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LEGISLATION

NEW YORK ADOPTS THE "FICTITIOUS PAYEE ACT"

At the 1960 session of the legislature, New York adopted the "Fictitious Payee Act,"[1] which amends Section 28(3) of the Negotiable Instruments Law. The amended section provides that an instrument shall be payable to bearer:

> When it is payable to the order of a fictitious *person*, or a non-existing person, *or an existing person not intended to have any interest in it,* and *any* such fact was known to the person making it so payable, *or known to his employee or other agent who supplied the name of such payee.*[2]

This provision is similar in part to Section 3-405 of the Uniform Commercial Code[3] and Section 7(3) of the English Bills of Exchange Act.[4] Upon the recommendation of the American Bankers Association[5] it has been enacted to date in twenty-one states.[6]

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[1] The term "Fictitious Payee Act" is merely descriptive of the instant amendment, and does not signify a codified act such as the Uniform Commercial Code. See Note, *The Impostor Payee, or What's in a Name?*, 33 ST. JOHN'S L. REV. 105, 115 (1958).

[2] N.Y. NEGOTIABLE INSTR. LAW § 28(3) (Supp. 1960). The italicization signifies the extent of the amendment. The amendment is at variance with UNIFORM NEGOTIABLE INSTRUMENTS LAW § 9(3). A similar amendment to an Illinois statute was treated in Swift & Co. v. Bankers Trust Co., 280 N.Y. 135, 19 N.E.2d 992 (1939).

[3] UNIFORM COMMERCIAL CODE § 3-405(1)(b)(c).

[4] 45 & 46 Vict. c. 61, § 7(3), at 368 (1882) (intent of drawer not a factor).

[5] See BRITTON, BILLS AND NOTES 710 (1943).

[6] ALA. CODE tit. 39, § 13(3) (1958); ARIZ. REV. STAT. ANN. § 44-409(3) (1956); ARK. STAT. ANN. § 68-109(3) (1947); CAL. CIV. CODE § 3090(3); FLA. STAT. ANN. § 674.11(3) (Supp. 1960); GA. CODE ANN. § 14-209(3) (Supp. 1958); IDAHO CODE ANN. § 27-109(3) (1948); ILL. ANN. STAT. ch. 98, § 29(3) (Smith-Hurd 1935); IOWA CODE ANN. § 541.9(3) (Supp. 1960); LA. REV. STAT. § 7:9(3) (1950); MICH. STAT. ANN. § 19.51(3) (1959); MINN. STAT. ANN. § 335.052(3) (Supp. 1960); MO. ANN. STAT. § 401.009(3) (1949); MONT. REV. CODES ANN. § 55-209(3) (1947); N. M. STAT. ANN. § 50-1-9(3) (1953); N.C. GEN. STAT. § 25-15(3) (1953); ORE. REV. STAT. § 71.009(3) (1953); UTAH CODE ANN. § 44-1-10(3) (1953); VA. CODE ANN. § 6-361(3) (Supp. 1960); W. VA. CODE ANN. § 4321(c) (1955); WYO. STAT. ANN. § 13-295(3) (1957).

The Uniform Commercial Code, which contains provisions similar to the "Fictitious Payee Act" is presently in effect in four states. See CONN. GEN. STAT. ANN. §42a-3-405(1)(b)(c) (1960); KY. REV. STAT. ANN. § 355.3-405 (1)(b)(c) (Supp. 1961); MASS. ANN. LAWS ch. 106, § 3-405(1)(b)(c) (Spec. Supp. 1958) and PA. STAT. ANN. tit. 12A, § 3-405(1)(b)(c) (1954).

Payroll Padding and Prior Law

The instant amendment to the Negotiable Instruments Law was enacted with a view toward shifting the loss in cases of payroll padding.[7]

Payroll padding usually occurs in the following classic manner: *A*, a trusted employee of *B*, prepares a payroll list which includes names of persons represented to be employees of *B*. In reality, no such persons exist, but this fact is not known to *B*. *B* then draws checks payable to the supposed employees. The checks are intercepted and indorsed in the name of the ostensible payees by *A*. Subsequently, the fraud is discovered and *B* commences an action against the drawee bank for the purpose of having his account recredited in the amount of the bogus checks. The question then presented is who, as between drawer (*B*) and drawee (the bank), shall bear the loss.[8]

