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The Fictitious Payee Doctrine Under the Uniform Negotiable Instruments Law

B. Lloyd Magruder

The need for additional legislation is apparent. The Eighty-fourth Congress had on its calendar, when it adjourned, a bill which would have cleared up most of the trouble in this area.[67] It provided basically for treating the proceeds from the sale of a carved out oil payment as ordinary income subject to depletion.[68] Although the bill died in committee, it is highly probable that the same or a similar one will be offered in the present session of Congress.

Richard F. Knight

The Fictitious Payee Doctrine Under the Uniform Negotiable Instruments Law

When an instrument is payable to order, an endorsement by the payee or by one authorized by him to endorse is necessary in order for one to maintain an action on the instrument as holder.[1] Likewise, a valid endorsement of a check which is payable to order is necessary before the drawee may debit the drawer's account without incurring liability to the drawer for the amount of the check.[2] However, if the instrument is payable to bearer it need not be endorsed in order for one to maintain an action on it[3] or for the drawee to debit the drawer's account.[4] Usually it is obvious whether an instrument is payable to order or bearer, and hence, whether a valid endorsement is necessary. But the fictitious payee doctrine operates to make paper, ostensibly drawn to order, bearer paper. This doctrine, therefore, becomes important in determining whether a valid endorsement of an instrument which purports to be order paper is necessary and,

67. H.R. REP. 9559, 84th Cong., 2d Sess. (1956).

68. *Ibid.* The general provision of § 633 would have read: "(1) General Rule.—Except as provided in paragraph (2), the proceeds from the sale of an oil, gas, or production payment out of a larger property, as that term is defined in section 614(a), shall be considered income subject to a depletion allowance."

1. United Motor Car Co. v. Mortgage & Securities Co., 128 So. 307 (La. App. 1930).

2. The drawee bank assumes the duty of paying out the depositor's money only on the order of the depositor. If the drawee pays out money on instruments bearing a forged endorsement and debits the drawer's account, it has failed to pay according to the depositor's order and has thus breached its duty to the depositor. The depositor may require the drawee to recredit his account even if the drawee bank used all possible diligence in making payment. See BRITTON, BILLS AND NOTES § 142 (1943).

3. Hillman v. Kropp Forge Co., 340 Ill. App. 606, 92 N.E.2d 537 (1950).

4. Fidelity & Casualty Co. v. United States Fidelity & Guaranty Co., 81 So.2d 576 (La. App. 1955).

hence, who is to bear the loss as between the drawer,[5] drawee, and holder in certain situations.

The origin of the fictitious payee doctrine is the case of *Tatlock v. Harris*,[6] but *Minet v. Gibson*[7] is considered the leading case on this subject, since it was the first to reach the House of Lords. There, a bill drawn to the order of John White, who was known by both the drawer and drawee not to exist, was held to be payable to bearer. It was reasoned that the maker, by naming a fictitious person as payee, had not manifested an intention to limit the negotiability of the instrument. But he had made endorsement of the instrument impossible, and therefore must have intended that it be negotiated without endorsement. Cases followed, holding that the intention of the party sought to be held liable on the instrument in naming the payee determined whether the payee was fictitious. If he intended the payee to be fictitious, the instrument was bearer paper as to him.[8]

The author of the Uniform Negotiable Instruments Law[9] provided for the fictitious payee doctrine in Section 9(3) which states that "The instrument is payable to bearer . . . when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable. . . ."

Meaning of Fictitious and Non-Existing in NIL Section 9(3)

Since NIL Section 9(3) refers to a "non-existing" and a "fictitious" payee in the disjunctive, the courts have reasoned that the codifiers did not intend that these words be synonymous.[10] The term "non-existing" is used in its ordinary sense to mean a payee who does not in fact exist.[11] However, the word "ficti-

5. Drawer is used in the broad sense to include not only the author of a draft but also the maker of a note.

6. 3 T.R. 174 (1789). An endorsee was allowed to recover on a bill payable to a non-existing company in the same manner as recovery had previously been allowed on a bill payable to "Ship Fortune or bearer" in Grant v. Vaughan, 3 Burr. 1516 (1764). In that case the defendant contended that there was a distinction between a bill payable to an inanimate thing and one payable to a person supposed to be in existence. It was urged that in the latter case the bill was payable to no one and was, therefore, waste paper. However, this contention was rejected.

