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Fictitious Payee

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THE FICTITIOUS PAYEE

IT is proposed to discuss the doctrine that negotiable instruments with fictitious payees are deemed payable to bearer, and to note the conditions and limitations of the rule.

The scope of the article, then, will be confined within a rather narrow compass and right at the outset it may be helpful to gain some conception of the meaning of the word "fictitious." In a majority of the cases no attempt has been made to define the term. It would seem, however, that ascertaining the legal meaning must be a simple task, and yet it has presented some difficulty.

In the case of *Vinden* v. *Hughes,* [1905] 1 K. B. 795, the court defined "fictitious" as "feigned or pretended;" and again, in *North and South Wales Bank* v. *Macbeth,* [1908] A. C. 107, Lord Robertson accepts the words "feigned, imaginary" as expressing "fictitious." The most common example, perhaps, is the use of the name of a person not living, with knowledge of that person's non-existence.[1] Suppose then the maker selects the name of John Brown, having in mind a person who died ten years ago. Is this a fictitious payee in view of the fact that there are many John Browns living? Is the term "fictitious" synonymous with "non-existing?" In the early case of *Bennett* v. *Farnell,* (1807) 1 Camp. 129, Lord Ellenborough used the term "fictitious" in the sense of "non-existing" in that the person named had died a long time ago. In both the English Bills of Exchange Act and the American Uniform Negotiable Instruments Law, the words "fictitious or non-existing" are found. An explanation of these terms is offered by Judge Bowen in the leading case of *Bank of England* v. *Vagliano Brothers,* 23 Q. B. D. 260, when he says the word "non-existing" is superfluous but probably was introduced in the sub-section with reference to the case of *Asphital* v. *Bryan,* 33 L. J. Q. B. 320, where the payee's name was that of a deceased person.[2] But in *Clutton & Company* v. *Attenborough,* 2 Q. B. 306, 707; [1897] A. C. 190, the court emphasized the fact that the payee was a "non-existing" person. Lord Halsbury says:

"Whatever might have been said in *Vagliano's case* [1891]

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[1] Or using the name of a dissolved partnership. *Catitt* v. *James & Co.* (1873), 39 Tex. 189, 198; or of a firm which never existed. *Ort* v. *Fowler* (1884), 31 Kan. 478, 47 Am. Rep. 501; or of a pretended corporation without a *de facto* existence. *Farnsworth* v. *Drake* (1858), 11 Ind. 101.

[2] This explanation was accepted by M. D. Chalmers in 7 LAW QUAR. REV. 219; also CHALMERS BILLS OF EXCHANGE (6 ed.) (1903) p. 22.

> A. C. 107, where there were questions raising a doubt upon the applicability of those words, or whatever might be said about the difference between the words 'fictitious' and 'non-existing,' it has in this case never been suggested that on the face of these instruments the name of George Brett is anything other than the name of a non-existing person."

In *North and South Wales Bank* v. *Macbeth,* [1908] 1 K. B. 20, Lord Alverstone, speaking for the Court of Appeals, in commenting on the case of *Clutton & Company* v. *Attenborough* said:

> "The judgments in that case proceeded throughout upon the basis that Brett, the payee of the cheque, was a non-existing person. The summary of the facts states, 'There was no such person as George Brett.' That statement does not mean, of course, that there was no person whose name was George Brett. I myself am aware of the fact that there are persons bearing that name, one of whom I know. The statement means that the case was argued upon the basis of George Brett being a non-existing person."

In that same case Lord Buckley has this to say in attempting to sustain the position that there is a difference between "fictitious" and "non-existing:"

> "Two different effects are contemplated by that sub-section (7-3), the one is, that the payee is fictitious; the other that he is non-existent. Existence or non-existence of a particular person is a question of fact, not relevant to anybody's mind or intention. 'Fictitious' is different. A thing can only be fictitious relatively to some one. There can be no action without an actor, and no fiction without a feigner. Fiction is necessarily relative."

With due deference to the learned judges who have attempted thus to distinguish between "fictitious" and "non-existing" it seems that the real difference between the terms is, that, while every non-existing payee must necessarily be fictitious, the converse is not true. In other words, the term "fictitious" is the broader, including within it that which is "non-existing." Especially is this true as there is still another sense in which the term "fictitious" has been employed. Where the name of a living person, known to the drawer or maker, is chosen, but that person has no interest in the instrument, and it is intended that he shall have none, such a designation is held to constitute a fictitious payee. Illustrations are to

be found in both the English law[2] and in that of the United States.[4]

But before proceeding further, it may be well to eliminate some things that do not constitute fictitious payees and are not to be confounded with this doctrine.

