

The Imposter Payee, or What's in a Name?

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determination of the defendant's right to the writ entirely in the hands of the courts is perhaps to allow them to usurp a legislative function, but in viewing their use of it thus far one cannot say that they have failed to protect the right of defendants to full litigation. Of course, in the absence of a statute guaranteeing to a defendant the right to attack a judgment for some error not apparent in the record, he is always at the mercy of the courts of his particular era, whose opinions as to the necessity of continuing the use of the writ may change. That this possibility is not altogether remote can be borne out by the virtual limbo of disuse into which the writ had fallen until comparatively recent times. A statute in New York similar to section 2255, but not requiring incarceration at the time of bringing the action, might seem to be advisable. The writ of coram nobis, rather than being abolished, would be assimilated into such a statute. This was undoubtedly the intention of the creators of section 2255, which intention, however, failed.⁶⁸ This failure points up one possible disadvantage to a statutory form of coram nobis. In construing the statute the courts may actually restrict the areas in which coram nobis may be granted. The purpose of coram nobis, as has been pointed out, is to provide a remedy in a case where no other relief is available to a defendant. As a result an important ingredient in coram nobis is its flexibility. Rather than restrict its use to specific grounds the courts should, and probably will, extend coram nobis to new situations in which the defendant has no other relief, as they develop.

Moreover, except in the cases where another remedy is provided in the federal laws and none in the state laws, or vice versa, there would seem to be no valid reason for the different treatment in the two judicial systems accorded some of the problems mentioned above. A greater liberality on the side of the defendant would appear to be the better rule in such situations, for while litigation must come to an end sometime, undoubtedly most people would prefer to see the courts overzealous in guaranteeing that a defendant will not be unjustly convicted.



THE IMPOSTOR PAYEE, OR WHAT'S IN A NAME?

The impostor payee situation can arise only where one person successfully impersonates another.¹ In the classic case a swindler

⁶⁸ See *United States v. Kerschman*, 201 F.2d 682 (7th Cir. 1953), where coram nobis was thought to be superseded by § 2255. But as already stated in the text, *United States v. Morgan*, 346 U.S. 502 (1954), declared that the statute was not inclusive of the field.

¹ Aigler, *Imposters in the Law of Bills and Notes*, 46 MICH. L. REV. 787, 793 n.19 (1948).

will induce a person to deal with him by pretending to be a well known businessman of good reputation and credit. As a result of these dealings the swindler receives a check payable to the businessman he has impersonated. The swindler then endorses the check, as made out, and cashes it at a bank. Of course by the time the fraud is discovered the swindler will not be amenable to process, and as a result the loss must fall either on the drawer of the check or on his bank.²

The loss is placed by deciding whether the impostor's endorsement was forged or unauthorized, for under the Negotiable Instruments Law no right or title can be taken through a forged or unauthorized endorsement,³ and a bank's contract with its depositor is "to pay . . . checks only upon a genuine endorsement."⁴ Consequently, if the endorsement is forged or unauthorized the bank will have to recredit the depositor's account. A leading case holding that the loss should be on the drawer is *Montgomery Garage Co. v. Manufacturer's Liab. & Ins. Co.*⁵ In that case a bona fide purchaser from the impostor was allowed to recover from the drawer on the ground that the drawer intended the impostor, rather than the person impersonated, to be the payee. Therefore the impostor was the proper person to endorse, so that there was no forgery. This is the view taken by most courts.⁶

The minority view is stated in the case of *Tolman v. American Nat'l Bank.*⁷ In that case one Potter, representing himself to be Haskell, went to Tolman to obtain a loan. He gave Haskell's residence and occupation as his own. After making inquiries about Haskell, Tolman agreed to make the loan and gave Potter a check

² The loss must fall on either of two groups, the drawer, maker, or special endorser [if transferred by blank endorsement it will become bearer paper, UNIFORM NEGOTIABLE INSTRUMENTS LAW § 9(5), N.Y. NEGOTIABLE INSTR. LAW § 28(5)] from whom the impostor received the instrument, or the holder or drawee who takes the instrument from the impostor. See Abel, *The Impostor Payee: Or, Rhode Island Was Right*, 1940 WIS. L. REV. 161, 162 (hereinafter cited Abel, *The Impostor Payee*); Note, 23 IND. L.J. 484, 485 (1948).

³ UNIFORM NEGOTIABLE INSTRUMENTS LAW § 23, N.Y. NEGOTIABLE INSTR. LAW § 42.

⁴ *Shipman v. Bank of N.Y.*, 126 N.Y. 318, 328, 27 N.E. 371, 373 (1891); *Midland Sav. Bank & Loan Co. v. Tradesmen's Nat'l Bank*, 57 F.2d 686 (10th Cir.), cert. denied, 287 U.S. 615 (1932); *United States Cold Storage Co. v. Central Mfg. Dist. Bank*, 343 Ill. 503, 175 N.E. 825 (1931). "[T]he obligation of a bank to its depositor is to pay his checks, up to the amount of his deposit, according to his direction, and if that direction is to pay to a person named, or to his order, the bank must ascertain at its peril the identity of the person named as payee or the genuineness of the indorsement if the check is presented by an alleged indorsee." *Id.* at 826. (Emphasis added.) BRANNAN, NEGOTIABLE INSTRUMENTS LAW 442 (7th ed. Beutel 1948); BRITTON, BILLS & NOTES § 142 (1943). But see, Abel, *supra* note 2, at 210.

