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HUDSON COUNTY CIRCUIT COURT.

MONTGOMERY GARAGE COMPANY, a  
corporation of New Jersey,

*vs.*

MANUFACTURERS' LIABILITY INSUR-  
ANCE COMPANY OF NEW JERSEY,  
a corporation of New Jersey.

Action at Law.  
Complaint.

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20

The plaintiff, a corporation of the State of New Jersey, having a residence and place of business at #8 Foye Place, in the City of Jersey City and State of New Jersey, says that:

1. On March 15th, 1918, the defendant, the Manufacturers' Liability Insurance Company of New Jersey, made and delivered to one N. K. Turner, its check in writing of that date for \$1,500. payable to the order of the said N. K. Turner at the Commercial Trust Company of New Jersey, in Jersey City, New Jersey, a copy of which is hereto annexed.

30

2. The payee, the said N. K. Turner, afterwards endorsed and delivered said check to the plaintiff, who took the same for value.

40



3. Said check was duly presented for payment at the said Commercial Trust Company of New Jersey at Jersey City, New Jersey, but was not paid.

4. Said check still remains the property of plaintiff and is unpaid.

10 Plaintiff demands as damages the sum of fifteen hundred and one 58/100 dollars (\$1501.58) being the amount of said check and protest fees, and interest on said sum, from March 15th, 1918, and costs.

FRANK J. HIGGINS,  
Attorney of Plaintiff.

20 This check is a payment in full of the following account and payee accepts it as such by endorsement. No other receipt necessary.

Manufacturers Liability Insurance Company of New Jersey

No. 6652. Jersey City, March 15, 1918.

Pay \$1500 and 00 cts. \$1500 00/100  
N. K. TURNER

Pay \$1500 and 00 cats. Dollars

To  
Commercial Trust Company of New Jersey, A. E. Williamson  
President.

Jersey City, N. J. John G. S. Johnson  
Treasurer.

Total Discount  
Other Deductions  
Amount of Check.

30

ENDORSEMENTS

N. K. Turner  
Montgomery Garage  
M. A. Cox, Treas.

40



## HUDSON COUNTY CIRCUIT COURT.

MONTGOMERY GARAGE COMPANY, a  
Corporation of the State of  
New Jersey,

Plaintiff,

*vs.*

MANUFACTURERS' LIABILITY IN-  
SURANCE COMPANY, a Corpora-  
tion of the State of New Jer-  
sey,

Defendant.

Action at Law.  
Answer.

10

20

The Defendant, a corporation of the State of New Jersey with a place of business at No. 1 Montgomery Street, Jersey City, New Jersey, says that:

1. It denies the first paragraph.
2. It denies the second paragraph.
3. It denies the third paragraph.
4. It denies the fourth paragraph.

30

RANDOLPH PERKINS,  
Attorney for Defendant.

40



## HUDSON COUNTY CIRCUIT COURT.

MONTGOMERY GARAGE COMPANY,

vs.

10 MANUFACTURERS' LIABILITY INSURANCE COMPANY OF NEW JERSEY.

Action at Law.

*Agreed statement of Facts*

## APPEARANCES:

MR. FRANK J. HIGGINS, for the plaintiff.

MR. RANDOLPH PERKINS, for the defendant.

20

## PLAINTIFF'S FACTS:

On March 15th, 1918, the defendant issued its check, drawn on the Commercial Trust Company of New Jersey in the sum of \$1,500.00, payable to one N. K. Turner. That said check was endorsed and delivered to the plaintiff by the person representing himself to be N. K. Turner, and this person was the party to whom the defendant issued and delivered the check and who was intended by it to be the payee. Said check was as follows:

30

This check is a payment in full of the following account and payee accepts it as such by endorsement. No other receipt necessary.

Manufacturers Liability Insurance Company of New Jersey  
No. 6652. Jersey City, March 15, 1918

Pay to the order of \$1500 00/100  
N. K. TURNER

| DATE                                                                  | AMOUNT |
|-----------------------------------------------------------------------|--------|
| Pay \$1500 and 00 cts. Dollars                                        |        |
| To Commercial Trust Company of New Jersey, A. E. Williamson President |        |
| Jersey City, N. J. John G. S. Johnson Treasurer.                      |        |

40

Total Discount  
Other Deductions  
Amount of Check.

## ENDORSEMENTS

N. K. Turner  
Montgomery Garage  
M. A. Cox, Treas.



Plaintiff became its holder before it was overdue and at the time it was negotiated to it, the plaintiff had no notice of any infirmity in the check, or of any defect in the title of the person negotiating it. Said check was promptly presented to the Commercial Trust Company of New Jersey, but payment of the same was stopped by the defendant. 10

The plaintiff before receiving any notice of any infirmity in the check, or defect in the title thereof, paid to the person who negotiated the check to it, the full amount agreed to be paid therefor.

The said consideration or payment by the plaintiff consisted of \$300.00 in cash, two checks of the plaintiff, one for \$200.00 and one for \$500.00 and credit for the payment of \$500.00 on a contract for the purchase of one Franklin automobile. Said automobile contract, with said credit of \$500.00 endorsed thereon, was delivered to the person known as N. K. Turner, and is a contract which could be assigned by the holder without the consent of the plaintiff. 20

Plaintiff has always and still is, treating the said contract as legal and binding upon it and has still in its possession the identical automobile so sold to the person known as N. K. Turner, and said credit for the deposit of \$500.00 is still outstanding and has not been returned to it. 30

Plaintiff's check for \$200.00 which it gave to the person known as N. K. Turner was negotiated for full value by him to one Joseph A. Connor, and plaintiff paid the said Joseph A. Connor the sum of \$201.56, being the amount of said check with protest fees. Plaintiff's check for \$500.00 was negotiated by him for full value to one J. K. Bokser and plaintiff paid to said J. K. Bokser the sum of \$575.10 being the amount of a judgment and court costs rendered against the plaintiff, in the Second District Court of Jersey City, upon said check at the suit of the said J. K. Bokser. 40



Plaintiff refused to pay its check for \$500.00 to Bokser because of the notification to it by the defendant that it would not pay its check for \$1,500.00, and would rely upon the fraud in the transaction as a defense. Plaintiff defended Bokser's suit on the same ground, but judgment was rendered against it.