Under prior law, the right of a depositor to have his account recredited depended upon whether or not the bank had acted according to his directions.[9] This, in turn, depended upon his intentions when drawing the check. If he knew that the named payee was a fictitious or non-existing person, the check, according to the terms of the then-existing section 28(3), was considered bearer paper.[10] As such, title to the instrument passed by delivery, and it was not necessary for the bank to inquire into the genuineness of the indorsement.[11] On the other hand, if the drawer were not aware of the fictitious nature of the payee, his intent that there should be a real payee controlled. Hence, the duty devolved upon the bank to pay only upon the indorsement of the named payee.[12] In this

[7] See N.Y. LEGISLATIVE ANNUAL 156-57 (1960).

[8] See, *e.g.*, City of New York v. Bronx County Trust Co., 261 N.Y. 64, 184 N.E. 495 (1933); Shipman v. Bank of New York, 126 N.Y. 318, 27 N.E. 371 (1891).

[9] "The relation existing between a bank and a depositor being that of debtor and creditor, the bank can justify a payment on the depositor's account only upon the actual direction of the depositor." Critten v. Chemical Nat'l Bank, 171 N.Y. 219, 224, 63 N.E. 969, 970 (1902).

[10] The statute "applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. *The maker's intention is the controlling consideration which determines the character of such paper.* It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person." Shipman v. Bank of New York, *supra* note 8, at 330, 27 N.E. at 374 (emphasis added).

[11] N.Y. NEGOTIABLE INSTR. LAW § 60; UNIFORM NEGOTIABLE INSTRUMENTS LAW § 30. In fact, if the note is payable to a fictitious payee "the name of the payee need not be indorsed thereon before negotiation." Irving Nat'l Bank v. Alley, 79 N.Y. 536, 540 (1880).

[12] Caledonian Ins. Co. v. National City Bank, 208 App. Div. 83, 203 N.Y. Supp. 83 (1st Dep't 1924). See note 8 *supra*.

case, therefore, payment to any other than the named payee was a misdirection of the depositor-drawer's funds for which the bank was liable.

The payroll cases were included in this latter category, and absent any special defense,[13] the bank was bound to make good the loss.

Transfer of Intent

As is apparent from the above, the difficulty inherent in the prior law was that the determination of whether the paper issued was payable to order or to bearer depended upon the subjective intent of the drawer. As a result, there were some attempts made to impute the intent of the employee to the employer for the benefit of the holder in due course.

A leading case propounding this theory was *Equitable Life Assur. Soc'y v. National Bank of Commerce*,[14] in which it was held that an agent's knowledge of the fictitious character of the payee was the knowledge of the drawer of the check. This decision drew what would seem to be just criticism[15] in view of the general principle that a principal is not liable for the fraudulent acts of an agent which are outside his scope of employment.[16]

The traditional principal-agent rule[17] was stated in *City of New York v. Bronx County Trust Co.*,[18] wherein the court determined that the plaintiff's employees "were not acting within the scope of

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[13] "No bank shall be liable to a depositor for the payment by it of a forged or raised check, unless within one year after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid was forged or raised." N.Y. Negotiable Instr. Law § 326. See also N.Y. Negotiable Instr. Law § 43 (Supp. 1960). On the theory of estoppel due to negligence, see generally, Arant, *Forged Checks—The Duty of the Depositor to His Bank*, 31 Yale L.J. 598, 612 (1922); Britton, *Negligence in the Law of Bills and Notes*, 24 Colum. L. Rev. 695 (1924).

[14] 181 S.W. 1176 (Mo. Ct. App. 1916), overruled by American Sash & Door Co. v. Commerce Trust Co., 332 Mo. 98, 56 S.W.2d 1034 (1932), 33 Colum. L. Rev. 910 (1933).

[15] See Brannan, Negotiable Instruments Law 333 (7th ed. 1948).

[16] When an agent commits such a fraud, the presumption is that no communication, either express or constructive, has been made with the principal, since the very perpetration of the fraud necessitates secrecy. 2 Pomeroy, Equity Jurisprudence § 675 (5th ed. 1941). See 2 Mechem, Agency § 2001 (2d ed. 1914) for the view that a principal is not liable for the criminal acts of his employee. *But see* Phillips v. Mercantile Nat'l Bank, 140 N.Y. 556, 35 N.E. 982 (1894), in which the bank was held liable for the acts of its cashier; but note that the cashier had express authority to issue checks, and the element of estoppel appeared in the case.