⁵ 94 N.J.L. 152, 109 Atl. 296 (1920).

⁶ See BRANNAN, *op. cit. supra* note 4, at 470; BRITTON, *op. cit. supra* note 4, § 151; 5 WILLISTON, CONTRACTS § 1517B (1937).

⁷ 22 R.I. 462, 48 Atl. 480 (1901).

drawn on the defendant bank payable to Haskell's order. Potter endorsed Haskell's name on the check and transferred it to a third person, who collected from the bank. When Tolman discovered the fraud he demanded that the bank recredit his account by the amount paid on the check. The appellate court set aside a verdict directed for the defendant, declaring that the case should have gone to the jury, and granted a new trial. The court said: "[A]s the case stood, the plaintiff had ordered money paid to Haskell. The bank had not so paid it. The fact that the plaintiff had been imposed upon did not relieve the bank from its duty to see that the money was paid according to order."⁸ While this is distinctly the minority position it has received some very able support.⁹

In resolving the problem, the Negotiable Instruments Law itself is found to be of limited aid. Several sections have been referred to as bearing on the point. Section 9(3),¹⁰ stating that an instrument payable to the order of a fictitious or non-existing person¹¹ is bearer paper, does not apply because it is held that this section is a restatement of the common law¹² and requires that the drawer must have intended to draw the check to a fictitious person.¹³

Under section 61¹⁴ the drawer admits the existence of the payee and his capacity to endorse. But this is held to compel admission of

⁸ Tolman v. American Nat'l Bank, 22 R.I. 462, 48 Atl. 480, 482 (1901). "Waiving the question of forgery, . . . the signature in this case is clearly one 'made without the authority of the person whose signature it purports to be,' and therefore it is wholly inoperative." *Ibid.*

⁹ Abel, *The Impostor Payee* at 398-99.

¹⁰ UNIFORM NEGOTIABLE INSTRUMENTS LAW § 9(3), N.Y. NEGOTIABLE INSTR. LAW § 28(3).

¹¹ "Fictitious or non-existing person," as used in the statute, is not restricted to one who is actually fictitious or non-existing but includes real and existing persons where the *drawer* intends that they have no right or interest in the instrument. Norton v. City Bank & Trust Co., 294 Fed. 839 (4th Cir. 1923); Phillips v. Mercantile Nat'l Bank, 140 N.Y. 556, 35 N.E. 982 (1894); Snyder v. Corn Exch. Nat'l Bank, 221 Pa. 599, 70 Atl. 876 (1908); BRITTON, BILLS & NOTES 700-02 (1943). See also ILL. ANN. STAT. c. 98, § 29(3) (Smith-Hurd 1935): The instrument is payable to bearer when "it is payable to the order of a fictitious or nonexisting or living person not intended to have any interest in it, and such fact was known to the *person making it so payable, or . . . [the] agent who supplies the name of such payee.*" (Emphasis added.)

¹² 2 HALSBURY, LAWS OF ENGLAND 620 n. h (2d ed. 1931). The common law, however, was changed by the English Bills of Exchange Act of 1882 § 7(3), 45 & 46 Vict. c. 61, Bank of England v. Vagliano Bros. [1891] A.C. 107, 129-30.

¹³ "The instrument is payable to bearer: (3) [W]hen 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. . . ." See note 9 *supra*. Seaboard Nat'l Bank v. Bank of America, 193 N.Y. 26, 34, 85 N.E. 829, 831 (1908) (dictum); Shipman v. Bank of N.Y., 126 N.Y. 318, 330, 27 N.E. 371, 374 (1891) (dictum); Abel, *supra* note 9, at 201.

¹⁴ UNIFORM NEGOTIABLE INSTRUMENTS LAW § 61, N.Y. NEGOTIABLE INSTR. LAW § 111.

the endorsing capacity of the designated payee only—not of a fraudulent one.¹⁵

Section 23¹⁶ declares that no right or title can be acquired through a signature that was either forged or made without the authority of the person whose signature it purports to be. However, this section will not operate until and unless a forgery is established, so that it is of no help in determining this fact in the first instance.¹⁷

In some few cases the courts have relied on the theories of negligence and estoppel to place the loss.¹⁸ However, since the law of

¹⁵ *Robertson Baking Co. v. Brasfield*, 202 Ala. 167, 79 So. 651 (1918). "The section does not make Brasfield [the drawer] admit that any one other than his named payee could properly and legally indorse the check." *Id.* at 653. See also *McCornack v. Central Sav. Bank*, 203 Iowa 883, 211 N.W. 542 (1926) (section is for benefit of holders of paper if drawee does not pay) (dictum); *American Express Co. v. People's Sav. Bank*, 192 Iowa 366, 181 N.W. 701 (1921).

¹⁶ UNIFORM NEGOTIABLE INSTRUMENTS LAW § 23, N.Y. NEGOTIABLE INSTR. LAW § 42.

