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Fictitious Payees in Bills of Exchange: A Comparative Study

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The motive behind the insertion in a bill of exchange of the name of a fictitious payee is not difficult to understand. Fundamentally it is fraudulent, designed to clothe the resulting instrument with the appearance of a more substantial credit than it in fact possesses. The framer of such a bill says in effect to the subsequent taker that, in the event of dishonor by the acceptor, recourse may be had not only on the drawer, but on an additional party as well. The possibility of raising money on the instrument is thus greatly enhanced: it becomes three-name instead of two-name paper.

When a bill drawn in this way has fulfilled its primary purpose and has passed into the hands of a holder in due course, the position of that holder always has presented a question of interest to the commercial world. The supposed right of recourse against the payee has proved to be chimerical; the ordinary right against the drawer is usually, for obvious reasons, of little actual value. What then is the situation of the holder with reference to his sole remaining hope, the acceptor? It seems probable that in the early days of the law merchant the question was answered in much the same way wherever it arose. In more recent times however divergent developments in various countries, coupled with increasing complexity in the underlying transactions involved, have resulted in a state of considerable confusion not only in regard to the treatment of the original question but also with respect to others arising from similar

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operations. It is proposed therefore to examine the problem in some detail, to trace the progress of these varying developments, and to consider their effect on particular situations that arise in practice. By means of such a comparative survey an attempt will be made to determine the nature of existing diversities in the law, and to discover whether any basis can be found which might result in more uniform treatment. It is manifestly desirable in the case of an instrument often circulating in more than one country that uncertainties concerning the rights of the parties should be reduced to a minimum.

The chief difficulty in the way of the holder's recovery from the acceptor lies of course in the impossibility of proving the payee's indorsement. Despite such impossibility it was early recognized that under certain circumstances recovery ought to be allowed. The first English case mentioned in the reports to raise the point was that of Stone v. Freeland.\(^2\) In that case the drawer of a bill had inserted as payee the name of a firm with which he had dealings, but which was not intended to come by the proceeds of the particular bill. The drawer himself indorsed the bill in the name of the payee, and after regular acceptance it came into the hands of a *bona fide* indorsee for value who took it "on the special undertaking of the acceptor, who expressly promised to pay at the time the holder discounted the bill."\(^3\) It did not appear that the acceptor was aware of the fraud. In an action by the indorsee against the acceptor the defendant contended that a proper indorsement was essential to the plaintiff's title, whereas the plaintiff obviously could not prove such an indorsement since it was agreed by all the witnesses that the bill was indorsed by the drawer. Said that great commercial judge, Lord Mansfield: "The intent of the bill was only to enable Cox (the drawer) to raise money, and the reason why it was not made payable to the order of Cox was, that there were other bills at that time made payable to his order; if this had been also payable to the same order, too many would have been in circulation at the same time, in the same name, which would have had the appearance of fictitious credit. Names are often used of persons who never existed. The defendant has

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\(^2\) B. R. Sittings at Guildhall after Easter Term, 1769. See 1 H. Blackstone 316, note (a).

\(^3\) Tatlock v. Harris, 3 T. R. 174, 176 (1789).
enabled Cox to do this by lending his acceptance, and when he has by so doing put the bill in circulation, it shall not lie in his mouth to make an objection that he has nothing to do with it.  

In protecting the innocent holder of an irregular bill the effect of this decision was to reflect the mercantile views and customs of the day. Certainly, contemporary French practice would have led to the same result. The French commercial code, promulgated in 1807 and based largely on the ordinance of 1673, embodied a codification of commercial usage during a period when there was more than a little truth in the saying that the law merchant “is universal and one and the same in all the countries in the world.” By the provisions of the code the insertion of the name of a fictitious payee created a supposition de nom, and reduced the instrument to the status of a mere promise. It was admitted however that should such a bill come into the possession of a bona fide holder the rule could not be invoked against him; for “otherwise there no longer would be any security for third persons who confided in the superficial regularity of the bill.” The commercial importance of ready negotiability was placed above any technical defect in the title of an honest transferee.

It would appear therefore that the tendency of the law merchant in the eighteenth century was to protect the holder in due course of a bill of exchange naming a fictitious payee, and that this general tendency, based fundamentally on reasons of mercantile desirability, found its way into the common law under circumstances that justified the raising of an estoppel. The proposition was that anyone who purported to give circulation to a bill regular on its face ought not to be permitted to invoke to the bill regular on its face ought not to be permitted to invoke

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1 See note (2).
2 Davies, Concerning Impositions, 17 (1656).
3 Code de commerce, Art. 112, read as follows in its original form: “Sont reutpees simples promesses toutes lettres de change contenant supposition soit de nom, soit de qualites, soit de domicile, soit des lieux d'ou elles sont tirees, ou dans lesquels elles sont payables.”
4 Cohendy et Darras, Code de Commerce Annote, 648 (1903): “Mais l'exception de supposition ne peut pas etre invoquee, malgre la generalite des termes de notre article, contre le porteur de bonne foi: car autrement il n'y aurait plus de securite pour les tiers qui ont eu confiance dans la regularite exterieure du titre, ce qui entraverait singulierement la circulation des lettres de change.” See to the same effect Lyon-Caen et Renault, Traite de Droit Commercial (5th ed., 1925), Vol. IV, Sec. 478.
5 Nouguier, Des Lettres de Change (4th ed., 1875), Sec. 292.
an actual irregularity against an innocent purchaser relying on its apparent validity.  