[17] See, *e.g.*, Grand Lodge of Kansas, A.O.U.W. v. State Bank, 92 Kan. 876, 142 Pac. 974 (1914); American Sash & Door Co. v. Commerce Trust Co., *supra* note 14.

[18] 261 N.Y. 64, 184 N.E. 495 (1933).

their duties [in supplying the names], and their knowledge [that the payees were fictitious] was not the knowledge of the city."[19] This approach, however, has now been obviated by the recent amendment to Section 28(3) of the Negotiable Instruments Law. Under this amendment, it is no longer necessary to ascertain the intent of the employer-drawer in the payroll cases; it is sufficient for the employee supplying the name of the payee to know that the check is payable "to the order of a fictitious person, or a non-existing person, or an existing person not intended to have any interest in it."[20]

Section 3-405 of the Uniform Commercial Code Distinguished

The "Fictitious Payee Act," as adopted in New York, differs from Section 3-405 of the Uniform Commercial Code in three particulars.

(*A*) *Requirement of Indorsement.* Section 28(3), as amended, makes any instrument payable to a fictitious payee bearer paper. As such, no indorsement is needed to pass title, since bearer paper is negotiable by delivery.[21] Section 3-405 of the Uniform Commercial Code, on the other hand, requires an indorsement for negotiation,[22] since such paper is, on its face, order paper. However, the Code comment obviates the apparent restrictions of this requirement by providing that anyone—"first thief, second impostor or third murderer"—can validly indorse in the name of the ostensible payee.[23] What, then, is the purpose of the indorsement?

It would seem that the reason lies in the fact that a recipient of what outwardly appears to be order paper should require a regular chain of indorsements, the absence of which might bear on his ability to claim the position of holder in due course.[24] In actuality, however, the distinction between the two sections appears academic, since the person who causes such an instrument to be issued would invariably indorse in the name of the ostensible payee, if only to give the instrument an appearance of regularity and thus prevent his fraud from prematurely coming to light.

(*B*) *Confusing Terminology.* During the time in which section 28(3) has been in existence, the terms "fictitious" and "non-

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[19] *Id.* at 70, 184 N.E. at 497.

[20] N.Y. NEGOTIABLE INSTR. LAW § 28(3) (Supp. 1960).

[21] N.Y. NEGOTIABLE INSTR. LAW § 60; UNIFORM NEGOTIABLE INSTRUMENTS LAW § 30.

[22] UNIFORM COMMERCIAL CODE § 3-405, comment 1.

[23] *Ibid.*

[24] In order to be classified as a holder in due course under the statutes, one must take without "notice of any infirmity in the instrument. . . ." N.Y. NEGOTIABLE INSTR. LAW § 91(4); UNIFORM NEGOTIABLE INSTRUMENTS LAW § 52(4).

existent" included therein caused some difficulty in construction. Under this section, it is the intent of the drawer that the named payee shall have no interest in the instrument, rather than the fictitiousness or non-existence of the payee which makes the instrument bearer paper. Thus, a payee in a given case, though in fact a real person, may be considered fictitious within the meaning of the statute if the intent is that he shall have no interest in the instrument. On the other hand, a check drawn to the order of a person who, unknown to the drawer, is not in existence, is non-negotiable, since the only person who could transfer title is not *in esse*. If, however, the non-existence of the payee is known to the drawer, the instrument is payable to bearer. The view has therefore been expressed that a person may be considered a "real" person within the statute though he is in actuality non-existent.[25]

The Code drafters, recognizing that the language of section 28(3) was confusing,[26] eliminated it from their official text. The confusion was also noted by the New York Law Revision Commission in its consideration of the Code,[27] but its observation seems not to have influenced the legislature when the instant amendment was adopted. As a result, the statute is now redundant since it first mentions the terms "fictitious" and "non-existent" which have been judicially defined in terms of intent,[28] and then expressly mentions persons "not intended to have any interest", which would necessarily seem to include the other two categories.

(*C*) *The Impostor Payee.* In the general area of imposture, there occurs a situation giving rise to what is known as the "impostor rule", a seeming exception to the normal application of section 28(3).[29] This situation is exemplified in the following manner: *A* represents himself as someone else in a face-to-face transaction with *B*, the drawer of the check. *B* then draws the check to *A* under his assumed name. Subsequently, *A* indorses in the assumed name and appropriates the proceeds of the check to his own use. In an action to recover the amount thus paid to the impostor, the drawer cannot recover, since it is generally held that it was the intent of the drawer to pay the check to the person[30] before him

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[25] BRITTON, BILLS AND NOTES § 149, at 705 (1943).

