevant. It begs the question since there cannot be a forgery until the intended payee is determined.[32] Consequently, these cases are not theoretically inconsistent with an analysis proceeding from a premise of the drawer's intent.

However, the drawer's intent is not the sole consideration. Although the contractual analysis is both persuasive and valid as a premise, it is limited in the area of negotiable instruments. The relationships here involved originated in the Law Merchant rather than in assumpsit.[33] These relationships are designed for ends far broader than the immediate and particular interests of the two parties involved. The basic commercial policy of the Law Merchant to encourage the use of means of financing transactions which reduce the burdens and risks inherent in the use of cash should not be ignored.[34] Hence, in applying the usual contract analysis of the intent of the parties to negotiable instruments, the courts should endeavor to insure that the result does not unreasonably impede the use of negotiable instruments.[35] To be sure,

29 Marcus v. Peoples Nat'l Bank, 57 Pa. Super. 345 (1914); Morris Plan Bank v. Continental Nat'l Bank, 155 S.W.2d 407 (Tex. Civ. App. 1941). UNIFORM NEGOTIABLE INSTRUMENTS LAW § 23 provides: "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 therefore, 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."

30 See, *e.g.*, Central Nat'l Bank v. National Metropolitan Bank, 31 App. D.C. 391 (1908); Levy & Salomon v. Bank of America, 24 La. Ann. 220 (1872); Peninsula State Bank v. First Nat'l Bank, 245 Mich. 179, 222 N.W. 157 (1928); States v. First Nat'l Bank, 203 Pa. 69, 52 Atl. 13 (1902).

31 See, *e.g.*, Missouri Pacific R.R. v. M. M. Cohn Co., 164 Ark. 335, 261 S.W. 895 (1924); Hoffman v. American Exchange Nat'l Bank, 2 Neb. Unoff. 217, 96 N.W. 112 (1901). Abel, *supra* note 12, at 200.

32 Greenberg v. A & D Motor Sales, 341 Ill. App. 85, 93 N.E. 2d 90 (1950).

33 Abel, *supra* note 12, at 225. See generally BRITTON, BILLS AND NOTES §§ 1, 2 (1943); BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW ch. 1 (7th ed. 1948).

34 See BRITTON, BILLS AND NOTES § 1 (1943).

35 United States v. Continental-American Bank & Trust, 175 F.2d 271, 272 (5th Cir.), *cert. denied*, 338 U.S. 870 (1949); Citizens' Union Nat'l Bank v. Terrell, 244 Ky. 16, 24, 50 S.W.2d 60, 63 (1932); Burrows v. Western Union Tel. Co., 86 Minn. 499, 504, 90 N.W.

upholding the intent of the drawer promotes this end by assuring drawers that their wishes will not be disregarded and that the use of negotiable instruments does not increase their risk of loss. But commercial policy also requires a market willing to accept the instruments; indorsers and drawees should not be driven from the market because of an unreasonably high incidence of loss. Consequently, the characterization of the drawer's intent must necessarily be bent by the consideration of loss allocation and the resulting effect upon the circulation of negotiable instruments. To illustrate, suppose the drawee bank receives two checks issued by the same drawer, check A obtained by an impostor and indorsed by him and check B stolen and indorsed by a thief. When the drawee has paid these checks and has discovered the circumstances of each, he can charge check A to the drawer, as will be subsequently shown,[36] but not check B[37] because he paid check B upon a forged indorsement. When the drawee first receives the checks he cannot discern any difference between them and hence does not know that greater protective measures are required for check B than for check A. Indeed, he cannot distinguish either of these checks from perfectly safe checks. The drawee's willingness to deal in negotiable paper and the protective measures he will take will be affected by his over-all probability of loss. If the drawee has to bear the risks for both of these checks, his increased probability of loss might require that he take fuller measures on all checks to satisfy himself of the identity of the presenting party and the indorsers, and the circumstances of issuance.[38] This would hinder the circulation of commercial paper. On the other hand, if the drawer has to suffer both the losses, he will hesitate to issue negotiable instruments since he would be subject to losses even in circumstances beyond his control, such as indorsement by a thief, in much the same manner as if he used cash. Consequently, the losses on checks A and B are allocated rationally between the parties in the hope that the probabilities of loss will remain sufficiently low for each person so that neither will be driven to use

1111, 1113 (1902); Dartmouth Nat'l Bank v. Keene Nat'l Bank, 99 N.H. 458, 461, 115 A.2d 316, 318 (1955). See generally Strahorn, *The Policy or Function of the Law of Bills and Notes*, 87 U. PA. L. REV. 662 (1939).

36 This statement assumes that the drawer dealt with the impostor in person. See text accompanying note 40 *infra* for a textual discussion.