Some twenty years after the decision of Lord Mansfield in Stone v. Freeland, came the first of a series of cases that were to have a profound influence in shaping the later law in England and in the United States. These cases arose out of the bankruptcy in 1788 of Livesey, Hargreave & Co., a Manchester partnership, and were based accordingly on related underlying facts. This firm, apparently in common with many others during the same period, had been in the habit of kiting bills of exchange on a large scale in order to provide funds for current needs. In order to facilitate subsequent negotiation the names of fictitious payees were inserted in the bills, which were drawn by arrangement on various drawees who sometimes were paid substantial commissions for lending their credit. Indorsements purporting to be those of the payees were written in by a clerk in the firm's office. "This traffic had gotten to such a height that in Livesey's house a book of fac similes was actually kept, from which the clerks used to take such name for payee as they thought proper, and indorse the name; and when the necessities of the house were very great, they inserted any name that their imagination could suggest." In a typical transaction the bills thus completed were discounted with a banking house in Manchester whose acting partner was on intimate terms with the drawers and in extending discount facilities relied wholly on their ability to make good without reference to the acceptors. It is noteworthy that the fictitious character of the payees was known both to the acceptors and to the discounting banker.

*Stone v. Freeland, supra, note 2.*

*See note (2).*

*See Bennett v. Farnell, 1 Camp. 129, 131 note (1807), and Ex parte Royal Bank of Scotland, 2 Rose 197, 201 note (b) (1815), from which it appears that the firm was launching these bills to the extent of nearly a million sterling a year. In Hunter v. Jeffery, Peake's Add. Cas. 146 (1797), it is stated that one acceptor alone had from £1500 to £2000 a day of the firm's bills. As to the prevalence of the practice, see the remarks of Lord Chief Baron Eyre and of Heath, J., in Gibson v. Minet, 1 H. Blackstone 568 (1791), at pages 617 and 623 respectively.*

*Heath, J., as cited supra.*

*Hunter v. Jeffery, supra, at page 148.*

*Id., at page 147.*
The net result of such a transaction was that a subsequent purchaser of one of these bills obtained an instrument regular on its face, but in fact issued purely on speculation, without reference to any actual commercial operation, and with an entirely deceptive appearance of added credit derived from the payee's indorsement.

In Tatlock v. Harris, the first of these cases to come before the courts, the holder was allowed to recover from the acceptor on counts for money paid and money had and received. This case contained no count stating the bill to be payable to bearer. The later cases in the series included such counts however, and in permitting recovery accordingly the courts formulated a proposition which may be stated as follows: When a bill of exchange is drawn in favor of a fictitious payee and both drawer and acceptor are privy to the fiction, the bill may be treated as payable to bearer in an action by a bona fide holder against the acceptor. Knowledge on the part of the acceptor might be shown by evidence in regard to other bills, even though unrelated.

This proposition was grounded in the fraud of the acceptor in wittingly giving currency to fictitious paper. "If therefore they have accepted a bill," said Baron Hotham in the House of Lords, "which they knew was so framed as to be incapable of being proved in the shape it bore, they shall nevertheless be held to their undertaking to pay it, though it be presented to them in another, because they themselves have induced such necessity; for it is a known rule of law, that no man shall take advantage of his own wrong." With the conclusion of this series of cases we accordingly find a variant on the former doctrine. Under the rule established in Stone v. Freeland an acceptor who actively misrepresented to a prospective holder the nature of a bill drawn and indorsed in the name of a fictitious payee

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15 3 T. R. 174 (1789).
16 Id., at page 182.
17 Thus in Hunter v. Jefferies, supra, a holder with knowledge was not allowed to recover. See also Hunter v. Blodgett, 2 Yeats 480 (Penn., 1799), where lack of knowledge was averred in the declaration.
20 Gibson v. Minet, supra, at page 584.
21 See note (2).
was not permitted as against such a holder to deny the validity of the indorsement; and his own ignorance of the fiction was immaterial. In accordance with the decisions in the later cases an acceptor who was in fact aware of the fiction was held on the bill without reference to any direct dealings with the holder; and the holder was allowed to recover as on a bill payable to bearer.

From one point of view the difference between the two situations merely illustrated the distinction in English law between estoppels based on active and on passive misrepresentations.\(^2\) From another angle however the trend thus given to the law was more far-reaching. In the first place, the emphasis placed on the knowledge of the acceptor and the treatment of the bills as payable to bearer marked a definite departure from the views held on the continent, where such knowledge was immaterial and where bearer bills were regarded with disfavor.\(^2\) In the second place, the same two factors paved the way, as we shall see, for subsequent confusion both in England and in the United States.

By the close of the eighteenth century therefore the process of translating the law merchant into the common law had resulted in breaking down the fictitious payee transaction into two clearly distinguishable situations, each susceptible of treatment in a particular way, and in the handling of one of those situations in a manner which not only did not reflect but could not be reflected in the corresponding law of the continent. Even in England and in the United States moreover the matter was far from clarified. In an American case, where the acceptor was unaware of the fiction, the court said that “the rule with regard to fictitious payees has only been carried to this extent, that the \textit{bona fide} holder of such a bill, ignorant of the facts, may re-

\(^2\) \text{Ewart, Estoppel, Chap. viii (1900).}

\(^2\) \text{Bearer bills were in use in France during the seventeenth century, and were expressly permitted by Article 20 of the Ordinance of 1673. They were prohibited by edict in 1716, ostensibly because they favored usury, but actually because of possible competition with bills issued by the newly created royal bank. This prohibition soon was withdrawn, but bearer bills continued unpopular throughout the eighteenth century, and were finally forbidden altogether by the Code de Commerce. For a discussion of the matter, see \text{Levy-Bruhl, Histoire de la Letre de Change en France aux XVII et XVIII Siecles (1933), 76–78, 207–211.}
cover against an acceptor who knew that the payee was a fictitious person. The use of such names has been, indeed, highly censured, and an acceptance, without knowledge by the acceptor of the fictitious character of the bill, would, it seems, give no remedy and be completely void.24 This unequivocal statement disregards entirely the possibility of a situation such as that exemplified in Stone v. Freeland.25 In a later English case, on the other hand, where recovery was allowed against an acceptor without knowledge on the basis of estoppel, the judges nevertheless indicated that they would have been prepared to regard the bill as payable to bearer had it been necessary.26 It is noteworthy too that the leading English and American writers of the nineteenth century failed to distinguish clearly between the two types of cases.27