7. 3 T.R. 482 (1789), aff'd, 1 H. Bl. 568 (1791).

8. See BRITTON, BILLS AND NOTES 692-93 (1943).

9. LA. R.S. 7:1 *et seq.* (1950).

10. See Snyder v. Corn Exchange National Bank, 221 Pa. 599, 70 Atl. 876 (1908).

11. An administrator of an estate is non-existent whether or not the estate is being administered. Hansen v. Northwestern National Bank, 175 Minn. 453, 221 N.W. 873 (1928); Janssen v. Tusha, 66 S.D. 604, 287 N.W. 501 (1939). *Contra*, Bacher v. City National Bank, 347 Pa. 80, 31 A.2d 725 (1943). The abbreviation of a payee's name by omitting "Co., Inc." does not make the payee non-

tious" has been uniformly construed to mean one who is intended by the "person making it so payable" to have no interest[12] in the instrument, whether or not he actually exists.[13] It is to be noted

existent. Seidman v. North Camden Trust Co., 122 N.J.L. 580, 7 A.2d 406 (1939). Similarly, the named payee is not non-existing if it is the name assumed by the one intended to be the payee. People's State Bank v. Trombly, 241 Mich. 199, 217 N.W. 47 (1928); Jacoby v. Kline Bros. Co., 241 App. Div. 470, 272 N.Y. Supp. 871 (1st dep't 1934). See also Traders' Securities Co. v. Dutsch, 137 So. 75 (La. App. 1931), on rehearing, 140 So. 75 (La. App. 1932). There an endorsee from the named payee was allowed to recover on a bill made payable to Arc Manufacturing Company, which was a trade name used by the Blackstead Corporation. The court based its holding that the bill was not payable to bearer on NIL § 9(3), or NIL § 62, which precludes the acceptor from denying the existence of the payee and its capacity to endorse. However, the acceptor is not deemed to admit the payee's signature. National Union Fire Ins. Co. v. Mellon Nat. Bank, 276 Pa. 212, 119 Atl. 910 (1923). Therefore, the court must have considered the named payee as an existing person, otherwise there could have been no valid endorsement and the endorsee would have been unable to recover.

Related to the question of the applicability of NIL § 62 to the fictitious payee situation is the question of whether the drawer admits the existence of the payee to the drawee under NIL § 61. It is generally held that NIL § 61 does not apply to drawees because it refers only to holders and endorsers. Callaway v. Hamilton National Bank, 195 F.2d 556 (D.C. Cir. 1952); Robertson Banking Co. v. Brasfield, 202 Ala. 167, 79 So. 651 (1918); McCornack v. Central State Bank, 203 Iowa 833, 211 N.W. 542 (1926); International Aircraft Trading Co. v. Manufacturers Trust Co., 297 N.Y. 285, 79 N.E.2d 249 (1948), 9 OHIO ST. L.J. 700 (1948), 97 U. PA. L. REV. 122 (1948). See also American Express Co. v. People's Sav. Bank, 192 Iowa 366, 181 N.W. 701 (1921). *But see* Darling Stores, Inc. v. Fidelity-Bankers Trust Co., 178 Tenn. 165, 156 S.W.2d 419 (1941), 22 B.U.L. REV. 336 (1942), 90 U. PA. L. REV. 973 (1942), 17 TENN. L. REV. 397 (1942). For a discussion of NIL §§ 9(3) and 61, see Note, 29 NEB. L. REV. 96 (1949). It has been held that under NIL § 60 the maker admits the existence of the named payee and his capacity to endorse only where he knows the named payee is fictitious. People's State Bank v. Trombly, 241 Mich. 199, 217 N.W. 47 (1928). If the payee is known to be fictitious by the maker, the instrument would be payable to bearer and there would be no need to urge NIL § 60.