First. Suppose the bill of exchange, note or check is payable "to the order of the Estate of D. G. Littlefield." In the case of *Lewisohn* v. *The Kent and Stanley Company*, (1895) 87 Hun 257 (N. Y.), the court in a poorly reasoned case held the instrument to be a promissory note payable to a fictitious payee, and, having been negotiated by the maker, was payable to bearer.[5] Incidentally it may be noted that some courts have gone to the other extreme, treating such instruments as bad altogether for want of certainty of a payee, and regarding them merely evidence of a debt due the estate.[6] It is submitted, however, that such instruments should be regarded as payable to the personal representative of the estate named, that being obviously the intention.[7]

Second. There is the impersonal payee, as distinguished from the fictitious payee, for example, "cash" or "bills payable," not purporting to be the name of any person. This class of case offers no difficulty, the instrument being uniformly, both under the law merchant and the code, treated as payable to bearer.[8]

Third. Where, by mistake, the payee is wrongly designated, and the maker, erroneously supposing that William Jones' name is William Smith, inserted the latter name. Such an instrument, both under the law merchant and the Negotiable Instruments Law, is not payable to a fictitious person but to William Jones, who can transfer the instrument by signing either name.[9]

Fourth. Leaving a blank for the name of the payee, and thereby giving an implied authority to fill in a payee's name.[10] Under the law merchant in the United States the great majority of cases held that the taker could rely upon the apparent authority

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[2] *Bank of England* v. *Vagliano Brothers* [1891], A. C. 107.

[4] *Meacher* v. *Fort* (1837), 3 Hill (S. C.) 227, 30 Am. Dec. 364.

[5] See also *Scott* v. *Parker* (1889), 5 N. Y. S. 753.

[6] *Henricks* v. *Thornton*, 45 Ala. 309; *Tittle* v. *Thomas* (1855), 30 Miss. 122, 64 Am. Dec. 154; *Lynn* v. *Marshall*, 11 Barb. 241. Cf. *Bowles* v. *Lambert* (1870), 54 Ill. 237.

[7] *Shaw* v. *Smith* (1889), 150 Mass. 166, 6 L. R. A. 348; *Peltier* v. *Babillion* (1881), 45 Mich. 384 (Semble), CRAWFORD'S ANNOTATED NEGOTIABLE INSTRUMENTS LAW (1916), p. 33.

[8] C. J. ¶ 292; 22 L. R. A. N. S. 507 note.

[9] *Chenot* v. *Lefevre* (1846), 8 Ill. 637; *Charitable Association in the Middle Parish in Granville* v. *Baldwin* (1840), 1 Metc. (Mass.) 359 Negotiable Instruments Law (Commissioners Draft) ¶ 43.

[10] *Rich* v. *Starbuck* (1875), 51 Ind. 87; *Johnston Harvester Co.* v. *McLean* (1883), 57 Wis. 258, 46 Am. Rep. 39.

given by the maker or drawer to the first holder, an authority which he could delegate to subsequent takers.[11] But under the Negotiable Instruments Law this has probably been changed, making the law in this respect now conform to the English view, which puts the taker on his guard to ascertain whether the authority to fill in was properly exercised, whenever he has notice that a blank existed in the instrument when it left the hands of the maker or drawer.[12] This is not to be confused with the case where no blank space is left, for example, in the case of *McIntosh* v. *Lytle*, (1880) 26 Minn. 336, the instrument was payable to the order of "On sight," and the court said:

> "The drawer undoubtedly meant to draw a check, but having left out the payee's name without inserting in lieu thereof words indicating the bearer as payee, it is as fatally defective as it would be if the drawee's name were omitted."

It is evident the words used indicated the time of payment and did not manifest an intention to designate an impersonal payee. Nor is the case of the impersonal payee to be confounded with one where a line is drawn through the blank space, such an instrument being likewise non-negotiable for want of a payee.[13] The doctrine of South Carolina, that an instrument payable "to order" only without designating a payee shall be deemed payable to a fictitious person, and can be sued on by a bona fide holder as bearer seems clearly erroneous.[14]

Fifth. Still another kind of case occurs, where it is payable to the order of a certain person who has just died, but of whose death the maker or drawer is ignorant. The payee is in fact non-existing, but the case should be classified with: "order paper," that is to say, it should be treated as payable to the order of the personal representatives, and not as payable to bearer. CHALMERS, BILLS OF EXCHANGE (6 ed.) 1903, p. 24, in discussing the English Act says:

> "Before the Act, it was held that where a bill was drawn payable to a deceased person in ignorance of his death, his personal representative might enforce the bill and there is nothing in the Act to derogate from this ruling."

It is to be observed, however, that the case which he cites, *Mur-*

[11] *Chemung Canal Bank* v. *Bradner* (1871), 44 N. Y. 680; *Wilson* v. *Kinsey* (1874), 49 Ind. 35.

[12] NORTON, BILLS AND NOTES (4 ed.) p. 346; BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED (2 ed.), p. 19.

[13] *Gordon* v. *Lansing State Savings Bank* (1903), 133 Mich. 143.

[14] *Davega* v. *Moore*, 3 McCord 482, 14 S. C. L. 482. Cf. *Fretwell* v. *Carter* (1907), 78 S. C. 531.

ray v. *East India Company*, (1821) 5 B. and Ald. 204, is not squarely in point because it involves a special indorsement to a person after his decease. But the same principle should apply to the case of the payee.