In this state of the authorities, the English Bills of Exchange Act was passed in 1882, and provided that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."28 "The object of the Bill was to reproduce, as exactly as possible, the existing law on the subject in a codified form."29 Not even the framers of the bill however were sure whether they had reproduced the existing law in the provision quoted. The original intention had been to insert a clause working out in detail the results of the cases; the clause actually incorporated was substituted in committee.30 "This sub-section," observed Chalmers, is perhaps new law.31 As evidence to the contrary, however, he then pointed to the case of Phillips v. Im Thurn.32 Whatever their doubts as to the existing law therefore, and in spite of their silence on the point, it is clear that the framers intended by this provision to sweep away any requirement of knowledge on the part of the acceptor.

25See Note (2).
26Phillips v. Im Thurn, L. R. 1 C. P. 463 (1866). Cf. the observations of Lord Ellenborough in the note to Bennett v. Farnell, 1 Camp. 150c (1807).
27See for example Byles, Bills of Exchange, 68 (1857); Story, Bills of Exchange, Sec. 56 (1860); Parsons, Notes and Bills, 32, 33 (1865); and Daniels, Negotiable Instruments, Secs. 136–138 (1876).
28Sec. 7, sub-sec. (3).
32L. R. 1 C. P. 463 (1866).
To quote again from Chalmers: "What the Act has done is to declare that the mere fact that a bill is payable to a fictitious person is not of itself a bar to proceeding against parties who were ignorant of that fact."33 If this be a true construction the effect of the Act is to perpetuate neither the doctrine of Stone v. Freeland34 nor that of the subsequent series of cases, but the curious intermingling of the two approved by the judges in Phillips v. Im Thurn.35

The Uniform Negotiable Instruments Law later adopted in the United States was based on the English Act.36 The wording of the corresponding section however is different. The law provides that "the instrument is payable to bearer when it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable."37 The American law thus requires specifically that the irregularity should be known to the drawer, but like the English Act is silent on the point of knowledge by the acceptor. Other differences between the two statutes also may be noted. The American law, for instance, speaks of the bill as payable to order, but the English refers merely to the payee. This difference is due to the fact that in compromising with Scottish law the English Act departed from the ordinary rule of the common law which required definite words of negotiability,38 whereas the American law made no such departure.39 Again, it may be observed that the English provision is that "the bill may be treated as payable to bearer," where the American states more definitely that "the instrument is payable to bearer," a variation with possible implications.

French law in the meantime had remained unchanged, for the numerous amendments to the commercial code did not affect the provision in regard to a supposition de nom.40 Many other

34 See note (2).
35 L. R. 1 C. P. 463 (1866).
37 Sec. 9, 3.
39 U. N. I. L., Sec. 126, provides that a bill must be payable "to order or to bearer."
40 The amendment of 1894 abolished the provisions in regard to suppositions of domicile and place.
countries with commercial codes moreover had based these codes directly on that of France, so that with the opening of the twentieth century a large part of the mercantile world had laws which embodied the French view of bills of exchange designating a fictitious payee.\textsuperscript{41} In Germany, however, and in those countries which followed the German system,\textsuperscript{42} another way of regarding such bills had appeared. Laws regulating bills of exchange had not been adopted by any concerted action among the German states until the middle of the nineteenth century.\textsuperscript{43} This comparatively late development brought with it a new conception of the bill of exchange which differed radically from the French and English theories.\textsuperscript{44} The resulting law, re-enacted in the German \textit{Wechselordnung} of 1908, contained no specific reference to the case of a fictitious payee, but merely provided generally that the name of the payee must be mentioned.\textsuperscript{45} German authorities were agreed that under this provision the fictitious character of the payee named was immaterial; no rights or obligations with respect to such a payee could arise, but the validity of the bill was not affected, and a holder in due course had the usual rights against the other parties.\textsuperscript{46} The German law was thus more liberal than the French in recognizing the initial effectiveness of the bill, but reached substantially the same result in protecting the innocent holder.

In 1930 an international conference was held at Geneva in the hope of bringing about greater uniformity in laws of the continental types relating to bills of exchange.\textsuperscript{47} The law under

\textsuperscript{41} Including France and her colonies, twenty-eight countries are included in this group by Meyer in his Welt-Wechselrecht (1909) 25. See also Potu, L'Unification du Droit Relatif a la Lettre de Change (1916) 48.

\textsuperscript{42} Eighteen countries are included in this group by Meyer, supra, at page 26. See also Potu, supra, 49.

\textsuperscript{43} For an account of this development in Germany see Jencken, Compendium of the Laws on Bills of Exchange (1880), 14-18.

\textsuperscript{44} For a comprehensive discussion of the French, English, and German theories, see Potu, supra, chap. ii.

\textsuperscript{45} Article 4 provided that the bill must contain "der Name der Person oder die Firma, an welche oder an deren Order gezahlt werden soll."

\textsuperscript{46} Staub, Kommentar zur Wechselordnung (11th ed., 1926), 48 and 49. See also Grunkut, Wechselrecht (1897), Vol. I, 346-347.