12. The jurisprudence contains little or no discussion of the meaning of the word "interest." However, in Fidelity & Casualty Co. v. United States Fidelity & Guaranty Co., 81 So.2d 576 (La. App. 1955) a doubtful meaning appears to have been assigned to that word. There a dishonest employee, whose intent determined whether the payee was fictitious, intended to and did cash the checks in question at the drawee-payee bank and pocketed the proceeds. The checks were held to be payable to bearer. The court's conclusion that the drawee was intended to have no interest in the checks runs against the reason for the fictitious payee rule, the reason being, that by making the instrument payable to a fictitious or non-existing payee, a valid endorsement was made impossible. However, it was obviously intended that the instrument be negotiated. Therefore, it must have been intended to be negotiated by mere delivery, which means it was intended that the instrument be payable to bearer. McIntosh v. Lytle, 26 Minn. 336, 3 N.W. 983 (1880). See also National Surety Co. v. National City Bank, 184 App. Div. 771, 172 N.Y. Supp. 413 (1st dep't 1918). In the case under discussion nothing was done to make endorsement impossible. On the contrary, the one whose intent was controlling delivered the check to the named payee and made it possible that there be a valid endorsement. *Cf.* City Nat. Bank v. Louisiana Sav. Bank & Trust Co., 216 La. 262, 43 So.2d 602 (1949), where a check was held not to be payable to bearer although the named payee was not intended to receive the ultimate benefit of the check.

13. Saul Co. v. Rich Wine and Liquor Co., 120 A.2d 208 (D.C. Cir. 1956); California Mill Supply Corp. v. Bank of American Nat. Trust & Savings Ass'n, 36 Cal.2d 334, 223 P.2d 849 (1950); Harsin Motor Co. v. Colorado Savings & Trust Co., 131 Colo. 595, 284 P.2d 235 (1955); Ritter v. Moore, 64 Idaho 144,

that a non-existing payee may also be a fictitious payee. This results when the named payee is not in existence and is not intended by "the person making it so payable" to have an interest in the instrument.[14]

Requirement of Knowledge in NIL Section 9(3)

The fictitious payee doctrine as codified in NIL Section 9(3) not only requires that the named payee be fictitious or non-existing but it also requires that the "person making it so payable" have knowledge of the non-existing or fictitious character of the named payee.

The courts have experienced no difficulty in finding the requisite knowledge where the payee is found to be fictitious. Since the intent of "the person making it so payable" must be that the named payee have no interest in the paper in order for the payee to be considered fictitious, he necessarily has knowledge of the fictitious character of the payee. This is true whether or not the payee is in existence. Obviously, once it is determined that the payee is fictitious, the second requirement of the NIL, that the "person making it so payable" know that the payee is fictitious, is fulfilled and the paper will be payable to bearer.[15]

If it is found that the payee is non-existing but is not fictitious because the "person making it so payable" intends that the named payee have an interest in the instrument, it becomes necessary to determine whether or not "the person making it so payable" had knowledge of the payee's non-existence. If he does not have this knowledge, NIL Section 9(3) is inapplicable and the instrument is not payable to bearer.[16] A valid endorsement

128 P.2d 639 (1942); Mueller & Martin, Inc. v. Liberty Ins. Bank, 187 Ky. 44, 218 S.W. 465 (1920); United Motor Car Co. v. Mortgage & Securities Co., 128 So. 307 (La. App. 1930); New York Cas. Co. v. Sazenski, 240 Minn. 202, 60 N.W.2d 368 (1953); American Sash & Door Co. v. Commerce Trust Co., 332 Mo. 98, 56 S.W.2d 1034 (1933); Hall v. Bank of Blasdell, 306 N.Y. 336, 118 N.E.2d 464 (1954); Seaboard Nat. Bank v. Bank of America, 193 N.Y. 26, 85 N.E. 829 (1908); Snyder v. Corn Exchange National Bank, 221 Pa. 599, 70 Atl. 876 (1908).

