

The parties having afterwards agreed as to the costs, that question was not argued; and upon a petition of the appellants (consented to by the respondents) it was ordered that each party pay their own costs in the appeal.

Solicitors for appellants: *Williamson, Hill & Co., for T. & H. Greenwood Teale, Leeds.*

Solicitors for respondents: *Torr, Janeways, Gribble, & Oddie, for Stewart & Sons, Wakefield.*

H. L. (E.)  
1890  
HOLLIDAY  
v.  
MAYOR, &C.,  
OF BOROUGH  
OF WAKE-  
FIELD.

[HOUSE OF LORDS.]

THE GOVERNOR AND COMPANY OF }  
THE BANK OF ENGLAND . . . . } APPELLANTS;  
AND  
VAGLIANO BROTHERS . . . . . RESPONDENTS.

H. L. (E.)  
1891  
March 5.

*Bill of Exchange—Estoppel—Negligence—Banker—Forgery of Name of Payee—Payee “a fictitious or non-existing person”—Knowledge of Acceptor—Fictitious Bill—Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) s. 7 sub-s. 3.*

The effect of sect. 7 sub-s. 3 of the Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) is that a bill may be treated as payable to bearer where the person named as payee and to whose order the bill is made payable on the face of it is a real person but has not and never was intended by the drawer to have any right upon it or arising out of it; and this is so though the bill (so called) is not in reality a bill but is in fact a document in the form of a bill manufactured by a person who forges the signature of the named drawer, obtains by fraud the signature of the acceptor, forges the signature of the named payee, and presents the document for payment, both the named drawer and the named payee being entirely ignorant of the circumstances.

A series of documents so manufactured were made payable at the acceptor's bank, and the amounts were paid over the counter to the forger or his agent by the bank *bonâ fide* and in pursuance of letters of advice signed by the acceptor, whose signature thereto was fraudulently obtained by the forger, a clerk in the employment of the acceptor:—

*Held*, that the bank was entitled to debit its customer, the acceptor, with the amounts, although paid to the forger or his agent and not to a *bonâ fide* holder of the documents for value or to any person who could sue the acceptor upon them:—

By Lord Halsbury L.C. and by Lords Watson, Herschell, Macnaghten, and Morris, on the ground that the named payee was a fictitious or non-

H. L. (E.)

1891

BANK OF  
ENGLANDv.  
VAGLIANO  
BROTHERS.

existing person within the meaning of the Bills of Exchange Act 1882 (sect. 7 sub-s. 3) and that the documents might be treated as bills payable to bearer; also

By Lord Halsbury L.C. and by the Earl of Selborne and Lords Watson, and Macnaghten for reasons turning on the conduct of the parties.

The decisions of Charles J. (22 Q. B. D. 103) and of the Court of Appeal (23 Q. B. D. 243) reversed on the above grounds.

*Held*, contra by Lords Bramwell and Field that a banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer, the acceptor: that the payee was not fictitious or non-existent, and that the documents could not be treated as bills payable to bearer within sect. 7 sub-s. 3 of the Act; that the conduct of the parties did not entitle the bank to debit the acceptor with the amounts; and that the decisions below ought to be affirmed.

**APPEAL** from a decision of the Court of Appeal (Cotton, Lindley, Bowen, Fry, and Lopes L.JJ., Lord Esher M.R. dissenting (1)) which affirmed the decision of Charles J. (2).

The facts are fully stated in the report of the decision of Charles J. and are also discussed in the judgments in this House. The arguments—all or most of them—also appear from the judgments, but the following short account may be useful to some readers.

1890. June 16, 17, 19, 20, 23, 24, 26, 27. Sir *R. Webster* A.G. and *H. D. Greene* Q.C. (*E. H. Pollard* and *R. M. Bray* with them) for the appellants:—

The bank has a good defence to this action both under the Bills of Exchange Act 1882 s. 7 sub-s. 3 and by estoppel or conduct. The Court of Appeal proceeded on *Robarts v. Tucker* (3), but that case does not apply. There there was a real payee named by a real drawer, payment to whom or to whose order alone could have enabled the acceptor to charge the drawer. Here there was no real drawer or payee, nor any person payment to whom or to whose order would have enabled the acceptor to charge the supposed drawer.

The only person entitled to name the payee of a bill is the drawer. The acceptor contracts to pay the person named by the drawer and authorizes his banker to pay accordingly. In the present case there was no genuine transaction in respect of which

(1) 23 Q. B. D. 243.

(2) 22 Q. B. D. 103.

(3) 16 Q. B. 560.

the bills were drawn: no genuine drawer or payee: the bills were a sham from beginning to end. Vagliano by accepting is estopped from denying the validity of the drawer's signature, but the forger of a drawer's name is not a legal drawer and cannot make of the nominal payee a genuine payee. C. Petridi & Co., the supposed payees, had no interest in the bills, no right to indorse them or be paid upon them: no person had any such right; and Vagliano, who had no right to require any one's indorsement, gave the bank authority to pay the bearer, there being no person who could have a better title. It is immaterial that C. Petridi & Co. were real people: they were none the less fictitious payees of these bills, having no interest in the bills. This being so the bills must be treated as payable to bearer under the Bills of Exchange Act 1882 s. 7 sub-s. 3 which enacts that "where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer." The Court of Appeal held that "fictitious" meant "to the knowledge of the acceptor," but where is the warrant for adding these words? The knowledge of the acceptor cannot make the payee more or less fictitious. Such a construction is inconsistent with the scheme of the Act, and on this point sect. 3 sub-s. 1, sect. 5, sect. 10 sub-s. 2, sect. 17, sect. 22 sub-s. 2, sect. 29 and sect. 41 sub-s. 2 should all be looked at. A holder of one of these bills, who had given value for it without notice, could have sued Vagliano on it, and the bank would therefore have been discharged by paying to such a holder. The bank is not the less discharged by paying without notice a holder who became possessed of the bill by fraud. The use of a real name owned by one or more people does not turn a fictitious payee into a real payee: *Stone v. Freeman* (1); *Collis v. Emett* (2).

The Court of Appeal reviewing some of the cases upon fictitious payees prior to the Act of 1882,—viz.: *Gibson v. Minet* (3); *Gibson v. Hunter* (4); *Mead v. Young* (5); *Bennett v. Farnell* (6); *Cooper v. Meyer* (7);—held that before the Act a bill made payable

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

(1) 1 H. Bl. 317, n.

(2) Ibid. 313.

(3) Ibid. 569, 588.

(4) 2 H. Bl. 187, 288.

(5) 4 T. R. 28.

(6) 1 Camp. 130, 180, c.

(7) 10 B. &amp; C. 468.

H. L. (E.) 1891  
 BANK OF ENGLAND  
 v.  
 VAGLIANO BROTHERS.  
 —

to the order of a fictitious payee could be treated as payable to bearer as against the acceptor or other person liable where the acceptor or such person knew the payee to be fictitious. But the above cases do not establish that proposition, and even if they did the Act of 1882 has left out the words "to the knowledge of the acceptor," and the omission is significant. The law before the Act is not as the respondents contend. See *Phillips v. Im Thurn* (1). There the acceptor upon protest of a bill for the honour of the drawer was held estopped from alleging in answer to an action by the indorser that the payee was fictitious and that he (the acceptor) was ignorant of that when he accepted it. See also *London & South-Western Bank v. Wentworth* (2).

Further, the conduct of Vagliano precludes him from saying that these payments were not made by his authority. But for his negligence these bills would never have come into existence. With a proper system of supervision Glyka's frauds must have been discovered. Vagliano was bound to know the signature of his customer Vucina: his act in mistaking the forged for the real signature of Vucina was the real cause of the loss. Moreover the payments by the bank were made in pursuance of Vagliano's letters of advice giving the dates, numbers and amounts of the bills which were coming forward. Of the two innocent persons Vagliano ought to suffer, his negligence being the cause of the loss. In such an action the plaintiff ought not to recover unless it is against conscience for the bank to retain the money: *Price v. Neal* (3). The bank have simply acted without negligence as Vagliano's agents in paying, having been induced to pay by his conduct. Vagliano's conduct brings the case within the principle of *Young v. Grote* (4). As to *Bank of Ireland v. Evans* (5), the seal of the corporation was affixed in fraud and without the knowledge of the corporation. The present is a much stronger case: Vagliano himself signed the bills and sent them out. Neither in that case nor in *Mayor, &c. of Staple of England v. Bank of England* (6) did the facts

(1) 18 C. B. (N.S.) 694; Law Rep. 1 C. P. 463.  
 (2) 5 Ex. D. 96.  
 (3) 3 Burr. 1355.  
 (4) 4 Bing. 253.  
 (5) 5 H. L. C. 389.  
 (6) 21 Q. B. D. 160.

resemble those in the present case. Here the negligence, or conduct, of Vagliano was the proximate cause of the loss, and he is therefore estopped: *Swan v. North British Australasian Co.* (1) See also *Baxendale v. Bennett* (2); *Arnold v. Cheque Bank* (3); *Halifax Union v. Wheelwright* (4); *Orr v. Union Bank of Scotland* (5); *Ireland v. Livingston* (6). The Court of Appeal seem to have held that the bank were negligent in paying the bills across the counter instead of through a banker; but how could they refuse payment? Nor if it were negligence could it be set off, as the Court of Appeal seem to have held, against the negligence of Vagliano.

Lastly, the pass book with the entries of these payments, and the bills themselves, were returned to Vagliano half yearly. He kept the bills and returned the pass book without objection. This amounted to a settlement of account, *primâ facie* at all events: *Commercial Bank of Scotland v. Rhind* (7).

Sir *C. Russell*, Q.C. and *Finlay*, Q.C. (*Hollams* with them) for the respondents:—

The Act of 1882 has no direct and only an incidental relation to this question. Sect. 7 sub-sect. 3 applies only to real bills, which these are not. The law prior to the Act is correctly stated in Story on Bills, ss. 56, 200, cited in the judgment of the Court of Appeal. (8) It is the assent of the acceptor which alone could estop him from denying that the bill was payable to bearer. That is the test; not the intention of the drawer. This was established by *Gibson v. Minet* (9); *Gibson v. Hunter* (10); and the other cases already referred to. And it is for the appellants to make out that the Act has altered the law. Where a principal authorizes his bankers as his agents to pay his acceptances, they are justified as against him in paying the person who can give a valid discharge. The authority is to pay according to the tenor of the bill, that is in the present case to the payees or their order. Here *C. Petridi & Co.*, of

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.

(1) 2 H. &amp; C. 175, 182.

(2) 3 Q. B. D. 525.

(3) 1 C. P. D. 578.

(4) Law Rep. 10 Ex. 183.

(5) 1 Macq. 513.

(6) Law Rep. 5 H. L. 395.

(7) 3 Macq. 643, 651.

(8) 23 Q. B. D. 257.

(9) 1 H. Bl. 569.

(10) 2 H. Bl. 187, 288.

H. L. (E.) Constantinople, were named as the payees. They were well known to Vagliano as old customers, and but for the fact of that knowledge Vagliano would not have accepted. They were real persons, as real as Vucina the drawer, and known to Vagliano to be so. The fraud of Glyka cannot turn them into fictitious persons. It has been argued by the appellants that C. Petridi & Co. had nothing to do with these bills and could not have indorsed them, and that a good title could not have been made. But that is not impossible. The indorsement of C. Petridi & Co. might have been procured by some clerk of their own acting in concert with Glyka. Or they might have bought the drafts (before acceptance) in order to remit money to London. Or lastly, they might have dishonestly indorsed the bills. In either of these three ways a good title could have been made. The appellants have therefore failed to shew that C. Petridi & Co. were "fictitious or non-existing" within the meaning of the Act. "A fictitious person" means a person who has never existed. "A non-existing person" means one who did exist but no longer exists. The words of the Act are not "a fictitious or non-existing payee," but "a fictitious or non-existing person," a material distinction. But assuming C. Petridi & Co. to be fictitious or non-existing persons, sect. 7 sub-s. 3, in saying that the bill may be treated as payable to bearer, means in the hands of a holder in due course, a lawful holder for value. The bank therefore is not discharged by paying Glyka who was not a holder in due course. That the legislature did not intend to protect banks in such a case as the present is shewn by sect. 60 which protects them in the case of cheques only. The object of the advice notes on which so much stress is laid by the appellants was simply that the bank might have money ready to meet the bills and to inform the bank that the acceptance was genuine and that Vucina was the drawer. The appellants insist that Vagliano represented to them that the bills were properly put into circulation. But suppose Glyka had obtained a genuine draft of Vucina's and had afterwards forged the payee's indorsement, it could have been said with as much truth that Vagliano had made that representation. Yet it would have been of no force, for in that case the payee would clearly

not have been fictitious. The case comes back therefore to the question whether the acceptor knew the payee to be a fictitious person. *Robarts v. Tucker* (1) applies to the present case, and the dicta of Maule J., during the argument, upon forged indorsements and as to the banker having a reasonable time to inquire whether an indorsement is genuine, are in favour of the respondents. As to negligence, Vagliano was not guilty of any negligence, at least of any which caused the loss: it was not negligence in or connected with the transaction. On the other hand the bank was guilty of negligence in paying such large sums over the counter instead of through a bank, and after the attention of one of the bank clerks had been directed to this very circumstance.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.

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Sir *R. Webster* A.G., in reply :—

There is no authority for the obiter dictum of Maule J., that a banker has a reasonable time for inquiry into the genuineness of an indorsement.

Whether a payee is real or fictitious must depend on the intention of the drawer. If the drawer's name is forged and the bill is a fiction, there can be no real payee though the named payee be a real person. A banker takes the risk of the indorsements being forged on a genuine bill; but the Legislature cannot have intended to impose such a risk where the bill is forged.

The House took time for consideration.

1891. Mar. 5. LORD HALSBURY L.C. :—

My Lords, the simple question in this case is whether the plaintiff's bankers have paid away the plaintiff's money under such circumstances as enable him to refuse to acknowledge the payments as made on his behalf. Each of the parties is innocent of any wilful default. They are both free from any suspicion of bad faith; but the banker has paid away and placed to the debit of his customer a sum of £71,500, while the customer was not

(1) 16 Q. B. D. 576, 577, 578.

H. L. (E.) conscious of and certainly never intended to authorize the payment of that sum on his behalf.

1891

BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.

Lord Halsbury,  
L.C.

The authority to pay, which was relied upon by the bankers as justifying the payments, was written documents in the form of bills of exchange, and, though they were not really bills of exchange at all, it is important to bear in mind what a real bill of exchange would import to the mind of a person to whom it was sent for payment.