10 The net loss of the plaintiff is the sum of \$1,076.66 with interest and the outstanding credits for \$500.00 the sale of the automobile.

*Defendant's facts:*

On March 15th, 1918, a man by the name of Ennis, represented that he was N. K. Turner of Boston and under that false representation delivered to the defendant a bogus check for \$5,000.00 and received from the defendant the check in ques-  
20 tion.

At the time of the above transaction the defendant believed that Ennis was N. K. Turner and delivered the check to him under the belief that he was N. K. Turner.

At the time of the transactions referred to both of the parties believed that Ennis was N. K. Turner. All of the above transactions were after banking hours on March 15th. Defendant discovered the fraud before the opening of the Commercial Trust Company on the following day and stopped payment. At the opening of the bank plaintiff presented the check to the Commercial Trust Company of New Jersey and payment was refused.  
30

This person who pretended to be N. K. Turner was a defrauder and took the \$500.00 credit on the contract for the purchase of an automobile merely in furtherance of his scheme to get the cash and the checks from the plaintiff.  
40

In all of the transactions both of the parties believed Ennis was N. K. Turner. He obtained the check in suit under the false representation that he was N. K. Turner. He endorsed the name



of N. K. Turner on it and delivered the check to the plaintiff.

Upon the above facts the court directed a verdict for the plaintiff for \$1,500.00 and interest from March 15th, 1918.

To which direction, defendant duly excepted and exception was allowed.

10

### HUDSON COUNTY CIRCUIT COURT.

MONTGOMERY GARAGE COMPANY, a  
Corporation of New Jersey,  
Plaintiff,

*vs.*

MANUFACTURERS' LIABILITY IN-  
SURANCE COMPANY OF NEW JER-  
SEY, a Corporation of New Jer-  
sey,

Defendant.

Action-at-Law.  
Rule to Show  
Cause.

20

30

This cause having been tried before the under-  
signed and a jury, and upon motion of the plain-  
tiff, the court having directed a verdict in favor  
of the plaintiff and against the defendant for the  
sum of \$1,500.00.

It Is on this 2nd. day of December, 1918, OR-  
DERED that the said plaintiff show cause before this  
court on Friday, December 13th, 1918, why said  
verdict should not be set aside and a new trial  
granted.

40

LUTHER A. CAMPBELL,  
Circuit Court Judge.



## HUDSON COUNTY CIRCUIT COURT.

MONTGOMERY GARAGE COMPANY, a  
Corporation of New Jersey,  
Plaintiff,

10

*vs.*

MANUFACTURERS' LIABILITY IN-  
SURANCE COMPANY OF NEW JER-  
SEY, a Corporation of New Jer-  
sey,

Defendant.

Action-at-Law.  
Stipulation.

20

It is hereby stipulated and agreed by and be-  
tween the attorneys for the above named parties  
that the Rule to Show Cause heretofore made in  
this cause be and the same is hereby amended so  
as to permit the defendant to reserve exceptions  
made in the trial of the above stated cause.

Dated December 12, 1918.

30

FRANK J. HIGGINS,  
Attorney for Plaintiff,

RANDOLPH PERKINS,  
Attorney for Defendant.

40



## HUDSON COUNTY CIRCUIT COURT.

MONTGOMERY GARAGE COMPANY,

*vs.*MANUFACTURERS' LIABILITY IN-  
SURANCE CO. OF N. J.

Action of Law.

On Rule.

10

FRANK J. HIGGINS, Esq., Atty. for plaintiff.  
 RANDOLPH PERKINS, Esq., Atty. for defendant.

## PRELIMINARY MEMORANDUM.

CAMPBELL, J.

20

I have not changed my conclusions as to the law applicable to the issues involved.

That the verdict should not exceed one thousand dollars because the automobile contract with the plaintiff was induced by fraud, in my judgment, does not necessarily follow in fact or law.

If it can be said that the contract was induced by fraud, as defendant urges, then the clear answer is that such a contract is not void but void-  
 able at the option of plaintiff.

30

The testimony, undenied is, that plaintiff has always and still is treating the contract as legal and binding upon it.

The question involved is an important one and the amount involved is considerably more than a trifling sum. Because of such reasons and further because the question involved has not been passed upon by the Court of this state since the adoption of the Negotiable Instruments Act I feel that the question should be certified to the Supreme Court. To do this the facts must be absolutely settled. The parties may present to me on Friday, March 7th, 1919, a stipulation of facts or present such as they can agree upon and at such

40



time appear for the purpose of settling the facts,  
If this can be done I will certify the question in-  
volved.

Dated March 3, 1919.

LUTHER R. CAMPBELL,  
Judge.

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HUDSON COUNTY CIRCUIT COURT.

MONTGOMERY GARAGE COMPANY, a  
Corporation of New Jersey,  
Plaintiff,

20

*vs.*

MANUFACTURERS LIABILITY INSUR-  
ANCE COMPANY OF NEW JERSEY,  
a Corporation of New Jersey,  
Defendant.

Action-at-Law,  
Order Dis-  
charging Rule  
to Show  
Cause.

30

This cause coming on to be heard on Rule to  
Show Cause on the tenth day of January, 1919,  
before the Hon. Luther A. Campbell, Judge of the  
Circuit Court of Hudson County, and no sufficient  
cause being shown why the judgment heretofore  
entered in this cause should be set aside;

40

It is on this fifth day of May, 1919, ORDERED that  
the Rule to Show Cause taken herein be and the  
same is hereby vacated and discharged, reserving,  
however, to the defendant the right to appeal from  
the whole of the judgment entered in the above en-  
titled cause.

LUTHER A. CAMPBELL,  
Circuit Court Judge.