¹⁷ *Cf. Tolman v. American Nat'l Bank*, 22 R.I. 462, 48 Atl. 480 (1901). "It is a surprising doctrine that if A. can successfully personate B., he thereby escapes being guilty of forgery in signing B.'s name on a check of C.'s." *Id.* at 481. *Cohen v. Lincoln Sav. Bank*, 275 N.Y. 399, 10 N.E.2d 457 (1937); *Seaboard Nat'l Bank v. Bank of America*, 193 N.Y. 26, 85 N.E. 829 (1908); *United Cigar Stores Co. v. American Raw Silk Co. Inc.*, 184 App. Div. 217, 171 N.Y. Supp. 480 (1st Dep't 1918). *Semble*, *Hubsch v. United States*, 256 F.2d 820 (5th Cir. 1958). See also UNIFORM COMMERCIAL CODE § 3-405(2). Regarding the situation where a person with the same name as the payee wrongfully endorses, see *Statterly & Co. v. National City Bank*, 114 Misc. 48, 186 N.Y. Supp. 619 (N.Y. City Ct. 1920). See also *Graves v. American Exch. Bank*, 17 N.Y. 205 (1858) (Where one not intended to be the payee of a bill but having the same name endorsed and transferred it knowing that he was not intended as the payee, such endorsement was held to be "if not technically a forgery . . . at all events spurious and false."). *But see Weisberger Co. v. Barberton Sav. Bank Co.*, 84 Ohio St. 21, 95 N.E. 379 (1911), 60 U. PA. L. REV. 443 (1912), wherein a check payable to one Max Roth was sent to the wrong address and fell into the hands of another Max Roth who endorsed and cashed it. The court stated that the endorsement was a forgery but that the drawer could not recover against the bank because of his negligent conduct. "He was first at fault and his mistake caused the loss." See also *Keck v. Browne*, 314 Ky. 151, 234 S.W.2d 183 (1950), where a check sent to one Ben Browne in Lexington was delivered to another person of that name who endorsed and cashed it. It was held that the loss fell on the drawer because he did not use Browne's street address, although he knew it. See 39 Ky. L.J. 476 (1951).

¹⁸ *C. E. Ericson Co. v. Iowa Nat'l Bank*, 211 Iowa 492, 230 N.W. 342 (1930); *Grand Lodge v. State Bank*, 92 Kan. 876, 142 Pac. 974 (1914); *Keck v. Browne*, 314 Ky. 151, 234 S.W.2d 183 (1950); *Young v. Greta Trust & Sav. Bank*, 184 La. 872, 168 So. 85 (1936); *United States Guar. Co. v. Hamilton Nat'l Bank*, 223 S.W.2d 519 (Tenn. 1949); *Defiance Lumber Co. v. Bank of Cal.*, 180 Wash. 533, 41 P.2d 135 (1935). See also *Maryland Cas. Co. v. Central Trust Co.*, 297 N.Y. 294, 79 N.E.2d 253 (1943). *Cf. Board of Educ. v. National Union Bank*, 121 N.J.L. 177, 1 A.2d 383 (1938), wherein it was held that negligence of persons employed as public servants by a municipal corporation could not be imputed to the employer. *Comment*, 18 U. CHI. L. REV. 281, 285-86 (1951).

negotiable instruments has a law merchant background,¹⁹ it could be argued that the common-law concept of negligence should not be used by courts in settling disputes under it.

The principal explanation given by the courts when they place the loss is that they are giving effect to the drawer's actual intention at the time he drew the instrument.²⁰ In order to do this, the courts use what is called the dominant intent theory.²¹ Under this theory, when the drawer deals with an impostor before him, he has two intentions: first, to deal with the person the impostor pretends to be; second, to deal with the person physically before him. While a name is one means of identification, a surer means is afforded by physical presence.²² The drawer normally wants to deal with the person and not the name. Therefore, it is said his dominant intent is to deal with the person physically before him. He is the one to whom the drawer wants to make the instrument payable and therefore the impostor is the proper person to endorse.²³ In effect, the courts call upon their literary background to ask: "What's in a name?"²⁴

However, it is not so clear that one deals only with a name and a physical presence. It has been suggested that these do not make up the entire person dealt with;²⁵ that together with these is their relationship, in the mind of the drawer at least, to something else—for example, some type of wealth—and that perhaps uppermost in the mind of the drawer is this wealth. It is this relation to the wealth that, in effect, dominates the intention of the drawer.²⁶ On this thinking it would seem that, unless the person endorsing the instrument were actually the person who bore the relation to the wealth that was the inducement to the issuing of the instrument, the endorsement would be a forgery.

¹⁹ BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 1-3, 54-55 (7th ed. Beutel 1948); Abel, *Impostor Payee* at 225.

²⁰ BRITTON, *BILLS & NOTES* § 151, at 720-22 (1943); 23 *IND. L.J.* 484, 486 (1948). See also 5 *WILLISTON, CONTRACTS* § 517, at 4238 (1936).

²¹ *Ibid.*

²² *Halsey v. Bank & Trust Co.*, 270 N.Y. 134, 200 N.E. 671 (1936). "The name, however, is not always controlling. Physical presence often is a surer means of identification." *Id.* at 139, 200 N.E. at 673.

²³ "Although one may be deceived as to the name of the man with whom he 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." *Id.* at 139, 200 N.E. at 673.

²⁴ Shakespeare, *Romeo and Juliet*, Act II, scene 2.

²⁵ See 3 *CORBIN, CONTRACTS* § 602, at 385 (1951).

²⁶ Abel, *The Impostor Payee* at 230; BIGELOW, *BILLS, NOTES & CHECKS* 102 n.2 (3d ed. 1928); BRITTON, *BILLS & NOTES* § 151, at 717 (1943). "If a person issues a check to another person, and the facts are exactly as he had been led to believe they were, he will never complain. If some of the facts are as he supposed they were and some of them are different, he will complain depending on how seriously his interests are affected by the unanticipated truth." *Id.* at 717.