[26] See authority cited note 22 *supra*.

[27] 1955 LEG. DOC. No. 65(D), N.Y. LAW REVISION COMMISSION REP. 242 (1955).

[28] See Shipman v. Bank of New York, 126 N.Y. 318, 330, 27 N.E. 371, 374 (1891). Perhaps the confusion would be eliminated if the amendment provided that an instrument would be payable to bearer when it is payable to the order of a payee not intended to have any interest in it and any such fact was known to the person making it so payable, or known to his employee or other agent who supplied the name of such payee.

[29] Comment, *The Fictitious Payee and the UCC—The Demise of a Ghost*, 18 U. CHI. L. REV. 281, 285 (1951).

[30] "Although one may be deceived as to the name of the man with whom he

rather than to the assumed personality. This situation is distinguished from one in which the impostor obtains the check through mail transactions rather than in a face-to-face encounter. In the former case, it is generally held that the drawer may recover, since his intent was to pay to the person named rather than the recipient of the check.[31]

The above distinction and its resultant placing of loss is abolished by the Code provisions, the drafters assuming that in the mail cases, the maker or drawer believes, in much the same fashion as the face-to-face imposture, that the named person and the person receiving the instrument are one and the same.[32]

New York, however, rejects this rigid Code rule and retains the distinction, reasoning that the flexible rule of the case law in this state makes it "possible to place the loss on the party who failed to take businesslike precautions." [33]

Bills of Exchange Act Distinguished

The English Bills of Exchange Act provides that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." [34] It is unlike sections 28(3) and 3-405 in that it omits any reference to the intent of the drawer, and thus eliminates the element of subjectivity which has been the bane of the American statutes.

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is dealing, if he dealt with and intended to deal with the visible person before him the check may properly be indorsed by the impostor." Halsey v. Bank of New York & Trust Co., 270 N.Y. 134, 139, 200 N.E. 671, 673 (1936). See also Holub-Dusha Co. v. Germania Bank, 164 App. Div. 279, 149 N.Y. Supp. 775 (1st Dep't 1914); First Nat'l Bank v. American Exch. Nat'l Bank, 49 App. Div. 349, 63 N.Y. Supp. 58 (1st Dep't 1900), *aff'd,* 170 N.Y. 88, 62 N.E. 1089 (1902). *But see* Cohen v. Lincoln Sav. Bank, 275 N.Y. 399, 10 N.E.2d 457 (1937), in which the court states that "physical presence is . . . 'often a surer means of identification' than a designated name . . . but . . . *only where physical presence is combined with antecedent dealings* and intention 'to deal with the visible person.'" *Id.* at 411, 10 N.E.2d at 463 (emphasis added). See also Palmer, *Negotiable Instruments Under the Uniform Commercial Code,* 48 MICH. L. REV. 255, 286 (1950), where the author suggests that the dealings between an impostor and a drawer indicate the carelesssness of the latter, on whom the loss should fall.

[31] See, *e.g.,* American Sur. Co. v. Empire Trust Co., 262 N.Y. 181, 186 N.E. 436 (1933) (impostor obtained a draft by sending a stolen savings bank book to the bank); Mercantile Nat'l Bank v. Silverman, 148 App. Div. 1, 132 N.Y. Supp. 1017 (1st Dep't 1911), *aff'd,* 210 N.Y. 567, 104 N.E. 1134 (1914) (impostor "sold" a claim to his salary to a bank through the mail).

[32] UNIFORM COMMERCIAL CODE § 3-405, comment 2.

[33] N.Y. LAW REVISION COMMISSION REP. 409 (1956). For an analysis of the role played by the element of negligence in impostor cases and the resultant allocation of loss, see Abel, *The Impostor Payee: Or, Rhode Island Was Right:* I, 1940 WIS. L. REV. 157, 187-99.

[34] 45 & 46 Vict., c. 61, § 7(3), at 368 (1882).

