If such authority on the part of the agent were recognized, the plaintiff, as owner of the check, might nevertheless recover from the forwarding bank. *California Stucco Co. v. Marine National Bank*, 148 Wash. 341, 268 Pac. 891 (1928); 4 Wash. L. Rev. 42 (1929); *Independent Oil Men's Ass'n v. Fort Dearborn National Bank*, 311 Ill. 278, 142 N.E. 458 (1922) (payee ratifies the collection of the forwarding bank and sues for money had and received); *Schaap v. State National Bank of Texarkana*, 127 Ark. 251, 208 S.W. 309 (1918) (conversion); *cf.* the Pennsylvania doctrine in *Tibby Bros. Glass Co. v. Farmers and Merchants Bank*, 220 Pa. 1, 69 Atl. 280 (1908); see also Chafee, Progress of the Law—Bills and Notes, 33 Harv. L. Rev. 225, 269 (1919); 31 A.L.R. 1068 (1924). If, for some reason, the plaintiff prefers to recover from the drawee bank, it may in turn, as when its drawer sued, recover over from the forwarding bank. *Chrahe v. Mercantile Trust and Savings Bank*, 295 Ill. 375, 129 N.E. 120 (1920).

Bills and Notes—Fictitious Payee—Payee Fictitious although Fiction not Known to Teller Executing Cashier's Check—[California].—One Williams, director and officer of X Corporation, who with one other official was authorized to draw corporate checks on the plaintiff bank, dishonestly procured the necessary countersignature on checks made payable to the drawee plaintiff bank. Over a period of time he took them, with written requisitions signed by himself, to the plaintiff bank and procured cashier's checks payable some to A and some to B, both actual persons known to Williams. Williams did not deliver the cashier's checks to A or B, but indorsed first the payee's name and then his own, and deposited the checks to his own account in the defendant banks. The defendant banks stamped the checks "all prior indorsements guaranteed" and collected the amounts of the checks from the plaintiff bank. Upon discovery of William's defalcations from his corporation, the plaintiff bank refunded to the corporation the sums lost through the transactions and then sued the defendant banks on their guarantee of indorsements. *Held*, judgment for the defendant banks affirmed. The checks were payable to bearer because the payee was fictitious under § 9 (3) of the Negotiable Instruments Law. Consequently, payment of the checks by the drawee bank was authorized, and the debit to X Corporation's account was proper; the refund by the plaintiff to X Corporation was a gratuity, and gave the plaintiff no right of action against the defendant banks. *Union Bank & Trust Co. v. Security First Nat'l Bank*, 65 P.(2d) 355 (Cal. 1937).

The decision makes a desirable extension of the fictitious payee concept but runs counter to the usually accepted interpretation of § 9 (3) of the N. I. L. which provides: "The instrument is payable to bearer when it is payable to the order of a fictitious person .... and such fact was known to the person making it so payable." The "person making it so payable" could be construed to refer to: (1) the person supplying the name of the payee to the one executing the instrument; (2) the person writing the payee's name on the instrument; (3) the person signing the instrument; (4) the person delivering the instrument. Courts, however, have generally construed the phrase as referring to the signer, and the payee is said to be fictitious only if such was the intention of the signer. *Armstrong v. Nat'l Bank*, 46 Ohio St. 512, 22 N.E. 866 (1889). Application of the intention criterion to the instant case involves peculiar difficulties. The teller, mechanically drawing up a cashier's check, probably had no intention in regard to the payee. But if he had any intention, it very likely was that the payee be real since that is the normal state of events. Consequently, a strict application of the intention criterion would probably lead to the conclusion that the payee in the instant case was not fictitious. See *American Express Co. v. People's Savings Bank,* 192 Iowa 366, 181 N.W. 701 (1921); *cf.* s.c., 200 Iowa 408, 205 N.W. 1 (1925). The court's justification of a contrary result by finding an agency relationship between bank teller and remitter is transparently artificial. The court's result derives some strength from the analogy to a holding that where checks are signed by co-signers, knowledge of the active signer is sufficient to make the payee fictitious if the conduct of the co-signers indicates that they are acting as mere automatons. See *Goodyear Tire Rubber Co. v. Wells Fargo Bank,* 1 Cal. App. (2d) 694, 37 P.(2d) 483 (1934).

