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Right of Banks to Recover Money, Paid on Forged Paper

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THESIS.

RIGHT OF BANKS TO RECOVER MONEY PAID ON FORGED PAPER.

by

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A U T H O R I T I E S .

P R E F A C E .

In writing this thesis I have endeavored to trace the growth of the law, and to give some notion of how the courts now stand, when treating cases involving the Right of Banks to Recover Money Paid out on Forged Indorsements.

Several able writers have devoted considerable space to the consideration of the subject and among them are Mr. Morse, who has perhaps the best discussion; Mr. Daniel also discusses it at some length in his work on Negotiable Instruments, and in 9 American Law Review 411 is a well written article.

In my treatment I have been obliged, in some instances to rather closely follow the texts, for the reason that the few leading cases have been discussed, critisized, and commented on, over and over again.

D. S. T.

At the present day very few business transactions of importance are for cash; our civilization has done away with payment in kind and the majority of business dealings are of such a nature that ready money is not convenient and payment is made by a bill or check drawn upon some banking house of which the drawer or maker is a customer.

This improved system of payment has given rise to a comparatively new species of crime, and where formerly our prisons were filled with men whose strange order of genius had made it possible for them to imitate, almost to perfection, our currency; now these later day geniuseses, profiting by the experience of their progenitors in crime are a standing menace to our banks. Hardly a day passes but some paper bearing a forged signature is innocently discounted or paid. To find when and from whom this money can be recovered is the subject under investigation.

And first as to what constitutes forgery, the defin-

ition which Mr. Daniel adopts, and which he takes from Byles on Bills, is this: Forgery is the counterfeit making of any paper with intent to defraud. This seems to be a good and comprehensive definition, including cases in which one having authority to fill in an amount fraudulently, fills in a larger amount. It may be[1] noted here that in this state one having authority to fill out checks signed in blank, and exceeds his authority by filling out a larger amount is not guilty of forgery, and consequently my inference would be that the maker must, as it is not a forgery, be liable for the full amount.

The material[2] alteration of a completed instrument is a forgery.

As soon as a person or bank finds that he is the holder of the forged paper, it is his duty to give notice to the person from whom he received the instrument. Some courts hold that this notice must be given immediately but the later, and, I believe, more general rule is that notice should be given without unreasonable delay. The reason that this notice must be given is in order to allow

1. People vs. Heimtz 7 Crim. R. 71.
2. Dwight vs. Holbrook, 1 Allen at 532.

the person preceding the holder - the man who gave him the instrument - to have a chance to indemnify himself. According to Daniel when there is an indorser on the instrument who is entitled to notice, the demand must be made in time for the holder of the instrument to notify the indorser. And, also according to the same authority, he must, unless the instrument is an utter forgery, and absolutely worthless, return the paper so that the party responsible to him can make the best of it.

But the time within which notice must be given to allow a recovery has not been definitely settled; the rule seems to be within a reasonable time after the forgery is discovered, and some of the cases limit this time to the day upon which it was discovered. Others, more liberal, have allowed several days. But it does not follow from the above that the forgery must be discovered at once, after the customer has received the check, as in a late New York case[1] forgeries were going on for a period of four years; periodical settlements were being made, and still, when the forgery was discovered the court held that the plaintiff

1. 126 N.Y. 209

had given notice as soon as the forgery was discovered and and that that was sufficient.

The writer of an able article in The American Law Review[1] divides the cases which we are about to consider into two classes: first, actions brought by the holders of paper against parties whom they claim to be liable. second actions brought to recover money paid by one party to another under mutual mistake of facts. The one party at the time supposing facts to exist which make him liable to pay, and the other party supposing facts to exist which entitle him to receive the amount paid.