Now, apart from the particular machinery by which this transaction was effected, it will not be denied that a principal who has misled his agent into doing something on his behalf which the agent has honestly done, would not be entitled to claim against the agent in respect of the act so done; and upon this branch of the case the question is whether the agent was misled into doing the act by the default of the principal: see *Ireland v. Livingston* (1).

I will treat the transaction for the sake of clearness as if it were a single payment. Could it be doubted that if the two parties met, and by word of mouth the customer had said to his banker, "There is a bill coming due to-morrow of such and such an amount; it is drawn on me by a customer of mine named Vucina, and will be presented for payment at your bank to-morrow," that such a statement was calculated to put the banker off his guard and be likely to induce him to act as he did act? Does it make any difference that the words were not spoken, but upon its face the document, reaching the banker's hands by the act of the customer, in which phrase I include the course of Vagliano's business, said this as plainly as if the words had been spoken? Vucina, in fact, had not drawn any such bill. There was no transaction between Vagliano and Vucina such as the instrument in question purported to effect, and yet this was the written statement which upon the face of the instrument Vagliano made to the bank.

Further, by a separate and independent writing, Vagliano told the bank that such a bill of exchange for such an amount was becoming due, and would have to be paid out of his account. No such bill of exchange existed, although a false document corres-

(1) Law Rep. 5 H. L. 395.



ponding in all particulars was accredited by Vagliano in writing his acceptance upon it. H. L. (E.)

In estimating the effect upon an agent's mind, it must of course be remembered, that though I have here for clearness spoken of it as a single transaction, it is a transaction repeated forty-three times and spread over a considerable period. The false documents were paid, duly debited to the customer, and duly entered in his pass-book, and so far as the banker could know or conjecture brought to his knowledge on every occasion upon which the payment was made and the bills returned. Further, on each occasion when these false documents were, by what I have called the act of the customer, permitted to reach the bank for payment, they were accompanied with a considerable number of other genuine bills of exchange, many of them drawn by Vucina, and regularly entered in the notice of bills about to become due, together with the false documents in question.

My Lords, it seems to me impossible to dispute that this was, in fact, a misleading of the bankers. I pass by for the moment the question whose default it was, for the purpose of considering the proposition which has found favour with one of your Lordships, and which I will not dispute, that the carelessness of the customer, or neglect of the customer to take precautions, unconnected with the act itself, cannot be put forward by the banker as justifying his own default. In order to make the cases of the *Bank of Ireland v. Trustees of Evans' Charities* (1), and the *Mayor, &c., of Merchants of the Staple of England v. Bank of England* (2), authorities in this case, it would be necessary to assume that the plaintiffs in those cases had by some voluntary act of their own given credit and the appearance of genuineness to the particular powers of attorney which were forged in those cases, and if they had, I very much doubt whether the decision would have been what it was; but no such fact appeared; all the parties whose negligence was relied on had done, was to leave their seal carelessly in the custody of the person who abused his trust. These decisions therefore do not seem to me to touch the case.

But how can it be said in this case that the default is

(1) 5 H. L. C. 389.

(2) 21 Q. B. D. 160.

1891  
BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.  
Lord Halsbury,  
L.C.

H. L. (E.) 1891  
 BANK OF ENGLAND  
 v.  
 VAGLIANO BROTHERS.  
 Lord Halsbury,  
 L.C.

unconnected with the act? The very thing which the banker does is induced by the fault of the customer. Was not the customer bound to know the genuineness of Vucina's draft? Was not the customer bound to know whether there was any real transaction between himself and Vucina, effected by the instrument in question? Was not the customer bound to know the contents of his own pass-book? Was not the customer bound to know the state of his account with Vucina? It certainly is very strange that it should be suggested that without any responsibility on his part he should be entitled to accredit forty-three documents to his bankers as genuine bills when he had the means of knowledge I have indicated that no one of them was a bill of exchange at all, or represented any transaction between Vucina and himself.

The bankers paid upon these documents, and they paid a person who was not entitled to receive the money. There was no person entitled to receive it. The fact that it reached their hands as representing a mercantile transaction in which somebody was to be paid was itself a misleading of them; and that it did reach their hands purporting to represent such a transaction arose from the mode in which Mr. Vagliano's business was conducted by those responsible for it.

I have designedly avoided calling these documents bills of exchange. They were nothing of the sort. But if they had got into the hands of an innocent owner for value without notice, Vagliano would undoubtedly have been responsible upon them; for he had given them a genuineness as against himself by accepting them.

Now, when it is insisted that the bankers are responsible because they did not pay the person indicated as payee, one is induced to inquire whether Mr. Vagliano or any other merchant would have expected that any inquiry should be made as to the genuineness of Petridi's signature. Suppose they had been genuine signatures of Petridi and the bills had been dishonoured while the bankers were making inquiries, would not Mr. Vagliano have had grave ground for complaint against the bankers who had allowed his credit to be thus disturbed? I think each of the parties to the transaction must be taken to have known the ordinary course of mercantile affairs, and it is manifest that

no banker could hesitate to pay such bills as came to him, so accredited as they were by Mr. Vagliano's acceptance, without throwing the whole mercantile world into confusion.

I am not intending to throw any doubt upon the propriety of the decision in *Robarts v. Tucker* (1), nor am I prepared to assent to the proposition that it is a harsh decision. A customer tells his banker to pay a particular person; the banker pays some one else, and it would seem to follow as a perfectly just result that the banker should be called upon to make good the amount he has so erroneously paid. But what relation has such a decision to a case where a thing which bears the form and semblance of a known commercial document like a bill of exchange gets by the act of the customer into the hands of the banker, where there is no real drawer, no real transaction between himself and the supposed drawer, and where, as a matter of fact, there is no person who in the proper and ordinary sense of the word is a payee at all?

It seems to me that if all these circumstances, acting upon and inducing the bankers to make the payments they did make, are acts which are the fault of the customer, it is the customer and not the banker who ought to bear the loss. I think, under these circumstances, the banker did what was usual and customary with bankers, and what both customer and banker knew to be usual and customary with bankers, as far as the payment without inquiry as to the genuineness of the indorsement by Petridi & Co. was concerned. But I propose to deal separately with the alleged negligence of the bankers, or at all events the unusual course pursued by the bankers in cashing these bills across the counter and paying to the person presenting the document for payment without inquiry.

My Lords, I do not know what is the usual course among bankers, and I should doubt whether in such a matter it would be possible to affirm that any particular course was either usual or unusual in the sense that there is some particular course to be pursued when circumstances occur, necessarily giving rise to suspicion. I can well imagine that on a person presenting himself whose appearance and demeanour was calculated to

H. L. (E.)

1891

BANK OF  
ENGLANDv.  
VAGLIANO  
BROTHERS.Lord Halsbury,  
L.C.

(1) 16 Q. B. 560.

H. L. (E.) 1891  
 BANK OF ENGLAND  
 v.  
 VAGLIANO BROTHERS.  
 Lord Halsbury,  
 L.C.

raise a suspicion that he was not likely to be entrusted with a valuable document for which he was to receive payment in cash, I should think it would be extremely probable that whether the document were a cheque payable to bearer for a large amount or a bill, the counter-clerk and banker alike would hesitate very much before making payment. However, I will assume the course pursued in this case to be somewhat unusual, and that this is proved by the bankers themselves, though the counter-clerk gives a different reason why the clerks called the attention of their immediate superior to the circumstance, and he in his turn called the attention of Mr. Vagliano's representative. In doing so it appears to me to have relieved the bankers from any accusation of having hastily or carelessly paid these bills. What could the bankers know of the particular transactions of Messrs. Vagliano? But Mr. Vagliano, when it was communicated to him or to his representative, would be surely the best person to judge whether there was anything calculated to give rise to suspicion in the facts to which I have referred.

My Lords, it has been sought to minimise the effect of that communication to Mr. Vagliano's representative, first by treating him as a clerk to whom such a communication ought not to have been made, and secondly, by suggesting that Mr. Ziffo possibly indicated that he was a person not fit to be trusted, since he took a very strange view of what was or was not calculated to cause suspicion and enforce inquiry as to these bills. But what had the bankers to do with Mr. Ziffo's capacity for business? He was Mr. Vagliano's confidential clerk, duly accredited as such. After one or two of the bills had been presented and paid in the manner I have referred to, Mr. Disney thinks it right to call the attention of Mr. Ziffo to the fact, and Mr. Ziffo replies to the information that they are presented over the counter and invariably taken in bank notes, "I suppose if they are properly advised you must pay them." Here is information given of the very fact relied on to the confidential representative of Mr. Vagliano, and it is suggested to be negligence in the bank that after receiving the answer I refer to they continued to pay these bills when properly advised by Mr. Vagliano himself.

I must add here that I think that the witness truly explained

his inadvertent use of the word "indorsed" and meant to say "advised." Now it appears to me that whatever case might be suggested against the bank is completely answered by the bank having communicated these facts to a person occupying such a position in Mr. Vagliano's house, and that his answer was such as to allay any suspicion or uneasiness on the part of the bank.

My Lords, I have not stopped to examine minutely the contrast between Mr. Ziffo's evidence and that of the bank's official, Mr. Disney, because if one comes to examine it carefully there is no real contradiction. One witness is positive as to communications actually made, and the other only meets that positive assertion by alleging a want of memory of any such communication.



One other point has been made at your Lordships' Bar, but I think under circumstances which do not entitle it to consideration. It is said that the course of post ought to have been known to the bankers, and that the date of the indorsements ought of itself to have raised suspicion. Possibly, if there was evidence sufficient to prove exactly what the facts are as to the course of post (and notwithstanding the evidence of one witness, I am not satisfied that we have the facts accurately as to the course of post), a serious doubt might arise; but it is enough to say, for the purposes of this case, that that point appears neither to have been pressed nor argued at a time when, by proper evidence, the matter could have been left beyond doubt, and the circumstances of excuse for not observing the dates, if such excuse existed, could have been properly determined. I can find no evidence that that point was really pressed. It is not noticed in any of the judgments, and though to my mind it is a singular argument coming from the mouth of Mr. Vagliano, whose suspicions one would have thought would have been aroused by the dates found on the documents afterwards appearing, it is enough for me to say that I decline to consider a topic which has been neither really argued nor properly fortified by evidence as a material circumstance to consider in this case.

My Lords, I should be content to rest my judgment here, and to express my opinion that, for these reasons, the judgment of the Court below should be reversed, although I regret to say that

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.Lord Halsbury,  
L.C.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.Lord Halsbury,  
L.C.

on this branch of the case my view is at variance with that of all the learned judges who have hitherto treated this question.

My Lords, I have hesitated long before I was able to acquiesce in the view of my noble friend Lord Herschell and that of the Master of the Rolls, that the same conclusion could be arrived at by a consideration of the Bills of Exchange Act, 1882.

My Lords, one difficulty I have had in the determination of that question is, in applying to the instruments with which I have been dealing an enactment which deals with bills of exchange. For reasons I have already given, it seems to me difficult to treat them as bills of exchange at all; but as against the person now insisting on their possessing the quality of such instruments, and remembering that it was his act by which they were put into circulation in that character, it does not seem unreasonable that, applying the doctrine of estoppel to him, one may consider whether as against him they may not possess qualities which, in their inception, they did not possess.

The 7th section, upon two of the sub-sections of which this question turns, commences thus: "(1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty." And the 3rd sub-section: "(3.) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."

Now, in the first instance, before dealing with the application of these sub-sections to the facts in debate, I must say that I cannot acquiesce in the view which the majority of the Court of Appeal appear to have entertained, that they were at liberty to import into that 3rd sub-section, that it was a condition of its application that the acceptor should be aware that the payee was a fictitious or non-existing person.

It seems to me that, construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction, and I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the code so created, because before the existence of that code another law prevailed.

To return to the construction of the language of the two sub-sections—for I think both should be read together—it seems to me that what the legislature was enacting was in substance this : That where a bill was not payable to bearer, the person to whom payment was intended to be made was to be named or otherwise indicated upon the face of the instrument with reasonable certainty ; but where there was no real payee, the bill might be treated as payable to bearer.

The language which the legislature has employed to express this law has been subjected to very minute verbal criticism. If the substance of the matter is looked at, and it is remembered that what the legislature was dealing with was what was to appear upon the face of the instrument, and contemplated the case of there being no one to whom payment could properly be made, no person on the face of the instrument having any rights under the bill, no person, therefore, capable of giving a discharge to the acceptor for having paid at the demand of the drawer, it would seem that the reason of the thing would apply equally to a real person whose name was forged as to a person who had no existence.

In truth, if strictly construed, the words “fictitious person” are a contradiction. One may pretend there is a person when there is not. One may assume a character which does not belong to one, but to satisfy the word “fictitious” as applicable to a person is assuming in one part of the proposition what is denied in the other. Some of the characters in Sir Walter Scott’s novels may be fictitious in the sense that no persons so named ever lived ; but if real names are taken, and events and conduct and character attributed by the writer to those real names, are the characters less “fictitious” because persons of those names identified with a totally different history and different qualities did in point of fact exist at one time ?

One singular result of treating the section in the way that the Court of Appeal has adopted, would be that one must dive into the mind of the hypothetical forger to determine whether the character be fictitious or not ; and this may be done, though it is not necessary to find the forger’s intention from the language or anything that appears upon the face of the instrument itself, but

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.Lord Halsbury,  
L.C.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.Lord Halsbury,  
L.C.

you may judge from previous commercial transactions of the party who was likely to be meant as giving plausibility to the forgery. But if it can be alleged (as it can be here) that the forger selected a name which would give plausibility to his forgery, and be likely to deceive those into whose hands his forged instrument should come, that is not the name of a fictitious person, although that person had no power to deal with the bill, and was not in any respect the real payee, any more than if the name had been selected of a person who had never been heard of or existed before; whereas, if it is pure imagination, then it is the name of a fictitious person.

I have come to the conclusion that, however expressed, the real meaning of the sub-section is to imply the unreality of any person who is named upon the face of the instrument as the payee of the bill. The statute itself uses the phrase "payee." That cannot mean in truth the payee, because by the hypothesis there is no payee, and dealing, as the statute was, with the form of the instrument, and enacting that if a name which appeared\* as payee on the face of the instrument was a fictitious person, the bill may be treated as payable to bearer, it expressed in popular words, though perhaps not very felicitously chosen, its meaning accordingly.

For these reasons I am of opinion that on this ground also the judgment of the Court below was wrong and ought to be reversed, and I so move your Lordships.