\textsuperscript{47} Law Times 15 (1930). For the background of the conference see Oederlin, Les Tentatives d'Unification du Droit de Change, (Societe suisse de Droit International, Publication No. 24). See also Hudson and Feller, International Unification of Laws Concerning Bills
consideration was based largely on the German, but clarified the silence of the German statute by providing that the insertion of a fictitious name should have no effect on the obligations of other signers. This law so far has been given effect in sixteen countries, most of them, with the exception of France, countries that already followed the German system.

At the present time therefore the original French view of the treatment of bills in favor of a fictitious payee is reflected only in those countries which had based their laws on the subject on the former provisions of the French commercial code; but a similar result in safeguarding the holder in due course is reached in countries following either the earlier German law or the Geneva convention. In all these countries the essential simplicity of the law merchant in seeking the free circulation of negotiable paper has been preserved in this particular connection with a minimum of juristic pother. In England and in the United States, on the contrary, such were the technical difficulties of absorption into the common law that the basic idea often received less notice than the legal muniments which were devised to support it; while the statutes intended to be declaratory of the absorption differ in their phraseology, and are otherwise of dubious import. Our next task then is to examine the details of these divergencies more closely, and to consider their effects in the application of the law to specific situations.

Let us turn first to the effect of knowledge of the fiction by the several parties concerned in the transaction.

With respect to the holder there is little difficulty. The decision in Hunter v. Jeffery that a holder with knowledge could not recover was declaratory of a fundamental principle in refusing aid to any other than a holder in due course. French of Exchange, 44 Harv. L. R. 333 (1931), and Balogh, Critical Remarks on the Law of Bills of Exchange, 9 Tulane L. R. 165 (1935), 10 Tulane L. R. 36 (1935).

This provision is reproduced in Article 7 of the present German Wechselgesetz, effective from June, 1933, and in Article 114 of the amended Code de Commerce of France, as decreed October, 1935.


See Note (41).

See Note (42).

See Note (49).

Peake's Add. Cas. 146 (1797).
and German writers alike have emphasized that the benefits of the law can be invoked only by a *porteur de bonne foi*, by a *gutglaubige Indossatar*. English and American writers have taken the same view, and the assurance of Lord Herschell that there is no change in this respect under the present law is scarcely needed. It should be noted however that neither the English nor the American statute refers to the point specifically, and that the effect accordingly is to read into the acts a provision which is not expressly there. Under the circumstances the justification for such a procedure cannot be doubted.

We come next to the question of knowledge on the part of the drawer of the instrument. In the ordinary situation where the drawer is giving the appearance of regularity to an irregular bill in order to raise money on it, such knowledge would be present as a matter of course, and was in fact present in all the early cases. The question is, whether this knowledge is an indispensable requisite, or whether circumstances may arise in which it becomes unimportant. It already has been noted that the English act is silent on the point, but that the American provides expressly for knowledge on the part of the "person making it so payable." Is this added requirement mere surplusage, or does it indicate a real difference in the meaning of the two statutes? The answer must depend on the definition to be given to "fictitious", and must take into account the fact that both the English and the American statutes include the word "nonexisting" as well.

In the older cases no distinction had been taken between fictitious and nonexisting payees. In some instances the payees were real firms or persons but not actually intended to receive payment; in others the names used were of persons once living

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15 See for example Chitty, Bills of Exchange (5th ed., 1833), 178 and 179; Story, Bills of Exchange (4th ed., 1860), Sec. 56.


17 Bills of Exchange Act (1882), Sec. 97 (2); Uniform Negotiable Instruments Law, Sec. 196.

18 Uniform Negotiable Instruments Law, Sec. 9, 3.

19 Stone v. Freeland, supra, note 2.

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but since dead;60 and in still others they were imaginary.61 The same was true in French and German law.62 "Fictitious" had been used in connection with all these situations, and it was plain enough that it could continue to be so employed. It was equally clear however that as a matter of derivation the word imported an additional connotation.63 Said Lord Herschell in Bank of England v. Vagliano:64 "Whenever the name inserted as that of payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence."65 If "fictitious" thus emerges as a word that may be applied both to existing and to nonexisting payees, it emerges also as an expression to be linked with a particular state of mind on the part of the person designating the payee: intent is determinative. As Lord Buckley pithily remarked, "There can be no action without an actor, and no fiction without a feigner."66 "Fictitious" necessarily connotes knowledge on the part of the person responsible for the fiction. To that extent therefore any express requirement of knowledge is superfluous, for, if a payee is fictitious, knowledge of the fiction is inherent in the language used.

It becomes correspondingly evident that the specific inclusion of "nonexisting" in both the English and American statutes is no idle mention.67 A fictitious payee may be either existing or nonexisting; it does not follow that a nonexisting payee is inevitably fictitious. Although "fictitious" imports a mental

60 Bennett v. Farnell, supra, note 11.
61 Gibson v. Minet, Id.
63 "Fictitious", derived from the Latin fingere, is synonymous with "feigned", which has the same derivation. Properly speaking therefore, fiction is a manifestation of pretence, and presupposes a person who consciously is putting something forward as being that which it is not.
64 (1891) A. C. (H. L.) 107, 153.
65 Ibid.
66 In Macbeth v. North and South Wales Bank, (1908) 1 K. B. 13, 22 (affirmed by the House of Lords in (1908) A. C. 137).
67 Chalmers, Bills of Exchange (10th ed., 1932), 26, points out that although the word might seem superfluous, it was intended to cover such a case as that of Ashpitel v. Bryan, 32 L. J. Q. B. 91 (1863), where a bill was made payable to a dead person.
attitude, "nonexisting" relates to a matter of fact: a thing either exists or does not exist, and intention is helpless to alter the point. The insertion of the word "nonexisting" without any qualifications accordingly provides for a situation independent of any state of mind.