## HUDSON COUNTY CIRCUIT COURT.

MONTGOMERY GARAGE COMPANY, a  
Corporation of New Jersey,  
Plaintiff,

*vs.*

MANUFACTURERS LIABILITY INSUR-  
ANCE COMPANY OF NEW JERSEY,  
a Corporation of New Jersey,  
Defendant.

Action-at-Law. 10  
Notice of Ap-  
peal.

To:

FRANK J. HIGGINS, Esq., Attorney of Plaintiff. 20

*Sir:*

PLEASE TAKE NOTICE that the defendant in the  
above entitled action appeals to the Court of  
Errors and Appeals from the whole of the judg-  
ment entered therein.

Yours respectfully,

RANDOLPH PERKINS,  
Attorney for Appellant. 30

Dated, May 15, 1919.



# NEW JERSEY COURT OF ERRORS AND APPEALS.

MONTGOMERY GARAGE COMPANY, a  
Corporation of New Jersey,  
Plaintiff-Appellee,

10

*vs.*

MANUFACTURERS LIABILITY INSUR-  
ANCE COMPANY OF NEW JERSEY,  
a Corporation of New Jersey,  
Defendant-Appellant.

Action-at-Law.  
Grounds of  
Appeal.

20

1. The Trial Court erred in directing a verdict in favor of the plaintiff and against the defendant.

2. The Trial Court erred in holding that the paper writing sued on was a negotiable instrument in the hands of Ennis.

3. The Trial Court erred in holding that plaintiff obtained title to the check sued on through the endorsement of Ennis.

30 4. The Trial Court erred in holding that the signature, "N. K. Turner" endorsed on said check was not a forgery.

5. The Trial Court erred in refusing to hold that the signature "N. K. Turner" endorsed on said check was forged or made without the authority of the person whose signature it purports to be.

6. The Court below erred in holding that the plaintiff was a bona fide holder in due course.

40 7. The Trial Court erred in refusing to hold that the verdict should not exceed the sum of One Thousand Dollars because the automobile contract with the plaintiff was induced by fraud.

8. The Trial Court erred in holding that the plaintiff paid full consideration for the check in suit.



9. The Trial Court erred in holding that the contract between plaintiff and Ennis under the name of N. K. Turner was a legal and binding contract upon the plaintiff.

10. The Trial Court erred in directing a verdict in excess of One Thousand Dollars damages.

RANDOLPH PERKINS,  
Attorney of Appellant.

10

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

MONTGOMERY GARAGE COMPANY, a  
Corporation of New Jersey,  
Plaintiff-Appellee,

20

*vs.*

MANUFACTURERS LIABILITY INSUR-  
ANCE COMPANY OF NEW JERSEY,  
a Corporation of New Jersey,  
Defendant-Appellant.

Action-at-Law  
Notice of  
Argument.

30

*Sir:*

TAKE NOTICE that the argument of the issue joined in this cause before the New Jersey Court of Errors and Appeals is to be held at the Court House, in the City of Trenton, New Jersey, on the third Tuesday of June next at eleven o'clock in the forenoon or as soon thereafter as the said Court can attend to the same.

Dated, May 15, 1919.

40

Yours respectfully,  
RANDOLPH PERKINS,  
Attorney for Defendant-Appellant.

To:

FRANK J. HIGGINS, Esq.,  
Attorney for Plaintiff-Appellee.



The Court ruled in favor of the  
plaintiff and the defendant was  
ordered to pay the costs of the  
action.

The Court ruled in favor of the  
plaintiff and the defendant was  
ordered to pay the costs of the  
action.

Attorney General  
Department of Justice

# NEW YORK STATE OF JUDICIAL

IN SENATE

January 1, 1900

REPORT OF THE

JUDICIAL COMMISSION

FOR THE YEAR 1899

ALBANY:

WATKINS & COMPANY, PRINTERS

1900

THE COMMISSIONERS OF THE

STATE OF NEW YORK

ALBANY:

WATKINS & COMPANY, PRINTERS

1900

THE COMMISSIONERS OF THE

STATE OF NEW YORK

ALBANY:

WATKINS & COMPANY, PRINTERS

1900

THE COMMISSIONERS OF THE

STATE OF NEW YORK

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WATKINS & COMPANY, PRINTERS

1900

THE COMMISSIONERS OF THE

STATE OF NEW YORK

ALBANY:

WATKINS & COMPANY, PRINTERS

1900

THE COMMISSIONERS OF THE

STATE OF NEW YORK

ALBANY:

WATKINS & COMPANY, PRINTERS

1900



23 NOV 1, 1919

## New Jersey Court of Errors and Appeals

MONTGOMERY GARAGE COMPANY,  
a corporation of New Jersey  
Plaintiff-Appellee

v.

MANUFACTURERS LIABILITY INSUR-  
ANCE COMPANY OF NEW JERSEY,  
a corporation of New Jersey  
Defendant-Appellant

Action at Law.  
On Appeal  
from Hudson  
Circuit Court.

### BRIEF FOR PLAINTIFF-APPELLEE.

This case was tried before a jury in the Hudson Circuit Court, on agreed state of facts and the Court directed a verdict in the sum of \$1500.00 for the plaintiff and against the defendant, and it is respectfully submitted that this judgment should be sustained.

The agreed facts show that the person who represented himself both to the defendant and the plaintiff as *N. K. Turner*, was the actual person whom the defendant intended as the payee of its check for \$1,500.00. The contract of the defendant was to pay this sum to this person or his order and it ordered it paid to the plaintiff.

That the plaintiff is a holder in due course, is clear, it having taken the check in good faith and for value and having paid the full amount agreed to be paid therefor, before receiving notice of



any defect in the title of the person negotiating it.

The *Negotiable Instrument Act of 1902* covers several of the points raised by the defendant.

Under Section 52, 3 C. S., p. 3741, plaintiff is clearly a "holder in due course" and being such, he holds the check free from any defect of title of prior parties and may enforce payment against the defendant for the full amount. See also Sec. 54 and 57, 3 C. S., p. 3741.