37 See BRITTON, BILLS AND NOTES § 142 (1943).

38 Atlantic Nat'l Bank v. United States, 250 F.2d 114, 118 (5th Cir. 1957); United States v. Continental-American Bank & Trust Co., 175 F.2d 271, 272 (5th Cir.), *cert. denied*, 338 U.S. 870 (1949).

restrictive measures which would impede the free and confident circulation of negotiable instruments. This objective requires the application of loss allocation to checks payable to impostors as a policy limitation upon the interpretation of the drawer's intent.

II. THE DRAWER'S INTENT

It is said that when the drawer executes the check he has a double intent. First, he intends to pay the physical being with whom he is dealing. Second, he intends to pay the person who has the same name as that inserted in the check as payee.[39] The overwhelming weight of authority holds that the drawer's dominant intent is to pay the physical person with whom he deals.[40] In *Robertson v. Coleman*[41] the court, in one of the more thoughtful opinions in this area, analyzes and explains the result:

> "The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name. The defendants, for a valuable consideration, gave the check to a person who said his name was Charles Barney, and whose name they believed to be Charles Barney, and they made it payable to the order of Charles Barney, intending thereby the person to whom they gave the check. The plaintiff received this check for a valuable consideration, in good faith, from the same person, whom he believed to be Charles Barney, and who indorsed the check by that name. . . . It is clear from these facts, that, although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was the person intended by them as the payee of the check, designated by the name he was called in the transaction, and that his indorsement of it was the indorsement of the payee of the check by that name."[42]

[39] Security-First Nat'l Bank v. United States, 103 F.2d 188, 190 (9th Cir. 1939); Cohen v. Lincoln Sav. Bank, 275 N.Y. 399, 407, 10 N.E.2d. 457, 461 (1937). BEUTEL'S, BRANNAN, NEGOTIABLE INSTRUMENTS LAW 476 (7th ed. 1948).

[40] *E.g.*, Cureton v. Farmers State Bank, 147 Ark. 312, 227 S.W. 423 (1921); Greenberg v. A & D Motor Sales, 341 Ill. App. 85, 93 N.E.2d 90 (1950); Montgomery Garage Co. v. Manufacturer's Liab. Ins. Co., 94 N.J.L. 152, 109 Atl. 296 (Ct. Err. & App. 1920); Halsey v. Bank of New York & Trust Co., 270 N.Y. 134, 200 N.E. 671 (1936).

[41] 141 Mass. 231, 232, 4 N.E. 619, 620 (1886).

[42] *But cf.* Cohen v. Lincoln Sav. Bank, 275 N.Y. 399, 10 N.E.2d 457 (1937), where the court held that the drawer could not intend the person dealt with unless he had negotiated directly with the impostor in person and that a fleeting acquaintance made just before issuing the check would not support such an intent.

Some courts explain that if the indorser or the drawee were to call the drawer before discovery of the fraud for a description of the payee so that the indorser or drawee could be sure he was paying the proper party, the drawer would describe the physical features of the person with whom he dealt.[43] Other courts premise their explanation on the theory that checks are a substitute for cash and serve a cash function. If the drawer had had sufficient cash on hand, he would have paid the cash to the person appearing before him. But not having the cash, he gave the person an order, addressed to the drawee, directing and intending the drawee to pay cash to the person who appeared before the drawer and to charge the payment to the drawer's account.[44]

Authority for the alternative proposition—that the drawer's dominant intent is to pay the named payee—is sparse[45] except in cases where the impersonation is of someone known personally to the drawer[46] or in other special circumstances.[47] There may

43 United States v. First Nat'l Bank, 131 F.2d 985, 989 (10th Cir. 1942); Corinth Bank & Trust Co. v. Security Nat'l Bank, 148 Tenn. 136, 252 S.W. 1001 (1923); Commercial Bank & Trust Co. v. Southern Industrial Banking Corp., 16 Tenn. App. 141, 66 S.W.2d 209 (1932). Aigler, *Bills and Notes—Impostors in the Law of Bills and Notes,* 46 MICH. L. REV. 787, 790 (1948). *But cf.* Rivara v. Delaware, L. & W. R.R., 98 N.J.L. 290, 119 Atl. 6 (Ct. Err. & App. 1922), where one impersonated an employee in the payroll line and received the check of the employee and the court said that the drawer would describe the employee rather than the impostor.

44 Greenberg v. A & D Motor Sales, 341 Ill. App. 85, 92, 93 N.E.2d 90, 93 (1950); Market St. Title & Trust Co. v. Chelten Trust Co., 296 Pa. 230, 145 Atl. 848 (1929). Aigler, *supra* note 43, at 791. This does not undermine the distinction between order instruments and bearer instruments. Order instruments are to prevent payment to someone other than the intended party but they are not to protect the drawer from the fraud of the party he intended to pay. On the other hand, payment of bearer paper is not restricted to the intended payee.

