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NEGOTIABLE INSTRUMENTS—A COMPARISON OF
WASHINGTON LAW AND UNIFORM COMMERCIAL
CODE ARTICLE 3†

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Section 3-113. Seal. An instrument otherwise negotiable is within this Article even though it is under a seal.

Though the use of private seals has been statutorily abolished in Washington,¹¹⁹ there is some decisional authority recognizing that a seal imports, in a rebuttable way, consideration.¹²⁰ To the extent that a negotiable instrument is involved, the various provisions of the Code respecting consideration¹²¹ will supplant those cases; none of which involved negotiable instruments.

Section 3-114. Date, Antedating, Postdating.

- (1) The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.
- (2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.
- (3) Where the instrument or any signature thereon is dated, the date is presumed to be correct.

With respect to subsections (1) and (2), no authority other than the controlling statutes¹²² has been found.

It is to be noted that any signature on an instrument may be dated, and this obviously includes an indorsement. In view of the provisions of section 3-503, computing the time for presentment from the time each secondary party becomes liable on the instrument, it is highly desirable that indorsements be dated. In *Dittmar v. Frye*,¹²³ it was argued that a dated indorsement, clearly showing that it had been made after the execution of the instrument, coupled with evidence

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† The first in this series of articles appeared in 38 WASH. L. REV. 501 (1963).

¹¹⁹ RCW 64.04.090.

¹²⁰ *Gates v. Herr*, 102 Wash. 131, 172 Pac. 912 (1918), RESTATEMENT, CONTRACTS, Wash. Annots. §110 (1935).

¹²¹ UCC § 3-408 is of principal concern.

¹²² RCW 62.01.006 and 62.01.012 [NIL §§ 6, 12].

¹²³ 200 Wash. 451, 93 P.2d 709 (1939).

that the indorser received no consideration, sufficiently refuted any presumption of consideration for his undertaking. The holding, of course, was to the contrary, because the instrument may have been originally executed with the understanding and requirement that another subsequently indorse. Where such an agreement exists, there is consideration for the subsequent indorsement.

There has been a presumption in Washington that dates shown on negotiable instruments are correct.¹²⁴ Indeed, the suggestion is contained in the governing case that this presumption must be rebutted by clear and convincing evidence. Subsection (3), when read in connection with section 1-201(31), alters this requirement, for only evidence sufficient to support a finding that the date is incorrect need be introduced.

Section 3-115. Incomplete Instruments.

- (1) When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.
- (2) If the completion is unauthorized the rules as to material alteration apply (Section 3-407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting.

This particular section has been identified by most commentators as containing one of the major changes in the law of negotiable instruments, because it reverses the rule announced in the N.I.L.'s provision with respect to non-delivery of incomplete paper.¹²⁵ The Washington decisions on this particular point have not followed the majority rule, nor have they adopted the rule here codified. Prior to the Code, it seems definitely established that if paper in incomplete form is stolen and filled in without authority, no holder can recover thereon, because this is a "real" defense. But on two occasions, the Washington court has mitigated the hardship of such a rule by estopping the person who signed the incomplete paper and who carelessly handled it from

¹²⁴ National City Bank v. Shelton Elec. Co., 96 Wash. 74, Pac. 933 (1917).

¹²⁵ RCW 62.01.015 [NIL § 15].

asserting the defense.¹²⁶ The specific peculiarity of the Washington decisions is that they have relied on such estoppel in order to protect *holders* of the instruments. Most courts would find such estoppel in a suit involving the drawer and drawee of a check, where the drawee bank had paid out on a check signed but not completed or delivered by the drawer.¹²⁷ But the Washington court goes farther than most in imposing such an estoppel in favor of a mere holder. The difference is that the drawee-drawer relationship may impose a duty on the drawer to protect the drawee from harm, since the drawee is obligated to pay properly drawn paper. On the other hand, no one is bound to purchase negotiable paper, so there may be no duty as to such purchasers to foresee and protect against intervening completions or alterations. This matter is presented again in section 3-406.