The plaintiff paid the full amount agreed to be paid before receiving notice of any infirmity in the check; viz: \$300.00 in cash, one of the plaintiff's checks for \$200.00, another of its checks for \$500.00 and an assignable contract for the purchase of an automobile with a credit thereon for a \$500.00 payment on account.

The plaintiff still has in its possession the identical automobile so purchased ready for delivery to this person or his assignee, upon payment of the balance due. It cannot safely dispose of it, as this contract with the credit of \$500.00 is still outstanding, and binding upon it.

Both of the plaintiff's checks came into the hands of innocent holders and plaintiff paid for the \$200.00 one, the sum of \$201.56 and upon receiving notice that the defendant would not pay its \$1,500.00 check, relying on its fraudulent character, the plaintiff refused to pay its check of \$500.00 on the same ground. Suit was instituted against the plaintiff by the holder thereof and judgment obtained and plaintiff paid in satisfaction thereof, the sum of \$575.10, being the amount of the said judgment with interest and costs. The net loss of the plaintiff is therefore \$1,076.66 in cash and the outstanding credit of \$500.00 on the contract for the automobile.



The plaintiff has therefore given as consideration more than the full amount of the \$1,500 check, and is still compelled to hold this automobile on account of the outstanding contract of sale. The automobile is naturally decreasing in value on account of age and there is expense in storing and taking care of it. Both this decreasing value and expense will continue so that the ultimate loss of the plaintiff will be far in excess of the judgment obtained in this case.

An existing debt is good consideration for the assignment of a negotiable instrument and the moment the individual known as *N. K. Turner* signed the contract for the automobile he owed the plaintiff the first payment of \$500.00. This he paid with part of the defendant's check.

By making this check, the defendant admitted the existence of the payee, his then capacity to endorse and engage to pay the check according to its tenor.

Negotiable Instrument Act of 1902, Secs. 60 and 61, 3 C. S., p. 3742.

If the name of the payee of this check was wrongly designated or misspelled, he had the right to endorse it as he was therein described.

Negotiable Instrument Act of 1902, Sec. 43, 3 C. S., p. 3740.

The following cases are upon the points involved in this case and are submitted as bearing out the plaintiff's contention.

In *Meridian National Bank v. First National Bank*, 7 Ind. App., 322, 33 N. E., 247, 34 N. E., 648, cited in 50 L. R. A. page 77, notes, a check in payment of cattle was delivered to the person who had stolen them. He had given a fictitious name,



and the payee was described by that name. The action was by a bona fide purchaser of the check upon an indorsement made by the impostor against the drawee. The case was decided for the plaintiff upon the theory that the indorsement of the check by the person to whom it was actually delivered, and by whom the drawee intended that the money should be received was an effectual indorsement. The Court said: "It is the identity of the person and not of the name which controls." In this case, however, as remarked in the opinion, even the drawer did not have in his mind as the payee, any other different person whom he erroneously believed the person to whom he delivered the check to be.

In *Robertson v. Coleman*, 141 Mass., 231, 55 Am. Rep., 471, 4 N. E., 619, cited in 50 L. R. A. page 77, notes, a stranger, falsely assuming the name of a real person, took stolen goods to the defendant, who sold them for him and gave him a check in which the payee was described by the assumed name, the defendant believing that to be his name. The impostor endorsed the check in that name, and it came to the hands of the plaintiff, a bona fide holder, who sued the drawer after the latter had stopped payment. The Court in deciding for the plaintiff, said: "The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name;" again: "It is clear from these facts that, although the defendants may have been mistaken in the sort of man the person they dealt with was, this person was the person intended by them as the payee of the check, designated by the name he was called in the transaction, and that his endorsement of it was the en-



dorsement of the payee of the check by that name. The contract of the defendants was to pay the amount of the check to this person or his order, and he has ordered it paid to the plaintiff. If this person obtained the check from the defendants by fraudulent representations, the plaintiff took it in good faith and for value."

Where the drawer of a check delivers it to an impostor believing him to be the payee named in the check, the endorsement thereof by the impostor is *not a forgery*, and the drawer is liable to any subsequent bona fide holder.

- Burrows *v.* Western Union Tel. Co., 86 Minn., 499, 90 N. W. Rep., 1111;  
 First National Bank *v.* American Exch. Nat. Bank, 49 N. Y., App. Div., 349, 63 N. Y. Supp., 58, Affd., 170 N. Y., 88, 62 N. E. Rep., 1089;  
 Gallo *v.* Brooklyn Savings Bank, 129 N. Y., App. Div., 698, 114 N. Y. Supp., 78;  
 Jamieson & McFarland *v.* Heim, 43 Wash., 153, 86 Pac. Rep., 165;  
 United States *v.* National Exchange Bank, 45 Fed. Rep., 163;  
 Hoge *v.* First National Bank, 18 Ill. App., 501;  
 Meyer *v.* Indiana National Bank, 27 Ind. App., 354, 61 N. E. Rep., 596;  
 Emporia National Bank *v.* Shotwell, 35 Kan., 360;  
 Sherman *v.* Corn Exch. Bank, 91 N. Y. App. Div., 84, 86 N. Y. Supp., 341;  
 McHenry *v.* Old Citizens' National Bank, Ohio, 97 N. E. Rep., 395.



The decisions seem to apply the rule that, where one of two innocent persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence and commits the first overnight, must bear the loss and hold that, under this rule, the drawer of a check delivered to an impersonator is estopped by his own lack of caution.

FRANK J. HIGGINS,  
Attorney for Plaintiff-Appellee.

HARRY LANE,  
Of Counsel.

*Harry Lane*  
*of counsel*

*Frank Higgins*  
*Attorney for Plaintiff*  
*Appellee*

[3806]



## New Jersey Court of Errors and Appeals

MONTGOMERY GARAGE COMPANY,  
Plaintiff-Respondent,

vs.

MANUFACTURERS' LIABILITY INSUR-  
ANCE COMPANY,  
Defendant-Appellant.