14. Snyder v. Corn Exchange National Bank, 221 Pa. 599, 70 Atl. 876 (1908).

15. Union Bank & Trust Co. v. Security-First Nat. Bank, 8 Cal.2d 303, 65 P.2d 355 (1937); Ritter v. Moore, 64 Idaho 144, 128 P.2d 639 (1942); Mueller & Martin, Inc. v. Liberty Ins. Bank, 187 Ky. 44, 218 S.W. 465 (1920); Hall v. Bank of Blasdell, 306 N.Y. 336, 118 N.E.2d 464 (1954); Snyder v. Corn Exchange National Bank, 221 Pa. 599, 70 Atl. 876 (1908).

16. Robertson Banking Co. v. Brasfield, 202 Ala. 167, 79 So. 651 (1918); McCornack v. Central State Bank, 203 Iowa 833, 211 N.W. 542 (1926); Jorgensen Chevrolet Co. v. First Nat. Bank, 217 Minn. 413, 14 N.W.2d 618 (1944); Strang v. Westchester County Nat. Bank, 235 N.Y. 68, 138 N.E. 739 (1923); International Aircraft Trading Co. v. Manufacturer's Trust Co., 297 N.Y. 285,

will be necessary for it to be negotiated. This, of course, will be impossible because the named payee is the only one who can validly endorse the instrument and he is not in existence.

However the instrument will be payable to bearer and no endorsement will be necessary if it is found that "the person making it so payable" knows that the named payee is non-existing, even if he is not fictitious.[17] Although it is difficult to conceive of a situation in which the payee is non-existent and the "person making it so payable" knows of this fact but, nevertheless, intends the named payee to have an interest in the instrument, such situations do arise. In one case[18] the plaintiff, who was to invest in a proposed corporation, made out checks payable to that corporation a few days before it was to be formed and mailed them to the promoters. The checks could not be considered as payable to a fictitious payee because the named payee was intended to have an interest in them. Therefore, the definition of a fictitious person was not fulfilled. However, the checks were "payable to the order of a . . . non-existing person, and such fact was known to the person making it so payable,"[19] and thus they were bearer paper.

Meaning of "the person making it so payable" in NIL Section 9(3)

Under NIL Section 9(3) "the person making it so payable" must have the requisite intent and knowledge to bring the sec-

79 N.E.2d 249 (1948). In the *Strang* case the non-existing person was an endorsee; however NIL § 9(3) has been held applicable to endorsees as well as payees. Hall v. Bank of Blasdell, 306 N.Y. 336, 118 N.E.2d 464 (1954), 53 MICH. L. REV. 277 (1954), 33 TEX. L. REV. 385 (1955).

17. Callaway v. Hamilton National Bank, 195 F.2d 556 (D.C. Cir. 1951); Janssen v. Tusha, 66 S.D. 604, 287 N.W. 501 (1939). The position has been advanced that "while every non-existing payee must necessarily be fictitious, the converse is not true." Kulp, *The Fictitious Payee*, 18 MICH. L. REV. 296, 297 (1920). It is usually true that a non-existing payee is fictitious, but in both the *Callaway* case and the *Janssen* case the named payee was known to be non-existent but was not fictitious. *Cf.* Darling Stores, Inc. v. Fidelity-Bankers Trust Co., 178 Tenn. 165, 156 S.W.2d 419 (1941), where knowledge of the payee's non-existence was imputed to the drawer because of his negligence. The writer of a note on this case contends that "under the N.I.L. there is but one rule, that of fictitiousness." Note, 22 B.U.L. REV. 336, 339 (1942).