Under the Bills of Exchange Act, the instrument would be payable to bearer in any case where the named payee was non-existent as that word is commonly understood,[35] regardless of the drawer's intent at the time of drawing. If the payee is a real person to the knowledge of the drawer, however, the instrument is regarded as order paper.[36] Thus, the nature of an instrument is determined by the existence or non-existence of the payee instead of the intent of the drawer—a view more conducive to the free flow of commercial paper.

The Scope of Section 28(3)

The amendment to section 28(3) provides that an instrument shall be designated bearer paper when the "employee or other agent" supplying the names of the payees knows that they will not have any interest in the instrument. This provision, therefore, although expanding the fictitious payee rule, defines a limitation as well. In a case, for instance, where the person supplying the names is not such "employee or other agent" the intent of the employer would seem to be the only controlling factor.[37]

Section 28(3), as amended, effects no change in the imposition of loss in cases where an employee forges his employer's name as the drawer or maker of an instrument.[38] This is evident from the fact that the employee has no authorization to sign his employer's name, and the instrument is a legal nullity. Nor is the liability of the drawer affected where an incomplete instrument is stolen from the employer before delivery.[39]

With reference to the language of the instant amendment, it may be noted that it is not framed in terms so definite as to preclude judicial interpretation. There is room for the courts to decide whether a person may be classified as an "employee or other agent" within the meaning of the statute, and what constitutes the act of "supplying" the name of a payee.[40]

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[35] Clutton v. Attenborough, [1897] A.C. 90.

[36] Vinden v. Hughes, [1905] 1 K.B. 795.

[37] *Cf.* Seaboard Nat'l Bank v. Bank of America, 193 N.Y. 26, 85 N.E. 829 (1908).

[38] N.Y. NEGOTIABLE INSTR. LAW § 42; UNIFORM NEGOTIABLE INSTRUMENTS LAW § 23. See also Sullivan v. Foote, 120 N.Y. Supp. 61 (App. T. 1909). Note, however, that the acceptor may nevertheless be held liable on such a note. N.Y. NEGOTIABLE INSTR. LAW § 112; UNIFORM NEGOTIABLE INSTRUMENTS LAW § 62.

[39] N.Y. NEGOTIABLE INSTR. LAW § 34; UNIFORM NEGOTIABLE INSTRUMENTS LAW § 15.

[40] Note, however, that N.Y. NEGOTIABLE INSTR. LAW § 28(3) also states that the fictitiousness of the payee must be known to the person "making it [the check] so payable." Under this definition it is therefore possible to have liability imposed upon the drawer even when the person supplying him with the names of the fictitious payees was not his employee or agent. See Union

Application of Forgery Rule Narrowed

It is a general rule that no title may pass through a forged indorsement,[41] and any bank or person who makes payment over such indorsement does so at his peril.[42] The effect of section 28(3), as amended, is to limit the number of cases which can fall under this rule by eliminating the necessity for an indorsement in instances where the employee has supplied names of fictitious payees. The act of supplying names of fictitious payees is not per se forgery.[43] The irregularity occurs only when the employee signs in the name of the payee with intent to defraud, and then transfers the instrument for value.[44]

In limiting the application of this rule, the legislature has also limited the liability of banking institutions. The rationale of the amendment is that an employer is better able to guard against fraud in the fictitious payee area than is the bank.[45] Be that as it may, it is significant that the loss in these cases is occasioned not by the fact that the payees were fictitious or non-existent, but by the fact that the instrument was indorsed by an unauthorized person, and such lack of authorization was not discovered by the bank.

The effect of this abridgment of the forgery rule does not seem to curtail the criminal liability of the faithless employee in any way.[46] This is true despite the fact that in legal effect the employee's indorsement is not necessary to transfer title to the instrument. The reason for this distinction is twofold: (a) criminally, the employee's intent to defraud by use of a spurious instrument which he caused to be made and by which he illegally obtained funds controls;[47]

Bank & Trust Co. v. Security-First Nat'l Bank, 8 Cal. 2d 303, 65 P.2d 355 (1937). In that case one Williams, possessed of illegally obtained commercial paper, exchanged it for cashiers' checks which were made payable to persons designated by him but not intended to have any interest in them. The court, duly noting that Williams was not an agent or employee of the bank and had no authority to sign any cashiers' checks, held, nevertheless, that he was the "real" drawer and, therefore, the "person making it so payable." Hence, it would seem that judicial interpretation may expand the scope of § 28(3) in accord with the exigencies of the moment. *But see* Seaboard Nat'l Bank v. Bank of America, *supra* note 37.

