of an earlier relation. In the *Frankel* case this was an established fact, but in the *White-Allen* case the lapse of over two years would seem to interrupt this former relation so seriously as to preclude the application of the arguments of the *Frankel* case. The *White-Allen* case merely reaffirms the general definition of a trade dispute in Ohio, while the *Frankel* case has extended that definition to include disputes with non-employees where there has been an immediately prior course of dealing sufficient to imply an acceptance by the employer of this group as a bargaining unit.

LEON N. STONE

NEGOTIABLE INSTRUMENTS

CHATTEL LOAN ACT — HOLDER IN DUE COURSE

A provision in General Code section 6346-5a, known as The Chattel Loans Act, reads: "If interest, consideration, or charges in excess of those permitted by this act shall be charged, contracted for, or received, the contract and all papers in connection therewith shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges whatsoever." The case of *Capitol Loan and Savings Co.* v. *Biery, et al*, 134 Ohio St. 333, 16 N.E. (2d) 450, (1938), held absolutely void a note and mortgage given by a borrower to a company licensed under this Act. The loan was for less than $300.00 where the chattel mortgage was on household goods, and, in addition to the provisions for foreclosure proceedings authorized under the Act, the mortgage contained a provision concerning default, and in that event, provided for entry by the mortgagee " . . . into any building or upon any premises where said property, or any part thereof, may be situated, and take the same into its possession without process of law and dispose of the same at any time thereafter, at public or private sale, and out of the proceeds of said sale to pay first, the reasonable cost and expense of taking, keeping, and selling the same and all court costs . . ." The grounds relied upon by the court were that the note and mortgage were to be considered as a part of the same transaction; *McClelland* v. *Sorter*, 39 Ohio St. 12 (1883), that the excessive charges as defined by General Code section 6346-5, were "contracted for"; the statute providing "*the contract and all other papers* in connection therewith shall be void and the *licensee* (italics supplied) shall have no right to collect . . ." The case was not affected by the fact that General Code section 8566, provides only for an actual foreclosure proceeding in the case of a chattel

mortgage on household goods as was the case here, Myers, J., saying, "This is a rather strange theory to attempt to justify, or excuse the illegal provision in the chattel mortgage by the admission that it was in conflict with two statutes instead of only one." *Cf. Columbia Discount and Loan Co.* v *Taylor*, 21 Ohio L. Abs. 54; 6 Ohio Op. 279 (1936); *Rebholz* v. *Family Loan Co.*, 6 Ohio Op. 82 (C.P.) (1936), provision for attorney fees.

This case brings to the fore the interesting question as to the position of the indorsee of such an instrument in the face of General Code section 8307, which reads, "No debtor shall be deemed a particeps criminis, on account of having paid or agreeing to pay, such exorbitant interest, but he shall have like remedy and relief in either case. No bona fide indorsee of negotiable paper purchased before due, shall be affected by any usuary exacted by any former holder of such paper, unless he has actual notice of the usury previous to his purchase. In such cases, the amount of such excess, if incorporated in negotiable paper, after payment, may be recovered back, by action against the party who originally exacted the usury." This act is a part of the General Interest Law and has been on the Ohio statute books since February 18, 1848. 43 Ohio Laws 55.

Shall we then, in a case between a *bona fide* indorsee of such an instrument for value, and the maker allow the indorsee to recover the face amount of such a note? On this precise question there seems to be a dearth of authority. Yet if the note is void, the rule is violated that instruments void by statute cannot be enforced even by one who is a holder in due course. BRANNAN, NEGOTIABLE INSTRUMENTS, 6th Ed., 55, p. 616; 3 R.C.L. 225, p. 1018; *Citizens Bank* v. *Nore*, 67 Neb. 69, 93 N.W. 160, 2 Ann. Cas. 604, 60 L.R.A. 737 (1903); 3 R.C.L. 1017; 10 C.J.S. sections 502e, 503, p. 1108, 1110; *Sabine* v. *Paine*, 223 N.Y. 401, 119 N.E. 849, 5 A.L.R. 1444 (1918), and see anno. 95 A.L.R. 735.