18. Callaway v. Hamilton National Bank, 195 F.2d 556 (D.C. Cir. 1951), 57 DICK. L. REV. 168 (1953).

19. NIL § 9(3). Plaintiff argued that his intent rather than his knowledge should govern. To this argument the court said: "The courts do recognize a converse rule: a drawer's intent that the payee he names shall have no interest in the checks makes the check payable to bearer although the drawer knows the payee to be an existing person. [citing cases.] But the proposition for which appellant contends is not the law." *Id.* at 561.

tion into operation. Although there has been a large amount of litigation to determine who is "the person making it so payable" within the contemplation of the NIL, the courts almost unanimously hold[20] that it is the actual signer of the instrument.

This problem arises frequently in cases in which the nominal drawer is induced[21] to sign checks payable to a named payee who is known to be non-existing or who is intended to have no interest in the check by the one who induces the drawing of the check. In these cases the nominal drawer is invariably ignorant of the fictitious or non-existing character of the named payee. Since he was the one who signed the instrument and did not have the knowledge or intent required by NIL Section 9(3), the instrument is order paper.[22] The fact that the one who induced the signing was the agent of the nominal drawer is not important. The rule of agency that knowledge of the agent is not imputable to the principal when the agent is acting in his own behalf and against the interest of his principal is applied.[23] It is also immaterial that the one who induces the drawing of the check, instead of the nominal drawer, actually inserts the name of the payee, if he inserts the name before the check is signed.[24] However, a distinction may be drawn between a case in which

20. For a case that does not follow this rule, see Rancho San Carlos, Inc. v. Bank of Italy Nat. Trust & Savings Ass'n, 123 Cal. App. 291, 11 P.2d 424 (1932).

21. This inducement may take various forms. Thus, it may be a dishonest employee presenting fictitious invoices to his employer; the payroll clerk padding the payroll; an insurance adjuster presenting false claims to his employer; or by one presenting a claim as agent for another when in fact he is not. It is to be noted that in the latter situation the impostor rule is inapplicable because the person making and drawing the check does not intend the person actually before him to be the named payee, but his purported principal is intended to be the payee. For a discussion of the distinction between the fictitious payee and impostor situations, see Comment, *The Effect of the Adoption of the Proposed Uniform Commercial Code on the Negotiable Instruments Law of Louisiana — The Impostor Rule*, 16 LOUISIANA LAW REVIEW 155 (1955).

22. Robertson Banking Co. v. Brasfield, 202 Ala. 167, 79 So. 651 (1918); Edgington v. Security-First Nat. Bank, 78 Cal. App.2d 849, 179 P.2d 640 (1947); Harsin Motor Co. v. The Colorado Savings & Trust Co., 131 Colo. 595, 284 P.2d 235 (1955); McCornack v. Central State Bank, 203 Iowa 833, 211 N.W. 542 (1926); Commonwealth v. Farmers Deposit Bank, 264 Ky. 839, 95 S.W.2d 793 (1936); United Motor Car Co. v. Mortgage & Securities Co., 128 So. 307 (La. App. 1930); Detroit Piston Ring Co. v. Wayne County and Home Savings Bank, 252 Mich. 163, 233 N.W. 185 (1930); New York Cas. Co. v. Sazenski, 240 Minn. 202, 60 N.W.2d 368 (1953); American Sash & Door Co. v. Commerce Trust Co., 332 Mo. 98, 56 S.W.2d 1034 (1933), 33 COLUM. L. REV. 910 (1933); Seidman v. North Camden Trust Co., 122 N.J.L. 580, 7 A.2d 406 (1939); International Aircraft Trading Co. v. Manufacturers Trust Co., 297 N.Y. 285, 79 N.E.2d 249 (1948); Commonwealth v. Globe Indemnity Co., 323 Pa. 261, 185 Atl. 796 (1936).