Sixth. It is also important to exclude the case of the impostor, who fraudulently induces the maker or drawer to deliver an instrument to him made payable to the name of the person whom the impostor is impersonating. A holder in due course is permitted to recover, either because the maker or drawer must be considered as having intended the instrument to be paid to the impostor, or to his indorsement, or because there is an estoppel to deny he was the real payee.[15] It is different, however, if the impostor represents himself as the agent of some other person, to whose order the instrument is made payable. Not even an innocent purchaser can recover in this country against the maker, drawer or acceptor on such an instrument, as a valid indorsement of the person named as payee is necessary.[16]

Seventh. A distinction is to be noted between the doctrine of the fictitious payee and the case of the maker or drawer who uses a fictitious name as his own business name. It is well settled that a man may use any name he pleases as a business name. Such paper is rightly treated as payable to his order, and may be indorsed, either in his own name, or in the assumed name.[17] The argument has been advanced that this principle be applied to all fictitious payees, with the result that the doctrine as it now exists, would be done away, and all such paper would be deemed payable to the order of the maker or drawer under the fictitious name, and his indorsement would be necessary to pass a good title.[18] This theory would be unobjectionable if it in fact expressed the intention of the party inserting, or causing the fictitious name to be inserted, but where the name is that of a real person which is used to deceive others, to say that the forger was thus designating himself, and when he indorsed, he wrote simply his own name, is certainly not expressing the drawer's real intention.[19] Further than that, even if it were conceded that the law should be simplified by doing away with the doctrine altogether, it would seem from a practical viewpoint to be

[15] *Emporia Nat. Bank* v. *Shotwell* (1886), 35 Kan. 360, 57 Am. Rep. 171.

[16] 50 L. R. A. 75, note.

[17] *Bryant* v. *Eastman* (1851), 7 Cush. 111 (Mass.); *Forbes* v. *Espey* (1871), 21 Oh. St. 474; *Edgerton* v. *Preston*, 15 Ill. A. 23; *Jones* v. *Home Furnishing Co.* (1896), 41 N. Y. S. 71; Negotiable Instruments Law (Commissioners Draft) ¶ 18.

[18] HARV. L. REV. 494; 29 HARV. L. REV. 216; BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED (2 ed.), p. 166, 227.

[19] See 3 ILL. L. REV. 331.

highly improbable that concerted action to that effect could be obtained after more than one hundred and twenty-five years of universal acceptance thereof in some form. The failure to distinguish between the fictitious payee and the case where another name is really assumed as a business name is likely to lead to confusion and to carry with it serious consequences, so far as the rights of parties to such instruments are concerned. It must be admitted that it is by no means an easy task to determine just at what point John Smith will be said to have assumed the name of William Jones, where his motive was to defraud someone. The New York courts have had occasion to deal with this question several times in recent years, and there is a dissenting opinion in three out of four cases. The conclusion, if any can safely be drawn from the cases, seems to be that the intention to assume another name must have been manifested by overt acts outside of and in addition to the one which gave rise to the litigation.[20]

We may ask ourselves why any one would wish to make an instrument payable to a fictitious person. Two motives suggest themselves: first, in order to defraud some one by inducing another to part with his money on the strength of the supposed credit of the payee, particularly where the payee is the name of some person known to the other party;[21] second, to assume another name in which to conduct the business. But this last kind of case, as heretofore explained, ceases to be a fictitious payee in the sense in which it is used in negotiable paper.

As the doctrine of the fictitious payee came into being in England it may not be amiss briefly to trace its history. It had its origin in a series of cases that arose out of bills drawn by Livesey & Co., bankrupts.[22] In the *Tatlock case,* which was the first to be decided, the court held at the time the bill was drawn, there were no such persons in existence as Grigson & Co., a fact notorious to all the parties in the transaction; further, though the names of

[20] See *United Cigar Stores Co.* v. *American Raw Silk Co.* (1918), 171 N. Y. S. 480; *Hartford* v. *Greenwich Bank* (1913), 142 N. Y. S. 387, affd. 215 N. Y. 726. *Holub-Dusha Co.* v. *Germania Bank* (1914), 149 N. Y. S. 775. The majority of the court seem to have misconstrued the facts, the dissenting opinion appears to be the better. *P. & G. Card & Paper Co.* v. *Fifth Nat. Bank* (1918), 172 N. Y. S. 688.

[21] *Macbeth* v. *North and South Wales Bank* [1906], 2 K. B. 718, Bray, J.; "I think the word 'fictitious' implies the name has been inserted by the person who has put it in for the same dishonest purpose, without any intention that the cheque should be paid to that person only."

[22] *Tatlock* v. *Harris* (1789), 3 Term R. 174; *Vere* v. *Lewis,* 3 Term R. 182 (same day and without argument); *Collis* v. *Emett,* 1 H. Bl. 313; *Minet* v. *Gibson* (1789), 3 Term R. 481; *Bennett* v. *Farnell* (1807), 1 Camp. 129, 180 c.