EARL OF SELBORNE :—

My Lords, if the bills in question in this case had been genuine, really signed by Vucina in favour of C. Petridi & Co., and if the indorsements only had been forged, the case would have been governed by *Robarts v. Tucker* (1). But the signatures of Vucina were forged; the use of the name of C. Petridi & Co. as payees was part of the fiction; they were not in any true sense payees; and the bills were, nevertheless, accredited by the plaintiffs to the bank as genuine, and as coming forward, like other genuine bills of Vucina, for payment in due course, on days specified in the plaintiffs' letters of advice; and their

(1) 16 Q. B. 560.



payment, as such, was expressly directed by the plaintiffs. When I speak of the plaintiffs' letters of advice I do not forget that the effect of acceptances payable upon the face of the bills at the Bank of England might, perhaps, have been the same; but in this case there were both; and I think it unnecessary to consider whether the addition of the one form of direction to the other made any difference. If it did not, the effect of the letters of advice cannot on that account be less. This state of things appears to me to raise a question which was not decided in *Robarts v. Tucker* (1), or in any other case cited at the bar. It is (as *Robarts v. Tucker* (1) was) a question between the plaintiffs as principals and the bank as their agent, and not between any parties to the bills.

If the plaintiffs misled the bank upon a material point, however innocently, and although they were themselves deceived by the fraud which had been committed, I think that they, and not the bank, ought to bear the loss which has been the consequence. Here there was never any real holder of these bills, by whom they could have been indorsed, or any outstanding liability from which a discharge was necessary. Your Lordships have to deal with the case of an agent, not claiming any title to or interest in the bills, but instructed by his principal to pay them. It is convenient to speak of them as bills, but, properly speaking, they had not (though they seemed to have, and were represented by the plaintiffs as having) that character; they were accepted as such; but there was no real drawer, and no real payee; and they were never negotiated. It is not (as I understand) disputed that ~~there might, as between banker and customer, be circumstances which would be an answer to the primâ facie case that the authority was only to pay to the order of the person named as payee upon the bill, and that the banker can only charge the customer with payments made pursuant to that authority.~~ Negligence on the customer's part might be one of those circumstances; the fact that there was no real payee might be another; and I think that a representation made directly to the banker by the customer upon a material point, untrue in fact (though believed by the person who made it to be true), and on

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Earl of Selborne.

H. L. (E.) 1891  
 BANK OF ENGLAND  
 v.  
 VAGLIANO BROTHERS.  
 ———  
 Earl of Selborne.

which the banker acted by paying money which he would not otherwise have paid, ought also to be an answer to that *primâ facie* case. If the bank acted upon such a representation in good faith, and according to the ordinary course of business, and a loss has in consequence occurred which would not have happened if the representation had been true, I think that is a loss which the customer, and not the bank, ought to bear.

I should be of that opinion on general principles; and the application of those principles is fortified, to my mind, in this particular case, by the circumstances under which the forgeries were committed, and the facts that the plaintiffs had large dealings with Vucina going on at the same time with the forgeries, in the course of which they accepted many of his genuine bills, all which were in like manner accredited to and made payable at the bank; and that there were documents in the plaintiffs' possession (the true and forged letters of advice from Vucina and the forged bills themselves, when returned by the bank), from which, if attention had been paid to them, the fraud might have been discovered in an early stage.

I do not see how it can be open to dispute that it was material to the bank to know whether these were genuine or forged bills; or (subject to the consideration of some matters which I postponed) that, in paying the bills as they did without inquiry into the genuineness of the indorsements (which, for the present, I assume to have been regular upon the face of them), the bank acted in good faith, and according to the usual and practically necessary course of business; or that, if the bills had really been Vucina's, and if C. Petridi & Co. had been real payees, no loss would have been incurred. If it were the duty or the practice of bankers, without special reasons for suspicion, to refuse or delay payment of foreign bills appearing on their face to be regular, and regularly advised for payment by their customers, until they could ascertain by inquiry the genuineness of every foreign indorsement, it must continually happen that the bills would not be paid at the proper time and place, and *bonâ fide* holders might treat them as dishonoured. It was admitted that it is not in the ordinary course of business to make such inquiries; and I should say that business could not go on if it were so. No

doubt there is, in the ordinary course of business, the possible risk which occurred in *Robarts v. Tucker* (1), of a genuine bill being stolen and presented for payment with a forged indorsement. Between that case and one like the present there is this very substantial difference, that the acceptor in that case has not in any way contributed to mislead the bankers, and when there is a real bonâ fide payee the acceptor remains liable to him; but if when there is no such payee the person who signs as drawer indorses the bill with the name of a pretended payee there is no outstanding liability from which a discharge is needed for the acceptor's protection. The risk of a genuine bill being stolen and presented with a forged indorsement is one which, being of rare occurrence and distributed over a large amount of business, bankers may be willing to run. But they are entitled to judge for themselves what risks they will run; and the customer is not, in my opinion, entitled to tell the banker (in effect) that the risk is an ordinary one, and when it turns out to be otherwise to put upon him another, which, if the truth had been known, the banker with his eyes open would not have undertaken. When, as in this case, the customer accredits the bills as genuine and as coming forward in due course against him for payment on certain days, the banker must, I think, be considered to undertake the risk incident to bills of that description, and no more. If this would be true of a single bill, much more of a series of bills of large amount, all successively authenticated to the banker in like manner by the customer who orders them to be paid. The judgment under appeal puts upon the bank a risk which it never was called upon, and never agreed, to undertake.

It seems to me also clear (as a matter of fact, and without reference to the question under the Bills of Exchange Act) that the Constantinople firm of C. Petridi & Co. were never in any true sense payees of these bills, and their genuine indorsements would never have appeared upon them without an additional fraud. The suggestions at the bar, as to conceivable ways in which such indorsements might have been obtained, were in my judgment irrelevant to the real facts, with reference to which, and not to merely imaginable possibilities, this case ought to be

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Earl of Selborne.

H. L. (E.)  
 1891  
 {  
 BANK OF  
 ENGLAND  
 v.  
 VAGLIANO  
 BROTHERS.  
 —  
 Earl of Selborne.  
 —

determined. In *Stone v. Freeland* (1) and *Cooper v. Meyer* (2) a real firm, Butler & Co., and real person, Woodman, were named as payees; but the Courts did not hold that enough to make the firm or the person so named a real payee.

If the question were merely one of legal estoppel against the acceptor, it may be true that the estoppel would be only against denying the genuineness of the drawer's signature; or, if the acceptor knew that there was no real payee, against insisting that the bill must receive an indorsement which he knew to be impossible. But there are authorities, relevant as far as general principles are concerned, which, even as between parties to a negotiable instrument, seem to me to go beyond legal estoppel. I cannot but think it an extension of that doctrine to hold (as was done in *Cooper v. Meyer* (2) that when the bill is payable to the drawer's order, the acceptor (because he is supposed to know the drawer's signature) is bound by the subsequent indorsement of the person who forged the signature as well as by that original signature. And I am not convinced that estoppel is a sufficient explanation of the cases in which the drawer of a cheque has been held bound by fraudulent alterations for which the state of the paper afforded space. The drawer was ignorant of, and could hardly be held bound to anticipate, the subsequent fraud. But if it were universally true that the liability of an acceptor to a bonâ fide holder of a bill in all such cases depends upon legal estoppel, I do not think it would follow that the discharge of a banker or other agent employed by the acceptor to pay the bill must depend under similar circumstances upon that principle only.

If in the present case the plaintiffs, instead of making their acceptances payable at the Bank of England, had directed (in the same terms) a managing clerk in their own office, ignorant of the fraud, to pay those acceptances, and to take for that purpose the necessary money from their cash-box, and if the clerk so authorized had paid the bills exactly as the Bank of England did (not indeed to Glyka himself, but to some one acting for him and presenting them in any manner not irregular), I cannot doubt that the clerk so acting in good faith would have

(1) 1 H. Bl. 316, n.

(2) 10 B. & C. 468.

been exonerated. A banker undertakes to do what is in the proper course of a banker's business, and so far differs from an agent who is not a banker; but beyond this I see no principle for putting him in a worse position than any other agent.

In *Bennett v. Farnell* (1), Lord Ellenborough held that when the payee was fictitious, and the acceptor did not know it, the bill was neither to order nor to bearer, but was completely void. If in such a case the acceptor had directed his bankers to pay the bill, and the bankers had paid it in good faith upon an indorsement regular upon its face, though fictitious in fact, the bankers would have been in my judgment entitled to credit in account for what they had so paid. Whatever might have been before the Bills of Exchange Act of 1882 the materiality of the acceptor's knowledge or ignorance on such a point as between himself and a bonâ fide holder of the bill, I should not have thought it material as between him and his bankers paying the bill under such circumstances. I have come to this conclusion without resting my opinion upon the Statute of 1882. Assuming the present case not to be expressly ruled by that statute, it is also (in my judgment) not ruled by any former authority. And I cannot but think that the statute so far as it does rule certain other cases in *pari materiâ*, and not well distinguished from this in principle, is as proper to be taken into account as any of the authorities which preceded it as to the acceptor's knowledge or ignorance where there is not a real payee.

But it was insisted that in paying these bills as they did the bank deviated from the proper course of business, and ought to be held affected with notice that the indorsements were fraudulent. The first point relied upon for that purpose was, that the bills, drawn as they were for large sums, were all presented and paid across the counter and not through any bankers. This was admitted to be "unusual" in the evidence for the bank; but it was not, as I read the evidence, either admitted or otherwise proved that it was irregular or sufficient in itself to excite a suspicion that there was something wrong, although it was unusual in the sense of not often happening. No authority was produced to shew that it was irregular according to the law

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Earl of Selborne.

(1) 1 Camp. 130, 180, c.

H. L. (E) merchant; and if not, and if the payments were bonâ fide made, without any actual suspicion on the part of the officers of the bank, I cannot think it enough to defeat their right to charge the plaintiffs with those payments that they did not take a precaution not required by the law merchant, and on which they could not have insisted without the risk of the bills being treated by bonâ fide holders as dishonoured. In *Roberts v. Tucker* (1), payment through a banker was no protection to the defendant.

1891  
BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.  
Earl of Selborne.

Some of these bills were in fact referred by the counter-clerks of the bank before payment to Mr. Disney, the principal in the private drawing office of the bank, not (as I understand the evidence) because of any suspicion, but because they had received general instructions that any cheques or bills of large amount should be so referred. Mr. Disney (the truth of whose evidence I see no reason to doubt) thought that if the bill was advised (as it was) the counter-clerk must pay it; and Mr. Ziffo, the plaintiffs' out-door manager, to whom (on his coming to the bank on other business in June, 1887), Mr. Disney mentioned the fact that such bills had been presented across the counter, and paid in bank notes, expressed the same opinion. This happened when not more than four of the bills, amounting altogether to 3000*l.*, had been presented and paid. When from time to time the plaintiffs' pass-book was sent to them, the bills then paid, and debited in it against the plaintiffs, were returned with it, and they remained from thenceforth in the plaintiffs' possession. It was apparent upon the face of them that all those bills had been paid across the counter; but no objection was taken by the plaintiffs on that or any other ground; and similar bills, to a continually increasing and ultimately very large amount, were afterwards from time to time advised, and came forward and were paid in like manner. I cannot hold that these circumstances are sufficient to deprive the bank of any right which they would otherwise have had to charge those payments to the plaintiffs' account.

The other point urged at your Lordships' bar (but not apparently before either of the Courts below) was, that according to

(1) 16 Q. B. 560.

the statement of Mr. Kurz, the plaintiffs' deputy-manager, in cross-examination, the course of post between London and Constantinople was four days; and nineteen out of the forty-three forged bills paid by the bank purported to be indorsed in Constantinople on the third day before the date of acceptance in London. No question was put on that subject to any other witness; and of the dates appearing on the bills, the plaintiffs also had notice when they were returned. One of these, of which the indorsement was on the third day before acceptance, was the fifth in the whole series. I think it would not be right in this state of the evidence, and upon a point which, though open upon the plaintiffs' pleading (in their reply), was for some reason not pressed on the Courts below, to treat the bank as having had notice that the indorsements were not regular.

The judgments in the Courts below, of the weight of which (as well as of the opinions agreeing with them, which I know some of your Lordships to entertain) I am fully sensible, seem to have been addressed to two questions only, that of the proper construction and effect of sect. 7, sub-sect. 3, of the Bills of Exchange Act, 1882, and that of negligence on the plaintiffs' part. As to the Bills of Exchange Act, I am not myself satisfied that Charles J. and the majority of the Judges in the Court of Appeal, were wrong in holding that the words of the statute, "where the payee is a fictitious or non-existing person," do not extend to the case of a real person falsely represented as payee upon a forged bill; though in principle the cases seem to me much the same. The difficulty to my mind arises out of the fact that the legislature has here described "*a person*" as "fictitious or non-existing"; instead of saying, "where the payee is fictitious or non-existing," and it has been increased rather than removed by reference to other parts of the statute, particularly sects. 5 (sub-sect. 2), 24, 41 (sub-sect. 1), 46 (sub-sect. 2), 50 (sub-sect. 2), and 54 (sub-sect. 2).

I cannot, however, agree with the opinion, that in the cases which do fall within the 3rd sub-section of sect. 7 knowledge on the part of the acceptor that the payee is a fictitious or non-existing person is still necessary. Such a qualification of the express words of the statute cannot properly, in my judgment,

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Earl of Selborne.

H. L. (E.) 1891  
 BANK OF ENGLAND  
 v.  
 VAGLIANO BROTHERS.  
 —  
 Earl of Selborne.

be implied from the earlier authorities which treated knowledge as necessary. Those authorities were no doubt within the view of the legislature, and all reference to the necessity of knowledge being here omitted, I think the omission must be taken to have been deliberate and intentional, and that there is no sound principle on which what is so omitted can be supplied by construction. I think it right to add that, in point of principle, it seems to me neither unjust nor unreasonable that the rights and liabilities of third parties should in such a case depend upon the facts, rather than upon an inquiry into the acceptor's state of mind. I am glad that the majority of your Lordships have seen your way with the Master of the Rolls to put a construction upon sect. 7, sub-sect. 3, of the Act of 1882 which makes its operation co-extensive with its principle.

As to the other point, my opinion does not rest upon mere negligence, but on what seems to me higher ground. Upon that ground I find myself compelled, notwithstanding my sincere respect for the opinions from which I differ, to give my voice in the appellants' favour. The amount in controversy is large; the question is one of much importance both to the parties and to bankers and their customers generally; and it is not, in my judgment, covered by any previous authority. The case of *Robarts v. Tucker* (1) is no doubt law; but I am not for extending it as it seems to me to be extended by the order under appeal.