41 N.Y. NEGOTIABLE INSTR. LAW § 42; UNIFORM NEGOTIABLE INSTRUMENTS LAW § 23. See also Seaboard Nat'l Bank v. Bank of America, *supra* note 37; Stein v. Empire Trust Co., 148 App. Div. 850, 133 N.Y. Supp. 517 (1st Dep't 1912).

42 Shipman v. Bank of New York, 126 N.Y. 318, 327, 27 N.E. 371, 372 (1891).

43 See DeRose v. People, 64 Colo. 332, 171 Pac. 359 (1918).

44 N.Y. PEN. LAW § 884(4)(6). See also 6 U. CHI. L. REV. 700, 703-04 (1939).

45 See N.Y. LEGISLATIVE ANNUAL 136-37 (1960).

46 See N.Y. PEN. LAW § 883; *accord*, UNIFORM COMMERCIAL CODE § 3-405(2), comment 5.

47 N.Y. PEN. LAW § 887(4) provides: "A person is guilty of forgery

and (b) the legislative intent was to shift the civil liability from the bank to the maker or drawer [48] rather than negating the employee's criminal responsibility.[49]

Consequences of a Special Indorsement

Cases in which a special indorsement is placed upon an instrument falling within the ambit of section 28(3) highlight a somewhat anomalous situation. Consider the following: a check is issued in a typical padded payroll case. It is then appropriated by the employee who supplied the name of the sham payee, indorsed with such name, and specially indorsed in turn, to the order of *X* for value. Prior to the instant amendment, *X* would have no right to the instrument, since he took through a forged indorsement and thus could obtain no title.[50] Now, however, *X*, if a holder in due course, could enforce the instrument as bearer paper. But the benefit thus conferred by the statute may be applied in favor of *any* holder in due course. Therefore, if the instrument is subsequently stolen by *Z*, who forges *X*'s signature and presents it to a bank for payment,[51] who, as between *X* and the bank, has title to the instrument?

It would appear that title is in the bank. The reason for this is that an instrument payable to a fictitious payee is considered bearer paper on its face.[52] As such, a special indorsement has no effect upon its negotiability by delivery.[53] The instrument in legal

in the second degree who, with intent to defraud: . . . (4) causes or procures to be made . . . any instrument . . . or evidence of debt or for the payment of money . . . issued in a characteristic form or appearance by any corporation, firm, association or individual whose name appears thereon. . . ." See also the dictum in International Union Bank v. National Sur. Co., 245 N.Y. 368, 157 N.E. 269 (1927), where the court stated that "throughout the sections of the Penal Law of this State defining the crime of forgery in its various degrees may be found at least by implication the legislative intent that the crime of forgery includes the subscription or indorsement of an instrument, by any name fictitious or genuine, 'under the pretense that such subscription or indorsement is the act of another person of the same name, or of a person not in existence' . . . or 'purporting to be the act of another.'" *Id.* at 372, 157 N.E. at 270.

[48] The only purpose of the instant amendment was to reverse the decision in City of New York v. Bronx County Trust Co., 261 N.Y. 64, 184 N.E. 495, (1933). N.Y. LEGISLATIVE ANNUAL 156 (1960).

[49] *Cf.* 1955 LEG. DOC. NO. 65 (D), N.Y. LAW REVISION COMMISSION REP. 247 (1955).

[50] See authorities cited note 41 *supra*.

[51] *Cf.* Comment, *The Fictitious Payee and the UCC—The Demise of a Ghost,* 18 U. CHI. L. REV. 281, 290 (1951).

[52] BRITTON, BILLS AND NOTES 697, 699 (1943).

[53] N.Y. NEGOTIABLE INSTR. LAW § 70; UNIFORM NEGOTIABLE INSTRUMENTS LAW § 40. *But see* UNIFORM COMMERCIAL CODE § 3-204, which reverses the

effect is payable to bearer; X is not entitled to demand that his signature alone transfer title, nor is Z's indorsement considered a forgery for the purpose of transferring title. In sum, therefore, X, who purchased what appeared to be an order instrument with its attendant safeguards, is left to prosecute his remedy against a possibly insolvent thief—a risk he never intended to assume. Hence, though the statute provides X with a benefit, this benefit is one which may be removed as hastily as it was conferred.