45 Tolman v. American Nat'l Bank,, 22 R.I. 462, 48 Atl. 480 (1901).

46 United States Cold Storage Co. v. Central Mfg. Dist. Bank, 343 Ill. 503, 175 N.E. 825 (1931); Palm v. Watt, 7 Hun 317 (N.Y. Sup. Ct. 1876); Goodfellow v. First Nat'l Bank, 71 Wash. 554, 129 Pac. 90 (1913). Usually these impersonations are by correspondence since it is difficult to impersonate in person one known by the drawer. *But cf.* Maloney v. Clark, 6 Kan. 53 (1870), where on similar facts the court put the loss on the drawer on the ground that the holder was innocent; the intended payee problem was not discussed.

47 Where one impersonates an employee and receives the check for that employee from the employer, the courts have usually held that the impostor's indorsement is a forgery. Miners' & Merchants Bank v. St. Louis Smelting & Ref. Co., 178 S.W. 211 (Mo. Ct. App. 1915); Rivara v. Delaware, L. & W.R.R., 98 N.J.L. 290, 119 Atl. 6 (Ct. Err. & App. 1922); Simpson v. Denver & R.G. Ry., 43 Utah 105, 134 Pac. 883 (1913); Rolling v. El Paso & S.W. Ry., 127 S.W. 302 (Tex. Civ. App. 1910). *Contra,* Missouri Pac. R.R. v. M. M. Cohn Co., 164 Ark. 335, 261 S.W. 895 (1924). Where an employee of the drawer sends in false invoices or pads the payroll and receives the checks, his indorsement is usually held to be a forgery. United States Cold Storage Co. v. Central Mfg. Dist. Bank, 343 Ill. 503, 175 N.E. 825 (1931); Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N.E. 740 (1909); St. Paul v. Merchants Nat'l Bank, 151 Minn. 485, 187 N.W.

be several reasons for the lack of authority. First, the forcefulness of the leading case urging this view is weakened by the court's reasoning that because there is a fraudulent impersonation the indorsement is false and is thus a forgery.[48] This does not follow. Even though the impersonation may be fraudulent, the forged character of the indorsement depends not upon this but upon whom the drawer intended to pay. A more compelling objection to the minority view is that it so increases the drawee's risk of loss that burdensome protective measures would be required of the drawee to insure that the indorsing or presenting party is in fact the intended payee as named by the drawer.[49] This view would tend to impair the negotiability of all checks. Nevertheless, the proposition that the drawer intended to pay the person named is not without merit when measured solely in the terms of actual intent. In the opening fact situation the impostor impersonated someone whose existence and name could be verified. There was certainly inducement value[50] in impersonating that individual and using his name, and the deciding factor influencing the drawer to issue the check may not have been the personal persuasion of the person before him but the name used and the reputation serving it. However, the view that the drawer intends to pay the person named lacks support not only at common law, but also under statutory provisions in the jurisdiction where the view originated.[51]

In reality, it is probable that these two alternatives do not exhaust the drawer's various intents. It may be that the drawer really intends to pay that individual, whoever it may be, who has the status of economic wealth which has been represented to him.[52]

516 (1922); Shipman v. Bank of New York, 126 N.Y. 318, 27 N.E. 371 (1891); National Sur. Co. v. National City Bank, 184 App. Div. 771, 172 N.Y. Supp. 413 (1918). *Contra,* Atlantic Nat'l Bank v. United States, 250 F.2d 114 (5th Cir. 1957). See cases cited note 79 *infra.*

[48] Tolman v. American Nat'l Bank, 22 R.I. 462, 463, 48 Atl. 480, 481 (1901). This manner of reasoning is not unknown. See, *e.g.,* First Nat'l Bank of Hastings v. Farmers & Merchants Bank, 56 Neb. 149, 76 N.W. 430 (1898); Shipman v. Bank of New York, 126 N.Y. 318, 331, 27 N.E. 371, 374 (1891); Palm v. Watt, 7 Hun 317 (N.Y. Sup Ct. 1876).

[49] See authorities cited note 35 *supra.*

[50] "The 'impostor' picks the name of an actual person with whose qualities, particularly economic, the victim is presumably acquainted. The impostor's plan is to gain an advantage by pretending to be that other person." Aigler, *When is a Payee an "Impostor"?* 2 ARIZ. L. REV. 78, 82 (1960).