Where the instrument is filled in by an agent who has limited authority and who exceeds it, a holder in due course may recover under the Code and a decision in Washington¹²⁸ in accordance with the terms as written in the instrument. This makes the requirements of due course holding an important consideration here. In substance, the rule of the Code is: (a) one who takes the instrument in incomplete form cannot be a due course holder,¹²⁹ but one may take paper after it has been completed, even knowing that it had left the issuer's hands in incomplete form, and nonetheless be a due course holder.¹³⁰

The Code assumes, as did the N.I.L. section 14, that the person executing the instrument harbored an intention as to the proper method of filling in blanks therein. In one interesting Washington decision, this intention did not exist, because the drawer of a purported check carefully omitted to designate a drawee bank.¹³¹ He was not guilty of forgery because such an instrument would have no efficacy even if genuine. The Code will not change this rule.

Section 3-116. Instruments Payable To Two Or More Persons.

An instrument payable to the order of two or more persons

(a) if in the alternative is payable to any one of them and may

¹²⁶ Northern Pac. Ry. v. Spokane Valley Growers' Union, 132 Wash. 607, 232 Pac. 691 (1925), noted, 9 MICH. L. REV. 569 (1925), 32 Case & Com. 111 (1926); Ladd & Tilton Bank v. Small, 126 Wash. 8, 216 Pac. 862 (1923).

¹²⁷ Britton, *Defenses, Claims of Ownership and Equities—A Comparison of the Provisions of the Negotiable Instruments Law with Corresponding Provisions of Article 3 of the Proposed Commercial Code*, 7 HASTINGS L.J. 1, 12 (1955).

¹²⁸ Baumeister, Vollmer & Scott Bank v. Talbott, 129 Wash. 509, 225 Pac. 238 (1924).

¹²⁹ Section 3-304(1)(a).

¹³⁰ Section 3-304(4)(d).

¹³¹ State v. Taes, 5 Wn.2d 51, 104 P.2d 751 (1940).

be negotiated, discharged or enforced by any of them who has possession of it;

- (b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them.

This section for the first time spells out the mechanism for and effect of creating jointly held and severally held paper. The present statute contains an inexplicable gap, because it clearly recognizes the difference between paper payable to persons jointly (to A and B), and to them in the alternative (to A or B),¹³² yet the prescribed mechanism for indorsement of multiple payee paper is adapted only to jointly held paper.¹³³ The Code clearly and concisely overcomes the inadequacies of the N.I.L.¹³⁴

One Washington decision, though not involving specifically the problem here covered, presents an interesting point.¹³⁵ The case involved an instrument payable to "A and B," and A indorsed the instrument over to B, the co-payee. The ultimate issue was whether B could be a due course holder, and the holding was in the affirmative. The validity of this holding has, though, been questioned.¹³⁶ It raises once again the problem of whether a payee may be a due course holder, to be answered under the N.I.L. by whether the payee takes through negotiation. Assuming for the moment that negotiation of order paper requires indorsement of the entire paper, is it not arguable that the co-payee did not acquire title to the entire paper through the indorsement? This matter will again be referred to under section 3-302, suffice it here to point out that under the Code obviously one of two payees may indorse to the other who will, if he meets the requirements, become a holder in due course.

Section 3-117. Instruments Payable With Words Of Description.
An instrument made payable to a named person with the addition of words describing him

- (a) as agent or officer of a specified person is payable to his principal but the agent or officer may act as if he were the holder;
- (b) as any other fiduciary for a specified person or purpose is

¹³² RCW 62.01.008 [NIL § 8].

¹³³ RCW 62.01.041 [NIL § 41].

¹³⁴ See BAILEY, BANK CHECKS, § 5.14 (1962).

¹³⁵ State Bank v. Pacific Grain Co., 125 Wash. 149, 215 Pac. 350 (1923).

¹³⁶ BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW 633 (7th ed. 1948).

payable to the payee and may be negotiated, discharged or enforced by him;

- (c) in any other manner is payable to the payee unconditionally and the additional words are without effect on subsequent parties.

The addition of words of description to names appearing on negotiable instruments generally raises one of two types of problems. The first, and most frequent, concerns the liability created by a signature followed by such words, such as "John Jones, Treasurer of X Co.," or "John Jones, Treasurer," or "John Jones, Trustee for X." This type of problem is governed by a subsequent section of the Code.¹³⁷ The second type of problem, and the one here covered, concerns the interests created in paper payable to persons whose names are modified by words of description, such as "Pay to the order of John Jones, Treasurer of X Co." The section clearly emphasizes that such a designation, clearly showing the principal, sufficiently shows the obligor's intention that the designated principal is, in fact, the owner of the claim. By the same token, an instrument payable to John Doe, Trustee for Richard Roe is beneficially owned by Richard Roe.