Artificial reasoning and distinctions are found in other cases involving the fictitious payee problem. Courts have attached different legal consequences to functionally equivalent transactions. Thus where an employee induces his employer to issue a bill to a payee fictitious in fact and the fiction is known only to the employee, the payee is not fictitious, the instrument is not bearer paper, and the maker or drawer is not liable to an innocent taker for value. *Nat'l Union Fire Ins. Co. v. Mellon Nat'l Bank,* 276 Pa. 212, 119 Atl. 910 (1923); *Los Angeles Investment Co. v. Home Savings Bank,* 180 Cal. 601, 182 Pac. 293 (1919); *cf., Equitable Life Assur. Soc. v. Nat'l Bank of Commerce,* 181 S.W. 1176 (Mo. App., 1916). But see *American Sash & Door Co. v. Commerce Trust Co.,* 25 S.W. (2d) 545 (Mo. App. 1933); Brannan, Negotiable Instruments Law 188 (5th ed. 1932). The same result obtains when the employee prepares an instrument which is then signed by an employer unaware of the fiction. *Nat'l Surety Co. v. Nat'l City Bank,* 184 App. Div. 771, 172 N.Y.S. 413 (1918); *U.S. Cold Storage Co. v. Cent. Mfg. Dist. Bank,* 343 Ill. 503, 175 N.E. 825 (1931). However, where an employee authorized to issue an instrument signs one designating a payee known by the employee but not by the employer to be fictitious, the payee is fictitious, and the employer is liable to a holder in due course. *Snyder v. Corn Exchange Nat'l Bank,* 221 Pa. 599, 70 Atl. 876 (1908); *Phillips v. Mercantile Nat'l Bank,* 140 N.Y. 556, 35 N.E. 982 (1894). In each of these cases the control, fault, and risk-bearing faculty of the principal on the one hand, and the purchaser's need for protection on the other, are not affected by the form which the issuance of the instrument takes. Yet it is the form of the issuance which determines the rights of the holder and, correlatively, the liability of the principal.

It would seem desirable to protect the innocent holder for value by holding that the payee was fictitious whenever an authorized agent, aware that the payee was fictitious in fact, either supplied the payee's name to his principal, wrote in the payee's name, signed his principal's name, or used the principal's funds to purchase paper payable to a payee fictitious in fact. The employer by careful selection of personnel and by bonding employees in responsible positions can probably protect himself more effectively than can purchasers of paper. A step in the direction suggested has been taken by several recent amendments to § 9 (3) of which the Montana act is typical: "The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person or living person not intended to have any interest in it and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee." 3 Mont. Rev. Code 1935, c. 197, § 8416 (3). It is to be noted that even under such a statute the payee in the instant case would not be fictitious unless agency notions were stretched to make the teller the agent of the remitter. The instant situation could be covered by a supplemental provision that the payee is fictitious when the person actually selecting him and supplying his name to the maker or drawer knows that he is fictitious.

The justification for the suggested statutory modification raises the further question of why the forgery of a principal's indorsement by an agent authorized to deal with negotiable paper should not pass title to a *bona fide* taker for value. Title does pass in the essentially similar situation when the agent "indorses" the name of the fictitious payee since the paper, being bearer, passes by delivery alone. In fact, the results already reached under the fictitious payee concept and those made possible by the statute suggested make it difficult to understand why a *bona fide* holder for value claiming under any forged indorsement is not permitted to recover on the instrument.

Constitutional Law—Reduction of Public Pensions—[Texas].—The plaintiff, a police officer of Dallas, Texas, had contributed to a voluntary pension fund, and since retirement had been receiving the stipulated monthly payments. A new pension plan materially revised pension payments, including the plaintiff's. The plaintiff sued for reinstatement under the pension law in force at the date of his retirement. *Held*, the plaintiff did not have a vested interest in future monthly payments, under the old statute, but had a mere expectancy that was subject to legislative change. *City of Dallas v. Trammel*, 101 S.W. (2d) 1009 (Tex. 1937).

The instant decision, one of the first to recognize the pension right as a contract right, takes a more realistic approach to the pension problem than has hither to been the case under the traditional treatment of the pension as a gratuity. See *Gaffney v. Young*, 200 Iowa 1030, 205 N.W. 865 (1925); *State v. Board of Trustees*, 121 Wis. 44, 98 N.W. 954 (1904); *Pecoy v. City of Chicago*, 265 Ill. 78, 106 N.E. 435 (1914). Since the employee often accepts a lower wage or as in the instant case makes voluntary contributions and might even refuse more favorable jobs because of the security offered by pensions, it seems reasonable to assume the employee considers the pension right a part of his wage contract. See 12 Encyc. Soc. Sci. 65 (1934). The technical contract requirement of consideration for the state's (or here the city's) promise could be satisfied by the combined elements of long and faithful service, and, in the instant case voluntary contribution. *Cf. Wilson v. Wurlitzer*, 48 Ohio App. 450, 194 N.E. 441 (1934); *Schofield v. Zion's Cooperative Mercantile Institution*, 85 Utah 281, 39 P. (2d) 342 (1934) (in both cases long and faithful service was held consideration sufficient to bind private employers to pension agreements).

Nevertheless, even though the plaintiff is said to have a contractual right to a pension, it may be desirable to allow modification of this right. As the Texas and other courts have recognized, flexibility may be necessary to preserve the pension system in times of economic maladjustment. See *Casserly v. City of Oakland*, 56 P. (2d) 377 (Cal. 1936). This need may be especially pressing if the pension funds being separate have been depleted by economic distress. Moreover, since price levels will fall during such periods, a reasonably reduced pension may not be too harsh on the employee. In making pension adjustments, however, it should be kept in mind that because of the expectancy of the employee, because of the pension's beneficial effect on morale and efficiency, and because pension payments going to low income bracket groups may serve to prime the pump for recovery, pension reductions should come as one of the last items in governmental economies.

There is no express power analogous to that over corporations in the Texas statutes