[51] Rhode Island has adopted the Uniform Commercial Code, R.I. GEN. LAWS ANN. § 6A-1-101 (1956), which validates the impostor's indorsement. See note 82 *infra.*

[52] Murphy v. Metropolitan Nat'l Bank, 191 Mass. 159, 162, 77 N.E. 693, 694 (1906); First Nat'l Bank v. American Exch. Nat'l Bank, 170 N.Y. 88, 91, 62 N.E. 1089, 1090 (1902)

Neither the physical identity of the person dealt with nor the naked name of the person represented has inducement value standing alone. The decisive factor is probably the impostor's representation that he is the owner of the land described, and upon the faith of this the drawer issues a check, intending the money to be paid to the landowner. However, with but few exceptions,[53] the strongest statements of this view are only dicta. The small number of cases discussing the view imply either that the bar has not been active in arguing it or that courts have not considered it meritorious.[54] A serious obstacle to the application of the view stems from the practical consequences which would follow it. In order for anyone taking a check to protect himself, he would have to determine the circumstances in which the check was issued and the purpose for which it was issued; he would have to identify the landowner and to verify that the landowner received the check from the drawer and that the indorsement was made by the landowner.[55] These increased burdens and risks could undermine the confidence and willingness of people to accept negotiable instruments, or they could force such protective measures that it would become more difficult to negotiate checks generally. The end result would be an impediment in the commercial stream.

As fact situations vary, it becomes more difficult to justify realistically the result in terms of actual intent. Surely, where the impersonation of the landowner is accomplished by correspondence, the argument in *Robertson v. Coleman* that "the visible presence of a person affords surer means of identifying him than his name" has no application since the drawer is unable to identify a payee by description.[56] It is still possible to apply the rationale that the checks serve a cash function by assuming that the drawer would have sent cash to his correspondent but used an order instrument only to avoid appropriation by others of the payment while in transit. Nevertheless, without reference to this rationale and without satisfactory explanation for the departure from the

(dictum); Sherman v. Corn Exch. Bank, 91 App. Div. 84, 86, 86 N.Y. Supp. 341, 342 (1904); Goodfellow v. First Nat'l Bank, 71 Wash. 554, 558, 129 Pac. 90, 92 (1913) (dictum). Abel, *supra* note 12, at 183. *Contra,* McHenry v. Old Citizens Nat'l Bank, 85 Ohio St. 203, 97 N.E. 395 (1911).

[53] Murphy v. Metropolitan Nat'l Bank, 191 Mass. 159, 77 N.E. 693 (1906); Sherman v. Corn Exchange Bank, 91 App. Div. 84, 86 N.Y. Supp. 341 (1904).

[54] Abel, *supra* note 12, at 183.

[55] McHenry v. Old Citizens Nat'l Bank, 85 Ohio St. 203, 97 N.E. 395 (1911).

[56] Aigler, *supra* note 43, at 792.

premise of *Robertson v. Coleman,* the courts have held that the drawer intended to pay the person with whom he corresponded.[57] It may be that this is an instance wherein considerations of commercial policy dictate the result regardless of actual intent although few courts have overtly declared this to be the reason.

The courts are on firmer ground in cases where the impostor claims to be the agent for the landowner, obtains the check drawn payable to the landowner, indorses the landowner's name and cashes it. This is generally considered to be a forged indorsement.[58] Some courts reason that the drawer intended to pay the person named, who is allegedly the principal.[59] Others deem it sufficient to hold merely that whatever else may have been the drawer's intent, he believed that the agent and the principal were two different persons and therefore intended to pay someone other than the agent.[60]

Thus it is apparent that while in theory the intent of the drawer is a correct and valid point of departure for the allocation of the loss from checks payable to an impostor, the intent required is more nearly the drawer's objective intent than his subjective intent. This is further illustrated by the tendency of most courts to impute intent on the strength of judicial precedents rather than to discover it by actual inquiry.[61] Moreover, in many cases it is not possible to say that any one of the many factors comprising the drawer's intent is so dominant as to be considered the essence of his intent.[62] Therefore, a court's assertion that the drawer had

[57] *E.g.,* United States v. Union Trust Co., 139 F. Supp. 819, 825 (D.C. Md. 1956); Boatsman v. Stockmen's Nat'l Bank, 56 Colo. 495, 138 Pac. 764 (1914); Hoffman v. American Exch. Nat'l Bank, 2 Neb. Unoff. 217, 96 N.W. 112 (1901); First Nat'l Bank v. American Exch. Nat'l Bank, 170 N.Y. 88, 62 N.E. 1089 (1902).

[58] *E.g.,* Russell v. First Nat'l Bank, 2 Ala. App. 342, 56 So. 868 (1911); Harsin v. Trust Co., 131 Colo. 595, 284 P.2d 235 (1955); First Nat'l Bank v. Pease, 168 Ill. 40, 48 N.E. 160 (1897); Land Title Bank & Trust Co. v. Cheltenham Nat'l Bank, 362 Pa. 30, 66 A.2d 768 (1949).