Grigson & Co., might not be known to the holder, yet since he took it on the credit of those whose names appeared upon it to either of whom he might resort for payment, he could recover from the acceptor on the count for money paid and money had and received. Campbell, in 3 Term R. 133, commenting on this case said the recovery was "upon the idea that there was an appropriation of so much money to be paid to the person who should become the holder of the bill;" said holder being the "bona fide holder for a valuable consideration." In the subsequent cases the recovery was allowed on the count that the instrument was payable to bearer. The first case to reach the House of Lords was *Minet* v. *Gibson* in 1791, 1 H. Bl. 569, and has since generally been referred to as the leading case, although it contains a strong dissenting opinion. In the case of *Bennett* v. *Farnell,* 1807, 1 Camp. 129, the reporter at first stated the decision erroneously, but corrected it at page 180 c, where he quotes Lord Ellenborough as follows:

> "If it had appeared that defendant knew George Abney, the payee, to be a fictitious payee (George Abney being the name of a deceased brother of the drawer) he should have directed the jury to find for the plaintiff."

In other words, it is clear from these cases that in order to make the instrument payable to bearer as against the acceptor, knowledge on his part was necessary, and the holder must have taken for value, in ignorance of the fact, that the instrument was payable to a fictitious person.[23]

In 1882 the English Bills of Exchange Act was adopted. Section 7 (3) provides, "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." The English courts have had considerable trouble in determining the law under this provision, and have considered the matter in four notable cases, to-wit: *Bank of England* v. *Vagliano Brothers,* [1891] A. C. 107; *Clutton & Company* v. *Attenborough,* [1897] A. C. 90; *Vinden* v. *Hughes,* [1905] 1 K. B. 795; *North and South Wales Bank* v. *Macbeth,* [1908] A. C. 107. In the first case the acceptor sued the bank at which the bills were payable to recover the money paid out by the bank, and charged to the acceptor. The House of Lords, by a divided court, finally held that the acceptor need have no knowledge of the fictitious character of the payee, thereby changing the law merchant.[24] In the *Clutton case* the court in substance

[23] See STORY, BILLS OF EXCHANGE (1843), ¶ 56 and ¶ 200.

[24] Chalmers in 7 LAW QUART. REV. 216 has this comment to make: "the case affords a good illustration of the uncertainty of law, and of the kaleidoscopic nature of the judicial mind. Although the plaintiff lost the day, he may still derive a melancholy sat-

held that the payee be deemed fictitious, because the drawer did not have a particular person in mind at the time, although he supposed the payee was a real person; while in the last two cases the payees named were known by the drawers to be customers, to whom the drawers supposed themselves to be indebted, because of the fraudulent representations of their clerks, with the result that the bills were not regarded as payable to fictitious payees.[25]

This brings us, then, to a consideration of the code, the Uniform Negotiable Instruments Law, which has been adopted in every state of the United States, except Georgia, and which is also law in Alaska and Hawaii. Section 9 (3) of the Commissioners Draft, provides that a negotiable instrument shall be payable to 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."

It is commonly stated that this section is a codification of the law merchant,[26] except that the indorsement of the fictitious name is no longer necessary,[27] and this is no doubt very largely true, though it is a rather broad statement to make in view of the fact that the questions which arise from a failure expressly to eliminate them, have not been adjudicated in a majority of the states. The requirement that the maker or drawer must have known of the fictitious character of the payee was quite generally accepted as part of the law merchant,[28] except in Kansas.[29] The Kansas doctrine, prior to the adoption of the code in that state, made a distinction between the case, where the maker had a particular person in mind, whom he named as payee, and where he thought the fictitious payee was a real person, but did not know any one by that name, treating the instrument in the latter case as payable to bearer.[30] It may be observed in

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isfaction from the knowledge that eight judges out of fifteen have given opinions in his favour, and that the seven who were adverse to him by no means agreed as to the grounds on which his claim should be defeated."

[25] *Town and County Advance Co.* v. *Provincial Bank of Ireland* [1917], 2 Ir. R. 421, accord.

[26] 16 COLUMBIA L. REV. 428; 64 PENNSYLVANIA L. REV. 96.

[27] NORTON, BILLS AND NOTES (4 ed.), p. 89; BRENNAN, THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED (2 ed.), p. 13.

[28] *Armstrong* v. *Pomeroy National Bank* (1889), 46 Oh. St. 512, 15 Am. St. R. 655, 6 L. R. A. 625.

[29] *Kohn* v. *Watkins* (1882), 26 Kan. 691, 40 Am. Rep. 336; *Ort* v. *Fowler* (1884), 31 Kan. 478, 47 Am. Rep. 501.

[30] DANIEL, NEGOTIABLE INSTRUMENTS (6 ed.), ¶ 139, seems to have been the only American text-writer who took this view, and it is to be noted that the only cases he cites in support are *Kohn* v. *Watkins, supra,* which in arriving at its conclusions quoted from an earlier edition of Daniel; and *Lane* v. *Krekle,* 22 Ia. 404, where it is at most only a dictum, as the instrument was expressly made payable to bearer.

passing, that the English court, in construing Section 7 (3) of its code has accepted the Kansas position by making knowledge on the part of the maker immaterial.[31] It is, of course, to be remembered that the English Act makes no reference to the maker's knowledge of the fictitious character of the payee. This change in the English law seems to be without justification, because if it is right to protect the maker or drawer where a fraudulent party induces him to make the instrument payable to a real person, whom the maker has in mind at the time, there appears to be no good reason why the same protection should not be afforded him where the payee is in fact fictitious, though the maker honestly thinks the name is that of a real person, whom he intends shall indorse.