An argument in support of the result reached by the dominant intent theory might be called the "money in the hand" theory.²⁷ If the drawer of the check had cash in his hand and chose to give the cash instead of a check, to whom would he give it? Obviously he would give it to the impersonator, believing him to be another. The conclusion of this argument is that since he would be out of pocket in that case, he should not be allowed to complain now, and shift his loss to the person taking in good faith from the impostor. An answer made to this argument is that the rules governing the transfer of bearer paper should not be used to solve a problem involving order paper.²⁸

Whatever the merit of the above criticism of the dominant intent rule's application, the rule itself has met with a telling objection, the tenor of which has been stated by Judge Lehman in *Cohen v. Lincoln Sav. Bank*:²⁹ "Perhaps, in truth, both intents are so inseparable that the choice of one intent rather than the other is purely arbitrary—an example of rationalization perhaps unconscious, to reach a desired result."³⁰ In accord with this it has been stated as a general proposition that there is *no scientific foundation* whatever for saying that where the component parts of a complex stimulus, such as are involved in an impostor payee situation, operate to produce a given reaction they can be broken down and the resultant conduct attributed to any one of the isolated elements.³¹

If these positions referred to are correct it would seem clear that the dominant intent theory is a legal fiction. A danger in continuing its use as a rule of law exists if it is not universally appreciated as such and if courts apply it as a valid exposition of the mental processes in given circumstances to determine liability.

Applications of the Rule

The impostor payee rule has been applied in several situations each having a different degree of association between the drawer and the impostor. In one situation an impostor deals face to face with the drawer. Here there is a meeting of at least some duration between the two, and the drawer is in as good a position as the im-

²⁷ Aigler, *Imposters in the Law of Bills & Notes*, 46 MICH. L. REV. 787, 791 (1948).

²⁸ "Bearer paper follows its own rules, which take no account of the identity of title of those through whose hands it has passed but are concerned only with whether there has been delivery to one possessing the qualifications for a holder in due course. . . . [A] thief or a finder can pass such paper on so as to give those taking from or under him a position superior to that of prior parties." Abel, *The Impostor Payee* at 164.

²⁹ 275 N.Y. 399, 10 N.E.2d 457 (1937).

³⁰ *Cohen v. Lincoln Sav. Bank*, 275 N.Y. 399, 407-08, 10 N.E.2d 457, 461 (1937) (Lehman, J.).

³¹ Abel, *The Impostor Payee* at 229-30. See also 8 N.C.L. REV. 76, 77 (1929).

postor's transferee to require identification of him. There is a possibility that the drawer has a mental picture of the person to whom he makes the check payable.³² The great majority of negotiable instrument cases are to the effect that the drawer intends to deal with the impostor and that he is the proper person to endorse.³³ In a similar situation, the law of sales employs the same reasoning and concludes that at least a voidable title passes to the impostor which can be perfected by a sale to a bona fide purchaser.³⁴ One situation, where the parties deal face to face, should be distinguished. That is where the impostor claims to be the agent of someone else. Here the rule is that since the drawer never intended to deal with the impostor as payee the instrument cannot be properly endorsed by him.³⁵

A different situation exists where the two deal by mail or over the telephone. There is less association upon which to base a mental image, weakening the contention that the drawer intended to deal with the impostor who wrote or telephoned rather than the person whom the impostor pretended to be. The law of sales, which was looked to by the courts for an analogy in the prior situation,³⁶ holds that in a transaction carried on by correspondence the dominant in-

³² Aigler, *Imposters in the Law of Bills & Notes*, 46 MICH. L. REV. 787, 790-92 (1948).

³³ *Montgomery Garage Co. v. Manufacturers' Liab. Ins. Co.*, 94 N.J.L. 152, 109 Atl. 269 (1920); 5 WILLISTON, CONTRACTS § 1517B, at 4245-46 (1936); BRANNAN, NEGOTIABLE INSTRUMENTS LAW 470 (7th ed. Beutel 1948); BRITTON, BILLS & NOTES § 151, at 715 (1943). Cf. *Cohen v. Lincoln Sav. Bank*, 275 N.Y. 399, 10 N.E.2d 457 (1937), wherein a check was specially endorsed to a man who was introduced as Harry Wolter. He was an impostor. The court said that plaintiff had no reason to suspect fraud and that therefore there was no reason to require further identification. Plaintiff named as payee the person whom he intended—Harry Wolter, the owner of the condemnation award. "The absence of all prior dealings differentiates this case from every case which has been cited to sustain the contention of appellants. . . . The impostor did not deceive 'by misrepresenting his responsibility or character.' He deceived by inducing Goldberg and Abrams to believe that he was Harry Wolter who, as they thought, was assigning an award which he owned, and thus he succeeded in appropriating what was intended for another." *Id.* at 411, 10 N.E.2d at 462.

³⁴ *Phelps v. McQuade*, 220 N.Y. 232, 115 N.E. 441 (1917); *Phillips v. Brooks Ltd.* [1919] 2 K.B. 243; *Edmonds v. Merchants' Despatch Transp. Co.*, 135 Mass. 283 (1883); 3 WILLISTON, SALES § 635 (rev. ed. 1948); RESTATEMENT, CONTRACTS § 475, illus. 6 (1932).