Probably the first leading case decided along this line was that of Price vs. Neale decided by Lord Mansfield in 1762.[2] It is true that in Jenys vs. Fawler,[3] Lord Raymond, the then Chief Justice, inclined strongly to the belief that even actual proof of forgery of the name of the drawer would not excuse the defendants against their acceptance, because of the danger to negotiable notes. But the peculiar notion advanced in this case of ignoring the very existence of forged paper was soon

1. 9 Am. L. Rev. 411. 2. 3 Burrows 1355. 3. 2 Strange. 946.

dropped.

It was not until Price vs. Neale that the rule was definitely laid down, but it must have existed before, even if not written in the books, or Lord Mansfield would not have summarily closed the case saying it was one of those which could never be made any plainer by argument.

The case was this:[1] the amount sought to be recovered was the combined sum of two bills of exchange drawn on the plaintiff. The plaintiff paid the first bill when it was presented to him, without having previously accepted it. The drawers signature was forged. As to the other, it was drawn in the same name as the first, was accepted, and after acceptance it came into the hands of the same innocent holder for value. The two bills are entirely different. In the first the plaintiff never promised to pay the forged bill but did pay it; in the second the plaintiff paid, after having accepted, a forged bill.

"The[2] defendant, Neale, acted innocently and bona fides, without the least privity or suspicion of the forgeries or either of them, and paid the whole value of those

1. 9 Am. L. Rev. 411. 2. 3 Burr. 1354.

bills." Lord Mansfield stopped the argument saying:"It is an action for money had and received to the plaintiffs'use In which action the plaintiff cannot recover the money In unless it be against conscience in the defendant to retain it, and great liberty is always allowed in this sort of action." The broad rule thus laid down is practically this:[1]" The banker is bound to know the hand writing of his customer; the drawee is bound to know the signature of his drawer, whence it follows that if the banker or drawee makes a payment or gives credit on the strength of a forged signature, the loss must be his as between himself and the depositor. The blunder is his; he has not known what he is bound to know. Having parted with his money by means of his own culpable negligence, he cannot be permitted to recover it back again when he afterwards discovers his error.

I have paid perhaps more than necessary attention to the case of Price vs. Neale, and have dwelt too long upon the primary rule developed by it. But it is this case which first, in express terms lays down the rule, which with

1. Morse on Banking 328.

slight variation, or as Mr. Morse says " paring down " exists to day. It is of this case and rule that Mr. Justice Story says:[1] " It has never been departed from, and in all the subsequent decisions in which it has been cited it has been deemed a satisfactory authority".

The rule laid down in Price vs. Neale, has, notwithstanding Judge Story, been very seriously departed from and much criticised, and the modern tendency seems to be, while not entirely to depart from it, to limit it to a great extent, so that it is now safe to say that the rule, broad and all-including as it is to be inferred from the decision of Lord Mansfield is no longer law. Judge Phelps of Vermont spoke truly when he said that the rule was too sweeping, according to the modern interpretation of the law

Many cases have been decided erroniously and unwisely by applying the rule when the facts did not warrant it, and such decisions have had a tendency to make the rule doubted, when in fact not the rule but the application was at fault. As an illustration of the above the following case bears witness. While not strictly in point the case

1. 6 U.S. 423.

of the Bristol Knife Company vs. The First National Bank of Hartford[1] is in the same line, and is, to my mind, one of the most glaring instances of injustice in the history of jurisprudence.

The treasurer of the plaintiff sent a messenger to a bank in another city -where they had an account-with a check, indorsed by them, enclosed in a sealed envelope. The plaintiffs at the time knew that the messenger was given to intoxication and was generally untrustworthy. On the way the messenger took out the check, and presenting it to the bank, drew the money and absconded. In a suit brought against the bank it was held that the plaintiffs could recover.