LORD WATSON:—

My Lords, the bank and Vagliano Brothers appear to me to have been equally innocent—in this sense, that they entertained no suspicion that the forged documents which have given rise to this action were other than genuine bills of exchange; and also that nothing wittingly done, or omitted to be done by them, in the conduct of their respective businesses as bankers and financiers, can reasonably be regarded as the proximate occasion of Glyka's forgeries, or of the success which attended them. Which of these innocent parties must bear the loss resulting



from Glyka's frauds is the only question to be determined in this appeal.

It seems to have been assumed by all the learned Judges in the Courts below, that in making payment of the bills in question on behalf of the acceptors the bank was under the same legal obligation to ascertain the identity of the payee which was held to attach to the defendants in the case of *Robarts v. Tucker* (1). That assumption, which is really the basis of the judgments appealed from, does not appear to me to be well founded.

The decision of the Queen's Bench in *Robarts v. Tucker* (1) has, ever since its date, been accepted in mercantile practice as determining the obligations incumbent upon bankers who agree to retire acceptances on account of their customers. It casts upon them the whole duty of ascertaining the identity of the person to whom they make payment with the payee whose name is upon the bill. They may pay in good faith to the wrong person, in circumstances by which the acceptor himself or men of ordinary prudence might have been misled; but they cannot take credit for such a payment in any question with the acceptor. It has been said by one of the learned Judges that the rule is a harsh one, and it is possible that in some instances it may operate harshly; but it appears to me to be settled beyond dispute, and I see no reason for suggesting any doubt that it puts a reasonable construction upon the contract constituted by the agreement of the banker to pay his customers' acceptances when they fall due. In the absence of any special stipulations it construes the arrangement so constituted as importing that, on the one hand, the customer is to furnish or repay to the banker the funds necessary to meet his obligations as acceptor; and that, on the other hand, the banker undertakes to apply the money provided by the customer, or advanced on his account, so as to extinguish the liability created by his acceptance. Accordingly, no payment made by the banker which leaves the liability of the acceptor undischarged can be debited to the latter.

The ratio of the judgment in *Robarts v. Tucker* (1) does not carry the liability of the banker beyond this point, that his

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.

Lord Watson.

(1) 16 Q. B. 560.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Lord Watson.

undertaking to retire bills genuine in their inception on behalf of acceptors who, by signing in that character became immediately indebted to the payees, implies an obligation on his part to discharge their debt, which he can only do by making payment to the proper creditor. It would obviously require a considerable extension of the principle in order to make it apply to documents purporting to be bills of exchange, in which the drawer's signature is a forgery, the payee a person who is not intended to be a holder, and the genuine signature of the acceptor has been procured by fraud. His signing such a document creates no legal obligation against the acceptor, although it is possible that he may be estopped from pleading his non-liability if and when the document has come into the hands of a bonâ fide holder for value. I venture to doubt whether the payee whose name was fraudulently inserted could ever occupy that position, because the occurrence of his own name in the original tenor of the bill would be sufficient notice to him that something was wrong and called for inquiry. At the time when Glyka's bills were presented for payment, they did not raise and never had raised any liability against Vagliano Brothers, although the latter informed the bank that they were liable and willing to pay; and when the bills had been paid by the bank and returned to them, there remained no debt due by Vagliano Brothers, which would have been the consequence of the bank's making an erroneous payment of a genuine bill.

The risk of error attending the payment of bills supposed to be genuine, but which are wholly counterfeit with the exception of the drawee's signature, is materially greater than the risk attending the payment of honest bills. In the latter case the danger of imposition can only arise from the document of debt having been stolen or fraudulently obtained from the true owner; whereas, in the former, the document, never having been in the possession of a real owner, will almost as a matter of certainty be used for the purpose of deceiving the acceptor, or the bank acting as his agent. In the ordinary course of business it is very difficult for a banker, who has no reason for suspecting fraud, to make an exhaustive inquiry in the case of each bill, as to the identity of the person by whom it is presented, without

exposing himself to claims of damage. But experience has shewn that the number of genuine bills which get into dishonest hands and are erroneously paid is comparatively insignificant, and does not materially affect profits derived from the business of retiring bills on account of the acceptor.

Again, it is well-nigh impossible that a regular system of appropriating genuine bills, in all of which the drawee, payee, and acceptor are the same, and of obtaining payment by means of forged indorsations, could be carried on for any length of time without discovery. If the series of documents forged by Glyka had been genuine drafts by Vucina in favour of Petridi & Co., it is hardly conceivable that even the ingenuity of Glyka would have enabled him to get possession of no less than forty-three of these bills, and to obtain payment of their contents at intervals extending over a period of eight months. In that case it is probable, if not certain, that detection would have followed at an early stage of his frauds; because the real payee would have discovered the loss of each bill as it fell due, and would have taken measures to stop payment.

It appears to me to be beyond dispute that the bank paid Glyka's spurious bills under the belief that they were genuine commercial drafts, and that their payment was attended with no greater risk of error than is incidental to the cashing of genuine bills. It would be ridiculous to suggest that the bank would have dealt as they did with these bills had it not been for the existence of that erroneous belief. The very fact that no payee complained of having lost a bill payable at their office, or of their having made payment to the wrong person, was well calculated to assure the bank that they had made and were making payment of all Vagliano Brothers' acceptances to the proper creditors.

It is, in my opinion, unnecessary to consider what would have been the precise extent of the implied obligation of the bank to Vagliano Brothers with reference to these forged bills if the latter had been unconnected with the belief upon which the bank acted, because that belief was induced and warranted by their representations. Their acceptances, if genuine, were in themselves distinct assurances, upon which the bank was

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Lord Watson.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Lord Watson.

entitled to rely, that each bill bearing their signature was a real draft upon them by their correspondent Vucina, and the notes sent by them to the bank from time to time directing payment of the bills were so many renewals of the same representation, strengthened by the further assurance that their acceptances were genuine.

Throughout these transactions the bank acted in good faith as the agent of Vagliano Brothers, and the errors into which they were betrayed were mainly if not wholly attributable to their having treated the bills as genuine, in reliance upon the representations of their principals, which were untrue. I think that in these circumstances Vagliano Brothers cannot be permitted to cast upon the bank liability for errors arising from their own representations. These representations were no doubt made in the honest belief that they were true; but that circumstance cannot, in my opinion, avail Vagliano Brothers in the present question with their agents.

These considerations are sufficient for the disposal of this appeal; but on considering the opinions which have already been expressed, and are yet to be delivered by your Lordships, I think it right to state my own opinion with regard to the construction of sect. 7, sub-sect. 3, of the Bills of Exchange Act, 1882. Upon that point I concur in the reasoning of my noble and learned friend Lord Herschell. I think that the language of the sub-section, taken in its ordinary significance, imports that a bill may be treated as payable to bearer in all cases where the person designated as payee on the face of it is either non-existing, or being in existence, has not and never was intended to have any right to its contents. The enactment has reference to real bills only, and has no direct application to these documents of Glyka's manufacture, which were not bills in their inception and never acquired the force of bills by virtue of estoppel. But the fact that the payees were fictitious within the meaning of the statute affords a good answer to Vagliano Brothers' contention that the bank was bound to deal with these documents on the same footing as if they had been real bills, and ought not to have paid except upon genuine indorsations by Petridi & Co.

For these reasons I concur in the judgment which has been moved by the Lord Chancellor.

LORD BRAMWELL:—

My Lords, the plaintiffs are merchants and agents or bankers for foreign traders. They kept a banking account with the defendants. That is to say they, the plaintiffs, paid to their credit with the defendants money, technically lent it, and doubtless delivered to them other assets, drew cheques on them and addressed accepted bills to them for payment. The plaintiffs claim of the defendants a large balance. The defendants admit the credit side of the account, but say they have paid bills accepted by the plaintiffs addressed to them, the defendants. It is immaterial, but this is not technically a set-off, for the defendants never could have maintained an action against the plaintiffs in respect of these payments. The plaintiffs never owed the bank anything. I say this is immaterial, but it is as well to be technical. Set-off or not, there is no doubt but that the defendants have, as they allege, paid bills accepted by the plaintiffs, and addressed payable at the defendants, equal to the amount claimed; but they have paid them to persons who could not have enforced payment of them from the plaintiffs. They were bills on which the plaintiffs were not liable to any holder unless he claimed under Petridi's indorsement, and which, if presented to them, they need not and possibly would not have paid. The drawing and indorsements on them were forgeries, or fictitious. It is for the defendants to establish that they have a right to charge the plaintiffs with the amount of these bills.

The first ground on which they claim this right is that the plaintiffs, by their conduct, wilful, careless, or unskilful, or all, enabled the fraud to be committed as to the whole or part (the part after the first one or two)—in effect, that the plaintiffs caused the defendants to pay these bills. I think it is necessary for the defendants to shew that the plaintiffs *caused* them to pay these bills as they did. It is not enough to shew that they gave occasion to their doing so—that different conduct would have prevented the fraud and the payment by the defendants.

H. L. (E.)

1891,

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Lord Bramwell.

I think the result of the authorities, *Robarts v. Tucker* (1); *Young v. Grote* (2); *Bank of Ireland v. Trustees of Evans' Charities* (3); *Mayor, &c., of Merchants of England v. Bank of England* (4), is, that the conduct of the bank's customer to enable the bank to charge the customer must be conduct directly causing the payment.

Now, there is no doubt that there were many ways in which the plaintiffs might have detected the forgeries. The forged letters which advised the forged bills omitted to advise some which were genuine. Yet the latter were accepted by the plaintiffs. The letters of the plaintiffs to Vucina did not mention the forged bills. The plaintiffs signed a letter to Vucina in which the balance against him was in blank; that balance seems to have appeared in different amounts in the plaintiffs' books at different times. Then the forged bills were all indorsed on the part accepted, unlike the genuine bills. The bills after payment, had they been examined by the plaintiffs, would have shewn that they had not been paid through a banker. The indorsements would have been known to the plaintiffs' clerks and to the plaintiffs to bear impossible dates. It would have been seen that Pasqua appeared to leave the bills for acceptance and yet not to be the holder for payment. Maratis was a fictitious name and would not be known to the plaintiffs. Vucina's account became very large, the balance against him unusually large, but no notice was taken; and what was much pressed was that Glyka was enabled to steal and did steal the forged bills after their acceptance. It was not the duty of anyone exclusively, apparently, to give out bills accepted to those who called for them. I suppose as that call might be made at any time in the day, any clerk might go to the leather case, take out the bill, and give it out. It was kept in the room where Glyka sat. Whether this was negligence I cannot say. I really do not know; no witness said it was; it may be unusual; I say sincerely, I do not know—I cannot of my own knowledge or reasoning say it was; and there is no evidence. All these things put together make it wonderful that the fraud could be practised—most wonderful

(1) 16 Q. B. 560.

(2) 4 Bing. 254.

(3) 5 H. L. Cas. 389.

(4) 21 Q. B. D. 160.

that it could be practised to the extent it was without earlier discovery, but do not, in my opinion, give the defendants a right to charge the plaintiffs with the amounts paid for these bills as payment caused by them.

A great deal has been made of the advice-notes the plaintiffs sent to the defendants of bills becoming due, with a request to the defendants to pay them. In my judgment these advice-notes in no way help the defendants. They mean nothing more than the very acceptances themselves meant. The bills were accepted, payable at the defendants—but to whom? To those who could give a discharge for them and were entitled to enforce payment. That is all the advice-notes mean. Suppose a genuine bill really drawn by Vucina and really payable to Petridi, and suppose a forgery of Petridi's name, can it be suggested that the advice-note would enable the defendants to charge the plaintiffs with that bill if they paid it? Certainly not. With all respect, it is a mistake to suppose that by that, or by the very acceptance itself, any more or other representation is made by the plaintiffs to the defendants than that they, the plaintiffs, are estopped to anyone interested to deny that Vucina drew the bill. The plaintiffs are not estopped from saying that they are not liable to pay the bill unless it is indorsed by Petridi. I am afraid though, that that memorandum operates strongly on some opinions.

The other ground on which the defendants claim to charge the plaintiffs with the amount of these bills is that Petridi & Co., the payees, were fictitious persons within the meaning of the Bills of Exchange Act, sect. 7, sub-sect. 3, and that the defendants therefore might pay them to a de facto bearer. I differ on both points. It must be borne in mind that the Bills of Exchange Act is “An Act to *Codify* the Law relating to Bills of Exchange,” not to alter or amend it, and by sect. 97 the rules of common law, including the law-merchant, “save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to bills of exchange.”

Then, were Petridi & Co. fictitious or non-existing persons? There was a firm of that name, a firm as identifiable as N. M. Rothschild & Co., as Glyn, Mills, Currie & Co., as the Bank

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Bramwell.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Bramwell.

of England itself would be identifiable if their names appeared as payees of a bill of exchange; and to my mind that shews they were not fictitious or non-existing persons. It is asked, What if the payee were John Smith? Well, if there were nothing to identify a particular John Smith as payee when all "the surrounding circumstances" were looked at, it may be that he might be treated as a non-existent person. But what if it was shewn that the bill was delivered to a particular John Smith, in payment of a debt due to him from the drawer, could any holder of it treat it as payable to bearer, Smith's name being forged as indorser? Certainly not; but then it is said that that is not the case here; that the bill was not delivered to Petridi & Co., nor intended to be so; that, in the intention of the makers of the bill, Petridi was a sham, and so fictitious or non-existent; that Petridi & Co. are not fictitious nor non-existent, that they exist in the flesh, yet they are fictitious *quâ* payees, constructively fictitious; that if Vucina had drawn the bill, Petridi was real and existent, but inasmuch as Glyka did not mean Petridi to have the bill he was non-existent. This beats me. They are at the same time real and unreal, they are that which is said to be an impossibility, being and not being at the same time. The bill means one thing or another, according to the intent of the drawer, that the drawee has or has not a right to Petridi's indorsement, according as that intent is one thing or another. Because the argument would be the same if Vucina had really drawn the bills, but not intended Petridi to have them; a possibility, if Vucina will forgive me. That if Glyka had intended to commit his fraud through the innocent agency of Petridi, Petridi would be real and not fictitious. If the argument is good, it would shew that a *bonâ fide* holder of these bills not claiming through Petridi might have enforced payment from the plaintiffs. It is said that such a payment, i.e. to himself, is according to the intention of the drawer. So it is of the drawer *de facto*, but not of him who by the bill itself the drawee has a right to suppose is the drawer. The plaintiffs are estopped to deny that Vucina is the drawer; but they are not estopped to deny that Vucina meant that Petridi and his assigns should receive the amount of the bill, and that it should not be paid unless indorsed by Petridi.