³⁵ *Strang v. Westchester County Bank*, 235 N.Y. 68, 128 N.E. 739 (1923); *United Cigar Stores Co. v. American Raw Silk Co.*, 184 App. Div. 217, 170 N.Y. Supp. 480 (1st Dep't 1918), *aff'd mem.*, 229 N.Y. 532, 129 N.E. 904 (1920); *McCornack v. Central Sav. Bank*, 203 Iowa 883, 211 N.W. 542, 545 (1926). See also 5 WILLISTON, CONTRACTS § 1517B, at 4246-47 (1936). In the *Strang* case, *supra*, a lawyer, Bushnell, induced a party to lend money on a mortgage to his client X. In fact there was no such person as X and the lawyer himself owned the "mortgaged" property. The lawyer's endorsement of the check with the name of X was held to be a forgery. The court stated that the plaintiff did not intend to deal with Bushnell and that he was merely an agent even though the property was his.

³⁶ 5 WILLISTON, CONTRACTS § 1517B, at 4246 (1936); Abel, *Impostor Payee* at 223 n.213.

intent is to deal with the person impersonated.³⁷ Nevertheless, the majority of cases in the negotiable instruments area hold that the intent is to deal with the impostor and consequently the latter's endorsement is not a forgery.³⁸

In a third situation, there is no personal contact between the parties. This can occur in several ways, a common one being where a drawer signs checks prepared for his signature, such as monthly payroll checks.³⁹ In such a case the dominant intent argument would seem to be least convincing if considered as other than a legal fiction.⁴⁰

Payroll situations can be broken into several categories. First, a dishonest agent who is authorized to draw and sign checks in the corporation's name, draws a few extra checks planning to cash them and keep the proceeds for himself. These will be payable to either real or non-existent persons.⁴¹ Employing the dominant intent rule,

³⁷ Phelps v. McQuade, note 34 *supra*. See Boatsman v. Stockmen's Nat'l Bank, 56 Colo. 495, 138 Pac. 764 (1914); Cundy v. Lindsay, 3 A.C. 459 (1878); 5 WILLISTON, CONTRACTS § 1517, at 4239 (1936); RESTATEMENT, CONTRACTS § 475, illus. 7 (1932).

³⁸ Halsey v. Bank & Trust Co., 270 N.Y. 134, 200 N.E. 671 (1936). "The attempt at all times is to effectuate the intent of the drawer, and where the impostor, although never physically present, is clearly shown to be the person to whom payment was intended his indorsement on the check is not invalid as a forgery." *Id.* at 139, 200 N.E. at 673 (dictum). See also Boatsman v. Stockmen's Nat'l Bank, 56 Colo. 495, 138 Pac. 764 (1914); Uriola v. Twin Falls Bank & Trust Co., 371 Idaho 332, 215 Pac. 1080 (1923); BRITTON, BILLS & NOTES § 151, at 715, 720 (1943). *But see* Mercantile Nat'l Bank v. Silverman, 148 App. Div. 1, 132 N.Y. Supp. 1017 (1st Dep't 1911), *aff'd on opinion below*, 210 N.Y. 567, 10 N.E. 1134 (1914). Defendant attempted to set up as a counterclaim a forged check on which the bank had paid out. On appeal, the court reversed the trial court's dismissal of the counterclaim. As part of defendant's business practice he purchased claims of army officers for their future salary. In response to a request by letter that he purchase such a claim, defendant, after checking the service list, mailed a check to a Lieutenant Colonel Frederick Marsh. The court held that the endorsement of the check by the impostor was a forgery, stating that defendant fully protected himself by addressing his correspondence in the name of the official, with his official title prefixed, and by making the check payable to the official by his respective title of office.

³⁹ The payroll situation has been said not to be a true impostor situation because there is an imposition only on the party who takes the instrument from the impostor. Abel, *The Impostor Payee* at 168-69. However it would seem proper to treat it, since all courts determine the liability of the parties on the dominant intent theory and several have explicitly held that it is an impostor situation.

⁴⁰ American Nat'l Bank v. United States, 250 F.2d 114 (5th Cir. 1957). "As in the case of countless other routine commercial transactions in which claims for payment or refund are processed in the business world, there is little to breathe into the transaction an articulate consensual 'intent' which would characterize more weighty matters or those found in a more primitive society." *Id.* at 117. It would seem that the court attributes to the drawer the intent that he should have had, had he addressed his thoughts to his signing. RESTATEMENT, PROPERTY §§ 241-48 (1936) (judicially ascertained intent).

⁴¹ A real person who is not intended to have any interest in the proceeds

the courts reason that the intent of the corporation is the intent of the person drawing the check,⁴² *i.e.*, the agent. If he makes it payable to a real person, who is not intended to receive it, the instrument becomes bearer paper. Therefore it requires no endorsement and no signature can be deemed a forgery. Hence the drawer can never recover from the bank for money paid out on the check.⁴³ On the other hand, if an authorized agent draws a check payable to a non-existent person, the courts reason that the corporation's intent, being the intent of the agent,⁴⁴ is to make the check payable to a person known to the drawer to be fictitious and again the instrument becomes bearer paper.⁴⁵

However, the agent's duty may be merely to prepare checks payable to persons to whom the corporation is in debt and submit them to an officer of the corporation, who has the power to sign them. Again using the dominant intent theory, the courts attempt to determine the "intent" of the corporation. The reasoning is that the corporation's intent is the intent of the officer signing the checks⁴⁶ and, assuming he is not a party to the fraud, his intent is that the payee be the person represented by the name on the instrument. The checks are not payable to bearer.⁴⁷ Consequently if it is made out to a real person, such as a person working with a dishonest agent, that person only is the proper party to endorse,⁴⁸ and such an endorsement

of an instrument is considered a "fictitious" person. *Phillips v. Mercantile Nat'l Bank*, 140 N.Y. 556, 35 N.E. 982 (1894).