Although General Code section 6346-5a says, "the contract and all other papers in connection therewith shall be void," its language specifies "and the *licensee* (italics supplied) shall have no right to collect." This might well be interpreted as meaning that the note in such case is void only between the licensee and the maker, 10 C.J.S. section 503, p. 1110. Here the indorsee has given good consideration for a *prima facie* valid instrument. The borrower has received actual value from the licensee. General Code section 8307 provides recovery to the maker to the extent of the usury exacted from him. So a position allowing recovery to the indorsee can hardly be said to be essentially unfair. Further, it is the policy of the Negotiable Instrument Law to make commercial paper as

attractive and certain to purchasers as possible, and we ought not to penalize a *bona fide* indorsee who is not a party to the original illegal transaction, Brannan, *supra.*

On the other hand, one might reasonably view such a position as making possible to licensees under the act a method for circumventing the law, the policy as to which has been fully declared. *Capitol Loan and Savings Co.* v. *Biery, et al., supra*; *People* v. *Stokes*, 281 Ill. 159, 118 N.E. 87, Cam. 277 (1917); *Geyer* v. *Spencer*, 99 Ind. App. 418, 189 N.E. 429, (1934). In *Smetal Corp.* v. *Family Loan Co.*, 119 Fla. 497, 161 So. 438 (1935), *re* the Florida Small Loan Act, the court said at pp. 510, 511, "The statute was passed as a protection to the borrower; it was intended to make the statute effective and to prevent its evasion by endorsing notes given for such loans to third parties. It would afford little protection to a borrower if the notes given contrary to the statute would be valid in the hands of a holder in due course." And see Hubachek, *Annotations on Small Loan Laws*, p. 175. As General Code section 6346-5a is a later statute than General Code section 8307 we should invoke the rule of construction that in the case of conflicting statutes a later statute dealing with some special subject matter has precedence over a prior general enactment. *Christman* v. *State ex rel. Norris*, 45 Ohio App. 541, 187 N.E. 584 (1932).

Furthermore, the position of the indorsee is not that of one denied justice. He has his action against the licensee on his warranty, Ohio General Code 8171, Ohio Jur. p. 1072, and possibly in quasi-contract if the note is cancelled as void; *See, Family Loan Co.* v. *Smetal Corp.*, 123 Fla. 900, 169 So. 48 (1936). At the same time the culprit exceeding the limits of his authority, expressly defined by the legislature in the Act, is held to the limit of his responsibility as set by that body, and the small and necessitous borrower gets the benefit which Gen. Code section 6346-5a was intended to confer upon him. *Northern Finance Co.* v. *Weiss*, 31 N.P. (NS) 196 (1933); Hubachek, *supra*, p. 175. Statutes must be construed so as to give them effect, if possible. *State ex rel. Allen County Law Library Ass'n* v. *Welker*, 47 Ohio App. 42, 190 N.E. 150 (1934). And the construction of a statute depends on its effect, not on the form it may be made to assume. *Hill* v. *Micham*, 116 Ohio St. 549, 157 N.E. 13 (1927). The general policy of the Negotiable Instrument Law in protecting *bona fide* indorsees ought not to be controlling in this case because: (1) only a fraction of the great mass of commercial paper can possibly be affected (i.e. loans by licensees of less than $300.00 at more than 3 per cent per month plus costs allowed by the statute; loans by licensees of more than $300.00 at more than

8 per cent per annum; loans by non-licensees of less than $300.00 at more than 8 per cent per annum), and (2) the statute is a police regulation, *State* v. *Powers*, 125 Ohio St. 108, 180 N.E. 647 (1932); *People* v. *Stokes*, *supra*; aimed at the protection of the small borrower which should include the "economically absurd luxury" of litigation as well as usury. It would not, under the circumstances, seem to be too harsh to require purchasers of such paper from licensees to inquire as to its validity. Finally General Code section 8307 was probably never intended to be applied to void instruments. Extended search fails to show a single occasion where it has been invoked to save the holder of a void instrument. The fact that the indorsee is not a party to the illegal transaction carries no weight. General Code section 8307 specifically declares the victim of usury not a *particeps criminis*. The indorsee seeks to invoke a part of the Interest Law to give life to an instrument declared void by the legislature as a police measure. It is hard to believe that the legislature would have intended to have this police measure circumvented by mere indorsement to a *bona fide* purchaser.

J. GARETH HITCHCOCK

PLEADING

ELECTION OF REMEDIES — MASTER-SERVANT RELATIONSHIP

The plaintiff brought an action against the defendant on the theory of *respondeat superior* for injuries received in an automobile accident caused by the negligence of the defendant's servant. While the action was pending, the plaintiff filed an action directly against the servant. Service was had but no answer was filed and the case went to default judgment. The court, upon motion, dismissed the suit against the master on the ground that the plaintiff's judgment against the servant constituted an election of his remedies and was a bar to his recovery against the master. On appeal it was held that the granting of such motion was error. In refusing to require election, the court said that the plaintiff had two *consistent* substantial remedies which are not repugnant to each other and he might pursue each separately, that is, he might pursue the master and he might pursue the servant separately but he can have only one satisfaction. *Land* v. *Berzin*, 26 Ohio L. Abs. 703 (1938).

The doctrine of election of remedies may be broadly defined as a choice made with knowledge between two *inconsistent* substantial rights, either of which may be instituted at the instance of the chooser, who