[59] See First Nat'l Bank v. Pease, *supra* note 58; Rogers v. Ware, 2 Neb. 29 (1873); Real Estate Land Title & Trust Co. v. United Sec. Trust Co., 303 Pac. 273, 154 Atl. 593 (1931).

[60] See Russell v. First Nat'l Bank, 2 Ala. App. 342, 56 So. 868 (1911).

[61] See Harsin v. Trust Co., 131 Colo. 595, 284 P.2d 235 (1955); Imperial Motors v. President & Directors of Manhattan Co., 65 N.Y.S.2d 86 (N.Y. City Ct. 1946); North Philadelphia Trust Co v. Kensington Nat'l Bank, 328 Pa. 298, 196 Atl. 14 (1938); Townsend, Oldham & Co. v. Continental State Bank, 178 S.W. 564 (Tex. Civ. App. 1915).

[62] "Perhaps, in truth, both intents are so inseparable that the choice of one intent rather than the other is purely arbitrary—an example of rationalization, perhaps unconscious, to reach a desired result." Cohen v. Lincoln Sav. Bank, 275 N.Y. 399, 407, 10 N.E.2d 457, 461 (1937). In accord with this it has been stated as a general proposition that: "No scientific foundation whatever exists for the assertion that the component parts

a particular dominant intent is usually an indulgence in a legal fiction.[63] Nevertheless, the legal fictions serve the valuable function of loss allocation,[64] and by use of the appropriate fiction losses can be so allocated among the various parties that no one of them will bear a burden which unduly restrains his use of commercial paper.[65] Because of the difficulty of determining the drawer's actual intent and because of the importance of commercial policy, it would seem advisable that courts give more overt consideration to commercial policy in interpreting the drawer's intent.

III. THE SIGNIFICANCE OF NEGLIGENCE

As indicated earlier,[66] defining the relationships of the drawer, the drawee, and the indorser in contractual terms renders the drawee's negligence immaterial as a premise for liability. But where the court finds that the indorsement is a forgery because it was not subscribed by the intended payee, the drawer's negligence becomes a factor. The forgery allows the drawer to avoid the loss by placing it either on the drawee because the check has not been paid to order, or on a subsequent indorser since section 23 of the Negotiable Instruments Law makes the forged indorsement inoperative to pass any interest by which the subsequent indorser can force the drawer to pay.[67] However, if the drawer has been negligent, he may be estopped from asserting the fact of forgery as a defense,[68] thereby excusing the drawee and the indorser from not strictly complying with their contractual obligations and enabling them to place the loss on the drawer. The drawer's negligent conduct has in theory misled the drawee or indorser to pay

of a complex stimulus [such as are involved in an impostor-payee situation, operating to produce a given reaction] . . . can be broken down and the resultant conduct attributed to any one of the isolated elements." Abel, *supra* note 12, at 229.

63 Abel, *supra* note 12 at 231; Comment, 33 ST. JOHNS L. REV. 110 (1958).

64 Abel, *supra* note 12, at 231.

65 *Cf.* Comment, 62 YALE L.J. 417, 433 (1953).

66 See authorities cited in note 16 *supra.*

67 See cases cited note 14 *supra.* See also note 22 *supra.* UNIFORM NEGOTIABLE INSTRUMENTS LAW § 23 makes a forged indorsement inoperative to pass title; see note 29 *supra* where the section is quoted in full.

68 UNIFORM NEGOTIABLE INSTRUMENTS LAW § 23 indicates that the drawer can use the defense of forgery "unless the party, against whom it is sought to enforce such right [payment of the check as the party secondarily liable], is precluded from setting up the forgery or want of authority."

upon a forged indorsement[69] and therefore the drawer is made to suffer the loss in the same manner as if the instrument had been paid to order.

IV. THE ASSUMPTION OF A NAME BELONGING TO NO PERSON

Compare the following facts with the opening impostor situation: *A*, a stranger to *D*, appears before *D* and uses the name *Z* in selling merchandise to *D* which is to be delivered later. There is in fact no person named *Z*. *D* gives *A* a check, payable to *Z*, which *A* indorses in the name *Z* and cashes before absconding. *D* discovers the fraud when he fails to receive the merchandise. Again, either the drawer, the drawee, or an indorser must bear the loss. Strictly speaking, this is not an impersonation by *A* of someone else but is merely a different means of verbal identification of the physical being *A* for the purposes of the particular transaction.[70] *A* has not put on the coat of any other person. *A's* situation is analogous to the author who publishes a book under a pen name which differs from his given name, or an entertainer who uses a stage name rather than his real name while before the footlights.[71] That someone unknown to both the drawer and the defrauding party may in fact have the assumed name does not change the character of the situation. There is no attempt to induce by making use of the reputation of another and the drawer is not aware that any reputation is attached to the name.