There has been only one decision in Washington on the point, and it accords with the view taken by the *Code*.¹³⁸ In that case an instrument was payable to "Winifred Lundberg, Guardian of Helen Lundberg," and in a suit brought by a substitute guardian of Helen, the obligors contended that their liability was to Winifred personally. Parol evidence was admitted to show this to be untrue and thus to enable the plaintiffs to recover. Under the *Code*, it is clearly understood that Winifred is designated only for convenience and that the beneficial owner is Helen.

There are many ways in which one dealing with an agent may issue an obligation, intending subjectively to have the principal become the owner thereof. It may be done:

Pay to the order of Principal

Pay to the order of John Doe, Agent for Principal

Pay to the order of John Doe, Agent

Only in the third situation is there no disclosure of the interest of the designated principal, and in this situation the word "agent" may be disregarded by one dealing with the agent Doe, unless he knows other

¹³⁷ Section 3-403.

¹³⁸ Hansen v. Lindell, 14 Wn.2d 643, 129 P.2d 234 (1942).

facts to show that Doe is actually holding the instrument for a known principal.

There are some Washington decisions to the effect that a principal, though not named on an instrument, may recover thereon,¹³⁹ even though the paper appears to be payable in the name of the agent who has not indorsed. These decisions seem justified so long as the evidence clearly shows that the principal was the intended payee, even though not named. So long as this is the true situation, no harm can result by allowing recovery by the actual owner.

The major emphasis of this section of the Code seems, however, directed to the correlative situation in which the rights of one who has dealt with the designated agent or fiduciary are involved. Such a person will be protected under this section, for the agent may act as if he were the holder, and the fiduciary may, being the owner, deal with the paper so as to cut off the beneficiary's rights, *unless* the person dealing with the agent or fiduciary knows of a breach of duty.¹⁴⁰ Thus the agent or fiduciary may cash checks designating him as agent or fiduciary and disclosing the principal or beneficiary. This is consistent with the Washington decisions respecting the position of depository banks which receive fiduciary held funds.¹⁴¹ Unless there is knowledge of a breach of trust or other duty, the bank is not affected by the fiduciary limitations.

At this point, the *Hansen v. Lindell*¹⁴² decision ought to be briefly reconsidered. The instrument, payable to "Winifred Lundberg, Guardian of Helen Lundberg," was held by Winifred until the statute of limitations barred an action by her. The suit, it will be recalled, was brought by another guardian acting for Helen, who was a minor. Under the presently discussed section of the Code, the designated guardian, Winifred, could have enforced, negotiated, or *discharged* the instrument. Did she discharge it by allowing the statute of limitations to run? It would seem that she did not, and that the actual holding in the case would survive enactment of the Code: the minor's claim was not barred by the statute of limitations. The bar resulting from the operation of the statute of limitations is not a discharge of the indebtedness.¹⁴³

¹³⁹ *First Nat'l Life Assur. Soc'y of America v. Farquhar*, 75 Wash. 667, 135 Pac. 619 (1913); *Stinson v. Sachs*, 8 Wash. 391, 36 Pac. 287 (1894).

¹⁴⁰ The problem of "notice" is covered by § 3-304.

¹⁴¹ *E.g.*, *Moody v. Clarke County Bank of Washougal*, 181 Wash. 263, 42 P.2d 803 (1935); *Mott Iron Works v. Metropolitan Bank*, 78 Wash. 294, 139 Pac. 36 (1914).

¹⁴² See note 138 *supra*.

¹⁴³ See 1 CORBIN, *CONTRACTS*, § 214 (1950).

Section 3-118. Ambiguous Terms And Rules Of Construction.
The following rules apply to every instrument:

- (a) Where there is doubt whether the instrument is a draft or a note the holder may treat it as either. A draft drawn on the drawer is effective as a note.
- (b) Handwritten terms control typewritten and printed terms, and typewritten control printed.
- (c) Words control figures except that if the words are ambiguous figures control.
- (d) Unless otherwise specified a provision for interest means interest at the judgment rate at the place of payment from the date of the instrument, or if it is undated from the date of issue.
- (e) Unless the instrument otherwise specifies two or more persons who sign as maker, acceptor or drawer or indorser and as a part of the same transaction are jointly and severally liable even though the instrument contains such words as "I promise to pay."
- (f) Unless otherwise specified consent to extension authorizes a single extension for not longer than the original period. A consent to extension, expressed in the instrument, is binding on secondary parties and accommodation makers. A holder may not exercise his option to extend an instrument over the objection of a maker or acceptor or other party who in accordance with Section 3-604 tenders full payment when the instrument is due.