Under the English act then, if a bill is drawn in favor of a payee who has no existence in fact it is immaterial whether or not the payee was intended to be a real beneficiary. The mere nonexistence of the payee is enough to bring the bill within the operation of the statute. This state of the English law goes beyond the actual cases prior to the act, in which the drawers invariably had knowledge, but it is not inconsistent with them, and it is definitely in harmony with French and German law, where the knowledge of the drawer never has been an essential element.

Under the Uniform Negotiable Instruments Law, on the other hand, the express requirement of knowledge on the part of the person making the bill payable applies equally whether the payee is fictitious or nonexisting. In this country therefore the fact of nonexistence must be coupled with knowledge.

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70 The use of the words imaginaire and erdichtete respectively in the present French and German codes [see note (48)] indicates a conception similar to that invoked by the English use of "fictitious". Both codes also include a general provision in regard to signatures not binding the persons purporting to have signed which would cover the case of a payee non-existing but not fictitious.

The result is substantially the same as if the word "nonexisting" had been omitted from the law, for no one who wittingly inserts in a bill the name of a nonexistent payee can possibly intend the designation to be effective in accordance with its apparent terms. In insisting on knowledge in all cases the American law is thus less inclusive than the English, and less in accord with French and German practice.

The final answer to our original question in regard to the necessity for knowledge on the part of the person making the bill payable therefore is an affirmative one under the law of this country; but, in cases where the question is not one of mere nonexistence, such knowledge should be regarded under English law rather as a test of the fictitious character of the payee, and not in any event as an indispensable requirement.

In the preceding discussion reference has been made indiscriminately and perhaps somewhat loosely to knowledge on the part of the drawer, or of the person making the bill payable. Until recently no more precise phraseology would have been necessary, for the facts of the earlier cases were not such as to offer many difficulties in this connection. Increasingly complicated situations however have introduced new factors that make further refinements imperative. The bill is signed by one person on the inducement of another; the person signing is acting for some one else; a confiding signer puts his name to a blank bill and entrusts it to another; the bill is signed by co-signers; the signature of the drawer is forged. In circumstances where knowledge is important, either as a test or because it is a requisite, in what precise person must the knowledge reside in order that the resulting bills should be deemed payable to a fictitious or nonexisting person? Only the American law is vocal on the point, providing that the knowledge must be on the part of "the person making it so payable."\(^{72}\)

In the first of the various situations enumerated some per-


\(^{72}\) Uniform Negotiable Instruments Law, Sec. 9, 3.
son procures the signature of another as drawer to a bill designating a payee known to the procurer to be fictitious or nonexistent. In the usual case a fraudulent agent or employee with authority to prepare bills for signature takes advantage of his position to draw up a bill apparently regular with the intention of profiting by its actual irregularity; after obtaining a proper signature as drawer he writes in the purported indorsement of the ostensible payee and secures payment. On such facts it would seem to be plain enough that, whatever the knowledge of the fraudulent employee may be, the payee is not fictitious so long as the actual signer regards the transaction as genuine. Without reference to its previous state of preparation the bill is created by the person who signs it as drawer, and if fiction requires a feignor it is logical to conclude that the feigning must be on the part of the person who brings the bill into existence as a living instrument. The designation of the payee is an empty form until rendered effective by the signature of the drawer. This view of the matter has been accepted in England in a case where the fictitious character of the payee was in question. In Vindon v. Hughes a confidential clerk whose duty it was to prepare cheques for signature made out a number of cheques in the names of actual customers, but with the fraudulent intention of misappropriating the proceeds. The employer signed the cheques in the belief that they covered real transactions, whereupon the clerk wrote in the indorsements of the payees and obtained payment. It was held that the payees were not fictitious on the ground that the drawer "had every reason to believe, and he did believe, that the cheques were being drawn in the ordinary course of business for the purpose of the money being paid to the persons whose names appeared on the face of those cheques." A similar result would seem to follow even more readily under the express wording of the American law that the knowledge must be by "the person making it so payable." Certainly it is the actual signer, not the scrivener, who makes the bill payable, and most courts have held accordingly that the knowledge of a fraudulent agent or employee is not enough to satisfy the

73 (1905) 1 K. B. 795.
74 Id., at page 802.
statute, whether the agent prepares the bill for signature or whether he merely induces its preparation and signing. Some courts however have toyed with the idea that under such circumstances the knowledge of the fraudulent employee should be imputed to the employer, with the result that the maker of the bill may be chargeable with knowledge which he does not possess. This line of reasoning is ill founded, and has been generally criticized. It is contrary to established principles that the knowledge of an agent should be imputed to the principal he is attempting to defraud.

A somewhat different question is presented when the agent or employee has authority not only to prepare instruments for signature but to sign them as well. Under such circumstances it obviously is an easy matter for the dishonest employee to issue irregular bills without any knowledge whatever on the part of the principal in whose name he signs. Is the knowledge of the agent alone sufficient to make the payee fictitious? The question has not arisen in England. In this country courts have tended to answer in the affirmative, usually by imputing the knowledge of the agent to the principal. In addition to being open to the ob-

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79 Mechem, Outlines of Agency (5th ed., 1923), Sec. 491.

80 Childs v. Empire Trust Co., 54 Fed. (2d) 981 (C. C. A. 2d, 1932); American Hominy Co. v. National Bank of Decatur, 294 Ill. 223, 128 N. E. 331 (1920); Bartlett v. First National Bank, 247 Ill. 490, 93
jection noted above, this disposal of the matter does not seem to take due account of the facts. In the sort of case outlined before, the authority of the agent ceased with preparation; in the present situation the agent actually completes and emits the instrument. His is the effective arm, although he writes in the name of another. Here then is a feigner who is responsible not only for the fiction, but also for the creation of the bill. What more could be needed in order that the payee should be regarded as fictitious? In a recent Kentucky case an agent with authority to sign the name of a corporation to cheques drew seven such cheques in favor of an existing association not intended by him to receive the proceeds, and procured payment for himself by writing in the indorsements. The corporation was unaware of the transaction. It was held nevertheless that the cheques were payable to bearer, the court saying: "The words 'the person making it so payable,' given their ordinary meaning, refer to the person who actually drew the bill, whether he be the nominal maker or not." This view of the matter, without resort to dubious imputations, seems to accord both with reason and with common sense, to meet the requirements alike of language and of law. It exemplifies moreover the general proposition that where knowledge is to be sought, it should reside in the person who brings the bill into existence as an effective instrument.