⁴² *Phillips v. Mercantile Nat'l Bank*, *supra* note 41; *United States Cold Storage Co. v. Central Mfg. Dist. Bank*, 343 Ill. 503, 175 N.E. 825 (1931); *BRITTON, BILLS & NOTES* 699-702 (1943).

⁴³ *Norton v. City Bank & Trust Co.*, 294 Fed. 839 (4th Cir. 1923); *Bartlett v. First Nat'l Bank*, 247 Ill. 490, 93 N.E. 337 (1910); *Snyder v. Corn Exch. Nat'l Bank*, 221 Pa. 599, 70 Atl. 876 (1908); *BRITTON, BILLS & NOTES* 698-702 (1943); *WHITNEY, BILLS & NOTES* 47-48 (1948). See also *Litchfield Shuttle Co. v. Cumberland Valley Nat'l Bank*, 134 Tenn. 379, 183 S.W. 1006 (1916), wherein a manager who was authorized to draw checks for a corporation forged endorsements on certain of the checks and procured payment to himself. It was held that by negotiating the checks the manager warranted that they were genuine and neither he nor the corporation could set up the forgery.

⁴⁴ See note 42 *supra*.

⁴⁵ *BRITTON, BILLS & NOTES* 698-99 (1943); *WHITNEY, BILLS & NOTES* 47-48 (1948).

⁴⁶ *United States Cold Storage Co. v. Central Mfg. Dist. Bank*, 343 Ill. 503, 175 N.E. 825 (1931). *BRITTON, BILLS & NOTES* 703-06 (1943).

⁴⁷ *Ibid.*; *WHITNEY, BILLS & NOTES* 47 (1948).

⁴⁸ *Fidelity & Deposit Co. v. Union Trust Co.*, 37 F. Supp. 3 (W.D.N.Y. 1941). One O'Connel, an adjuster for an insurance company, conspired with a doctor and others to present fraudulent accident claims. He would report the alleged accident and submit recommendations for settlement. Three drafts were involved in the case, one each to X, Y, and Z, X being an actual person using his true name and Y and Z being actual persons using assumed names. The court found that X did not endorse but that his endorsement was made by another and was a forgery. As to Y and Z, the court found that they themselves endorsed using the names they had taken for the purpose of the fraud. "They were real persons although they were using aliases to aid them in their

would not be a forgery. However if another person, such as the agent himself, endorses, that will be a forgery.⁴⁹

If an agent submits to the company officer a check made out to a fictitious person the courts, although all apply the dominant intent theory, are not in agreement as to the result. Under the minority view the reasoning is that the corporation must have intended to deal with someone. The only person in the picture being the agent, he must be the proper person to endorse, and should he do so, there will be no forgery.⁵⁰ Conversely, under the majority⁵¹ view the

fraudulent scheme. The intent of the drawer . . . should govern in determining whether there was a forgery." *Id.* at 4. The court held that *Y* and *Z* could transfer title to the drafts because they were identified by previous dealings with the insurance company and intended to be described by the names *Y* and *Z* in the drafts issued them.

⁴⁹ *Fitzgibbons Boiler Co. v. National City Bank*, 287 N.Y. 326, 39 N.E.2d 897 (1942); *Fidelity Deposit Co. v. Union Trust Co.*, *supra* note 48.

⁵⁰ *Atlantic Nat'l Bank v. United States*, 250 F.2d 114 (5th Cir. 1957), *citing* *United States v. Continental-American Bank & Trust Co.*, 175 F.2d 271 (1949) and *Continental-American Bank & Trust Co. v. United States*, 161 F.2d 935 (5th Cir. 1947). *But see* *McCornack v. Central Sav. Co.*, 203 Iowa 883, 211 N.W. 542 (1926). (Forgery can be in name of fictitious person if intention is to defraud. *Id.* at 545.) At least one writer feels that the payroll situation is not a true impostor situation for there is really only one imposition, that on the one to whom the instrument is delivered. Abel, *The Impostor Payee* at 168-69. However, the results reached in the decisions are the same as though it were, once the courts apply the dominant intent rule.

⁵¹ The two views are clearly set out in *Atlantic Nat'l Bank v. United States*, 250 F.2d 114 (5th Cir. 1957), where one Howard, a tax collector, submitted lists of names of persons to whom a tax refund was due. These names were fictitious. The collector obtained the checks and endorsed the name of the fictitious or non-existent payee. The majority, feeling that it was an impostor case, held that the collector was the proper person to endorse. "[T]he dealings had to be between the Revenue Service and some person, otherwise the papers would never have been submitted in the first instance. And, of course, the only person was Howard. . . . [I]t was with him, under other names, that the government was necessarily carrying on its dealings." *Id.* at 118. (Emphasis added.) The opposite view is taken of the same facts in a strong dissent. "It seems clear to me that Howard simply appropriated checks intended for 109 other, albeit fictitious persons, and that he did not become a *human chameleon* by impersonating each of those many people. It seems *preposterous* to say that Howard was the real payee, the person for whom each of the 109 checks was really intended. . . . Instead, I would say, 'While that person was non-existent, it certainly was not Howard, who had misrepresented the existence of such person, but not that he himself was that person.'" *Id.* at 119 (dissenting opinion). (Emphasis added.) The closest case found on the point in New York is *Hartford v. Greenwich Bank*, 157 App. Div. 448, 142 N.Y. Supp. 387 (1st Dep't 1913), *aff'd on opinion below*, 215 N.Y. 726, 109 N.E. 1077 (1915), *overruled in* *Ulman Co. v. Central Union Trust Co.*, 257 N.Y. 563, 178 N.E. 796 (1931) (mem. opinion). In the *Hartford* case, a company's dishonest employee submitted bills purported to be owing to one James Wilson. The company drew checks covering the amounts and mailed them to a post office box, which the employee had rented in the name of Wilson. The holding that the company intended to make the check payable to the employee was overruled in the *Ulman* case, *supra*, where the court said it was *inconsistent* in principle with *Strang v. Westchester County Nat'l Bank*, 235 N.Y.