This section is mainly a restatement of principles applicable under the N.I.L.¹⁴⁴ Consistent with clause (a) is a Washington decision on the point.¹⁴⁵ The decision holds that a bill drawn on an insurance company by its general adjuster is in effect a bill drawn on the drawer, and thus the holder may treat it as a note. The substantive effect of this rule is that the holder may recover from the drawee or drawer without meeting the requirements of presentment imposed before a drawer may normally be held.

¹⁴⁴ RCW 62.01.017 [NIL § 17].

¹⁴⁵ Creditors Claim & Adjustment Co. v. First Seattle Dexter Horton Nat'l Bank, 171 Wash. 575, 18 P.2d 844 (1933).

Clause (b) produces the same result as, and can be illustrated by, *Lombardo v. Lombardini*.¹⁴⁶ The note in suit was executed on October 24, 1902 and made payable "one year from date," but the scrivener used a printed form bearing the printed date "189—", and he filled in a "2," making the instrument appear to have been executed on October 24, 1892. Another portion of the instrument stated, in writing, that the instrument was due on Oct. 24, 1903. The plaintiff, payee, changed the date the scrivener had placed on the instrument from 1892 to 1902, and the obligor contended that he was thus discharged by material alteration. The Court held that there was no material alteration since the written words governed over the printed form, and thus the instrument can be shown to have been executed in 1902.

Clause (c) is a slight change from the N.I.L. provisions, because figures shown in an instrument will control where the writing is ambiguous. Otherwise, as was true under the N.I.L., the written terms control. Clause (d) is likewise a reworking of the provisions contained in the N.I.L.¹⁴⁷

Clause (e) restates the rule of *Pease v. Syler*.¹⁴⁸

Clause (f) has no counterpart in Washington statutes or decisions.

Section 3-119. Other Writings Affecting Instrument.

- (1) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.
- (2) A separate agreement does not affect the negotiability of an instrument.

A discussion of the parol evidence rule is not highly apposite to this section of the Code, and further its applicability to all contracts, negotiable and otherwise, ill adapts it to discussion in an article about

¹⁴⁶ 57 Wash. 352, 106 Pac. 907 (1910).

¹⁴⁷ See note 141 *supra*. The reference to interest at the judgment rate is new, and RCW 4.56.110 seems to control. Difficulties might be anticipated if the interest rate there stated differed from that stated in RCW 9.52.010.

¹⁴⁸ 78 Wash. 24, 138 Pac. 310 (1914). In *Churchill v. Miller*, 90 Wash. 694, 156 Pac. 851 (1916), a note stating, "I or we promise to pay," and signed by husband and wife was held to be a "joint and several" note of the husband and wife. This, too, is consistent with the Code.

negotiable instruments. Yet a reference to that rule in an Official Comment suggests the need for a brief examination at this point. The Code disclaims any coverage of the parol evidence rule, except insofar as it is implicit in section 3-118.¹⁴⁹ It is, of course, well settled that the parol evidence rule does apply to negotiable instruments.¹⁵⁰ This is not as obvious a point as first appears, because the obligations of drawers and indorsers are rarely spelled out in writing; instead, they are imposed or implied by law. These undertakings are so well understood and so widely accepted, however, as to make them contractual obligations within the parol evidence rule.¹⁵¹ For the moment, this statement must be only provisionally accepted as true, because it will be re-examined shortly.

Three fairly frequent situations have posed parol evidence rule problems in connection with bills and notes in Washington. The first involves the signer who fully believes he will never have to pay and the payee who shares this view, both believing that a third person will perform his primary obligation of paying. So strong is the belief, indeed, that the signer and the payee will orally agree that the signer will not be held to his undertaking. This oral agreement affronts the parol evidence rule, at least where it is made with a maker of a note or drawer of a draft.¹⁵² There seems to be no rational distinction

¹⁴⁹ Section 3-119, Official Comment 1; § 3-118, Official Comment 1.