It may be that the person inserting the name of the payee, instead of being an agent with authority to sign or to prepare for later signature, is one to whom the bill already signed has been entrusted in blank. In Rancho San Carlos v. Bank of Italy Association the superintendent of a corporation was in the habit of giving a bookkeeper signed blank cheques from time to time for the purpose of meeting current bills. On one such occasion the bookkeeper filled in the cheque for $10,000 and named as payee another employee of the corporation whose indorsement he subsequently forged. The conclusion of the trial court that


See note (79).

69 Calif. App. 656, 231 Pac. 1012 (1932).
the resulting instrument might be treated as payable to bearer was upheld on the ground that a cheque is actually "made" by the person who completes it, and that in this case the bookkeeper rather than the signer was the real drawer and "the person making it so payable." It is at least arguable that the person who puts the finishing touches to a blank bill is the maker of it. On the other hand, it is admittedly difficult to see any real distinction between a situation where the fraudulent employee fills up the bill before obtaining the signature of the drawer, and one in which he secures the signature first and fills up the bill later. In both cases the actual signer is the employer, and the same inducements may be used in both to procure the signing. It seems unreasonable that a mere change in the order of procedure should be allowed to work contrary results. Yet we have noted that if the filling up is done prior to the signing, the actual signer must be aware of the fiction. The truth of the matter would appear to be that in both instances alike the person ultimately responsible for the existence of the bill is the one who signs as drawer; for although the person filling in the blanks may complete the bill, it is none the less the signer who has made such completion possible. It is submitted therefore that knowledge of the fiction should lie in the signer if the resulting bill is to be regarded as payable to a fictitious payee.

A further problem is presented in the event of co-signers. If one such signer is fraudulent and frames an irregular bill, is his knowledge alone sufficient to make the payee fictitious? This was the situation in Goodyear Tire & Rubber Co. v. Wells Fargo Bank and Union Trust Co. In that case one of the officers of a corporation was charged with the duty of settling claims on account of returned goods, discounts, and replacements, by issuing cheques which required, in addition to his own, the signature of another official. The fraudulent officer devised fictitious transactions on account of which he drew seventy cheques totaling.

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85 Id., at page 659.
86 Note for example the language of the Uniform Negotiable Instruments Law, Sec. 14, and of the Bills of Exchange Act, Sec. 20, in speaking of the conversion into a bill of a blank signed paper; the inference being that the person filling up the paper brings it into existence as a negotiable instrument.
87 See note (75).
89 1 Calif. App. (2d) 694, 37 Pac. (2d) 483 (1934).
$100,000. These cheques were signed for the corporation by himself and by a co-signer who was unaware of any fraud but relied sometimes on supporting papers that had been faked and in other instances merely on the signature of his associate. Reversing the decision of the lower court, it was held that these cheques were payable to bearer on the ground that when the conduct of co-signers indicates that they are functioning as mere automata the intent of the fraudulent participant is controlling. Said the court: "The only specific intent with reference to such checks is that of the person who within the scope of his authority gives them life."

The general situation thus resembles that in *Mueller & Martin v. Liberty Insurance Bank*, where a distribution was taken between nominal and actual signers, but with the difference that here there are two actual signers instead of only one. The question then is how the principle of the former case can be applied under such circumstances. The California court replies by saying in substance that when there are several actual signers and a nominal signer, there nevertheless may be only one effective signer, and the intention of this last should govern.

Several considerations may be noted in regard to such a conclusion. In the first place, the commercial purpose of requiring for corporate bills more than one signer is obviously to protect the corporation against the possible fraud of one alone. If the corporation after all is to suffer when such fraud occurs therefore, the main object of the precaution is defeated. In the second place, it seems altogether futile in a mercantile arrangement of so usual a nature to speculate on the relative importance of the two signatures. The plain fact is that one is just as vital as the other to the effectiveness of the instrument, and to attempt to weight them by inquiring into the other duties of the signers, by examining the routine character of the signing, or by asking which signature was last affixed, is to juggle with intangibles that would be better avoided. Finally moreover, the effect of

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9 Id., at page 496.
91 187 Ky. 44, 218 S. W. 465 (1920).
permitting the fraudulent signature to control the other is virtually to disregard the latter entirely.

With these considerations in mind it would seem that a more logical application of the Kentucky rule would be to require knowledge equally of all co-signers. Such a solution would be more in accord with the mercantile purpose behind the practice, and would obviate the injection of elements difficult of exact ascertainment. Furthermore, if the law on the one hand places importance on the knowledge had by the maker of a bill, and on the other permits a plurality of makers, it surely is a reasonable assumption that the first requirement also may be understood in the plural.94