This case can be traced directly to the line of cases under discussion. Several cases are cited in the briefs which are in the books as illustrations of the rule in Price vs. Neale. But why should the bank recover? Is it supposed to know intuitively that when a check is brought to its window by the messenger of a business house he has torn up his directions and taken the wrapper

1. 41 Conn. 421.

from around it? Is the bank at fault because it pays value for a check indorsed in blank? Is it supposed to know that the house sending it intended it for adeposit? No. and it is this kind of cases that has reduced the law to almost a chaos. The earliest case decided on this side of the water was that of Levy vs. The Bank of the United States.[1] In this case a forged check, drawn upon one bank had been accepted by the latter and carried to the credit of the plaintiff. On the refusal of the bank afterwards to pay the amount suit was brought. The court expressly held the plaintiff entitled to recover on the ground that the acceptance concluded the defendant. The case was a very strong one for the fraud was discovered only a few hours after the receipt of the check and immediate notice given, but this seemed to have no effect on the decision "Some of the cases", said the court, "hold that the acceptor is bound because the acceptance gives a credit to the bill etc. But the modern cases certainly notice another reason for his liability which we think has much good sense in it, namely that the acceptor is pre-

1. 1 Binn 27 also 10 Wheaton 354.

sumed to know the drawer's hand writing, and by his acceptance to take this knowledge upon himself.

The language of the above case is approved by the court in The United States Bank vs. Bank of Georgia,[1] where is to be found a learned discussion of the earlier cases. In concluding Judge Story says: "After some research we have been unable to find a single case in which the general doctrine thus asserted has been shaken or even doubted." "Considering then, as we do that the doctrine is well established; that the acceptor is bound to know the hand writing of the drawer, and cannot defend himself from the payment by a subsequent discovery of the forgery, we are of the opinion that the present case falls directly within this principle". The case in which this language was used was one in which a bank had received as genuine, forged notes purporting to be its own. and had passed them to the credit of a depositer in good faith. When they found out the forgery they tried to recover but it was held that they were bound to the credit thus given, and the notes must be treated as cash.

1. 6 U. S. 431

It has often been held that the reason for holding banks liable is on account of their negligence in not sufficiently scrutenizing the bill or check, and that they had no business to pay the amount of the paper until satisfied that it contained the bona fide signature of their customer. As for instance, in the case above, the bank had no right to credit the notes to their customer until they were sure that the bills were in fact those issued by the bank. And from this it follows that whenever the payee or holder of a bill does that which will throw the bank off its guard, and will deter it from as close an examination as it otherwise would make, then such payee or holder will be held liable.[1] A much cited case on this point is that of The National Bank of North America vs. Bangs.[1] A bank took in a forged check drawn on another bank and paid face value for it. The bank then indorsed the check and finally it reached the bank on which it was drawn, through the clearing house. About thirteen days later the bank, in settling with its customer turned the check over to him, and he immediately pronounced

1. 106 Mass. 441.

it a forgery and returned it to the bank, who in turn, at once notified the defendant. In an action brought to recover the money it was held that the defendants must lose the amount of the check on the ground that the check in question could not be given currency but by the defendants indorsement. and that by thus indorsing they had given to the check a sort of character which warranted it into whosever hands it might come, and this, of itself, had prevented the plaintiff bank from making as careful an inspection of the check as it otherwise would. The court held that this signature by the defendant put the plaintiff bank off their guard, and relieved them of the charge of negligence which some courts hold is the primary reason for making the bank stand the loss. According to Mr. Morse,[1] there is a gradual but sure tendency to throw the burden from the bank to the payee or holder, and now the principal question has come to be whether or not he he has done his duty. And from this the interesting question has grown up of what constitutes negligence in the bank, and under what circumstances it will be held to

1. Morse on Banking 331.

have used due care. All of these questions limit the rule of Price vs. Neale.

But this question is very undecided. In The Bank of North America vs. Bangs the court seems to shift the burden on the payee, but other courts, equally high, still stick to the old rule.

A case much cited by the courts in their decisions is that of The Bank of St. Albans vs. The Farmers and Mechanics Bank,[1] and it seems to me to raise some of the clouds which seem to envelope the question. Judge Phelps in delivering his opinion said that the case of Price vs. Neale is now understood to have proceeded upon the ground that the drawee is bound to know the writing of his correspondent, and, thus understood, its authority has never been questioned. And although the applicability of the rule to a transfer of forged paper between persons not parties to it is in doubt, it has never been critisized when the bill was paid by the drawee, and it applies as well to a bill paid on presentment as to one presented and afterwards circulated."