This argument, as I have said, makes the effect of a bill depend, not on the meaning of the writing, but on the intent of the maker. A bill payable to the Bank of England is payable to a fictitious person if the drawer intends to forge their name and give it to another person. A payee is real or fictitious, at the option of the holder, within the Act. But it was shewn that a bill drawn like these might get into the hands of Petridi & Co., though not so intended, who might take it for value and be entitled to maintain an action against the plaintiffs. Would Petridi be fictitious then? It is asked, What difference does it make to the plaintiffs that there is a C. Petridi & Co. when, if the payee had been actually fictitious or unreal and the name was put on the back of the bill, it might be treated as payable to bearer? The answer is obvious. If the payee is a known person, the drawee can well believe that the drawing is genuine; he knows he cannot be made to pay without that person's indorsement. He knows that before presentment for acceptance the bill has been in ordinary course, or at all events will be, in the hands of a responsible person if a good name is used. His holding and indorsement are a guarantee that the bill is in right hands. Take this very case. Glyka could not have got Petridi's indorsement. I do not mean could not in point of law, but could not practically. Without that the plaintiffs were not bound to pay the bill. I have no doubt that Glyka chose Petridi's name to avoid suspicion. If it had been a strange name it might have attracted attention and caused some inquiry.

An argument is used which, with all submission, I think very feeble. It is said that the statute says "fictitious or non-existing," and that fictitious is needless on the plaintiff's construction; I do not agree. But what is the value of such an argument? Nothing, unless there is no other. A prudent draftsman does not accurately examine whether a word will be superfluous, he makes sure by using it.

A word on the case of *Cooper v. Meyer* (1). It is somewhat remarkable. The question was important; the judgment is singularly short, and nothing is said by Parke J. I think the

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Bramwell.

(1) 10 B. &amp; C. 468.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Bramwell.

decision right. Lord Tenterden says, when the drawer is a real person his indorsement may be disputed; but if there is no such person and (Bayley J. also says) if the acceptor accepts without knowing there is such a person as the supposed drawer, the acceptor undertakes to pay to the signature of the person who actually drew the bills. Further, I should say that as the bills were accepted for the accommodation of Darby, with no knowledge of any such person as the drawer, the acceptor authorized the indorsement as he authorized the drawing by Darby. The Court did not say that no indorsement was necessary, or that any one but Darby could have indorsed. This case does not help the defendants.

I say, then, that Petridi & Co. were not fictitious or non-existent, and that the bill could not be treated as payable to bearer. But supposing it could, by whom could it be so treated? By the holder in due course: by the person who could maintain an action. Not by a man who stole it; not by a man who could maintain no action on it. The enactment is for the benefit of the holder—the honest holder who is embarrassed by the difficulties of there being no actual existing payee. Sect. 5, sub-sect. 2, says, that when drawer and drawee are the same person, or the drawee fictitious, or a person not having capacity to contract, the *holder* may treat the instrument as a bill or a promissory note; surely that means a holder for value. Suppose A. draws on a fictitious person, indorses it to B. for his (B.'s) accommodation, who negotiates it, and has to take it up. B. could not say, "The statute says I may treat this as a promissory note." The answer would be, "You are not a holder for value." Now in this case the money was always paid by the defendants to Glyka, or Glyka's agents. Glyka had no right to "*treat*" the bill in any way. It was in his possession by a theft; he clearly stole it after it was accepted.

The enactment I say is for the benefit of the holder, not of the acceptor; it gives rights against him. The plaintiffs could not, even if Petridi is considered as fictitious, treat these bills as payable to bearer. How could they? How can an acceptor treat a bill as payable to bearer? But if he cannot, if the section does not apply to him, neither does it apply to his agent for

payment, his banker, at whose house it is made payable. How can it be said that the plaintiffs have given a mandate to the defendants to pay these bills without Petridi's indorsement, to pay them to a person who had no right to receive the money, who could not have compelled the plaintiffs to pay them? These bills, as the acceptances were not "payable at the bank, and *not elsewhere*," might have been presented to the plaintiffs. Had they been, the plaintiffs could have refused payment, perhaps would. No one could have maintained an action against the plaintiffs on these bills. How can it be right that the defendants should have paid them? If a clerk of the plaintiffs had paid this bill, I agree he would not be liable to his employers unless his suspicions had been excited. But the duty of a clerk is different from that of a banker. The defendants have deprived the plaintiffs of this right to refuse payment by electing to pay. Let it not be supposed I find fault with them—I do not in the least; but so it is.

I am of opinion that this case is governed by *Robarts v. Tucker* (1). I own to a prejudice in favour of that case. I do not agree with the notion that a banker is entitled to make inquiries as to whether he should pay, as there suggested. He must honour or dishonour the bill on presentment. The case was decided on no such ground, but on this, that the customer's mandate is to pay only to such person or persons as can give a discharge of the instrument. I am afraid, however, that a dislike of that case has a good deal to do with opinions unfavourable to the plaintiffs. Lord Esher says that is a harsh case. I have heard able arguments on both sides: on the one side that the banker sees the person who presents the instrument; on the other, that the banker's customer knows the parties to whom he gives his acceptance or cheque. There are two remarks to be made. One is that the banker can bargain with his customer, if he likes (I do not mean by Act of Parliament, but he can make his stipulation with his customer), that he will not be liable in such cases as the present. The other is that bankers do not make such a bargain; yet they and banking, I am glad to say, flourish.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Lord Bramwell.

(1) 16 Q. B. 560.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Lord Bramwell.

I have said nothing of the defendants paying this enormous amount over the counter to strangers. I have no doubt, as a matter of knowledge and of reasoning, that this was most unusual. There is, besides, cogent evidence that it was. The paying cashier inquired of his principal if the bill should be paid when first presented. The principal, according to his own account, thought it a thing to mention to the plaintiffs' clerk when the instances had been few. I have no doubt that (especially when the cases multiplied), instead of a gossiping intimation not enough to reach Ziffo's mind (as Charles J. finds), for the protection of themselves there ought to have been a formal communication to the plaintiffs. If Mr. Disney was satisfied with what he says Ziffo said to him, he is a very strange person. The thing is absurd. "I suppose you must pay if they have been advised." How could the advice that the bills would be presented for payment remove the suspiciousness of the presentment when it took place? True, the plaintiffs might have seen that the bills had been paid over the counter, but they trust to the defendants having paid properly. But I have not referred to this as a ground on which the defendants should fail. I have no doubt there was gross carelessness, but a carelessness to the bank's own hurt, a carelessness of precautions for their own good.

If, however, on some ground which I cannot see, the whole conduct of the parties is to be looked at, if it is to be said that the bank may charge Vagliano with payments they need not have made, then I think that must at least be limited to those payments which were reasonably, rightfully, and carefully made, and not to such as those in question.

I rely also on and agree with the judgments of the judges who have decided in favour of the plaintiffs; also on that of the Master of the Rolls, except that part which holds that C. Petridi & Co. were fictitious.

This is my opinion, and I am glad to think it is also that of my noble and learned friend Lord Field. I am sorry that it is not shared in by any other noble and learned Lord who heard the case. We are probably wrong, but—and I say it, I am sure I need not protest, with the most sincere respect for those who do not agree with me, for I know of no others more deserving

of respect—it is some comfort to me to think that the head-note of our opinion may be expressed very shortly and in the most abstract form—namely, “a banker cannot charge his customer with the amount of a bill paid to a person who had no right of action against the customer, the acceptor.” But I think the head-note which will represent the decision of your Lordships should be in a strictly concrete form, stating the facts and saying that on them it was held that judgment should be for the appellants. I think the judgment for the respondents should be affirmed.

H. L. (E.)  
 1891  
 BANK OF  
 ENGLAND  
 v.  
 VAGLIANO  
 BROTHERS  
 Lord Bramwell.

LORD HERSCHELL :—

My Lords, I propose to deal at the outset with the question of the construction of the Bills of Exchange Act, which gave rise to a difference of opinion in the Court below.

The facts material to this part of the case I take to be these. The bills in question purported to be drawn by Vucina, but were, in fact, entirely the production of Glyka, a clerk in the service of Vagliano Brothers, the respondents. He fraudulently procured the necessary forms to be printed and filled them up, inserting the name of Vucina as drawer and of C. Petridi & Co. as payees. A firm of C. Petridi & Co. carries on business at Constantinople, and had been the payee of some genuine bills previously drawn by Vucina upon Vagliano Brothers. I think there can be no doubt that this fact suggested to Glyka the insertion of the name of C. Petridi & Co.; but I do not believe that he made this choice with the idea that it would assist his fraud. I entertain no doubt, under the circumstances disclosed by the evidence, that Vagliano Brothers would equally have accepted the bills if any other name had been inserted, and that Glyka knew this. It was of course never intended by Glyka that Petridi & Co. should be the persons to whom the bill should be paid. The name was inserted merely to make the bills complete in form. The bills were accepted by Vagliano Brothers, payable at the Bank of England, who were requested by Vagliano Brothers to pay them at maturity. They were presented for payment with indorsements to all appearance regular, these having been written by Glyka, and were paid to the persons presenting them at maturity.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Lord Herschell.

The conclusion at which the majority of the Court of Appeal arrived with reference to the construction of the sub-section of the Bills of Exchange Act with which your Lordships have to deal is thus stated: ("The word 'fictitious' must in each case be interpreted with due regard to the person against whom the bill is sought to be enforced.") If the drawer is the person against whom the bill is to be treated as a bill payable to bearer, the term 'fictitious' may be satisfied if it is fictitious as regards himself, or in other words fictitious to his knowledge. If the obligations of the acceptor are in question, and the acceptor is the person against whom the bill is to be so treated, 'fictitious' must mean fictitious as regards the acceptor, and to his knowledge. Such an interpretation is based on good sense and sound commercial principle."

The conclusion thus expressed was founded upon an examination of the state of the law at the time the Bills of Exchange Act was passed. The prior authorities were subjected by the learned Judges who concurred in this conclusion to an elaborate review, with the result that it was established to their satisfaction that a bill made payable to a fictitious person or his order was, as against the acceptor, in effect a bill payable to bearer, only when the acceptor was aware of the circumstance that the payee was a fictitious person, and further, that his liability in that case depended upon an application of the law of estoppel. It appeared to those learned Judges that if the exception was to be further extended, it would rest upon no principle, and that they might well pause before holding that sect. 7, sub-sect. 3, of the statute was "intended not merely to codify the existing law, but to alter it and to introduce so remarkable and unintelligible a change."

My Lords, with sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. [I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was

probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground.

One further remark I have to make before I proceed to consider the language of the statute. The Bills of Exchange Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment.

Turning now to the words of the sub-section, I confess they appear to me to be free from ambiguity. "Where the payee is

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Herschell.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Herschell.

a fictitious or non-existent person ” means, surely, according to ordinary canons of construction, in every case where this can, as a matter of fact, be predicated of the payee.

I can find no warrant in the statute itself for inserting any limitation or condition. I am putting aside for the present the question by whom a bill answering the description of the subsection may be treated as payable to bearer, and I am accepting too for the moment the meaning attributed by the majority of the Court of Appeal to the word “fictitious,” viz. a creation of the imagination, confining myself to the question in what cases a bill purporting on the face of it to be payable to order may be treated as payable to bearer. I find it impossible without doing violence to the language of the statute to give any other answer than this—In all cases in which the payee is a fictitious or non-existent person. The majority of the Court of Appeal read the section thus: Where the payee is a fictitious or non-existent person, the bill may, as against any party who had knowledge of the fact, be treated as a bill payable to bearer. It seems to me that this is to add to the words of the statute and to insert a limitation which is not to be found in it or indicated by it. It is said that when the acceptor is the person against whom the bill is to be treated as payable to bearer, “‘fictitious’ must mean fictitious as regards the acceptor, and to his knowledge.” With all respect, I am unable to see why it must mean this. I confess I cannot altogether follow the meaning of the words fictitious “as regards” the acceptor. I have a difficulty in seeing how a payee, who is in fact a “fictitious” person in the sense in which that word is being used, can be otherwise than fictitious as regards all the world—how such a payee can be “fictitious” as regards one person and not another. The truth is the words, “as regards” the acceptor, are treated as equivalent to the words, “to the knowledge of” the acceptor. But I do not think these expressions are synonymous. It seems to me that to import into the statute after the words “fictitious person” the words “as regards” the acceptor or drawer, as the case may be, and then to interpret those words as meaning “to the knowledge of,” only tends to obscure the fact that the condition that the payee must be fictitious to the knowledge of the person sought to be charged



as upon a bill payable to bearer is being introduced into the enactment. H. L. (E.)

For the reasons I have given I find myself compelled to the conclusion, notwithstanding my respect for those who have expressed a contrary view, that in order to establish the right to treat a bill as payable to bearer it is enough to prove that the payee is in fact a fictitious person, and that it is not necessary if it be sought to charge the acceptor to prove in addition that he was cognisant of the fictitious character of the payee.

My Lords, if the conclusion which I have indicated as being, in my opinion, the sound one, involved some absurdity or led to some manifestly unjust result, I might perhaps, even at the risk of straining the language used, strive to put some other interpretation upon it. But I cannot see that this is so, or that the interpretation I have adopted does any violence to good sense, or is otherwise than in accordance with sound commercial principle. I will assume that as the law stood at the time the Bills of Exchange Act was passed, a bill drawn to the order of a fictitious payee could have been treated as a bill payable to bearer only as against a party who knew that the payee was fictitious. This decision even was arrived at little more than a century ago, and was dissented from by distinguished judges, and it is obvious from the observations of Lord Ellenborough in *Bennett v. Farnell* (1) that by some eminent lawyers at least it was regarded rather as a departure from strict principle, which ought not to be further extended than as an embodiment of sound commercial principle.

But is it impossible to take any step beyond this without violating sound principle and working injustice? Let me draw attention for a moment to the relative position and rights of the drawer and acceptor of a bill of exchange. A drawee who accepts a bill does so either because he has in his hands moneys of the drawer, or expects to have them before the bill falls due, or because he is willing to give the credit of his name to the drawer, and to make him an advance by payment of his draft. It is immaterial to the acceptor to whom the drawer directs him to make payment: that is a matter for the choice of the drawer

(1) 1 Camp. 130, 180, c.