Although under the express words of the Negotiable Instruments Law, the necessity of knowledge on the part of the maker or drawer seems obvious, the American courts have had to pass on the question a number of times. The leading case is that of *Seaboard Nat. Bank* v. *Bank of America,* (1908) 193 N. Y. 26. The fraudulent party induced the drawer to make the bill payable to real persons, whom the drawer supposed were to have an interest in the instrument. The swindler then forged the payees' names and received the money. The court in deciding that the bills were not payable to bearer said:

> "The secret intention of a criminal contrary to his express intention and the avowed purpose for which he obtains possession of a draft, does not give the criminal ownership of the draft or a legal right to change a draft payable to a real person, to one payable to bearer."

The intention to make the instrument payable to a fictitious person "must exist as an affirmative fact in the mind of the drawer of a draft at the time of its delivery."

Some courts seem to have experienced difficulty in knowing when, if ever, the knowledge of the fictitious character of the payee is to be imputed to the drawer or maker. In *Equitable Life Assur. Soc.* v. *National Bank of Commerce,* (1916) 181 S. W. 1176 (Mo.), the agent of the plaintiff insurance company conspired with others in procuring a policy on the life of a fictitious person, the loss being payable to a fictitious beneficiary, and shortly thereafter sent in proofs of death, causing the company to issue a check payable to

[31] *Clutton & Company* v. *Attenborough* [1897], A. C. 90.

the fictitious beneficiary. The agent delivered the check to a fellow conspirator, the payee's name was indorsed by one of them and cashed. The court held the instrument was payable to bearer, on the ground that knowledge of the agent is to be imputed to the principal. This decision is unsound on principle, inasmuch as the agent was here acting adversely to his principal, and was not the representative of the company in the drawing of the check.[32] Opposed to the Missouri case and representing the correct view is the recent decision of *Los Angeles Inv. Co.* v. *Home Savings Bank*, (1919) 182 Pac. 293, where the court said:

> "The point in this case is that the checks were not executed by the guilty agent; we are not concerned with an act done by him within the scope of his authority, and therefore his guilty intent and knowledge are not the intent and knowledge of his principal. The intent and knowledge of the principal was, as we have said, that of the officers who drew the checks, and they were wholly innocent of any intention of drawing checks to fictitious payees."[33]

But where the dishonest agent has authority to draw checks and signs the principal's name New York and Pennsylvania have held that the principal is to be charged with the knowledge of the agent in selecting a fictitious payee.[34] These cases, while closer to the line, as the agent was acting adversely to the principal's interest, are probably right in their application of the law of principal and agent. A different rule prevails where the wrongful agent is a government official, having authority under the treasury rules to draw instruments payable to the order of real persons only, because, if in such a case he draws it payable to a fictitious person and indorses the payee's name, the depository bank will be charged with notice that the agent's authority is limited.[35] But this rule did not prevail in *United States* v. *Chase Nat. Bank*, (1917) 241 Fed. 535, where a sergeant forged the name of an army officer, who was authorized to draw on the treasury department, made the bill payable

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[32] MECHEM AGENCY (2 ed.), ¶ ¶ 1815, 1822, 1825.

[33] *Grand Lodge of Kansas* v. *Emporia Nat. Bank* (1917), 101 Kan. 369, accord.

[34] *Phillips* v. *Mercantile Nat. Bank* (1894), 140 N. Y. 556, 23 L. R. A. 584, 37 Am. St. Rep. 596; *Snyder* v. *Corn Exchange Bank*, (1908), 221 Pa. 599, 128 Am. St. Rep. 780. Cf. *P & G Card & Paper Co.* v. *Fifth Nat. Bank* (1918), 172 N. Y. S. 688. And see *Bartlett* v. *First Nat. Bank* (1910), 247 Ill. 490.

[35] *National Bank of Commerce* v. *United States* (1915), 224 Fed. 679. See comment on case in 64 PENNSYLVANIA L. REV. 96, and in 29 HARV. L. REV. 216.

to the order of that officer, then forged the payee's name, and cashed it. The court held that the United States could not recover the money which the treasury department had paid to the defendant bank. This case is very unsatisfactory, for after arguing that the indorsement by the forger was immaterial, as the whole instrument was "a forgery and created no obligation," the court refused to permit the government to get back its money. It is not within the rule of the well known English case of *Cooper* v. *Meyer,* (1830) 10 B. & C. 468. There the drawer's and the payee's name was the same, and the holder was permitted to recover from the acceptor by proving that the handwriting of the drawer's name was identical with that of the payee in the indorsement, for in that case the drawer-payee was not a real person and the result reached was considered a carrying out the acceptor's intention; while in *United States* v. *Chase Nat. Bank* the drawer-payee was an agent of the drawee with authority to draw. The case is within the rule of *Beeman* v. *Duck,* (1843) 11 M. & W. 251. The government should have recovered the amount of the bill. Such a decision places the government in a worse position where a stranger forges the name of the drawer and the payee than where an agent with authority to draw makes the instrument payable to a fictitious person.