Action-  
at-Law.  
On Appeal.

### BRIEF FOR DEFENDANT-APPELLANT.

On March 15th, 1918, the Manufacturers' Liability Insurance Company was fraudulently induced, by a swindler named Ennis, to issue a check for \$1,500.00.

Ennis was operating a scheme to obtain money under false pretenses. He worked the same scheme upon both plaintiff and defendant.

His operations were simple. He was in the market to buy something—anything.

Ennis started with a forged check, purporting to be made by N. K. Turner of Boston, to the order of N. K. Turner, for \$5,000, drawn on a Boston bank. On the check was a forged cashier's certification.

Pretending that he was N. K. Turner he induced the Insurance Company to agree to sell some property to him, and got the Company to credit him with \$3,500 on the purchase price, and issue its check for \$1500 to the order of N. K. Turner, for which he gave the Company the bogus \$5,000 check.

Ennis, after procuring the \$1,500 check, went immediately to the Montgomery Garage Company and repeated the same operation. He pretended that he was in the market to buy an automobile.



The Garage Company was duped into the belief that it had a purchaser for an automobile. Turner was willing to pay down \$500 on account of the car, and leave the car with the Garage Company until it was convenient for him to call for it. It has never been convenient.

Ennis told the Garage Company that he was N. K. Turner, and in the name of N. K. Turner he entered into a written contract to purchase the automobile from them.

He then produced the check which he had just procured from the Insurance Company. He induced the Garage Company to believe that he was N. K. Turner and to accept his endorsement of N. K. Turner's name on the check. The Garage Company took the check without any inquiry as to the identity of Ennis, credited \$500 on this pretended automobile purchase, and handed to this smooth swindler \$200 in cash and two checks aggregating \$800 drawn to the order of "N. K. Turner."

All of these transactions were after banking hours on March 15th (p. 6, middle).

Both parties admit that Ennis was a swindler, pure and simple, and nothing else.

He never intended to purchase the property from the Insurance Company, and he never intended to purchase the automobile from the Garage Company.

His entire operations were for the purpose of obtaining money under false pretenses. He cashed the two garage checks for \$800, which, with the \$200 cash he got from the Garage Company, netted him \$1,000 out of his operation.

The net result of this swindle was that Ennis obtained \$1,000, and the parties to this suit lost \$1,000.

The fraud was discovered before banking hours on the following morning, March 16th, and the



Insurance Company stopped payment on its check.

The Garage Company instituted suit on the check, against the Insurance Company in the Hudson Circuit.

The trial Judge directed a verdict against the defendant, not for the sum of \$1,000, but for \$1,500 interest and costs.

To this ruling and direction of the Court the defendant duly excepted, and the exceptions were reserved in a rule to show cause, by stipulation (p. 8).

# I.

## **It was error to direct a verdict for \$1,500.**

Both parties admitted that the entire operation of Ennis was a swindle. The judgment gives plaintiff a profit of \$500 on that swindle.

Conceding everything, the plaintiff parted with \$1,000 and no more.

In order to perpetrate his fraud on the Montgomery Garage Company, Ennis deluded that Company into going through the forms of making a contract with N. K. Turner for the sale of an automobile.

There was no meeting of minds. There was no N. K. Turner present there. The paper which the swindler induced the Garage Company to sign was not a binding or a valid contract. It was only a pretext to induce the Garage Company, not to part with an automobile, but to part with \$200 in cash and \$800 in checks.

The Garage Company didn't sell an automobile to this swindler—instead of selling, they were sold.



The admitted facts in the case definitely dispose of the Garage Company's claim of a \$500 profit in Ennis' swindling operation.

"This person who pretended to be N. K. Turner was a defrauder and took the \$500 credit on the contract for the purchase of an automobile merely in furtherance of his scheme to get the cash and the checks from the plaintiff" (p. 6).

The point is too clear to really require argument. All the plaintiff parted with was a piece of paper which gave the swindler a \$500 credit on an automobile.

The judgment of the Circuit Court permits the plaintiff to reap a profit of \$500 as the result of being swindled out of \$1,000.

## II.

### **The Trial Court erred in directing a judgment against the defendant.**

It must be kept constantly in mind that this suit is brought on a check which the plaintiff claims title to by endorsement. It is not a check given by the defendant to the plaintiff; it is not a check which the defendant induced plaintiff to take. There are no relations existing between the parties in this case whereby the defendant is under any obligation to the plaintiff, except such as arise out of the issuance of the check in question, and the subsequent taking of the check by the plaintiff by the forged endorsement "N. K. Turner" made by Ennis.

The claim of ownership of the check made by the plaintiff depends entirely and is based upon an endorsement. This endorsement is "N. K. Turner." It was not made by N. K. Turner, but was made by Ennis.



If this swindler can by endorsing the name N. K. Turner on the back of the check pass title to the plaintiff, then, and only then, can it recover.

The text of *Corpus Juris*, Vol. 8, page 179, says: "Where an instrument is delivered to an imposter other than the payee, the question whether the instrument thereby becomes payable to bearer so to bind the maker or drawer and to protect subsequent holders relying on the forged endorsement of the imposter is the subject of conflicting decisions. Some cases hold that the drawer or maker is liable (citing a number of cases), while, in other jurisdictions the contrary is held (citing an equal number of cases), on the theory, in part, that in such a case the instrument is not payable to a fictitious payee so as to dispense with the endorsement of the payee \* \* \* So it has been held that if the name of a fictitious person is fraudulently imposed on the maker or drawer as a real person, and afterward personated by the fraudulent endorser, the drawer is not liable as in the case of a fictitious payee," citing a number of cases.

It is therefore perfectly plain that the question has for a long time been one of considerable difficulty.

We urge that Section 23 of the Negotiable Instruments Act was passed for the very purpose of solving this difficulty and clearing up all doubt connected with the conflicting decisions.

"Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative,



and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

Negotiable Instruments Act, Vol. 3,  
Comp. Stat., page 3738, Section 23.