1891

BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.

Lord Herschell.

H. L. (E.) alone. The acceptor is only concerned to see that he makes the payment as directed, so as to be able to charge the drawer. It is in truth only with the drawer that the acceptor deals; it is at his instance that he accepts; it is on his behalf that he pays; and it is to him that he looks either for the funds to pay with, or for reimbursement if he holds no funds of the drawer at the time of payment.

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Herschell.

In the ordinary case, where the payee designated in the bill is a real person intended by the drawer to receive payment, either by himself or by some transferee, the acceptor can only charge the drawer, if he pays the person so designated, or some one deriving title through him. If payment be made to any other person, the drawer's liability on the bill is not discharged by payment; he will or may remain liable to the real payee, or those claiming under him, and the acceptor having paid otherwise than according to the directions of the drawer cannot justify the use of his funds in making the payment, or claim to be reimbursed by him. But now suppose the drawer inserts as payee the name of a fictitious person, requests the drawee to accept a bill so drawn, indorses the payee's name, and puts the bill into circulation. He certainly intended it to obtain currency and to be paid at maturity, and he as certainly did not intend it to be paid only to the payee named, or some one deriving title through him. Nor, as it seems to me, can it reasonably be said that he intended to direct the drawee to pay such person and such person only.

What then is the position of a lawful holder of a bill so drawn? I do not understand it to be doubted that even before the Bills of Exchange Act such a holder could enforce payment of the bill against the drawer, for he not merely knew that the payee designated was a fictitious person, but was himself the author of the fiction. As against the drawer then such a bill could be treated as payable to bearer. But if it cannot be so treated as against the acceptor, the holder, who, it may be, bought or discounted it on the faith of the acceptance, relying on the credit of the acceptor, and unwilling to trust to that of the drawer alone, is deprived of that upon which he relied, of the liability which he regarded as his security for payment. The holder in such a

case suffers wrong. Would any injustice result if the bill could, as against the acceptor also, be treated as payable to bearer? The drawer must be taken to have intended the bill to be paid by the acceptor at maturity—but to whom? Not to the fictitious payee, or some one claiming through him. Why not then to the bearer, who can hold the drawer liable upon the bill, and treat it as payable to him? And if it were the law that the acceptor was bound in such a case to pay the bearer, who would suffer? Not the drawer, for payment would have been made to a person who could compel him to make payment, and he could have no ground for complaint if the acceptor used his funds in thus discharging his liability on the bill, or in case he had not provided such funds if he were held liable to reimburse the acceptor. And how would the acceptor suffer in such a case? It was his object in accepting the bill to render himself liable to make payment to the person intended by the drawer to receive it, either out of moneys provided by him, or looking to him for reimbursement. His position under such circumstances would be precisely what it would have been if he had made payment to a real person designated as payee, or to those claiming under him. And it might, I think, fairly be said that he was making the payment in accordance with the intention of the drawer.

It may be that the right of the holder to treat such a bill, as against an acceptor ignorant of the fictitious character of the payee, as a bill payable to bearer, could not be established merely by an appeal to the law of estoppel, and that such estoppel would exist only against the drawer who knew that the payee was a fictitious person. I will assume that this was the law prior to the recent statute. But why should not the legislature have intervened with a positive enactment imposing this liability upon the acceptor—an enactment which, it seems to me, would wrong no one, and would prevent a holder for value from suffering wrong? Estoppel is not the only sound principle upon which a law can be based. The law of estoppel was not thought to afford sufficient protection to those dealing with the apparent owner of goods. The legislature deemed it necessary to intervene, and the Factors Acts were passed, each of which added something to the protection of persons so dealing. Why, then, should it be thought

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Lord Herschell.

H. L. (E.)  
 1891  
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 BANK OF  
 ENGLAND  
 v.  
 VAGLIANO  
 BROTHERS.  
 ———  
 Lord Herschell.  
 ———

improbable that the legislature should have created in the holder of a bill drawn payable to a fictitious person a new right against the acceptor? If I am correct in thinking that this added right would obviate and not entail injustice, that it would make the law more reasonable and bring it more into conformity with the course of commercial transactions, I can see no reason for doubting that the legislature so intended, if this be the plain natural meaning of the words they have used, or for endeavouring so to construe the language as to find in it no more than a statement of the previous law.

I have dwelt at some length upon this point because it appeared to me important to shew that the words of the enactment might have their natural effect given to them without leading to results either unjust or commercially inconvenient. But I desired also to elucidate the principle upon which the enactment was, in my opinion, based; because this is not without its bearing upon the next question to be considered, and to which I will now pass. It is to my mind one of greater difficulty.

Even assuming, it is said, that where the payee is a "fictitious" person the bill may be treated as against the acceptor as a bill payable to bearer, the word "fictitious" is only applicable to a creature of the imagination, having no real existence, whilst in the present case "C. Petridi and Company" was the name of a firm having a real existence, so that the payee here cannot be termed a fictitious person. But are the words "where the payee is a fictitious person" incapable of legitimate application in any other case than that suggested? The first observation I have to make is, that, if so, there was no necessity for the introduction of the word "fictitious" in the enactment; the word "non-existent" would have sufficed. It was argued that whilst a fictitious person is one who has never existed, a non-existent person is one who has existed but whose existence has ceased. But even if this be admitted, the word "non-existent" would have sufficed, for it can hardly be doubted that it is employed as suitably in reference to that which has never existed as to that which, having existed, exists no longer.

Without however dwelling too much on this point, which may perhaps have a historical explanation, let me call attention to

the inconvenient complexity and strange and unmeaning distinctions to which, as it seems to me, the construction adopted by the Court of Appeal would give rise. If, for example, a drawer inserts after the words, "Pay to the order of," a name which he invents, himself indorses that name, and puts the bill into circulation, it is within the terms of the statute, and may be treated as a bill payable to bearer. But if he inserts the first name that occurs to him, though he never intends a bearer of that name to be the payee, or that title shall only be made through him, but himself indorses this bill and puts it into circulation just as he did the other, this bill, as I understand the Court below, stands in a different position. The case is not within the statute, and if the bill can be treated, even as against the drawer, as a bill payable to bearer, this does not depend upon the words of the enactment, but must result from the rules of the common law, which, in so far as they are not inconsistent with the express provisions of the Act, are by sect. 97, sub-sect 2, still to apply to bills of exchange.

It follows that, according to the view of the majority of the Court of Appeal, the legislature has dealt by express enactment with one case of estoppel—that is to say, where the payee is a "fictitious person" in the sense which they attribute to those words—but has left the analogous case, where, though the payee was not fictitious in that sense, the name was inserted as a mere pretence, and without any intention that payment should be made to the person designated, undealt with, and the rights and liabilities upon the bill to be ascertained by an appeal to the rules of the common law. Certainly a strange proceeding in a code of this description, and one for which it would be difficult to find a satisfactory explanation.

But this is not all. If I am right in thinking that in the case of a payee who is a fictitious person (whatever be the meaning of that expression) a bill may, as against the acceptor, be treated by a lawful holder as payable to bearer whether the acceptor knew of the fiction or not, why should this right and liability differ according as the name inserted as payee be a creature of the imagination or correspond to that of a real person, the drawer in neither case intending a person so designated to receive

H. L. (E.)

1891

BANK OF  
ENGLANDV.  
VAGLIANO  
BROTHERS.

Lord Herschell.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Herschell.

payment, and in each case himself indorsing the bill in the name of the nominal payee before putting it into circulation? I am at a loss for any reason why this distinction should exist. It is true that there is this difference between the two cases—that in the one an indorsement by the named payee is physically impossible, whilst in the other it is not. But I do not think this difference affords a sound basis for a distinction between the respective rights and liabilities of the drawer, acceptor, and holder. It seems to me that it would in each case be reasonable, and on the same grounds, that the acceptor should be liable to the holder of the bill, indemnifying himself out of the funds of the drawer or obtaining reimbursement from him.

It must be admitted, of course, that if the language of the statute is not reasonably capable of any other interpretation than that adopted by the majority of the Court of Appeal, if it will not allow of a construction which would cover the case we have been considering, then one must submit to the conclusion that the legislature has left the law in this respect in an unsatisfactory position and full of distinctions devoid of any sound principle. But are we compelled to this conclusion? Do the words, “where the payee is a fictitious person,” apply only where the payee named never had a real existence? I take it to be clear that by the word “payee” must be understood the payee named on the face of the bill; for of course by the hypothesis there is no intention that payment should be made to any such person. Where, then, the payee named is so named by way of pretence only, without the intention that he shall be the person to receive payment, is it doing violence to language to say that the payee is a fictitious person? I think not. I do not think that the word “fictitious” is exclusively used to qualify that which has no real existence. When we speak of a fictitious entry in a book of accounts, we do not mean that the entry has no real existence, but only that it purports to be that which it is not—that it is an entry made for the purpose of pretending that the transaction took place which is represented by it.

In his report of the case of *Stone v. Freeland* (1), the learned reporter speaks of there having been in that case “a fictitious

(1) 1 H. Bl. 316, n.

indorsement." The facts were that a bill had been drawn payable to Butler & Co., and indorsed in that name. There was a house, Butler & Co., with whom Cox, the drawer, had dealings; but the bill had never been in their hands, and appeared to have been indorsed by Cox. Now, in what sense was the word "fictitious" here used? Not, surely, to convey the idea that the indorsement had no real existence and was a mere creature of the imagination, but that it was put forward as being that which it was not.

These seem to me to be instances (and other illustrations might be given) of an analogous use of the word "fictitious" to that which, I think, may be attributed to it in the statute. Turning to the interpretation of the word "fictitious" in Dr. Johnson's Dictionary, I find amongst the meanings given are "counterfeit," "feigned." It seems to me, then, that where the name inserted as that of the payee is so inserted by way of pretence only, it may, without impropriety, be said that the payee is a feigned or pretended, or, in other words, a fictitious person. Stress was laid upon the fact that the words of the statute are, "where the payee is a fictitious person," and not "where the payee is fictitious." There is not, to my mind, any substantial difference in the meaning of the two phrases; and I cannot think that the legislature intended the rights and liabilities arising upon mercantile instruments to depend upon nice distinctions such as this.

For the reasons with which I have troubled your Lordships at some length, I have arrived at the conclusion that, whenever the name inserted as that of the payee is so inserted by way of pretence merely, without any intention that payment shall only be made in conformity therewith, the payee is a fictitious person within the meaning of the statute, whether the name be that of an existing person, or of one who has no existence, and that the bill may, in each case, be treated by a lawful holder as payable to bearer.

I have hitherto been considering the case of a bill drawn by the person whose name is attached to it as drawer, whilst the bills which have given rise to this litigation were not drawn by Vucina, who purported to be the drawer, his name being forged

H. L. (E.)

1891

BANK OF  
ENGLANDv.  
VAGLIANO  
BROTHERS.

Lord Herschell.

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by  
Vaghi  
Bros*

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Herschell

by Glyka. I think it was hardly contended on behalf of the respondents that this made any difference. The bills must, under the circumstances, as against the acceptor, be taken to have been drawn by Vucina, and if they have been made payable to a fictitious person within the meaning of the statute, I do not think it is open to question that they may, as against the acceptor, be treated as payable to bearer, in every case in which they could have been so treated if Vucina had drawn them. If, in the present case, Vucina had himself drawn the bills and inserted the name of C. Petridi & Co. as payees, as a mere pretence without intending any such persons to receive payment, it follows from what I have said that in my opinion they would have been bills whose payee was a fictitious person, and I do not think they can be regarded as any the less so, in view of the circumstances under which the name of C. Petridi & Co. was inserted.

Assuming, then, that the bills in question are within the sub-section of the Bills of Exchange Act which we are considering, and may therefore be treated as bills payable to bearer, the question remains, By whom may they be so treated? By a *bonâ fide* holder for value, certainly; and in considering the construction of the section, I have thus far limited my attention to the case of such a holder. It is the case which ordinarily arises in the course of commercial transactions with negotiable instruments, and it is the one, therefore, which must be taken to have been primarily had in view in framing a law to determine the rights and liabilities in respect of such instruments. But I can see nothing in the words of the enactment to confine their application to this case.

It appears to me that the natural answer to the question which I have proposed is this: a bill, within the sub-section, may be treated as payable to bearer by any person whose rights or liabilities depend upon whether it be a bill payable to order or to bearer. I, of course, exclude the case of one who is a party to, or who has notice of, a fraud. At all events, I can see no reason why a banker who has been requested to pay the bill by his customer, the acceptor, may not so treat it. Where the bill is, in truth, payable to order—that is to say, where the drawer intends that payment should be made only to the person named



as the payee, or to someone deriving title through him—then the direction to the banker must, since the decision in *Robarts v. Tucker* (1), be taken to be a direction to pay to such person only. But where the payee is a fictitious person within the meaning of the sub-section, I think the direction to the banker must be taken to be to pay the bearer. It is by reason of his filling that character that the holder is entitled to demand payment of the acceptor. And when a banker has been instructed by the acceptor to pay such a bill on his behalf, it is to the person filling that character that he must be taken to have intended the payment to be made. If the holder were a bonâ fide holder for value who, if payment had been refused, could hold the acceptor liable, I do not think this could be doubted; and where the bill is one which might be treated as payable to bearer by a bonâ fide holder, so that the direction to the banker to pay the bill is a direction to pay the bearer, I do not think that the banker is any the less entitled to charge the payment of the bill against his customer, because the bearer to whom payment is made holds it under such circumstances that the acceptor could successfully resist a claim for payment by him. It cannot be doubted that this would be so where a bill was in terms payable to bearer, and I do not think there is any sound distinction in the relative position of banker and customer between this case and that of a bill which may be treated as payable to bearer.

I cannot think that the view I have indicated works any injustice. It is too late now to question the decision in *Robarts v. Tucker* (1). It has been long acted upon and regarded as law, though the decision certainly seems to have rested upon the assumption that it was possible for a banker to do that which would be, commercially speaking, absolutely impracticable, viz., to investigate the validity of all the indorsements before he complied with the direction of his customers and paid the bill. In the case there dealt with, however, the complaint of the customer was that the banker had paid the wrong person, leaving him liable to pay the right one. Here the position of the customer is, that in spite of his direction to the banker to pay the bill he ought not to have made payment to anyone. The

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Herschell.

H. L. (E.) conclusion at which I have arrived is exclusively based upon the construction of the terms of the statute, uninfluenced by these considerations; but I am glad to think that it leads to a result which cannot, in my opinion, be regarded as either unjust or commercially inconvenient.