23. See note 22 *supra*.

24. Edgington v. Security-First National Bank, 78 Cal. App.2d 849, 79 P.2d 640 (1947); Detroit Piston Ring Co. v. Wayne County and Home Savings Bank, 252 Mich. 163, 233 N.W. 185 (1930).

the nominal drawer is induced to sign checks already prepared by the person inducing his signature and the case in which the nominal drawer is induced to sign blank checks which are later filled in with the name of a fictitious or non-existing payee. The nominal drawer's intent is controlling in the former situation,[25] and the intent of the inducer of the signing controls in the latter.[26]

When an agent has been given authority to draw checks in the principal's name, the principal has put the agent in his place and the agent is the "one making it so payable" when he signs an instrument in the principal's name.[27] Thus, if the agent signs a check intending the named payee to be a non-existing person, the check is bearer paper although his employer, the nominal drawer, had no knowledge of the fictitiousness or non-existence of the payee.[28]

When two or more persons are required to sign a check, it is generally held that the knowledge or the intent of only one of the signers is sufficient to render NIL Section 9(3) applicable.[29]

Since a forger of the drawer's signature is the actual signer, he is "the person making it so payable" within the meaning of NIL Section 9(3).[30] Therefore, if he intends that the named payee have no interest in the instrument or if he knows that the named payee is non-existing, the instrument will be payable to bearer. An endorsement of the instrument will add nothing to the validity of the title of any holder. This is important because a drawee may recover money paid out on the forged signa-

25. See note 24 *supra*.

26. Rancho San Carlos, Inc. v. Bank of Italy Nat. Trust and Savings Ass'n, 123 Cal. App. 291, 11 P.2d 424 (1932).

27. Goodyear Tire & Rubber Co. v. Wells Fargo Bank and Union Trust Co., 1 Cal. App.2d 694, 37 P.2d 483 (1934); American Hominy Co. v. National Bank of Decatur, 294 Ill. 223, 128 N.E. 391 (1920); Snyder v. Corn Exchange National Bank, 221 Pa. 599, 70 Atl. 876 (1908).

28. See note 27 *supra*.

29. Goodyear Tire & Rubber Co. v. Wells Fargo Bank and Union Trust Co., 1 Cal. App.2d 694, 37 P.2d 483 (1934); Globe Indemnity Co. v. First Nat. Bank, 133 S.W.2d 1066 (Mo. App. 1939); Board of Education of Jefferson Tp. v. National Union Bank of Dover, 121 N.J.L. 177, 1 A.2d 383 (1938); Hackensack Trust Co. v. Hudson Trust Co., 207 App. Div. 897, 202 N.Y. Supp. 928 (1st dep't 1923); Bourne v. Maryland Casualty Co., 185 S.C. 1, 192 S.E. 605 (1937). *Contra*, Portland Postal Employees Credit Union v. United States Nat. Bank, 171 Ore. 40, 135 P.2d 467, 136 P.2d 258 (1943).

30. United States v. Chase National Bank, 250 Fed. 105 (2d Cir. 1918), aff'd, 252 U.S. 485 (1920); Trust Co. v. Hamilton Bank, 127 App. Div. 515, 112 N.Y. Supp. 84 (1st dep't 1908); First Nat. Bank v. United States Nat. Bank, 100 Ore. 264, 197 Pac. 547 (1921).

ture of the payee[31] but is not allowed to recover money paid out on the forged signature of the drawer.[32] If the instrument is payable to bearer the drawee has not paid money out on the forged endorsement of the payee, and hence his right to recover is cut off.[33]

One who purchases a cashier's check is not the actual signer, consequently, it is generally held that he is not the person whose intent or knowledge is sought in determining whether NIL Section 9(3) is applicable.[34] The bank's agent who signs the check and whose intent and knowledge, therefore, is controlling will seldom be aware of the non-existing or fictitious character of the named payee. Accordingly, the check will be payable to order and will require a valid endorsement before it can be negotiated or before the drawee may charge the drawer's account.