Some Observations on Section 28(3)

(1) Section 28(3), as amended, does not expressly apply to a case where the indorsee rather than the payee is fictitious.[54] But in view of the fact that there seems to be no real difference between a case where a named payee is not intended to have an interest in the instrument and one in which an indorsee is similarly regarded, it is probable that this section will extend to the latter case by analogy.[55]

(2) The transfer of intent which is accomplished by the instant amendment raises an interesting question with respect to the effect of a change of intent after the instrument is drawn. Consider the following: a drawer draws a check to a person who is intended to have the benefit of it, and then, for some reason, the drawer decides to give the same instrument to a person other than the named payee. In this case, it would seem that the second person may validly indorse.[56] But suppose an agent in the normal course of his duties supplies the name of a payee who is intended to have the interest in the check. After it is drawn by the employer, however, the agent changes his mind and appropriates the instrument, now intending the named payee to have no interest in it. Query: will the agent's subsequent intent suffice to make the instrument bearer paper?[57] It probably will not, for two reasons: (a) in the

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effect of the above sections by making the last indorsement controlling. See also WHITNEY, MODERN COMMERCIAL TRANSACTIONS § 268 (1958).

[54] *Cf.* 1955 LEG. DOC. No. 65 (D), N.Y. LAW REVISION COMMISSION REP. 245 (1955).

[55] BRANNAN, NEGOTIABLE INSTRUMENTS LAW 336 (7th ed. 1948). See also Hall v. Bank of Blasdell, 306 N.Y. 336, 118 N.E.2d 464 (1954); Cohen v. Lincoln Sav. Bank, 275 N.Y. 399, 10 N.E.2d 457 (1937).

[56] BRITTON, *op. cit. supra* note 52, at 696-97.

[57] A related question is presented in a case where the concurrence of two employees is needed to "supply" the name of the payee. In such a case, if one of the two has a fraudulent intent not known to the other, will the check be considered issued to a fictitious payee under the instant amendment? See P. & G. Card & Paper Co. v. Fifth Nat'l Bank, 172 N.Y. Supp. 688 (Sup. Ct. 1918), holding that in a case where countersignatures are required to issue a check, the fraudulent intent of one of the signatories is enough

first hypothetical, the drawer is the person who changed his intent, whereas in the latter case the agent had no control over the drawing of the check; (b) under a strict view, it may be argued that the controlling intent is that existing at the time the instrument is drawn[58] and a subsequent intent, therefore, would be of no effect.

(3) The original purpose of the fictitious payee doctrine was to give effect to the intent of the maker-employer.[59] The instant amendment, however, gives effect to the intent of the employee, and, as such, is inconsistent with the reason behind the establishment of the doctrine.[60]

Conclusion

The "Fictitious Payee Act" imposes a type of absolute liability on an employer for the criminal acts of his employee. It validates a fraudulently procured instrument and places the resulting loss upon the employer rather than upon the banking institution, thus making such loss a cost of doing business.[61] Its enactment seems to be a clear concession to banking interests, and its rigid application may result in inequity in particular cases where a non-negligent employer is betrayed by a formerly faithful employee whom he had no reason to suspect of wrongdoing.[62]

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to make the instrument bearer paper. *Contra,* BRITTON, *op. cit. supra* note 52, at 714.

[58] See 6 U. CHI. L. REV. 700, 704 (1939).

[59] BRITTON, *op. cit. supra* note 52, at 697.

[60] See *1960 Survey of New York Law,* 35 N.Y.U. L. REV. 1403, 1483 (1960).

[61] The instant amendment not only requires an employer to bear a loss equal in amount to the fraudulently issued checks, but also makes it necessary for him to get "a blanket or at least a schedule fidelity bond . . . to give the protection against check fraud by employees for which an individual fidelity bond on the authorized signing officer previously sufficed." Farnsworth, *Insurance Against Check Forgery,* 60 COLUM. L. REV. 284, 306 (1960). It must be noted, however, that the possibility of inequity in the padded payroll cases may be a rare occurrence and may be overshadowed by the act's contribution to the free flow of commercial paper.

[62] "In commercial law, perhaps more than in any other field, Justice Brandeis' famous dictum holds true: 'It is more important that the applicable rule of law be settled than that it be settled right.' To the banker and the businessman litigation is a positive evil." Comment, *The Fictitious Payee and the UCC—The Demise of a Ghost,* 18 U. CHI. L. REV. 281, 286 (1951).