Section 9 (3) of the Negotiable Instruments Law appears to be seriously defective in that it leaves to judicial interpretation and construction four questions that could easily have been eliminated by express words. They are these:

I. In order that the instrument be deemed payable to bearer, is it necessary that the taker be a purchaser before maturity and without knowledge of the fictitious character of the payee, that is, must he be a holder in due course or claim through one?

II. In what sense are the words "fictitious or non-existing" used? Do they cover the case of a real person not having and not intended to have any interest in the instrument?

III. Is knowledge on the part of the drawee of the fictitious character of the payee necessary at the time of acceptance or payment?

IV. Is an indorsement of the fictitious name necessary?

The silence of the Negotiable Instruments Law on these points is unfortunate, because it is absolutely misleading to the laity, while it raises doubts in the mind of the professional man, which

naturally impairs its value in that it makes necessary a search of the authorities.[36] But it is too late now to bewail the fact that the Act is not perfect in these respects, because it has proven very difficult in the past to have changes adopted even when pointed out before that state adopted the Act. We have, therefore, a condition to face not likely or easily remedied by future legislation.

The solution of these questions we are told is a matter of interpretation and construction for the courts. How then should section 9 (3) be construed? Is it possible to devise any rule that will be a safe guide? In *Bank of England* v. *Vagliano Brothers*, 23 Q. B. D. 243, the Court of Appeals held the Bills of Exchange Act was a codifying Act, and must be interpreted with reference to the law it was intended to embody. On appeal to the House of Lords, [1891] A. C. 107, Lord Herschell took issue with this view by saying:

> "The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. The purpose of such a statute surely was that in any point specifically dealt with by it, the law should be as ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."

These generalizations, it is submitted, are not very helpful. Lord Herschell seems to lay all the emphasis on interpretation, that is in ascertaining the meaning of the words used and almost ignores the broader question of construction. Interpretation no doubt

[36] It might also be argued that these imperfections will lead to conflicting decisions in different jurisdictions, and to that extent will defeat the very purpose for which the Uniform Negotiable Instruments Law was passed, uniform decisions as well as a uniform statute being obviously necessary to reach the goal of a uniform law. The possibility of conflicting decisions on points not expressly covered is all the greater because of the attitude of the bench and the bar in ignoring oftentimes the decisions of other states on the same section, and instead thereof citing the cases in that state prior to the act. See article by Amasa M. Eaton in 12 MICH. L. REV. 89, "On Uniformity in Judicial Decisions of Cases Arising under the Uniform Negotiable Instruments Act."

should be conclusive "on any point specifically dealt with," but the difficulty in most instances is to determine when that has been done. Judge Chitty in the English case of *In re Budgett; Cooper* v. *Adams,* [1894] 2 Ch. Div. 557, 561, involving the English Bankruptcy Act made this comment:

> "These observations (of Lord Herschell) do not in my opinion apply to the bankruptcy Act of 1883. The substance of what fell from the Lord Chancellor is, that, where there is an Act such as the Bills of Exchange Act, codifying the law, the proper rule of interpretation is to read the Act and to interpret its provisions without reference to previous decisions or to previous legislation, that being a prima facie rule only to which there would be reasonable exceptions. As the Chancellor said, [1891] A. C. 145, 'I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code.' "

The upshot of the whole matter seems to be that insofar as the Act fails expressly to cover the questions involved, a problem of construction is presented, as to which no general rule can be devised. It is not only wise but right that the court consider the law as it was prior to the Act. Indeed the Bills of Exchange Act, section 97 (2), expressly provides: "The rules of the common law, including the law merchant, save so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange, promissory notes and cheques." And the Negotiable Instruments Law, section 196 (Commissioners Draft) says: "In any case not provided for in this Act the rules of the law merchant shall govern." The writer is inclined to agree with Professor Hening when he says:

> "The body of precedents of the common law and of the law merchant are a safety appliance. They give the judge examining them a liberal education in the subject before he decides the case before him."[37]

This application of former law may at times be tantamount to judicial legislation, but if intelligently done helps to correct the shortcomings of the legislature in turning out an incomplete act.

[37] 59 PENNSYLVANIA L. REV. 482.

Let us now address ourselves to the questions heretofore propounded.

I. Must the taker under the Negotiable Instruments Law be a holder in due course or claim through one before the instrument will be deemed payable to bearer? Neither the American nor the English Act, as drawn, expressly make it a condition. Under the law merchant both in England and in this country, it was well settled, however, that the holder could not recover if he had knowledge of the fictitious character of the payee, the basis of the doctrine being estoppel on the part of the drawer or maker for knowingly designating a fictitious payee.[38] In DANIEL ON NEGOTIABLE INSTRUMENTS, (6 ed.) ¶ 136 the reason is very forcibly given in these words:

> "The law abhors fraud and discountenances the instruments by which it may be committed. For this reason bills and notes payable to fictitious payees are not tolerated, and will never be enforced save when in the hands of a bona fide holder, who received them without knowledge of their true character. The appearance of a name upon the paper as a payee and indorser is naturally calculated and has been often used as a means to give it fictitious credit whereby innocent parties are beguiled into purchasing it."