1891  
BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.  
—  
Lord Herschell.  
—

The conclusion which I have indicated is sufficient to determine the case in favour of the appellants. I have not found it necessary, therefore, to form a decisive opinion upon the other questions raised; but I do not desire to be understood as dissenting from the view entertained by some of your Lordships, that, apart from the provisions of the statute, the facts of the present case afford sufficient grounds for arriving at the same decision.

LORD MACNAGHTEN :—

My Lords, it can hardly be denied that the business of Vagliano Brothers was conducted in rather a loose fashion. There was no check on the clerks; there was no effective supervision over the work of the office. But, apart from the error committed in taking the forgeries of a clerk for the signature of a correspondent whose bills the firm was in the habit of accepting, there was nothing, I think, in the conduct of the business, or in what Vagliano himself did or omitted to do, which can afford a plausible answer to the plaintiffs' claim. On the other hand, the fact that the sums in question were paid over the counter ought not, I think, to prevent the bank from setting up any defence which would have been available if the money had been paid through another bank.

Putting aside these matters, to which a good deal of evidence was directed, the case lies in a narrow compass. But it is one of much difficulty. There is no authority which governs it. Very little assistance is to be derived from reported decisions. And it is by no means easy to apply to Glyka's fabrications rules of law intended for genuine bills of exchange and principles applicable to honest commercial transactions.

There are, I think, two questions to be considered: (1.) Is the bank entitled to be indemnified against the moneys paid in respect of these forged bills, although the bills may not have been paid according to their tenor? (2.) Can the bank treat

the bills as payable to bearer, and so justify the payment as being in accordance with their customer's mandate? H. L. (E.)

As regards the first question the following points are, I think, established.

(1.) The relation of banker and customer does not of itself, and apart from other circumstances, impose upon a banker the duty of paying his customer's acceptances.

If authority is wanted for this proposition it will be found in *Robarts v. Tucker* (1), where it was said by the Court that "if bankers wish to avoid the responsibility of deciding on the genuineness of indorsements, they may require their customers to domicile their bills at their own offices, and to honour them by giving a cheque upon the banker." That implies that bankers may refuse to pay their customer's acceptances, and that such refusal is not inconsistent with the relation of banker and customer, or a breach of the banker's duty to his customer.

(2.) If a banker undertakes the duty of paying his customer's acceptances, the arrangement is the result of some special agreement, expressed or implied. And such an agreement in the absence of express stipulation to the contrary must have reference solely to genuine bills of exchange. It cannot be supposed to contemplate any dealings with fictitious instruments.

(3.) Bankers who undertake the duty of paying their customer's acceptances cannot do otherwise than pay off-hand, and, as a matter of course, bills presented for payment which are duly accepted and regular and complete upon the face of them.

It would be out of the question for a banker to adopt the suggestion made by one of the learned Judges in *Robarts v. Tucker* (1), and defer payment until satisfied by inquiry and investigation that all the indorsements on the bill are genuine. That is hardly a practical suggestion. A banker so very careful to avoid risk would soon have no risk to avoid.

(4.) In paying their customer's acceptances in the usual way bankers incur a risk perfectly understood, and in practice disregarded. Bankers have no recourse against their customers if they pay on a genuine bill to a person appearing to be the holder, but claiming through or under a forged indorsement.

(1) 16 Q. B. 560.

1891  
BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.  
Lord  
Macnaghten.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.Lord  
Macnaghten.

The bill is not discharged; the acceptor remains liable; the banker has simply thrown his money away. That was the effect of the decision in *Robarts v. Tucker* (1). I do not think that that was a harsh decision. Nor do I see how the Court could have come to any other conclusion, unless it had taken quite a different view of the customer's mandate and the banker's obligation. At any rate the ground of the decision is now part of the statute law. The Bills of Exchange Act, 1882, enacts (sect. 24) that, subject to certain provisions, which for the present purpose are immaterial, a forged or unauthorized signature on a bill is wholly inoperative, and that no right to retain the bill or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, except in the case of an estoppel. Nothing but legislation could have relieved bankers from the liability attaching to them in accordance with the law as declared in *Robarts v. Tucker* (1). The fact that no such legislation has ever been promoted or, I believe, advocated on behalf of bankers in the case of bills of exchange, though the law has been relaxed as regards cheques, seems to shew that in the case of genuine bills the liability is of little or no practical importance.

(5.) The drawee of a bill is bound to know the drawer's signature. It is his fault if he writes his acceptance on a forged instrument. And it is his act of acceptance which sends the bill forward for payment to the banker.

(6.) In the case of a counterfeit bill, the payee's signature must be forged unless the person named as payee is an accomplice in the fraud. And, therefore, if there is no accomplice, assuming *Robarts v. Tucker* (1) to apply, an acceptance making the bill payable at a bank necessarily entails upon the banker the loss of the sum for which the bill purports to be drawn. The banker has no chance of escape. Relying on his customer's acceptance, he takes it for granted that the bill is genuine. Ignorant of any danger, beyond the possible risk of a theft having been committed and remaining still undiscovered, he pays the apparent holder as a matter of course.

(1) 16 Q. B. 560.

It seems to me that if these premises are well-founded, the bank is entitled to be indemnified by Vagliano Brothers in respect of the money paid on the forged bills which Vagliano accepted and directed the bank to pay.

If A. employs B. on his behalf to deal with articles of a certain description in a particular way, and then A., through inadvertence or otherwise, introduces among the articles with which B. is to deal a dangerous counterfeit not distinguishable in appearance from its companions, I cannot doubt that A. is bound to indemnify B. against any loss resulting from his dealing with the counterfeit as if it were a genuine article within the scope of his employment. And it cannot, I think, make any difference that B. is bound by the terms of his employment to bear every risk incident to his dealing with the genuine article.

There is, I think, a wide distinction between this case and *Robarts v. Tucker* (1), though in both it was the duty of the bankers to pay bills of exchange accepted by their customers to the person who according to the law-merchant was capable of giving a good discharge, and in both the bankers were cheated out of their money. In the one case the customer's acceptance introduced to the bank a genuine mercantile instrument, though it had been tampered with by a thief without the fault or the knowledge of the customer. In the other, the acceptance introduced a fraudulent counterfeit which the customer ought to have detected. In *Robarts v. Tucker* (1) there was presented for payment a genuine bill bearing a forged indorsement. The bankers paid the wrong man, leaving the bill unpaid and the liability of the customer undischarged. They claimed credit all the same. But they did not pretend that they had done what they were told to do; nor could they allege that their employer had any hand in misleading them. Of course their claim was rejected. In the present case the bankers have not failed in the performance of any duty towards their customer. They undertook no duty, they accepted no mandate, in regard to pieces of paper which are not bills of exchange, and with which the law-merchant has no concern. They, too, have been cheated out of their money.

(1) 16 Q. B. 560.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord

Macnaghten.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.Lord  
Macnaghten.

Whether they can say that they have done what they were told to do remains to be considered. At least they can say that their employers were active, though no doubt unconscious instruments, in carrying out the deception which led to their loss.

I now come to the second question, which depends on the effect of sect. 7, sub-sect. 3, of the Act of 1882. The enactment, of course, was not directed to such a case as this. The provisions of the statute were meant for genuine bills of exchange. But if the argument on behalf of the bank is right, it happens to furnish a short answer to a claim which fails on broader and, I think, more satisfactory grounds.

On behalf of the bank, it was pointed out that these pretended bills, being duly accepted and regular and complete on the face of them, were presented for payment apparently in due course; and it was said that although no doubt at the time they were taken to be payable to order, and to be duly indorsed by the payee, yet when it turns out that the payee was a fictitious person, they may be treated as payable to bearer, and so the payment is justified though all the indorsements are inoperative.

On behalf of Vagliano Brothers, it was contended that a bill payable to a fictitious person is not payable to bearer unless the acceptor is proved to have been aware of the fiction; and further, it was contended that nothing but a creature of the imagination can properly be described as a fictitious person. I do not think that either of these contentions on behalf of the respondents can be maintained.

Before the Act of 1882, the law seems to have been, as laid down by Lord Ellenborough in *Bennett v. Farnell* (1), that "a bill of exchange made payable to a fictitious person or his order, is neither in effect payable to the order of the drawer nor to bearer, unless it can be shewn that the circumstance of the payee being a fictitious person was known to the acceptor." The Act of 1882, sect. 7, sub-sect. 3, enacts that, "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer." As a statement of law before the Act that would have been incomplete and inaccurate. The omission of the qualification required to make it complete and accurate as

(1) 1 Camp. 130, 180, c.

the law then stood seems to shew that the object of the enactment was to do away with that qualification altogether. The section appears to me to have effected a change in the law in the direction of the more complete negotiability of bills of exchange—a change in accordance, I think, with the tendency of modern views and one in favour of holders in due course, and not, so far as I can see, likely to lead to any hardship or injustice.

Then it was said that the proper meaning of “fictitious” is “imaginary.” I do not think so. I think the proper meaning of the word is “feigned” or “counterfeit.” It seems to me that the “C. Petridi & Co.” named as payees on these pretended bills were, strictly speaking, fictitious persons. When the bills came before Vagliano for acceptance they were fictitious from beginning to end. The drawer was fictitious; the payee was fictitious; the person indicated as agent for presentation was fictitious. One and all they were feigned or counterfeit persons put forward as real persons, each in a several and distinct capacity; whereas, in truth, they were mere make-believes for the persons whose names appeared on the instrument. They were not, I think, the less fictitious because there were in existence real persons for whom these names were intended to pass muster.

In the result, therefore, I think that on both grounds the bank is entitled to succeed. Nor is that conclusion altogether to be regretted. An opposite conclusion would, I think, go a long way to encourage mischievous negligence on the part of persons called upon to accept bills of exchange. To an acceptor it would be a matter of indifference whether the drawer’s signature were genuine or not. If it were genuine, the transaction would be completed in regular course. If it were not genuine, the loss would fall, not on the acceptor whose negligence had led to it, but on the banker, who could have no means of detecting the forgery and must have been thrown off his guard by the carelessness of his employer.

LORD MORRIS :—

My Lords, I entirely agree in the conclusion arrived at by my noble and learned friend Lord Herschell, viz., that whenever the name inserted as that of the payee is inserted without any

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.

VAGLIANO  
BROTHERS.

Lord  
Macnaghten.

H. L. (E.)

1891

BANK OF  
ENGLAND

n.

VAGLIANO  
BROTHERS.

Lord Morris.

intention that payment shall only be made in conformity therewith, the payee becomes a fictitious person within the meaning of the Bills of Exchange Act, 1882, sect. 7, sub-sect. 3, and that the bill may be treated by a legal holder as payable to bearer; and having had the advantage of reading the noble and learned Lord's judgment in print, I concur in the reasoning by which that conclusion is arrived at.

My Lords, that conclusion appears to me not only to embrace the bills which are the subject of this litigation, but I am of opinion they are *à fortiori*, and necessarily, within the statute as bills payable to bearer. The bills were regular in form, with Vucina of Odessa as drawer, Petridi of Constantinople named as payee, and Vagliano as drawee. Vagliano accepts the bills; that acceptance is the only real action of the three parties named in the bills. Vucina drew none of the bills, and knew nothing whatever about them; Petridi had no knowledge of or any connection of any kind with them; Vucina, though a known existing person, had no reality in regard to them; the paper writings only became bills as against Vagliano, who by his acceptance is estopped—in the language used in the statute, is precluded—from denying they were bills as against the bank who paid them on the faith of his acceptance, and also upon his express requisition to do so. If Vucina was an unreal person, Petridi must be also an unreal person, and therefore a fictitious person in regard to the bills. The drawer can alone designate the payee; but there was, in fact, no drawer. Vucina, the alleged drawer, could not and did not name any payee; Glyka, the forger, who wrote the documents in the form of bills of exchange, was not a drawer: he forges the name of Vucina as drawer; that cannot constitute Glyka himself a drawer. Vucina cannot become the alter ego of Glyka because Glyka forged his name, nor can Glyka be the alter ego of Vucina, who never knew of or heard of Glyka's existence; the only person who could call into existence a payee had no legal existence. There never was, in fact, a real bill of exchange. Though the acceptor, Vagliano, is bound to know the drawer and guarantee his existence and handwriting, and is precluded from denying against the holder that it is a bill of exchange, only to the extent of the



estoppel is the document a bill of exchange. In the case of a real drawer, that the payee is a fictitious person (unless it is obvious on the face of the bill) must be proved by the holder; but in the case of an unreal drawer, as a fact, the unreality, and therefore fictitiousness, of the person named as payee follows necessarily.

I am of opinion that the judgment of the Court of Appeal should be reversed.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS

Lord Morris.

LORD FIELD :—

My Lords, the question in this case between the appellants, the Bank of England, and their customer, a foreign banker and merchant, shortly stated, is whether the appellants are justified in debiting the respondent's account with various payments made by them, amounting in the whole to the sum of £71,500. The sums so paid were the amounts of a series of documents purporting to be bills of exchange and to have been drawn upon the respondent by one of his correspondents at Odessa named Vucina, and to be payable to the order of "C. Petridi & Co."

The acceptances by the respondent of these supposed drafts were genuine, although obtained from him by a fraud to which he was no party; but the drawings purporting to be by Vucina were forgeries by one of the respondents' clerks named Glyka, who having, after acceptance, also forged indorsements of the name of the firm of the alleged payees, obtained payment of the amounts from the appellants, at whose bank the respondent had made the acceptances payable.

Besides making the acceptances so payable, the respondent had, previous to their falling due, advised the appellants of his having so accepted by letters in the following terms :—

"From Vagliano Brothers to the Cashiers of the Bank of  
England.

"19, Old Broad Street, London, E.C.

"17 February, 1887.

"The undernoted bills have been accepted by us and made payable with you, which please pay at maturity and debit our account.

"Yours truly,

"Vagliano Brothers.

H. L. (E.)      “No. 97,326, drawn by G. Vucina, Odessa, 4 February, due 18th instant, £650. No. 97,332, drawn by D. P. Pulaco, Piraius, 29 January, due 18th instant, £200.”

1891  
BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.  
—  
Lord Field.  
—

The second of these two bills was an ordinary genuine bill in no way connected with the present question ; the first was also the first forgery by Glyka, and as it fell due in the course of the then current month, and had been accepted subsequent to the general monthly advice, it was the subject of a special advice.

The second forged draft (for £700) fell due on the 7th of March, and was included in the usual monthly advice, which was in the following form :—

“ Vagliano Brothers,

“ List for March enclosed.

“ 19, Old Broad Street, London, E.C.