Consequently, it is misleading to categorize these situations as impostor cases and mechanically apply the impostor rules. Yet this seems to be the choice of the courts.[72] Little verbal cognizance is taken of the distinction between impersonation and the mere assumption of a name.[73] Nevertheless, it is significant that the

[69] Boatsman v. Stockmen's Nat'l Bank, 56 Colo. 495, 499, 138 Pac. 764, 766 (1914); C. E. Erickson Co. v. Iowa Nat'l Bank, 211 Iowa 495, 230 N.W. 342 (1930); Citizens' Union Nat'l Bank v. Terrell, 244 Ky. 16, 24, 50 S.W.2d 60, 63 (1932). *But cf.* Keel v. Wynne, 210 N.C. 426, 187 S.E. 571 (1936); 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).

[70] Aigler, *supra* note 50, at 82.

[71] The drafters of the Negotiable Instruments Law demonstrated awareness that one may transact business in an assumed name by providing in § 18 that one who has signed an instrument in his trade or assumed name shall be liable on the instrument as if he had signed in his true name.

[72] See, *e.g.*, Meridian Nat'l Bank v. First Nat'l Bank, 7 Ind. App. 322, 33 N.E. 247 (1893); Forbes & King v. Espy, Heidelbach & Co., 21 Ohio St. 474 (1871); Corinth Bank & Trust Co. v. Security Nat'l Bank, 148 Tenn. 136, 252 S.W. 1001 (1923).

[73] "These cases lose sight of the distinction between real and fictitious persons. In the latter case there is nobody to inquire about; no one, in fact, misrepresented; no one in the mind of one party other than the person with whom he is dealing." Tolman v.

courts, under an impostor analysis, have uniformly held that the drawer in an assumed name case intended to pay the person dealt with.[74] Although the fact situation is different, the ultimate question is the same: to whom has the drawer ordered payment? Perhaps it is because the ultimate question is the same that the courts have so habitually decided the assumed name case by labelling it an impostor case and applying the impostor rules. Furthermore, the courts may not feel any compulsion to note the distinction because in the majority of instances the proper interpretation of the facts in an assumed name case will not change the result.

However, the factual difference may be of some relevance to the particular attorney in the particular case since the various elements comprising the drawer's intent weigh quite differently in the assumed name situation. Basically, there is no other individual intruding in the drawer's mind because for him the assumed name has no independent significance.[75] Therefore, the drawer's intent to pay the person with whom he dealt is more dominant here than in the impostor situation. While it is possible that the drawer intended to pay whoever held the status represented —the owner of the merchandise—this analysis is still subject to the objection that it might impair negotiability by disproportionately increasing the risk of loss of the drawee and indorser. Conse-

American Nat'l Bank, 22 R.I. 462, 465, 48 Atl. 480, 481 (1901). The distinction is also noted in Hartford Acc. & Indem. Co. v. Middletown Nat'l Bank, 126 Conn. 179, 10 A.2d 604 (1939), where the court held that indorsement by the party assuming the name was valid. *But cf.* American Express Co. v. Peoples Sav. Bank, 192 Iowa 366, 181 N.W. 701 (1921); Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N.E. 740 (1909). The courts in these cases indicated that if there was no actual person by that name, no one could indorse the instruments. The court in Kohn v. Watkins, 26 Kan. 691 (1882), felt that in this situation the issue became whether the check became bearer paper because the payee was fictitious. UNIFORM NEGOTIABLE INSTRUMENTS LAW § 9(3) declares that an instrument is bearer "when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable." Hence, these checks payable to one assuming a name are not bearer checks unless the drawer knew the payee was non-existing at the time he drew the check. Montgomery Garage Co. v. Manufacturers Liab. & Ins. Co., 94 N.J.L. 152, 109 Atl. 296 (Ct. Err. & App. 1920).

[74] *E.g.*, Meridian Nat'l Bank v. First Nat'l Bank, 7 Ind. App. 322, 33 N.E. 247 (1893); Elliott v. Smitherman, 19 N.C. 322 (1837); Merchants' Loan & Trust Co. v. The Bank of the Metropolis, 7 Daly 137 (N.Y. C.P. 1877); Forbes & King v. Espy, Heidelbach & Co., 21 Ohio St. 474 (1871); Corinth Bank & Trust Co. v. Security Nat'l Bank, 148 Tenn. 136, 252 S.W. 1001 (1923). *But cf.* Eagan v. Garfield Nat'l Bank, 118 Misc. 76, 192 N.Y. Supp. 209 (Sup. Ct. 1922), where the drawer made the check payable to the name assumed by one claiming to be the agent of the drawer's creditor and the court held that the drawer intended any agent of the creditor by that name, although there was in fact no such agent.