1. 10 Vt. 141.

The presentment of a bill to a drawee is a direct appeal to him to sanction or repudiate it. It is an inquiry as to its genuineness addressed to the party who, of all others is supposed to know, and to be the best able to answer it." "He is, moreover, the person to whom the bill itself points as the legitimate source of information to others, and if he were permitted to dishonor a bill after having once honored it, the very foundation and confidence in commercial paper would be shaken".

Mr. Daniel[1] advances a theory of his own, "which", he says, "is much better calculated to effectuate justice than the doctrine of Mansfield and Story." -"When the holder has received the bill after its acceptance the acceptor stands toward him as the warranter of its genuineness, and receiving the bill upon faith in the acceptor's representation, there is obvious propriety in maintaining his right to hold the acceptor absolutely bound. Indeed the acceptor, being the primary debtor stands just as the maker of a promissory note. But when the holder of an unaccepted bill presents it to the drawee for acceptance or payment

1. 2, Daniel on Negotiable Instruments 379.

the very reverse of this rule would seem to apply; for the holder then represents, in effect, to the drawee that he holds the bill of the drawer and demands its acceptance or payment as such. If he indorses it, he warrants its genuineness, and his very assertion of ownership is a guaranty of genuineness in itself. Therefore, should the drawee pay it, or accept it on such presentment, and afterwards discover that it was forged he should be permitted to recover the amount from the holder to whom he pays it, or as against him to dispute the binding force of his acceptance, provided he acts with due diligence." And he further says:" The mistake of the drawee should always be allowed to be corrected unless the holder, acting upon faith and confidence induced by his honoring the draft would be placed in a worse position by according such privilege to him."

In closing his discussion, Mr Daniel says that even where the general rule which I have beforesuggested he does not believe in - is recognized there are several exceptions to it. (1) where the payee receives the money,"

for the payee can be no loser by refunding money paid under such a forgery, and (2) where either by agreement or course of business between parties, or a general custom the holder takes upon himself the duty of exercising some material caution to prevent the fraud and by his negligent failure has contributed to induce the drawee to act upon the paper as genuine and to advance the money upon it. And he makes a third case where the parties are mutually in fault.

In National Park Bank vs. Fourth National Bank[1] Barrett, J. said: "The difficulty of disposing of the question consists neither in arriving at the justice or common sense of the case, nor in the obscurity of the underlying principle. It is debatable only because of the superficial consideration which the subject has received, and in the absence of a guiding principle in one of the earlier cases. Price vs. Neale- and because of some dicta in our own courts, in which subsequent criticisms upon the case are completely overlooked."

In this case the old cases, developing the rule are

1. 7 Abb. 138.

minutely examined, and Price vs. Neale is severely dealt with, the doctrine is called extraordinary and no longer law either in England or the United States, and Chitty is cited to bear the court out in its proposition. The decision in Bank of Commerce vs. Union Bank[1] was thrown aside as mere obiter dicta. And, in concluding, the Court said that after carefully examining all the authorities. it was impossible to lay down any one clear and comprehensive rule, nor even any single definite principle which would solve all the questions arising under the subject.

The language of Chitty, which the court seemed to use as sort of a light-house and which several of the text writers, including Mr. Daniel, quote with approbation is as follows:" It may be observed that the holder who obtained payment cannot be considered as having altogether shown sufficient circumspection; he might, before he discounted or received the instrument in payment have made more inquiries as to the genuineness of the instrument; even of the drawer or indorsers themselves. If he thought fit to rely on the bare representation of the party from whom he

1. 3 N.Y. 230.

took it, there is no reason that he shoud profit by the accidental payment when the loss had already attached upon himself, and why he shoud be allowed to retain the money when by an immediate notice of the forgery he is enabled to proceed against all the other parties, precisely the same as if the payment had been made. Consequently the payment to him has not in the least altered the situation or occasioned any delay or prejudice. It seems that of late upon questions of this nature these latter considerations have influenced the court in determining whether or not the money should be recovered back; and it will be found on examining the other cases that there were facts affording a distinction and that upon attempting to reconcile them they are not in contradiction as might on first view be supposed."