The Fictitious Payee Act

The Fictitious Payee Act proposed by the American Bankers' Association as an amendment to NIL Section 9(3) has been adopted by Louisiana[35] and eighteen other states.[36] NIL Section 9(3) as amended by the Fictitious Payee Act reads: "The instrument is payable to bearer . . . When it is payable to the order of a fictitious or non-existing *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."* (Amendment italicized.)[37]

The new phrase, "or living person not intended to have any interest in it" is not foreign to the fictitious payee doctrine. The word "fictitious" has always been construed to include a living person who is not intended to have an interest in the instru-

31. See BRITTON, BILLS AND NOTES § 139 (1943).
32. *Id.* §§ 133-36.
33. See cases cited in note 29 *supra.*
34. Continental Nat. Bank and Trust Co. v. Olney Nat. Bank, 33 F.2d 437 (7th Cir. 1929); Buena Vista Loan and Savings Bank v. Stockdale, 59 Ga. App. 798, 2 S.E.2d 158 (1939); American Express Co. v. People's Sav. Bank, 192 Iowa 366, 181 N.W. 701 (1921), 21 COLUM. L. REV. 597 (1921); First Nat. Bank v. Produce Exchange Bank, 338 Mo. 91, 89 S.W.2d 33 (1935); Wilson v. First National Bank and Trust Co., 276 P.2d 766 (Okla. 1954). *Contra,* Union Bank and Trust Co. v. Security-First Nat. Bank, 8 Cal.2d 303, 65 P.2d 355 (1937).
35. La. Acts 1942, No. 312, p. 1018.
36. See 2 PATON, DIGEST 1867 (1942) and 1954 Supp. § 6:9, p. 7.
37. The underlying purpose of the fictitious payee act is "to place the responsibility upon the drawer of an instrument for the acts of his agent, who names a fictitious payee without the drawer's knowledge." American Bankers Association, Recommended State Legislation 1942.

ment.[38] Thus it would appear that this phrase makes no material change in the fictitious payee doctrine.

However, the last clause inserted into the original text of NIL Section 9(3) operates to extend the circumstances under which an instrument ostensibly drawn to order is deemed to be bearer paper. Under this clause an instrument will be payable to bearer when an agent[39] of "the person making it so payable" "supplies" the name of a payee whom he knows to be non-existing or intends to have no interest therein, although "the person making it so payable" is ignorant of the fictitious or non-existing character of the named payee. Most of the cases that have arisen under the Fictitious Payee Act have involved a determination of what acts of an agent will come within the meaning of the word "supplies."

It will be recalled that under the original provisions of NIL Section 9(3) the intent and knowledge of an agent, who inserts the name of a payee and then induces his principal to sign, is immaterial in determining if the fictitious payee doctrine is applicable.[40] In this situation the agent "supplies" the name of the payee.[41] Hence, under the Fictitious Payee Act the agent's intent and knowledge of the fictitious or non-existing character of the named payee will cause the instrument to be payable to bearer.[42]

The Fictitious Payee Act has also been held to change the result in those cases in which the agent does not insert the name of the payee but merely induces the authorized signer to prepare and sign instruments payable to persons whom the agent intends to have no interest therein. Under the original text of NIL Section 9(3) the intent and knowledge of the signer alone is material.[43] However, the inducement by the agent has been held to

38. See page 458 *supra.*

39. No case has been found in which the meaning of the word "agent" as used in the fictitious payee act has been discussed. However, see Southall v. Columbia Nat. Bank, 244 S.W.2d 577 (Mo. App. 1951), where the court avoided a determination of the scope of the meaning of that word by holding that the jury's findings of an agency relationship was final.