He says further if the holder has notice then the instrument is said to be void, "it being the policy of the law to interdict the circulation of such deceptive instruments."[39] Lord Herschell in *Bank of England* v. *Vagliano Brothers,* [1891] A. C. 107 at 154, says:

> "By whom may they be so treated? By a bona fide purchaser for value, certainly * * * I, of course, exclude the

[38] STORY, BILLS OF EXCHANGE (1843), ¶56 and ¶ 200: *Hunter* v. *Jeffery,* 2 Peake N. P. 146; *Bennett* v. *Farnell* 1 *Camp* R. 130, 180; NORTON, BILLS AND NOTES (4 ed.), p. 88.

[39] But where no fraud is involved there is some authority for holding that one with knowledge can recover. For example, D makes a note payable to X bank intending to get it discounted there, but on the bank's refusal P buys it, the instrument never having been delivered to the bank nor indorsed by it. Two states have held that P may regard the instrument as payable to a fictitious person and sue as bearer. *Elliott* v. *Abbot* (1842), 12 N. H. 549, 37 Am. Dec. 227; *In re Pendleton Hardware Co.* (1893), 24 Oreg. 330. Most courts, however, do not treat the instrument as payable to bearer, but, instead of insisting that P shall sue in quasi-contract, they rather anomalously permit him to sue on the instrument either in the payee's name with or without that person's consent, or in his own name as the person intended or where code pleading prevails as the real party in interest. AMES' CASES ON BILLS AND NOTES, I, p. 135; 8 C. J. ¶ 338.

case of one who is a party to or who has notice of a fraud."

Thus the English court qulte properly read into its Act that part of the law merchant and settled the question there. In this counry, while there is very little authority directly in point subsequent to the adoption of the Negotiable Instruments Law, there is no reason, on principle, why the same result should not be reached.[40]

II. Do the words "fictitious or non-existing" as used in the Bills of Exchange Act and the Negotiable Instruments Law, include the case of a real person not having any right to or interest in the instrument, and who was not intended by the party inserting the name to have any? Illinois, seeing this omission in the Commissioners Draft, expressly covered the point by inserting in their Act after the words "fictitious or non-existent" the following: "or of a living person not intended to have any interest in it."[41] Other states, however, have not done so, nor does the English Act eliminate the question. Turning again to the law merchant, we find that most courts hold such a payee shall be deemed fictitious. In *Coggill* v. *American Ex. Bank,* (1847) 1 N. Y. 113, 49 Am. Dec. 310, the court said, "as the payee had no interest and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity," making the instrument payable to bearer. This view is clearly correct.[42] It is not surprising, then, to see that under the Act those courts that have had to deal with the problem have accepted this conception of fictitious as part of the code itself.[43] And it is to be hoped that like decisions will be made in jurisdictions where the question has not yet been presented.

III. Is knowledge on the part of the drawee of the fictitious character of the payee necessary at the time of the acceptance or payment before the bill becomes payable to bearer as to him? Under the law merchant, as already pointed out, knowledge was, from earliest times, deemed necessary, as otherwise, it was thought, no

[40] *Union Trust Co.* v. *Adams* (1913), 54 Ind. A. 166. In *Trust Co. of America* v. *Hamilton Bank* (1908), 112 N. Y. S. 84, the court several times emphasized the fact that the taker was a holder in due course.

[41] Jones and Addington, Ill. Stat. Anno. ¶ 7648 (3).

[42] *Dana* v. *Underwood* (1837), 19 Pick. (Mass.) 99, *contra.*

[43] 22 L. R. A. N. S. 506, note; *Shipman* v. *Bank of the State of N. Y.* (1891), 126 N. Y. 318, 12 L. R. A. 791, 22 Am. St. Rep. 821; *Trust Company of America* v. *Hamilton Bank* (1908), 112 N. Y. S. 84. *Seaboard Nat. Bank* v *Bank of America* (1908), 193 N. Y. 26; *Bartlett* v. *First Nat. Bank* (1910), 247 Ill. 490. *Holub-Dusha Co* v. *Germania Bank* (1914), 149 N. Y. S. 775. Cf. *Jordan Marsh Co.* v. *National Shawmut Bank* (1909), 201 Mass. 397, 22 L. R. A. N. S. 250.