The latest case that I have been able to find is that of Janin vs. London and San Francisco Bank,[1] decided by the Supreme Court of California No. 19,1891. In this case the plaintiff was a depositor in the defendant's bank and the defendant paid a large check purported to be drawn by

1. 34 Central Law Journal 49.

the plaintiff but which was in reality forged. The check was paid on May 29,1878, and on September 4,1878 the defendant returned to plaintiff his pass book,which contained a statement of his account up to date,-including the amount paid out on the forged check. Another statement was rendered the plaintiff on Dec.11,1878. It was not until Dec.28 that the plaintiff for the first time communicated to the defendants his doubt as to the genuineness of the check,and it was not until February 1,1879 that he actually gave notice that the check was a forgery. The point of the case seems to turn on the negligence or laches of the plaintiff in not giving earlier notice to the bank that the check was a forgery. And I think the discussion is within the spirit,if not strictly within the the letter of the old rule.

The check was payable to currency or bearer and the bank required no signature when it paid him the money. As some months elapsed between the paying of the check and and the statement to the depositor it was decidedly improbable that the bank could trace and identify the

swindler, even if the plaintiff had given immediate notice, when the first statement was presented to him, that the bill was a forgery. The notice was evidently given to the bank as soon as discovered, and the court held that the bank could recover nothing from the plaintiff. In its opinion the Court said: "It is the merest conjecture, with scarcely a possibility to support it, that the defendant, or those from whom it received the bill, could at any time after the transmission of the foreign bill of exchange to Baltimore, have taken any effectual measures either for arresting the swindler, or reclaiming the bill, bought and paid for upon the credit of the bill. Estoppels cannot be based upon mere conjectures, even if a proper foundation is laid for them in other respects." This they took to be the general rule, and quoted the above language from a New York case.[1]

In speaking of the forgery the court clings to the general rule and says" All unauthorized payments such as upon forged checks are, therefore, made at the peril of the bank, and it is not justified in charging them against the

1. White vs. Bank 64 New York 322.

depositor's account unless some negligent act of his in some way contributed to induce such payment in the first instance, or unless by his subsequent conduct in relation to the matter he is upon equitable principles estopped to deny the correctness of such payments. This view of the law cannot well be questioned, and finds abundent support in the decisions of the courts."

At the end of the case there is a valuable note by the reporter, who agrees in every particular with the ruling of the California Supreme Court, and quotes, with approval, part of the decision in Hardy vs. Chesapeake Bank, 51 Md. 562.

In Frank vs. Chemical National Bank[1] the plaintiff kept a running account at the bank of the defendants. In the margin of their check book the plaintiffs made memoranda of all checks drawn by them. Every settling day a balance was struck. A book-keeper always attended to this and forged many checks and they were returned to the firm on settling day by the bank. When the checks were returned the plaintiffs, with the assistance of the book-keeper

1. 84 N.Y. 209. 23 Albany Law Journal 313.

would go over the accounts and compare the checks with the marginal memoranda. By doctoring the books the book-keeper managed to deceive the plaintiffs until thirty four forged checks had been paid by the bank and charged to the account of plaintiffs before the forgery was discovered. It was held that the plaintiffs could recover. The court said:"The principal that a bank cannot pay out the money of a depositer and debit them to his account is clear enough. It makes no difference that the forgery was committed by a confidential clerk of the depositer,who by his position had unusual facilities for perpetrating the fraud,and imposing the forged paper upon the bank.-----But when the forged checks have been paids and charged in the account and returned to the depositer he is under no duty to the bank to conduct the examination so that it will necessarily lead to the discovery of the fraud."