40. See page 463 *supra.*

41. Houghton Mifflin Co. v. Continental Illinois National Bank and Trust Co., 293 Ill. App. 423, 12 N.E.2d 714 (1938); Orton Crane and Shovel Co. v. Federal Reserve Bank of Chicago, 345 Ill. App. 284, 102 N.E.2d 663 (1951); Fidelity & Casualty Co. v. United States Fidelity and Guaranty Co., 81 So.2d 576 (La. App. 1955).

42. See note 41 *supra.*

43. See page 462 *supra.*

fall within the scope of the meaning of the word "supplies" as it is used in the Fictitious Payee Act.[44] Thus, under the Fictitious Payee Act the agent's intent and knowledge is pertinent in determining whether the fictitious payee doctrine is applicable in the situation where the agent does nothing more than to induce the preparation and signing of the instrument.[45]

B. Lloyd Magruder

The Defenses[1] of Want and Failure of Consideration in Negotiable Instruments

The defense of want[2] of consideration[3] asserts that no consideration ever existed for the negotiable instrument.[4] There

44. Citizens Loan & Security Co. v. Trust Co. of Georgia, 79 Ga. App. 184, 53 S.E.2d 179 (1949), 3 VAND. L. REV. 109; Hillman v. Kropp Forge Co., 340 Ill. App. 606, 92 N.E.2d 537 (1950); Prugh, Combest and Land, Inc. v. Linwood State Bank, 241 S.W.2d 83 (Mo. App. 1951), 3 HASTINGS L.J. 58 (1951); Southall v. Columbia Nat. Bank, 244 S.W.2d 577 (Mo. App. 1951); Swift and Co. v. Bankers Trust Co., 280 N.Y. 135, 19 N.E.2d 992 (1939). In the *Hillman* case the court said that "the name was supplied by Lane, an employee within the meaning of the amendment, since he was an integral part of the required procedure established by defendant, which ultimately led to the issuance of the checks in question. The fact that his duties did not call upon him to prepare, execute or issue the checks in question would not take it out of the amendment." *Id.* at 612, 92 N.E.2d at 539.

45. For a discussion of this problem, see Boardman, *Proper Construction of the so-called "Bankers' Amendment" and its Significance Respecting Forgery Claims Under Bankers' Blanket Bonds*, 1950 INS. COUNSEL J. 166. It is interesting to note that the last clause of Missouri's NIL § 9(3) reads: "or was known to his employee or other agent who supplies or *causes to be inserted* the name of such payee." (Emphasis added.) MO. REV. STAT. ANN. § 401.009 (1952).

1. This Comment does not include actions instituted by a maker to cancel a note on the ground of want or failure of consideration. As regards such suits, however, see Fisher v. Rice Growers' Bank, 122 Ark. 600, 184 S.W. 36 (1916).

2. "Want," "lack," and "absence" of consideration are synonymous terms. The term "absence" is used in § 28 of the Uniform Negotiable Instruments Law (hereafter referred to as the NIL). LA. R.S. 7:28 (1950). The Uniform Commercial Code in § 3-408 uses the term "want." In court opinions the terms most commonly used are "want" and "lack."

3. Under the NIL, "consideration" is defined in § 25 in terms of "value." This section provides: "Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." LA. R.S. 7:25 (1950). See also Uniform Commercial Code § 3-408.

In Robinson Lumber Co. v. Tracka & Boudreau, 134 So. 430, 431 (La. App. 1931), it was said: "A valuable consideration may, in general terms, be said to consist either in some right, interest, profit, or benefit accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility or act, or labor or service on the other side; and if either of these exist, it will furnish a sufficient valuable consideration to sustain the making or indorsing of a promissory note in favor of the payee or other holder." Citing Benner v. Van Norden, 27 La. Ann. 473 (1875).

4. First State Bank v. Radke, 51 N.D. 246, 199 N.W. 930 (1924). See also Killeen's Estate, 310 Pa. 182, 165 Atl. 34 (1932). It is to be noted that there