Before passing to various cases on the subject it seems well to examine this statute to ascertain, if we can, just what it means. It deals with the right to enforce payment on a negotiable instrument. It also deals with the acquiring of title to a negotiable instrument. It says plainly that there are two instances under which a party cannot acquire title through or under an endorsement on a negotiable instrument. Those instances are (a) where the signature is forged, and (b) or made without the authority of the person whose signature it purports to be. It then deals with the effect of such signature. "It is wholly inoperative."

This section of the Negotiable Instruments Act was passed in 1902 and was apparently intended to correct such decisions as we find in *Kohn v. Watkins*, 26 Kansas 691, 40 Am. Dec. 336, which held it was possible for a person to become an innocent holder through the fraudulent endorsement of a fictitious person's name.

The case of *Meridian National Bank vs. First National Bank*, 7 Ind. App. 322, 52 Am. S. R. 450, cited in *Corpus Juris*, was decided in 1893. This case decided that where the certification of a check by the bank upon which it was drawn and its subsequent endorsement by the men to whom it was actually issued and by whom the drawer



intended the money should be received was effectual to pass the title to the check to another bank paying the amount of it in good faith to the drawee upon presenting it, although the latter acts under the assumed and fictitious name during the whole transaction.

The theory on which the Court decided the case is that the money was intended for a person and not a name. "Names possess neither personality nor existence. They but serve to identify individuals. The check was received by the identical person or individual to whom its drawer intended to deliver it, and was by that person endorsed in the name in which it was issued to him."

It further held that it was the identity of the person and not of the name which controlled the right to the check, citing

*Graves v. American Bank*, 17 N. Y. 205,  
and

*Indiana National Bank v. Holtsclaw*, 98  
Ind. 85.

In deciding this case, the Court admitted, page 456, that the effect of signing the name of a fictitious or non-existing person was forgery.

See

*Byles on Bills*, 333.

*Daniel on Negotiable Instruments*, Sec.  
136-1345.

*1 Bishop on Criminal Law*, 432.

*Chitty on Bills*, 182,

and stated,

"We do not think that any of these statements are really intended to mean such a case as we have here."



Another case cited in *Corpus Juris*, *Robertson v. Coleman*, 131 Mass. 231, 55 Am. Rep. 471, was decided in 1886.

In this case A, representing himself to be C. B., took stolen goods to the defendant and represented himself to be the owner and ordered him to sell them for him. The defendant, relying on these representations, sold the goods and gave him in payment his check payable to the order of C. B., and A endorsed the check in blank by that name, and transferred it for value to the plaintiff. The defendant discovered the fraud, and stopped payment of the check. It was held that plaintiff could recover the amount thereof. Of course, in that case defendant received full value for the check which he had issued.

The opinion was by Judge Field, who dealt with the whole subject on a half page, deciding the question on the theory that

"The name of a person is the verbal designation by which he is known, but the visible presence of a person affords surer means of identifying him than his name. \* \* \* It is clear that this person was the person intended by the defendants as the payee of the check and that his endorsement was the endorsement of the payee of the check by that name."

While that sounds plausible it certainly is entirely wiped out by Section 23, which says:

"Where a signature is made without the authority of the person whose signature it purports to be, it is wholly inoperative."

Undoubtedly Section 23 was passed for the very purpose of clearing up the difficulties of conflicting decisions, and of making the Law applying to negotiable instruments general, and to make ne-



gotiable instruments more definite, certain, and positive in their character and negotiability. The surest way of effecting this purpose is to make every person holding negotiable paper responsible for the genuineness of the signature under which he takes title.

Section 23 unquestionably has that design. It says that no person has the right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any person there-to where the signature is forged and made without the authority of the person whose signature it purports to be, and that such signature is "wholly inoperative" and that no right can be acquired by or under such signature. It upsets all such forms of reasoning as we find in cases like *Kohn v. Watkins*, and in *Robertson vs. Coleman*, where the Courts have attempted to do what seemed equity to applying a rule that a man does not have to act in his own name, but may act under a false and fictitious name and obtain the fruits of his fraud by negotiating checks by endorsements under the fictitious name.

We find nothing in the Negotiable Instruments Act which deals with "the visible presence of a person affording surer means of identifying the man than his name." The Negotiable Instruments Act deals or speaks of signatures which are forged or made without the authority of the person whose signature it purports to be.

The other case cited in *Corpus Juris*, *Levy v. Bank of America*, 24 La. 220 was decided in 1882 and is not really in point.



*Shipman v. Bank of the State of New York*, 12 L. R. A. 791 decided in 1891 is one of the leading cases on the responsibility of a Bank toward its depositor. This holds

"Payment of checks stolen from the depositor, without negligence on his part, by his clerk, who forged the endorsements of the payees' names constitutes no defense to the bank against an action by the depositor for his deposit, especially where the bank made no inquiry as to the genuineness of the endorsements, but relied upon the responsibility of the persons presenting the checks for payment."

It holds further

"A depositor has the right to assume when checks are returned to him by the bank that it has ascertained the genuineness of the endorsements thereon,"

and most important, so far as these cases are concerned, it holds

"A negotiable note made payable to a fictitious person and negotiated by the maker, which is given the same validity as against the maker and all persons having knowledge of the facts as if payable to bearer by Rev. Stat. 765, Sec. 5, includes only paper made with knowledge that the payee is fictitious, and does not include paper made by one who supposes the payee to be a real person and which is fraudulently negotiated by a third person without the maker's fault."

This is one of the leading decisions up to 1891 in the United States, and is by the high authority of the New York Court of Appeals. The counsel were Adrian H. Joline on the one side, and Elihu Root on the other. The opinion was delivered by Judge O'Brien and was unanimously concurred in.