In the Quarterly Law Review[1] there is a resume of the late English case of Vagliano vs. Bank of England. Mr. Chalmers,the author of the article,says that this case" affords a good illustration of the incertainty of law and

1. Vol 7.Page 217.

the kaleidoscopic nature of the judicial mind." This case was appealed and reversed. The court of First Instance deciding with almost one voice for the plaintiff, and the House of Lords with almost equal unanimity reversed the decision. The case was this; The plaintiff was a customer of the Bank of England and was in the habit of accepting his bills payable there. A confidential clerk forged drafts drawn on the plaintiff and without discovering the fraud he accepted them; to make the deception more perfect the clerk forged letters of advice in the name of the supposed drawer. The money was paid to the forgerswho also forged the payee's signature and the plaintiff brought this action to determine whether he, or the bank must stand the loss. "It was admitted that, as the plaintiff had really accepted the bills he could not dispute the drawers signature, but, it was urged, there was nothing to prevent him from settling up the forgery of the payee's indorsement, the bank therefore had paid the bills to a person who could not give a discharge of them, and according to the principle of the decision in Robarts

vs. Tucker[1], they were not entitled to debit his accounts with such payments."

The Bank defended on two grounds, (1), that the plaintiff had estopped himself by his negligence from settling up the forgery, and (2) By the English Bills of Exchange Act of 1882.

Two of the judges were of the opinion that the plaintiff was estopped by negligence. The remainder of the Court who expressed their views were of the opinion that he was not estopped. None of the judges threw any doubt on the rule of law, well established by previous cases, that in order to create an estoppel by negligence, the negligence relied on must have been the direct and proximate cause of the false signatures being taken as genuine."

But the main contention on the bill was on the construction of the Bills of Exchange Act, which enacted that" where the payee was a ficticious or non-existing person the bill is payable to bearer." And it was held that the payees were ficticious within the meaning of the Statue, and that the Bank was justified in paying the bills over

1. 16 Queens Bench 560.

its counter.

I will not give the reasoning of the case but one of the points discussed was how the payees who were real and natural persons could cease to be persons for this one purpose, and on this one bill become ficticious. The learned Mr. Chalmers says however that a French Count would have ultimately arrived at the same decision but by a different course of reasoning.

The latest case in our own State, that I have been able to find, is Shipman vs. The Bank of the State of New York.[1] This case, it would seem, is a very important one, carefully distinguished from the Vagliano decision, and may be regarded as the latest and best authority on this branch. As O'Brien J. said, in his decision, it resembles the Vagliano case more on account of the stupendousness of the fraud and forgeries than for anything else. The case was this; The plaintiffs were a law firm in New York doing a large business in real estate transactions. Over this department of their business they placed one Bedell, who had been long with the firm and enjoyed their confi-

1. 126 N.Y. 318.

dence to the highest degree. It is unnecessary here to to detail the manner in which the business was conducted or the manner in which he carried out his schemes. It is sufficient to say that he would draw checks, mostly to fictitious payees, which the plaintiffs would sign and give to Bedell for delivery. He would then forge the payee's name and draw the money. This was carried on for some four years and he obtained about $225,000. Only $2400. was paid to Bedell by the defendants, - the rest was deposited in other banks and ultimately paid out by the defendant, through the clearing house in the regular course of business. Sixteen of the checks were payable to fictitious persons, and the remainder to persons whose names Bedell deliberately forged. When the periodical settlements with the bank were made Bedell had principal charge of them, and it was only through accident that the forgeries were at last discovered. "The checks were paid in every case by the defendant without any inquiry as to the genuineness of the indorsements, and in reliance upon the responsibility of the parties presenting the same and not

in reliance on any thing done or forborne by the plaintiffs - except that they were signed by them."