courts feel that whoever the corporation intended as the payee, it certainly was not their dishonest agent, so that if he endorses the instrument it is treated as a forgery.⁵² It would seem that if the check were treated as a nullity the result would be the same, since the cases involving such paper hold that the banks should not pay out on this type of instrument.⁵³

At least two legislative solutions to the impostor payee problem have been proposed and are in effect in some jurisdictions. One is the "Fictitious Payee Act,"⁵⁴ amending section 9(3) of the Uniform Negotiable Instruments Act. This amendment designates as bearer paper an instrument prepared for signature by a dishonest employee, making endorsement unnecessary, so that there could be no forgery which would allow the drawer to recover. Thus where an instrument was drawn by an officer of the corporation to a person known only to a dishonest agent to be non-existent there would be no forgery. The loss in all these cases would fall on the drawer.

A more comprehensive proposal is embodied in the Uniform Commercial Code.⁵⁵ Under the Code an endorsement by *any* person

468, 139 N.E. 576 (1937), note 30 *supra*, and *United Cigar Stores Co. v. American Raw Silk Co.*, 184 App. Div. 217, 171 N.Y. Supp. 480 (1st Dep't 1918), *aff'd mem.*, 229 N.Y. 532, 129 N.E. 903 (1920).

⁵² *Cohen v. Lincoln Sav. Bank*, 275 N.Y. 399, 406, 10 N.E.2d 457, 460 (1937); *Shipman v. Bank of New York*, 126 N.Y. 318, 27 N.E. 371 (1891); *Commonwealth v. Globe Indem. Co.*, 185 Atl. 796 (Pa. 1936), where the court held that the drawer did not intend that the dishonest clerk should endorse the payee's name. Further, the court said the checks were not susceptible of a genuine endorsement. See also *United Cigar Stores Co. v. American Raw Silk Co.*, *supra* note 51; *United States Cold Storage Co. v. Central Mfg. Dist. Bank*, 343 Ill. 503, 175 N.E. 825 (1931).

⁵³ *International Aircraft Trading Co. v. Manufacturers Trust Co.*, 297 N.Y. 285, 79 N.E.2d 249 (1948) (A check drawn payable to a non-existing corporation was held to be a "legal nullity, not entitled to be honored" and the bank was liable for charging it against plaintiff's account.); *Swift & Co. v. Banker's Trust Co.*, 280 N.Y. 135, 145, 19 N.E.2d 992, 997 (1939) ("a mere scrap of paper creating neither right nor obligation") (dictum); *Jacoby v. Klein*, 241 App. Div. 470, 272 N.Y. Supp. 871 (1st Dep't 1934). *But see Alent v. Bank of United States*, 131 Misc. 370, 226 N.Y. Supp. 653 (County Ct. 1928).

⁵⁴ This act has presently been adopted in eighteen states: ALA. CODE ANN. tit. 39, § 13(3) (Supp. 1955); ARK. STAT. ANN. § 68-109(3) (Supp. 1957); CAL. CIV. CODE § 3090(3) (West 1954); FLA. STAT. ANN. § 674.11(3) (Supp. 1957); GA. CODE ANN. § 14-209(3) (Supp. 1955); IOWA CODE ANN. § 541.9(3) (Supp. 1958); LA. REV. STAT. ANN. 7:9(3) (West 1951); IDAHO CODE ANN. § 27.109(3) (1948); ILL. ANN. STAT. c. 98, § 29(3) (Smith-Hurd 1935); MINN. STAT. ANN. § 335.052(3) (Supp. 1957); MO. ANN. STAT. § 401.009(3) (1952); MONT. REV. CODES ANN. § 55-209(3) (1954); N.M. STAT. ANN. § 50-1-9(3) (1953); N.C. GEN. STAT. § 25-15(3) (1953); UTAH CODE ANN. § 44-1-10(3) (Supp. 1957); VA. CODE ANN. § 6-361(3) (Supp. 1958); W. VA. CODE ANN. § 4321 (1955); WYO. COMP. STAT. ANN. § 40-109(3) (Supp. 1945). See *Swift & Co. v. Bankers Trust Co.*, 280 N.Y. 135, 19 N.E.2d 992 (1939); *Citizens Loan & Security Co. v. Trust Co.*, 79 Ga. App. 184, 53 S.E.2d 179 (1949), 3 VAND. L. REV. 109.