It absolutely differs from the fallacious rules in cases like *Forbes v. Espy*, 21 O. St. 182, and *Kohn v. Watkins*, *supra*, and the other cases that go on the theory that where paper is payable to a fictitious person, it is equivalent to paper payable to bearer, for it clearly holds that it is only when the maker knows it to be fictitious that it is bearer paper. With such eminent counsel, of course, all of the cases bearing on the question were cited. The opinion of the Court, at page 797, says:

"We are of the opinion upon an examination of the authorities cited by counsel on both sides that this rule (paper payable to person having no existence being payable to bearer) applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. \* \* \* It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious and actually intends to make the paper payable to a fictitious person."

If you take away from the argument of the plaintiff that the check in question is payable to bearer it leaves nothing for the plaintiff but the thin ice that Ennis, the admitted swindler and crook, was lawfully justified in negotiating the paper by endorsing on it the name of N. K. Turner.

In the *Shipman* case the Court unanimously held:

"The endorsement of the names of the fictitious payees upon the checks with intent to deceive and to put the checks in circulation constituted the crime of forgery, by means of which, and without any fault of the plaintiffs, payment was obtained thereon."



"The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose endorsements were forged."

The case of *Phillips v. Mercantile National Bank of New York*, Court of Appeals, 140 N. Y. 156, 23 L. R. A. 584, decided in 1894, was a thoroughly exhaustive case on the proposition. General George W. Wingate appeared on one side, and John M. Bower and Charles A. Davison on the other. The opinion was delivered by Judge Gray.

There the cashier of the Bank of Sumter drew checks on the defendant bank for various amounts, some to the order of actual persons and some to the order of fictitious persons. The cashier after having drawn the checks endorsed them in the name of the payees making them payable to the order of a firm of stock brokers in New York who collected them from defendant bank.

The Court held that the checks in question were the checks of the bank of Sumter, the cashier having been authorized to draw the checks on the bank's fund. It cites with approval the *Shipman* case, that

"The fictitiousness of the maker's direction to pay does not depend upon the identification of the name of the payee with some existing person, but upon the intention underlying the act of the maker in inserting the name."

These two leading cases clarify the cases upon which the text in *Corpus Juris* is based, when it says, "some cases hold the drawer or maker is liable," etc., because those cases go on the theory that where the payee is fictitious it is bearer paper, whereas the New York cases clearly demon-



strate that it is only when the payee is fictitious to the knowledge of the maker, that it is bearer paper.

The case of *Burrows v. Western Union Telegraph Company* in the Minnesota Supreme Court, 1902, cited in 58 L. R. A. 433, is one where the Western Union Telegraph Company's manager delivered a check to the wrong person, who negotiated it by endorsing the name of the payee. In the opinion, Judge Lewis states:

"It has been decided that where a check has been issued payable to a certain party as payee and another party of the same name comes into possession of it either by mistake or fraud and forges the signature of the real party this does not give the check any legal status so as to protect the bank against which it was drawn."

citing

*Mead v. Young*, 4 T. R. 28.

*Graves v. American Exchange Bank*, 17 N. Y. 205.

*Famous Shoe and Clothing Co. v. Crosswhite*, 124 Mo. 134, 26 L. R. A. 563.

This case was decided on the authority of Chapter 13, section 89, of the Minn. Gen. Stat. of 1876, which provides:

"That possession of a note or bill is prima facie evidence that the same was endorsed by the person by whom it purports to be endorsed."

and is not authority in our State.

The case of *Land Title & Trust Co. v. Northwestern National Bank*, 196 Pa. 230, 50 L. R. A. 75, decided in 1900, was a case where Ashley



representing himself to Doctor Bissey procured a check under false representations. He endorsed the check in the name of Doctor Bissey and had it cashed through another bank. Six months later the fraud was discovered and the Land Title & Trust Co. endeavored to get the amount of the check back from the Northwestern Bank on which it was drawn,

“the ground of liability being that the defendant by this endorsement and presentation warranted the genuineness of the endorsement of the payee, Herman S. Bissey.”

The Court held that the plaintiff could not recover the money back on the ground that the facts of the case do not bring it within the rule that a bank paying a check to order on a forged endorsement may not charge the payment to the drawer's account. This was based on the idea that the check was issued to the person to whom the drawer intended to designate as the payee. Under this case there are numerous notes which throw a flood of light upon the law as it existed in 1900, and before the passage of the Negotiable Instrument Act. By a careful examination of the cases in the notes, it will be seen that there was not a great uniformity among the cases. The publisher's summary is as follows:

“Whatever the true theory may be it is apparent from the foregoing cases that the drawer of a check, draft, or bill of exchange who delivers it to an imposter, supposing him to be the person, whose name he has assumed, must, as against the drawee or bona fide holder, bear the loss where the imposter obtains payment of or negotiates the same.” On the other hand if the check, draft or bill is delivered to an imposter who has assumed to be the agent of the person named as payee,



the loss will not fall upon the drawer at least if he was free from negligence, and there was a real person bearing that name, whom he intended to designate as payee."

We contend that the publisher's note does not correctly express the rule of law. Under the Negotiable Instruments Act it is not the law. The chaotic condition of the law at that time is shown by the foot note to the last case cited and was one of the reasons for the passage of the Negotiable Instrument Act to clear up all doubts which had arisen from a multiplicity of conflicting decisions. It appears from the foot note to the Land Title and Trust Co. case that no one knew what the true theory was because the Courts had adopted a variety of rules. That is the reason for the summary beginning "Whatever the true theory may be," etc.

When we consider that a person suing on a Negotiable Instrument must prove title and that that title must come through a person having the right to endorse the payee's name, it is apparent that most of the previous cases have been determined upon illogical distinctions.

For instance if Ennis had pretended merely to be the agent of N. K. Turner, the defendant would not be liable, but inasmuch as he pretended to be N. K. Turner, the defendant is liable. There is no rhyme or reason in such a rule, and it was for the purpose of making the rule clear, definite, and positive that our Negotiable Instruments Act was passed, and for that reason our Negotiable Instruments Act says where a signature is forged it is wholly inoperative. It was for that reason that our Negotiable Instruments Act says that when the signature was made without the authority of the person whose signature it purports to be, it is wholly inoperative.