In addition to the possibilities already enumerated it may happen that the signature of the drawer is forged, so that strictly speaking there is no bill of exchange at all. Since there is also no real drawer, it is a question where to find a repository for the knowledge necessary in order to regard such an instrument as a bill payable to a fictitious payee. The leading case involving such a situation is that of Vagliano Brothers v. Bank of England.95 In that case a fraudulent clerk procured the acceptance of his employer to bills which he had forged in all particulars. The name used as drawer was that of a firm which often drew bills on the employer, and the name designating the payee was that of a house frequently named as payee in these genuine bills. The clerk then completed the fraud by forging the indorsement of the ostensible payee, and obtained payment at maturity from the acceptor's bank. It was eventually held by a majority in the House of Lords96 that the payees were fictitious, and that the instruments might be treated as bills of exchange payable to bearer. The initial difficulty in regard to the non-reality of the bills was overcome by raising an estoppel against the acceptor, who was thus precluded from denying that they were genuine.97 Since the payee unquestionably was not intended by the forger to be an actual beneficiary, and since the forger and the pseudo

94 See note in (1935) 15 B. U. L. R., supra.
95 (1891) A. C. 107, reversing the decision of the Court of Appeal in 23 Q. B. D. 248 (1889), which upheld that of Charles, J., in 22 Q. B. D. 103 (1888).
96 Five Lords so held in (1891) A. C. 107.
97 Id., at page 120.
drawer were identical, there was knowledge on which the fictitious character of the payee might be predicated. Said Lord Herschell on the point: "If, in the present case, Vucina had himself drawn the bills and inserted the name of C. Petridi & Co. as payees, as a mere pretense without intending any such persons to receive payment,... they would have been bills whose payee was a fictitious person, and I do not think they can be regarded as any the less so, in view of the circumstances under which the name of C. Petridi & Co. was inserted." A like result may be reached with even greater ease under the phraseology of the American law, for if there is an instrument which may be treated as a bill of exchange, the forger assuredly is the maker of it.

We come now to the question of knowledge of the fiction on the part of the acceptor. In French and German law this point was never of any consequence; the general policy of protecting the innocent holder which was behind the treatment of the specific situation made such knowledge of no account. We already have noted however that the particular conditions under which this policy was given effect in English law made knowledge of paramount importance in cases where the incidental estoppel was based on passive misrepresentation. We have noted also that it was the avowed intention of the framers of the English Bills of Exchange Act to do away with any requirement that the drawee should be aware of the fiction. This result was not accepted by the English courts without some qualms. In Vagliano Brothers v. Bank of England, where the acceptor was the defrauded party and was completely unaware of the fiction, a majority of the Court of Appeal, upholding the view expressed by Charles, J., in the court below, stated that "if the ob-

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201 See pages 206 and 207.
210 See page 209.
209 23 Q. B. D. 243 (1889).
202 22 Q. B. D. 103 (1888).
ligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, fictitious must mean fictitious as regards the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle.' In the House of Lords opinions also were divided, but a majority disagreed with this conclusion of the Court of Appeal on the ground that "this is to add to the words of the statute and to insert a limitation which is not to be found in it or indicated by it." Said the Earl of Selborne: "It seems to me neither unjust nor unreasonable that the rights and liabilities of third parties should in such a case depend upon the facts rather than upon an inquiry into the acceptor's state of mind." Added Lord Macnaghten: "The section appears to me to have effected a change in the law in the direction of the more complete negotiability of bills of exchange—a change in accordance, I think, with the tendency of modern views and one in favour of holders in due course, and not, so far as I can see, likely to lead to any hardship or injustice." In the end therefore any former requirement as to knowledge on the part of the drawee was deemed definitely to have been abolished by the English Act. This result has at least two desirable consequences: it sweeps away the confusion engendered by the application of estoppels based on differing factors, and it again brings the law more closely in harmony with that of the continent. It is worth noting moreover that the statement of Lord Macnaghten covers only part of the truth; in emphasizing more complete negotiability, and in favoring holders in due course, the change is fully as much a reversion to original principles as a reflection of modern tendency.

Here once more a like result would seem to follow a fortiori under the American statutes, for the express requirement of knowledge on the part of the maker might be said to indicate an intention to disregard any such factor in other cases. Furthermore, a fiction requires but one feigner, and it seems both unnecessary and undesirable to scrutinize the mental background of every person whom it is sought to charge on the in-

23 Q. B. D. 243, 261 (1889).
205 (1891) A. C. 107, 146.
106 Id., at page 130.
107 Id., at page 161.
instrument. The argument has been advanced however that knowledge was necessary under the common law in order to base an estoppel, and that in the absence of express reference to the point such knowledge must continue to be requisite. This argument is fallacious. We already have seen that, in cases where estoppel is based on active misrepresentation, knowledge is unimportant. It is preferable to maintain, with the House of Lords, that the omission of any reference to the matter was intentional.

There remain for discussion two problems which are a direct consequence of the peculiar development of the law in England and in the United States. We have seen that the original treatment of bills in favor of a fictitious payee was grounded in the general policy of protecting the innocent holder. We have noted further that the circumstances under which the matter arose in England led to its handling on the basis of estoppels, the ultimate effect of which was to preclude the acceptor from denying that the bill was payable to bearer. Still, however, the only rights in question were those of a holder in due course, for in the commercial transactions of the time it was such a holder who ordinarily sought redress. The specific treatment would have been impossible on the continent, but the result was as yet much the same. It was not until after codification that the more extensive possibilities of the clauses "may be treated as payable to bearer" and "is payable to bearer" began to appear. With changing commercial conditions, and particularly with the increasing use of cheques, questions connected with bills payable to fictitious persons were by no means limited to those arising between holder and acceptor; more often than not an unsuspecting drawee now found occasion to assert against a defrauded drawer his right to pay out money on a cheque which actually bore a forged indorsement.


\(^{109}\) Stone v. Freeland, supra, note 2; and see note (22).