[75] Tolman v. American Nat'l Bank, 22 R.I. 462, 465, 48 Atl. 480, 482 (1901) (dictum).

quently, although the courts may be somewhat perfunctory in their analysis of these cases, their conclusion that the drawer intended the person dealt with is more cogent than in the true impostor situation.

Because the impostor label has been attached so frequently to the assumed name cases, it is not surprising to find that the variations in the impostor rule are carried over to the assumed name cases. Where the defrauding party deals with the drawer by mail, the courts hold that the drawer intended to pay the person with whom he corresponded.[76] The weakness of this conclusion in the impostor case[77] in terms of a strict intent analysis is that the drawer is no longer able to describe the person he intended to pay. However, the inability to describe the payee is not so serious in the assumed name case since there is no competing image arising in the drawer's mind. Furthermore, one may say that even if the drawer intended to pay the person named that person is the correspondent since the name inserted as payee is his name as far as the transaction is concerned, and there is no other person known to the parties by that name. Where the defrauding party assumes a name and represents himself as an agent and the check is payable to an alleged principal, the courts apply impostor analysis to hold that the agent's indorsement is a forgery since the drawer dealt with him as the agent only and therefore intended someone else to be the alleged principal and payee.[78]

In general, the facts of the assumed name case strengthen the result reached under an impostor analysis. While the courts apparently do not feel compelled to note the distinction, in view of the courts' literal reliance upon a strict intent analysis without apparent emphasis of commercial policy, it would seem incumbent upon them to emphasize the distinction since it usually bolsters their holdings that the drawer intended to pay the person with whom he dealt or the person with whom he corresponded.

[76] Fidelity & Deposit Co. v. Union Trust Co., 37 F. Supp. 3 (W.D.N.Y. 1941); Hartford Acc. & Indem. Co. v. Middletown Nat'l Bank, 126 Conn. 179, 10 A.2d 604 (1939); First Nat'l Bank v. Whitaker, 136 Tex. 117, 147 S.W.2d 1074 (1941).

[77] See cases cited note 57 *supra*.

[78] *E.g.*, Strang v. Westchester County Nat'l Bank, 235 N.Y. 68, 138 N.E. 739 (1923); Armstrong v. Pomeroy Nat'l Bank, 46 Ohio St. 512, 22 N.E. 866 (1889); Chism, Churchill & Co. v. Bank, 96 Tenn. 641, 36 S.W. 387 (1896); Guaranty State Bank & Trust Co. v. Lively, 108 Tex. 393, 194 S.W. 937 (1917).

V. ASSUMPTION OF A NAME AND IMPERSONATION BY THE DRAWER'S EMPLOYEE

In one instance, however, the result reached in an assumed name case under an impostor analysis may be less rational than in the corresponding impostor situation. Where an employee obtains a check from his employer by assuming a name, filing false invoices, or padding the payroll and indorses the check in the assumed name, it would seem consistent with the correspondence cases to hold that the drawer intended to pay the correspondent, thus validating the employee's indorsement. Indeed, this would seem to be the result suggested by the assumed name distinction since the name induces no competing image. Nevertheless, the cases are in agreement that the employee's indorsement is a forgery in both the assumed name case[79] and the impostor case.[80] This makes sense where the particular employee physically obtains the check under the pretense of delivering it to the payee, for this has the appearance of an agency situation, and indicates that the employer did not intend to pay the agent-employee.[81] Further, in the impostor situation, it is possible to theorize that the drawer was induced by the name of the one impersonated and so did not intend to pay the correspondent employee who filed the invoice or padded the payroll. If the person impersonated was known to the drawer, such as a former employee or a regular supplier, the theory is acceptable. But not all of the cases meet this specification, and the theory cannot be extended to the case where the employee merely assumes a name since the name represents no image other than the correspondent-employee whom the drawer could have intended to pay.

The real explanation of these cases may be found in a negative intent rationale which is somewhat analogous to the reasoning employed in the agency cases. If it is assumed that the drawer knows the names of his employees, he would recognize that the name which he is inserting as the payee is different. Believing

[79] Padded payroll: City of New York v. Bronx County Trust Co., 261 N.Y. 64, 184 N.E. 495 (1933); National Sur. Co. v. National City Bank, 184 App. Div. 771, 172 N.Y. Supp. 413 (1918); Defiance Lumber Co. v. Bank of California, 180 Wash. 533, 41 P.2d 135 (1935). *Contra,* Atlantic Nat'l Bank v. United States, 250 F.2d 114 (5th Cir. 1957). False loan applications: First Nat'l Bank v. Farmers & Merchants Bank, 56 Neb. 149, 76 N.W. 430 (1898); Shipman v. Bank of New York, 126 N.Y. 318, 27 N.E. 371 (1891).