“ 28th February, 1887.

“ The Cashiers of the Bank of England.

“ Gentlemen,

“ Herewith we beg to hand you over list of acceptances falling due next month and made payable with you, which be good enough to pay at maturity and debit our account.

“ Yours truly,

“ Vagliano Brothers.”

Enclosed with the letter was a list of bills describing them by the date when drawn, the number, the drawer's name and residence, the date when due, and the amount. Similar letters were subsequently regularly sent by the respondents to the appellants, in which the acceptances making up the residue of the £71,500 were advised.

The transactions between Vucina and the respondent are very large, representing at times over a million sterling in the course of a year ; and, amongst other drafts by Vucina, the respondent had in the years 1886 and 1887, before the commencement of, and in one instance contemporaneously with, the transactions now in question, accepted genuine drafts of Vucina, sixteen or seventeen in number, payable to the order of a firm of C. Petridi & Co., carrying on business in Constantinople, and with whom Vucina had numerous transactions. Indeed, if Glyka is to be believed, there had been a direct communication between the

respondent and C. Petridi & Co. in reference probably to some of these genuine drafts, all of which represented genuine transactions between Vucina and C. Petridi & Co., and the indorsements upon which the appellants had paid them were all genuine and in order. There cannot, I think, indeed be much doubt but that Glyka, having obtained possession of some of the genuine business letters of Vucina and of genuine acceptances and indorsements, made use of them to fabricate his forgeries, probably also thinking that the names being familiar to the respondents' clerks no inquiry would be made.

There were of course no transactions of any kind in reference to which those bills could be supposed by anybody to have come into existence or be used; but that Glyka intended to make use of the actual names of existing persons, and existing to the knowledge of the respondent or his clerks, to facilitate his fraud, I entertain no doubt. It is equally clear that Glyka had no intention whatever that the acceptances should ever come to the knowledge either of the alleged drawers or payees. He doubtlessly expected to be able, as the result of his Stock Exchange speculations, to retire them before maturity, and conceal their existence from the respondent.

Under these circumstances, the appellants, firstly, contended that the payees named in the draft were "fictitious persons" within the meaning of the 7th section, sub-sect. 3, of the Bills of Exchange Act, 1882, and that the bills were, therefore, according to their tenor and effect in law bills payable to bearer; so that whatever might have been the original limits of the authority under which the appellants had acted in undertaking the making of the payments complained of, it was competent to them, now that the actual facts had been discovered, to shew and rely upon them as justifying their right to debit the respondent with the amount.

I will deal with that contention first. That the terms of the original mandate, as between the appellants and respondent, were limited to payment to the actual indorsees of the payees named in the instruments is I think clear, and was not, if I followed the argument of the appellants correctly, seriously disputed. At the times of acceptance and payment neither party entertained any

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.

Lord Field.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Field.

suspicion that C. Petridi & Co. were other than what they appeared to be, genuine payees, and Vucina a genuine drawer. The respondent, therefore, had the right to assume that by making the payment to the order of the payees he would acquire a discharge to that amount in his accounts with the assumed drawer, Vucina.

On the other hand, it appears from the evidence that the bank on presentation of the acceptances did no more than refer to the advices and indorsements in order to satisfy themselves that the bills were in order. In other words, by accepting the duty of paying the acceptances at maturity, they intentionally undertook the risk which the law-merchant has been held, under those circumstances, to impose upon bankers in the case of a genuine acceptance (*Robarts v. Tucker* (1)); a liability the existence of which I understood the appellants did not deny, but they endeavoured to distinguish that case from the present by a circumstance which did not exist in that case, viz., that the respondent in this case had by the letters of advice untruly although innocently, represented the drawing as genuine, whereas it being a forgery, the appellants in paying the amount would acquire no valid discharge against any valid drawer.

Assuming, however, that the letters of advice amount to such a representation, it does not appear to me that the appellants in making the payments complained of relied in any way upon it, nor that the representation goes any further than the acceptance itself, which in the case of *Robarts v. Tucker* (1) was held insufficient to vary the duty of the banker.

The sole question in this case appears to me to be, whether in making the payments to Glyka the bankers have complied with the direction of their customer. That direction is found in the letters of advice and the acceptances, and I do not see that the terms of the latter differ from the former. The question, therefore, upon the first point seems to me to be reduced to this: whether, as alleged by the appellants, the payees were "non-existing or fictitious persons" within the 3rd sub-section, and if so, whether as against an acceptor no party to and ignorant of the fiction the bills might be treated as payable to bearer so as to justify the payments to Glyka.

(1) 16 Q. B. 560.

Upon this point the appellants argued that, as in fact there was no person in existence capable of giving the discharge contemplated by the acceptor, or of making a valid title by indorsement, they were under no obligation to make any inquiries as to the named payee's indorsement, or require it, but were justified, as against the respondent, in payment to bearer; that being in law the tenor and effect of the bill.

In support of this proposition they cited various cases decided in the Courts of Common Law for the purpose of shewing that where the names in one case, even of known and existing persons, had been inserted as payees fictitiously, and without any intent that they should be actual payees, the Courts had treated the bills as payable to bearer. Those cases have been fully discussed and dealt with in the Courts below, and it will, I think, appear that in all of them the persons against whom the bills were so treated had been parties to the putting forth of the bills, either with knowledge of the fictitious insertion, or with authority to make the instrument (as when accepted in blank) a negotiable instrument for the payment of money to somebody, which a holder in due course must of necessity have the right to enforce against somebody, so that the parties to their emission could not be heard to say that the bills were not payable at all for want of an indorsement by a payee who was never intended to have the power to, and could not make, any valid indorsement.

The case nearest to the present in its facts is that of *Cooper v. Meyer* (1). There the persons named as payees were known and existing persons, although their names were fictitiously inserted by the drawer as payees without any intention that they should have anything to do with the bills. But the point decided in that case simply was, that the acceptor, for whom the holder had discounted the bill, having accepted for the accommodation of the drawer who had been guilty of this fiction, evidence that the handwriting of the indorsement was the same as that of the drawing was sufficient as against the acceptor, who was precluded from denying the drawing, and who, it was said, had given credit to the drawer's handwriting.

Upon the authority of these cases, and what was said to be the

(1) 10 B. & C. 468.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.

Lord Field.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Field.

true construction of the statute, it was contended that the fraudulent intention of Glyka in inserting C. Petridi & Co. as payees, although unknown to the acceptor, had, as against him, converted an acceptance which was in terms payable to a named payee "or order" into a liability to pay any bearer. But I fail to see how upon principle the intention of a drawer can alter the terms of a bill in which there is a named and ascertainable payee. All it can do is, where more than one person fulfils the description of the payee in the bill, to say which was the person intended: *Mead v. Young* (1); and I therefore have come to the conclusion, which has been arrived at by the noble and learned Lord (Lord Bramwell), that the payees in the present case were not "fictitious or non-existent persons," within the meaning of the statute, so as to entitle the appellants to treat the respondents' acceptances as payable to Glyka or any other bearer.

It was not denied that the firm of C. Petridi & Co., who were so named as payees, were existing persons carrying on business at Constantinople, that they were known to be such to Vucina and others, and that the respondent had been in commercial relations with them by paying bills to their genuine indorsements. They are, however, said to be "fictitious" persons, because Glyka intended so to deal with the bills that the fact that their names appeared upon them should remain concealed. Now what he intended was to obtain the amount of the bills by fraudulently inserting a genuine name as the payee, relying upon his being able, in his position in the respondents' counting-house, to prevent the discovery of the forgery. But I cannot see how that can render actual existing persons fictitious within the meaning of the statute. If he had made Rothschild of Vienna, or Hirsch of Constantinople, payees, that would have been as fraudulent, but would not have made them fictitious persons.

In this view it is unnecessary to consider whether, if the payees had been fictitious persons within the meaning of the statute, the bills might be treated as against the respondent, who was ignorant of the fiction, as payable to bearer.

But the appellants argued, secondly, that even if the payments in question could not be justified in themselves, the conduct of

(1) 4 T. R. 28.

the respondent precluded him from complaining of them. They urged that his representation in the letter of advice that the bills were genuine commercial instruments, his instructions to honour them at maturity, coupled with such a lax system of business as enabled a man in the position of Glyka to concoct and carry into effect his extensive frauds; the omission to examine the forged indorsements on the bills when periodically returned by the appellants; the non-observance of the omissions in the forged letters, which ought to have been noticed and so excited inquiry, and the amount of the forged acceptances—£6000 in June, £19,000 in July, and over £15,000 and £16,000 in August and September—which ought also to have excited attention, amounted to conduct without which the loss would not have happened, and which so far conduced to the loss as to render the alleged rule applicable, that where a loss has to fall upon one of two innocent parties, it ought to be held to fall upon the party conducing to it.

The appellants' case in this respect is, I think, a strong one, and deserving of great consideration, and, as I look upon their position as one of considerable hardship (for in any view of the case the forgeries by which they were deceived had been concocted and carried out by the respondents' servant, and, as I think, without such care and supervision on the respondents' part as I should like to have seen), I should have been well satisfied if, consistently with what I conceive to be the law, I could have held in their favour.

No doubt in one case (*Lickbarrow v. Mason* (1)), Ashhurst J. stated, as a broad general principle, that whenever one of two innocent parties must suffer by the act of a third person, "he who has enabled such person to occasion the loss must sustain it."

But more recent decisions, and one of this House of great importance, have either shewn that this proposition is not to be understood in all its generality or cannot be supported; and this was very clearly pointed out in two cases which were not, I think, cited in argument (*Arnold v. Cheque Bank* and *Arnold v. City Bank* (2)) by the Judges constituting the Common Pleas Division, who in a very careful judgment reviewed all the

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Lord Field.

(1) 2 T. R. 70.

(2) 1 C. P. D. 568.

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.VAGLIANO  
BROTHERS.

Lord Field.

authorities. It was an action by the drawer to recover the proceeds of a bill which had been received by the defendants upon a forged indorsement, and negligence affording facilities for the fraud was set up, and evidence in support of it tendered at the trial, but rejected by the Lord Chief Justice. There were several acts of alleged negligence relied upon, some of them of a similar character to some of those relied upon in the present case.

In delivering the considered judgment of the Court, consisting of the Lord Chief Justice, and the now Lord Justice Lindley, and Mr. Justice Archibald, the Lord Chief Justice said on the second and third points: "It was contended by the defendants that there was evidence of negligence in the custody and transmission of the draft by the plaintiffs, which afforded facilities for the forgery and fraud, by which the defendants were induced to receive it, and that the evidence which was rejected would have shewn an almost invariable custom for merchants in America remitting bills to correspondents in England to send another independent letter of advice either by the same or a subsequent mail, and that there were opportunities of sending such a letter by other vessels leaving on the same day as the *Celtic*, or on subsequent days, which would have arrived in time to have enabled Messrs. Williams & Co., the indorsees, whose indorsement had been forged, in the event of their not having received the draft in due course, to have communicated with Smith, Payne, & Smith, either by letter or telegram, to have stopped payment. We are of opinion, however, that there was no evidence of negligence which could operate by way of estoppel to the plaintiffs. Reliance was placed by the defendants on the case of *Young v. Grote* (1). That case, no doubt, must be considered as well decided; but various opinions have been expressed as to the real ground of the decision. But we have only to look at the case itself to see that it really proceeded on the authority of the extract from Pothier cited in the judgment of Best C.J. which makes the inability to recover depend upon the fault of the drawer of the cheque in the mode of drawing it, and is entirely consistent with the rule laid down and explained on fuller consideration in subsequent cases, viz., negligence in

(1) 4 Bing. 254.



order to estop must be negligence in the transaction itself; see per Blackburn J. in *Swan v. North British Australasian Company* (1). Indeed, in a later case: *Bank of Ireland v. Evans's Charities* (2), this is stated by Parke B. himself to be the true ground of decision. The rule, which is expressed by Ashhurst J. in *Lickbarrow v. Mason* (3), 'We may lay it down as a broad general principle that whenever one of two innocent parties suffers by the act of a third person, he who has enabled such person to occasion the loss must sustain it,' was, though not expressly referred to, observed and acted on in *Young v. Grote* (4); and it has received illustration and explanation in subsequent cases on the subject, which shew that the words 'enabling a person to occasion the loss,' must be understood to mean by some act, conduct, or default in the very transaction in question: see *Freeman v. Cooke* (5). The correct rule seems to us to be that which is thus stated by Blackburn J. in his judgment in *Swan v. North British Australasian Company* (1), where, referring to the judgment of Wilde B. below, he says: 'that he omits to qualify the rule (he had stated) by saying that the neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake; and also must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy.' In the case of *Bank of Ireland v. Evans's Charities* (3) it was expressly held both that the negligence, in order to operate as an estoppel, must be a negligence 'in or immediately connected with the transfer itself,' and, further, that it must also be 'the proximate cause of the loss.' "

The principle thus enunciated seems to me to be sound; and, applying it to the present case, I am unable to say that the conclusions arrived at by the learned Judge who tried the cause, and all the Judges of the Court of Appeal are wrong, and I am of

H. L. (E.)

1891

BANK OF  
ENGLAND  
v.  
VAGLIANO  
BROTHERS.  
—  
Lord Field.  
—

(1) 2 H. &amp; C. 181.

(2) 5 H. L. Cas. 389.

(3) 2 T. R. 70.

(4) 4 Bing. 254.

(5) 2 Ex. 654.

H. L. (E.)

1891

BANK OF  
ENGLAND

v.

VAGLIANO  
BROTHERS.

Lord Field.

opinion, therefore, that both grounds urged by the appellants fail, and that the judgment of the Court of Appeal should be affirmed.

Indeed, as has been affirmed by Lord Bramwell, in any view of this part of the case I cannot see how this objection can avail in respect of the earlier bills, which up to the 14th of May amounted to £3000, and up to the 27th of June £6000 more. Nothing is alleged to have been done or omitted, at all events at the first date, which could preclude the respondent from complaining of the prior payments.

Taking the view which I do of this case, it is unnecessary for me to advert to the alleged negligence of the bank in continuing to pay such large sums in cash over the counter, and not through a bank, further than to say that there is nothing in the evidence relating to the matter (which is very much in conflict), which, in my judgment, relieved the bank from their responsibility in respect of the payments complained of.

*Judgments of the Court of Appeal and of the Queen's Bench Division reversed and judgment entered for the defendants with costs here and below; cause remitted to the Queen's Bench Division.*

Solicitors for appellants: *Freshfields.*

Solicitors for respondents: *Hollams, Son, & Coward.*