By whom then might the instrument be treated as payable to bearer? Said Lord Herschell: "A bill, within the sub-section, may be treated as payable to bearer by any person whose rights or liabilities depend upon whether it be a bill payable to order or to bearer." It accordingly was held that where a bill payable to a fictitious person and bearing the genuine acceptance of the drawee was payable at the acceptor's bank, the bank was justified in making payment on a forged indorsement to the perpetrator of the fraud. The reasoning involved in this decision is broad enough to cover as well the case of a drawee bank maintaining its right to debit the account of a drawer in connection with a cheque payable to a fictitious person, although the precise question has not arisen in England. In the United States however the wording of the American law dissipates any possible doubt in such situations by providing flatly that the bill "is payable to bearer."

This all-inclusive extension seems at first glance far removed from an original proposition that aimed primarily at safeguarding a holder in due course. The particular treatment would be, we have seen, impossible under other systems of law. The result reached moreover, of permitting a payment to be made to a fraudulent person, although it could have been enforced only by a bona fide holder, savors somewhat of inconsistency. Further consideration nevertheless shows that an entirely distinct principle is involved in such a situation. Under continental legal systems the drawee never has been bound to verify the genuineness of the indorsements on the bill. In the case of a

114 Id.
115 In North and South Wales Bank v. Macbeth, (1908) A. C. 137, the depositor was allowed to prevail against the bank because the payee was not fictitious. For a Canadian case in which the right of the bank was upheld, see London Life Assurance Co. v. Molson's Bank, 8 Ont. L. R. 238 (1904).
116 Uniform Negotiable Instruments Law, Sec. 9, 3.
117 Supra, note (23).
118 Art. 145 of the former French Code de Commerce provided that "celui qui paie une lettre de change a son echeance et sans opposition est presume valablement libere." A drawee who paid on a forged indorsement in good faith accordingly was free from any liability. For discussions of the doctrine, see Nougier, Des Lettres de Change (4th ed., 1875), Secs. 333-339, and Bedarride, De la Lettre de Change (2d ed., 1877), Secs. 395 and 396. Art. 36 of the German Wechselordnung stated that "die Echtheit der Indossamente zu prufen, ist der Zahlende nicht verpflichtet." For comment on this provision, see Staub, Kom-
bill designating a fictitious payee therefore, the holder in due course on the one hand was protected by the policy favoring free negotiability, while the drawee making payment on the bill was safeguarded on the other by the separate policy which enabled him to do so without reference to the validity of the indorsements. Two independent principles were concerned, each bringing its own consequences in the specific aspect of the matter under consideration. It thus appears that, albeit accidentally, the actual effect of the English and American statutes in regard to fictitious payees is to relieve the drawee in such cases from his ordinary responsibility respecting indorsements, and to that extent to approximate the continental law.\footnote{The seeming inconsistency just adverted to accordingly disappears: two distinct relationships are involved, between the acceptor and the holder, and between the drawer and the drawee; it is not to be expected that the position of the drawee should be the same in both.}

Since the bills under discussion are payable to bearer generally, in the latter relationship as well as in the former, the possibility of the drawer's negligent conduct in giving currency to such an instrument is in most instances of slight importance. The drawee is protected in any event by his ability to make payment as on a bearer bill.\footnote{There nevertheless are situations in which the carelessness of the drawer conceivably should play a weightier role. In \textit{Defiance Lumber Co. v. Bank of California},\footnote{120 Wash. 533, 41 Pac. (2d) 135 (1935).} for example, a fraudulent time clerk by preparing time cards in fictitious names induced his employer to issue pay cheques which he himself cashed after writing in the indorsements of the ostensible payees. Here obviously was no case of a fictitious payee, for in the eyes of the employer the transac-

\[\textit{Fictitious Payees}\]
tions were genuine. In an action by the employer against the drawee bank, however, payment of the cheques by the latter was upheld on the ground that it was the proximate result of the drawer’s own conduct. Said Beals, J., speaking for a majority of the court: “We are clearly of the opinion that appellant, by its careless and negligent conduct of its own business, permitted its own employee to perpetrate upon it a gross fraud, and that it cannot now recoup its losses by passing the burden thereof to respondent.” We are not concerned here with a detailed examination of the doctrine of estoppel by carelessness. It is sufficient to note that even in cases where the designated payee is neither fictitious nor nonexistent, the conduct of the drawer still may remove from the drawee his usual burden of verifying an indorsement. The possibility exists similarly in situations where the instruments in question have been signed in blank, and where there are co-signers. The substantial justice of such a result is clear; the net effect is to bring the English and American law nearer to the continental in yet another type of case.

To summarize the main features of the comparative development that has been depicted is to emphasize the influence of mercantile custom in the ultimate shaping of the law. The original treatment of bills of exchange in favor of fictitious payees fell naturally enough within a commercial policy aiming at free negotiability, but was absorbed into the common law in a way that stressed legal ways and means rather than objectives and that led inevitably to confusion. Subsequent codification in England and in the United States removed the difficulties at

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112 Id., at page 548.
113 For a discussion of the subject, see Evart, Estoppel, Chap. IX (1900).
116 Negligence on the part of the drawer is immaterial in French and German law, since the drawee is safeguarded by the general provision relieving him from any duty in regard to verifying indorsements; the only exception is in the case of payments made in bad faith: See note (117).
tendant on the application of estoppels by providing a flat rule, and resulted incidentally in bringing the law of the two countries more closely in accord with that of France and of Germany in two directions, first in regard to the treatment of a holder in due course in his relations with the acceptor, and secondly by relaxing in certain particulars the ordinary obligation of the drawee in verifying indorsements. As the matter stands at present therefore, the outstanding obstacle in the way of complete reconciliation is the specific requirement in the American law of knowledge on the part of the maker in the case of nonexisting payees, and local peculiarities adopted in some individual states. By routes however divergent the various countries discussed have arrived at a point where substantial accord appears to be a possibility in dealing with most of the situations arising out of a fictitious payee transaction.