[80] See note 47 *supra.*

[81] See First Nat'l Bank v. Farmers & Merchants Bank, 56 Neb. 149, 76 N.W. 430 (1898); Board of Educ. v. National Union Bank, 16 N.J. Misc. 50, 196 Atl. 352 (Sup. Ct. 1938).

that the payee is someone other than his employee, the drawer would thus intend to pay someone other than his employee. If the drawee were to call the drawer and describe the person presenting the check, the drawer would say that he did not intend to pay that person because that person is his employee and he intended to pay someone else. This theory applies equally well whether the employee is an impostor or merely assumes a name. However, application of the negative intent rationale to corporate employers is clearly an indulgence to explain the conclusion since usually the drawer does not immediately know the names or descriptions of the many employees. Nevertheless, in the broad perspective, such an indulgence may be justified in the interest of allocating losses for the purpose of preserving the drawer's, the drawee's and the indorsers' willingness to use negotiable instruments.

VI. UNIFORM COMMERCIAL CODE[82]

The Uniform Commercial Code has taken affirmative action regarding some of the situations herein discussed. Section 3-405 states:

"(1) An indorsement by *any* person in the name of a named payee is effective if

(a) an *impostor* by use of the *mails or otherwise* has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or

(b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or

(c) *an agent or employee of the maker or drawer* has supplied him with the name of the payee intending the latter to have no such interest.

(2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing."[83]

It is readily apparent that the code places the loss on the drawer in more situations than does the present law. For example, under the code the drawer will bear the loss in all cases of imper-

[82] The Uniform Commercial Code has been adopted by the following states: Arkansas, Connecticut, Illinois, Kentucky, Massachusetts, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island and Wyoming.

[83] UNIFORM COMMERCIAL CODE § 3-405. Emphasis added.

sonation, even though the impersonation is of someone the drawer knows personally. In addition, where the drawer's defrauding employee provides the name of a payee he is impersonating, the code again places the loss on the drawer by giving effect to the employee's indorsement. The drafters' comments for subsection 1 (c) explain this provision with hypothetical situations of an employee padding the payroll, but the exact language of the provision would seem to be broad enough to cover the employee who files fictitious invoices and receives and indorses the checks. On the other hand, as the comments make clear, the code makes no provision for the case where one poses as the agent for another and the drawer makes the check payable to the principal; the indorsement required is still that of the principal and not of the supposed agent.

Several justifications are offered in the comments for these particular provisions. One is that the drawer intends to pay the person dealt with. Another is that the drawer is the party better able to prevent the forgery through the exercise of reasonable care. Actually, it would seem that the code's greatest advantage is simply providing more definite rules for this area. Certainty of result decreases litigation and increases the confidence and willingness to deal with negotiable paper. Thus the code appears to be a legislative determination that having more definite statutory rules promotes the fundamental policy of insuring the utility of negotiable instruments, that the drawer can bear these additional losses without so increasing his risks as to restrict his use of negotiable instruments, and that the circulation of negotiable instruments will be encouraged by removing these risks of loss from the drawee and the indorser.

Nevertheless, the code does not directly attack the assumed name situation. Although subsection 1 (c) appears to be broad enough to cover the employee who assumes a name in padding the payroll or in filing false invoices, some doubt is created by the phrase "intending the latter to have no such interest." This phrase seems to require the existence of a person with the assumed name whom the employee does not intend to receive the check. This makes little sense in the case of an employee assuming a fictitious name, for the very thing he does intend is that the payee named is to get the money since he is that person and is so named for the particular transaction. However, there does seem to be evidence of an awareness that one can assume a name for a particular transaction. Section 3-401 provides that one can be liable

on an instrument although he signs in his assumed name.[84] In view of the case history, the code provisions and the fact that the question of the intended payee is common to both the impostor and the assumed name case, it seems highly probable that under the code the courts will find that the drawer intended to pay the person who merely assumed a name. This also would seem to be within the spirit of subsection 1 (c).

CONCLUSION

Whether the check is obtained by impersonation or the mere assumption of a name, conceptually, the intent of the drawer is a technically correct premise for placing the loss. However, this is not as so many courts unfortunately seem to conclude the sole consideration or the end in itself. If the courts persist in analyzing the cases as if they are ascertaining the drawer's actual intent and nothing more, it is incumbent that full use be made of the facts and all available arguments. This calls for both the full utilization of the facts in the assumed name case and a clear enunciation of the negative intent rationale in the appropriate situation. However, the courts should recognize and apply the broader considerations of commercial policy. Not only is it nearly impossible to ascertain a true dominant intent, but in the long run it is important to consider the significant commercial interest which will be promoted by the wise allocation of the losses from these checks.

Stuart S. Gunckel, S. Ed.

[84] UNIFORM COMMERCIAL CODE § 3-401 states: "(1) No person is liable on an instrument unless his signature appears thereon. (2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any work or mark used in lieu of a written signature."