The case of *Judson Harmon, Rec'v'r etc. vs. Old Detroit National Bank*, Mich. 17 L. R. A., N. S. 515, was decided May 26, 1908, is a case exactly on all fours with ours. In fact as to the detail, it appears from the report of the case

"That the person who identified the impostor to the Bank though himself deceived was the same person who identified him to the postmaster."

The same person who identified Ennis to the plaintiff, identified him to the defendant.

The *Harmon* case holds that

"The endorsement upon the check of the name of a fictitious person to whom it was by fraudulent procurement made payable is forgery."

If the endorsement by Ennis of N. K. Turner was forgery, the endorsement is "wholly inoperative."

This leading case, quoting *Murphy v. Metropolitan National Bank*, 191 Mass. 159, 114 Am. St. R. 595, says:

"The ordinary rule is well established that a bank upon whom a check is drawn must ascertain at its peril the identity of the person named in it as payee."

The *Harmon* case cannot be reconciled with the earlier decisions notwithstanding the effort of the editor of L. R. A. to work out a rule upon which it might be reconciled. It cites with approval the *Shipman* case. It acknowledges that there are authorities to the contrary but states that the clear weight of authority both in England and the United States is in favor of the rule that



"The maker's intention is the controlling consideration which determines the character of the paper. It cannot be treated as payable to bearer unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person."

The Court further says:

"If this warrant had been changed so as to make it a forged instrument after it had been issued by the railroad company, under all of the authorities, the defendant would not have been justified in paying the forged instrument. \* \* \* The drawee's duty to use due diligence in identifying the payee of the check or warrant is not changed by the time and place of the forgery."

It distinguishes the case of the *United States vs. National Exchange Bank*, 45 Fed. 163, where the drawer of the check went with the fraudulent payee to the bank and identified him as the payee named in the check.

It cites the case of *Robarts v. Tucker*, 16 Q. B. 560, that

"That a banker cannot debit his customer with the payment made to one who claims through a forged instrument, and so cannot give a valid discharge for the bill, unless there be circumstances amounting to a direction from the customer to the banker to pay the bill without reference to the genuineness of the endorsement."

The case of *Tolman v. American National Bank*, R. I. 52, L. R. A. 877, decided in 1901, is exactly in point and is based on a statute similar to Sec. 23 of our Negotiable Instruments Act. It holds:

"A bank cannot justify the payment of a check on the endorsement by one, who procured it by representing himself as another,



of the latter's name,—at least, under a statute declaring an instrument to be wholly inoperative, which is made without the authority of the person whose signature it purports to be.”

In that case the same arguments were used as used by the plaintiff in this. For instance:

“This is not the case of a forgery, because the money was paid to the exact person to whom the plaintiff intended it should be paid.”

And also

“It makes no difference if the plaintiff was deceived as to the identity of the applicant. It is to the person, no matter what his name, that the law looks in such cases.”

citing all of the cases which have been cited against us, including *Land Title & Trust Co. v. Northwestern Bank*.

Chief Justice Stiness, standing on the authority of the Negotiable Instruments Act, decided

“That because the plaintiff had been imposed upon did not relieve the defendant bank to see to it that the money was paid according to order.”

Chief Justice Stiness said further:

“The attention of counsel was called to the negotiable instruments act (Pub. Law 1899, Chap. 674, sec. 31) which is: “Where a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against a party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up forgery or want of authority.”



"We have referred to authorities because defendant's counsel so earnestly and ably argued that the act did not alter the law merchant that it seemed proper to show that the law in this respect, outside of the act, is in a very unsatisfactory state, and that the act is right. We do not think that the act does alter the law as it was when a few years ago, it seems to have been switched off on a fallacy in some places. One of the advantages of the act is in settling the question. Waiving the question of forgery, about which the cases we have cited differ, the signature in this case is clearly one made without 'the authority of the person whose signature it purports to be' and therefore 'it is wholly inoperative.' This being so, the defendant cannot justify its action under it, there being no evidence of any conduct by the plaintiff to mislead the defendant, and so to estop his present claim. As the case stood, the plaintiff had ordered money paid to Haskell. The bank had not so paid it. The fact that the plaintiff had been imposed upon did not relieve the bank from its duty to see that the money was paid according to order."

The case of *Armstrong v. Pomeroy National Bank*, 1889, 46 Ohio St., 6 L. R. A. 625, fully supports the contention of the defendant. In this case Chief Justice Minshall said:

"If the fictitious character of the payee is unknown to the drawer, whoever endorses the paper in that name with intent to defraud perpetrates a forgery, and the endorsement is void, a general intent to defraud being sufficient to constitute the offense."

This case gives a careful review of the law of the previous cases. The Chief Justice continues:

"If the drawer of a check acting in good faith makes it payable to a certain person or order, supposing there is such a person, when



in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precaution than if it had been made payable to a real person; in other words, why he should not be required to use the same precautions in the one as in the other, that is, determine whether the endorsement is a genuine one or not. \* \* \* The determination of the character of any endorsement involves the ascertainment of two things: (1) the identity of the endorser, and (2) the genuineness of his signature; and no careful banker would pay upon the faith of the genuineness of any name, until he had fully satisfied himself both as to the identity of the person and the genuineness of his signature."

**I respectfully submit that the Trial Court erred in directing a verdict against the defendant for \$1,500.**

Respectfully submitted,

RANDOLPH PERKINS,  
Attorney for Defendant.



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in this letter, it seems to me that the only way to  
 settle the matter is to have the matter  
 referred to the committee on the subject of  
 the proposed amendment to the constitution.  
 I am sure that the committee will be able to  
 settle the matter in a satisfactory manner.  
 I am, Sir, very respectfully,  
 Yours, Sir, very truly,  
 J. M. Smith

I respectfully submit that the proposed  
 amendment is entirely unnecessary and  
 would be a waste of money.

Respectfully submitted,

James M. Smith  
 Secretary of the Board