⁵⁵ The Uniform Commercial Code has been adopted in Massachusetts

in the name of a named payee is effective in all the impostor situations, whether in person, by correspondence or where a dishonest agent has supplied the drawer with the name of a payee, real or imaginary, intending that said payee have no interest in the instrument. Such an endorsement is effective whether the instrument has been issued to the impostor or his confederate. The Code section also provides that it does not affect the criminal or civil liability of a person so endorsing.⁵⁶

It should be noted that the Code does not make bearer paper of the instrument, but rather makes the impostor's endorsement effective to transfer title.⁵⁷ The stated purpose of the Code in the payroll situation is to place the loss on the drawer, and thereby to make that loss a cost of business. Both the Fictitious Payee Act and the Code would place the loss on the drawer in each situation where they apply. This would codify the majority rule in those cases where the drawer and impostor deal face to face, or by mail, and in the payroll situations where the dishonest agent has the power to draw the check, but would change the majority rule in the payroll cases where the agent submits a padded list and would resolve the differences of opinion where the agent submits a fictitious name. It would seem that a person who would trick a drawer into issuing a check by padding a payroll list would not hesitate to write an endorsement in the proper form so that the varying approaches of the Uniform Fictitious Payee Act, not requiring endorsement, and the Uniform Commercial Code, requiring one, would be of little practical difference. Further if one accepted what appeared to be an order instrument without endorsement, it would seem, that he might not be a holder in due course because he would take it with notice of an infirmity.⁵⁸

Conclusion

Whether the dominant intent rule is psychologically sound or not, it would seem that the courts will continue to apply it in impostor cases, at least until there is legislation on the point.

If the rule were generally recognized to be a legal fiction so that the result aimed at would determine its application rather than the converse, *i.e.*, following the rule to its conclusion wherever it may lead, there would be no need to do away with it. The fact that it is not so recognized is again pointed up by a recent case⁵⁹ wherein

[MASS. ANN. LAWS c. 106, § 3-405(1)(c) (Spec. Supp. 1958)] and Pennsylvania [PA. STAT. ANN. tit. 12, § 3-405(1)(c) (1954)].

⁵⁶ UNIFORM COMMERCIAL CODE § 3-405(2).

⁵⁷ Compare UNIFORM COMMERCIAL CODE § 3-405(1)(c), with UNIFORM NEGOTIABLE INSTRUMENTS LAW § 9(3) as amended and adopted in the states mentioned in note 54 *supra*, which makes the instrument bearer paper.

⁵⁸ UNIFORM NEGOTIABLE INSTRUMENTS LAW § 52(4), N.Y. NEGOTIABLE INSTR. LAW § 91(4).

⁵⁹ Atlantic Nat'l Bank v. United States, 250 F.2d 114 (5th Cir. 1957).

a dishonest government employee caused over a hundred instruments to be drawn to non-existing payees. The court there applied the theory to the effect that since the employee was the only person involved he *must* have been the person with whom the government intended to deal and consequently the proper person to endorse each of the instruments.⁶⁰ Early adoption of legislation in the area would seem to be in order.

The legislation proposed and already adopted in some jurisdictions⁶¹ will serve the good purpose of doing away with the necessity of using the dominant intent rule to decide the impostor⁶² cases. Moreover it will substitute the certainty of result advocated by many as important to the free circulation of negotiable paper.⁶³ However, it should be noted this legislation does not leave any room for a recovery by the drawer in a case where he was not negligent in the issuance of the instrument and the person taking the instrument from the impostor was negligent in so doing.⁶⁴

It is submitted that the difficulty of administering a rule allowing for a recovery in such an instance would be no greater than the difficulty presently encountered in discovering the intent of the drawer, and would reach a more desirable and equitable result.

⁶⁰ *Id.* at 117. See also note 51 *supra*.

⁶¹ See note 57 *supra*.

⁶² "It is meaningless and unworkable. It derives from elimination and oversimplification among the mental drives which produce the delivery of the instrument, and is as unreal as a frankly arbitrary approach to intention would be, with the added disadvantage of deluding the courts and the profession into the belief that it expresses a usable factual basis for differentiation." Abel, *The Impostor Payee* at 231.

⁶³ See, e.g., one of the more forceful statements: "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, 18 U. CHI. L. REV. 281, 286 (1951). See also 24 VA. L. REV. 192, 193-94 (1937) (more desirable to facilitate commercial transactions than to protect the party defrauded).

⁶⁴ Although negotiable instruments have their roots in the law merchant, Aigler, *Commercial Instruments, the Law Merchant, and Negotiability*, 8 MINN. L. REV. 361 (1924), the common-law concept of negligence is not foreign to this body of law. See, e.g., UNIFORM NEGOTIABLE INSTRUMENTS LAW § 23, N.Y. NEGOTIABLE INSTR. LAW § 42; Stella Flour & Feed Corp. v. Nat'l City Bank, 285 App. Div. 182, 136 N.Y.S.2d 139 (1st Dep't 1954), *aff'd mem.*, 308 N.Y. 1023, 127 N.E.2d 864 (1955). See also Leather Mfrs.' Bank v. Morgan, 117 U.S. 96 (1886); Gutfreund v. East River Nat'l Bank, 251 N.Y. 58, 167 N.E. 171 (1929); Coffin v. Fidelity-Philadelphia Trust Co., 374 Pa. 378, 97 A.2d 857 (1953); Abel, *The Impostor Payee* at 391-97. See also UNIFORM COMMERCIAL CODE § 3-406, adopting the reasoning of Young v. Grote, 4 Bing. 253, 130 Eng. Rep. 764 (C.P. 1827).