estoppel could be raised against him.[44] In *Bank of England* v. *Vagliano Brothers,* [1891] A. C. 107, the court ultimately held that the omission in the English Act was intentional, and that knowledge was no longer necessary. The strongest argument to be advanced by the majority Lords was, that knowledge is, on principle, unnecessary because the acceptor has nothing to do with the selection of the payee, his only concern being to carry out the order of the drawer, so as to be able to charge him.[45] In this country there are only two states under the Negotiable Instruments Law that have passed on the question. In *First Nat. Bank* v. *Northwestern Nat. Bank,* (1894) 152 Ill. 296, the court held the law merchant still prevailed and knowledge on the acceptor's part was consequently necessary. New York, on the other hand, in the case of *Trust Company of America* v. *Hamilton Bank,* (1908) 112 N. Y. S. 84, came to the opposite conclusion.[46] The last three cases were very ably discussed by Professor Louis M. Greeley in his excellent article in 3 ILLINOIS LAW REVIEW 331. The writer agrees with the conclusion reached, that the Illinois position, retaining the law merchant view, is the better where the swindler forges the name of the drawer, because in that event, the acceptor can not recover from the person whose name is forged as drawer, and, as between the defrauded acceptor and the innocent holder, the ultimate loss ought to fall, as stated by Professor Greeley, "upon the party who could most easily detect the forgery, that is, the party taking immediately under the forged indorsement." In the present state of the authorities it would be presumptuous to say what view will eventually prevail, whether knowledge on the acceptor's part will always be essential before he can be charged, or whether such knowledge is

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[44] *Minet* v. *Gibson* (1791), 1 H. Bl. 569; *Bennett* v. *Farnell* (1807), 1 Camp. 180 c; *McCall* v. *Corning* (1848), 3 La. Ann. 409, 48 Am. Dec. 454.

[45] DANIEL, NEGOTIABLE INSTRUMENTS (2 ed.), ¶ 137, accepts this argument and cites two American cases, to-wit: *Anderson* v. *Dundee State Bank* (1893), 66 Hun 613, 21 N. Y. S. 925. This case is at most only a dictum as the suit was against the drawer, the drawee not having accepted. The other case is *Meridian Nat. Bank of Indianapolis* v. *First Nat. Bank of Shelbyville* (1893), 7 Ind. A. 322, 52 Am. St. Rep. 450. Neither is this case exactly in point. Here M. sold stolen cattle to S. G. & Co. and when asked for his name said "W. C. Smith." S. G. & Co. thereupon drew a check to the order of W. C. Smith, and delivered it to M who had the defendant, drawee bank, certify it, and later cashed it at the plaintiff bank after indorsing the name W. C. Smith. Held, defendant is liable as the check was received by the identical person to whom its drawer intended to deliver it, and was by him indorsed in the name in which it was issued to him, and he, as was intended by the drawer, received the benefit of it.

[46] Cf. *United States* v. *Chase Nat. Bank* (1917), 241 Fed. 535.

wholly immaterial, or only to be required where the drawer s name has been forged.

IV. Is the indorsement of the name of the fictitious payee necessary under the Negotiable Instruments Law? Under the law merchant, it is said, most courts required such an indorsement, and it is a fact that generally where the holder recovered, an indorsement appeared on the instrument; but it seems rather to have been a circumstance, very important in determining whether the holder took in ignorance of the real facts, than a requirement of the rule itself. New York and a few jurisdictions maintained that no indorsement was necessary.[47] Professors Ames and McKeehan and Judge Brewster all take the position that an indorsement is no longer necessary. The point has not been stressed in the decisions since the adoption of the Act, but seems to be assumed, since the section involved does not expressly require it, and a genuine indorsement could under the very circumstances never be proved.[48] But it is no doubt true, as Professor McKeehan points out, that the change, if indeed it is one, is not so very important, as no bona fide purchaser would be likely to take such an instrument, unless the payee's name had first been indorsed thereon.

In conclusion, then, it might be urged that should the occasion present itself, section 9 (3) of the Negotiable Instruments Law ought to be amended so as to avoid the uncertainties that now exist in that section. Professors Ames and McKeehan have suggested that the amendment read as follows:

> "When the drawer or maker knowingly makes the instrument payable to the order of a fictitious or non-existing payee, or a living person not intended to have any interest in it."[49]

This is substantially the present provision of the Illinois Act, and is an improvement on the Commissioners Draft in that it answers the second question herein discussed, and may perhaps be said to reach the right result in question three, but it leaves some doubt on that point and does not touch on the other two at all. It would

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[47] *Irving Nat. Bank* v. *Alley* (1880), 79 N. Y. 536; *Rogers* v. *Ware* (1873), 2 Neb. 29, semble; *Kohn* v. *Watkins* (1882), 20 Kan. 691, 40 Am. Rep. 336, 338; *Dana* v. *Underwood* (1837), 19 Pick. (Mass.) 99, 104; Cf. *Security Bank of Faribault* v. *Lucas* (1897) 69 Minn. 46, semble.

[48] BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED (2 ed.), p. 229; *Boles* v. *Harding* (1909), 201 Mass. 103, semble.

[49] BRANNAN, THE NEGOTIABLE INSTRUMENTS LAW ANNOTATED (2 ed.), p. 233.

seem that the desideratum might, therefore, be secured by adding to the Ames-McKeehan amendment the following:

> whether the payee's name be indorsed or not; provided the party relying on the instrument as payable to bearer takes for value and in ignorance of the fictitious character of the payee; but knowledge on the part of the acceptor shall not be necessary in order to charge him, except where the drawer's name is forged.

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