"Payments made upon forged indorsements are at the peril of the bank, unless it can claim protection upon some principle of estoppel or by some negligence chargable to the depositor." (Numerous cases are cited to substantiate this proposition).

"The law imposed no duty on the plaintiffs to do more than they did to determine whether the indorsements on the check were genuine ------ The defendant's contract was to pay the checks only upon genuine indorsement. The drawer is not presumed to know and, in fact, seldom does know the signature of the payee. The bank must, at its own peril, determine that question. It has the opportunity by requiring identification when the check is presented, or a responsible guaranty from the party presenting it of ascertaining whether the indorsement is genuine or not"-------

"There is not the slightest reason to believe that if the examination was conducted by the plaintiffs, themselves, the result would have been any different".

It was claimed by the defendant that the sixteen checks made payable to the order of non-existing persons were in fact payable to bearer. And that such was the interpretation of the language of the statue[1] which says that paper payable to the order of a non-existing person should be treated as payable to bearer as against the maker and all persons having knowledge of the facts.

But on this point the court held that the rule only applied to paper put in circulation by the maker who knew at the time that the person was ficticious. "The makers intention is the controlling consideration which determines the character of such paper"

In speaking of the difference between the decision of the Vagliano case and the case at bar the court said that our statue in regard to ficticious payees was a codification of the common law while the intention of the English Statue was to depart from it. And after carefully discussing and studying the English case they were convinced that it was not an authority adverse to their decision in the present case.

1. 1 R.S. 768.

In conclusion, it is hard, as Judge Barrett said, to formulate any one, inflexible rule of law to suit all the the decisions, or to be used as a guide in all possible cases that may arise. It is safe, however, to say with Mansfield and Story that the rule that a bank is supposed to know the hand-writing of its customers has never been departed from by any high tribunal. It is evident from the foregoing pages that Judge Barrett, in 7 Abbott, tried to override the old rule, but decisions by the Court of Appeals have since failed to bear him out. A late California case, a late New York case, and the Vagliano case all seem to stick to the old rule. The decision in the Vagliano case was made partly in accordance with a late statutory enactment, and that, in the opinion of Judge O'Brien, is the reason that it should be considered, as far as the common law in it goes, as recognizing the rule. New York, in the case of Shipman vs. The New York State Bank, decided last year, still clings to the Price vs. Neale decision, and the United States Courts, have not, as far as I have been able to learn, ever substantially departed from it.

It is true that the courts of some states are in conflict with the general rule, but it may be, as a writer in The American Law Review suggest, more on account of a misconception of the rule, and the application of it to cases where the facts do not warrant it, than in any trouble with the rule. Mr. Morse and many other eminent writers lay it down as a general proposition that the rule is now as good as when declared a hundred years ago; but that the general tendency has been to "pare it down" and to shift the liability wherever possible from the bank to the shoulders of the payee. But a bank is only to pay out the money of its customer upon his order, and if they pay it upon the order of some one else they must bear the loss unless they can find the payee. Almost all the decisions quote with approval the early cases and the leading cases in this country. Mr. Chalmers said in discussing this subject that there are points which always have been and always will be in controversy, and Mr. Daniel is inclined to formulate a rule of his own rather than to stick to the old one. He thinks his better calculated to effectuate justice

Judge O'Brien does not regard the late decisions in England, as far as they are confined to the common law, and independent of statute, as in any way contrary to the well established doctrine. The difference between the English law and the law of our own country is, that in the former the statute regarding ficticious payees is construed to mean that if a person's name is used as a dummy payee by one who is perpetrating a fraud and forgery, the bill will be regarded as payable to bearer unless the maker knew that the payee was ficticious and intended the note as negotiable without indorsement before it left his hands.

I do not think that it is necessary to cite more cases, or to longer quote from decisions. In my opinion the rule, with some refinements, still stands and while it may in some cases seem to be harsh, inflexible and unjust, I it would be hard to work out any scheme applicable to all cases, which would be fairer.

Daniel Lamont Tuttle