¹⁵⁰ BRITTON, *BILLS & NOTES*, 121 (2d ed. 1961); *McGregor v. First Farmers-Merchants Bank & Trust Co.*, 180 Wash. 440, 40 P.2d 144 (1935).

¹⁵¹ *Bryan v. Duff*, 12 Wash. 233, 40 Pac. 936 (1895), illustrates the point.

¹⁵² Legal Adjustment Bureau v. West Coast Constr. Co., 162 Wash. 260, 298 Pac. 429 (1931); *Whitman Realty & Inv. Co. v. Day*, 161 Wash. 72, 296 Pac. 171 (1931); *Puget Sound Tel. Co. v. Telechronometer Co.*, 130 Wash. 468, 227 Pac. 867 (1924) (however note may be avoided for fraud); *Larsen v. Betcher*, 114 Wash. 247, 195 Pac. 27 (1921); *Moore v. Kildall*, 111 Wash. 504, 191 Pac. 394 (1920); *Bank of Calif. v. Starrett*, 110 Wash. 231, 188 Pac. 410 (1920), noted, 90 CENT. L.J. 394 (1920); *Naylor v. Lovell*, 109 Wash. 409, 186 Pac. 855 (1920) (makes an exception where mistake is shown); *Van Tassel v. McGrail*, 93 Wash. 380, 160 Pac. 1053 (1916); *Post v. Tamm*, 91 Wash. 504, 158 Pac. 91 (1916); *Taylor v. Parish*, 86 Wash. 141, 149 Pac. 635 (1915) (makes an exception where the writing is ambiguous); *Gwinn v. Ford*, 85 Wash. 571, 148 Pac. 891 (1915), *aff'd* 91 Wash. 498, 158 Pac. 536 (1916); *First Nat. Life Assur. Soc'y of America v. Farquhar*, 75 Wash. 667, 135 Pac. 619 (1913); *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941 (1910), noted, 23 YALE L.J. 313 (1914); *Carr v. Jones*, 29 Wash. 78, 69 Pac. 646 (1902) (makes an exception where the writing is ambiguous); *Bryan v. Duff*, *supra* note 151; *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977 (1895).

A fortiori the evidence is inadmissible against a holder in due course. *Yakima Fin. Corp. v. Mullins*, 138 Wash. 553, 245 Pac. 5 (1926); *Anderson v. Mitchell*, 51 Wash. 265, 98 Pac. 751 (1908).

The parol evidence rule does not, of course, invalidate oral agreements subsequent in time to the writing, even if reached on the same day on which the writing was signed. *Commercial Bank v. Hart*, 10 Wash. 303, 38 Pac. 1114 (1894).

Though, as some of the cases previously cited in this note have held, the accepted rule is that an obligor in a money undertaking may not show that an oral agreement had been reached to discharge the instrument by something other than a money pay-

between such liability and the liability of an indorser, but the Washington Court has on occasion enforced a parol agreement absolving an indorser from liability.¹⁵³

The second situation in which the parol evidence rule has created problems results from an express provision of the N.I.L.¹⁵⁴ A similar provision, incidentally, is included in the Code.¹⁵⁵ The effect of these provisions is to recognize the accepted rule that conditions precedent to contractual obligations may be shown, as between immediate parties, even though the conditions rest in parol. Though the cases will be adverted to in the discussion of section 3-306, it must be noted at this point that the parol evidence rule will preclude the setting up of conditions subsequent, and it may preclude the showing of an internal condition precedent.¹⁵⁶

The third and final typical situation in which the parol evidence rule has been applicable to bills and notes is the case of the signer who appears on an instrument as principal debtor, but who seeks to show that he really signed as agent¹⁵⁷ or, more frequently, as surety.¹⁵⁸ Except for the cases where the rights of the purported surety and alleged principal *inter se* are concerned, in which cases parol evidence is clearly admissible to show the true relationship of the parties,¹⁵⁹ the problem is a very difficult one, insofar as the Washington decisions are concerned.¹⁶⁰ The Code covers the problem in section 3-415, and discussion of the cases will be postponed until that point.

ment, this rule has not been uniformly enforced. *Blaine v. Darwin*, 160 Wash. 327, 295 Pac. 131 (1931); *Stevens v. Selvidge*, 103 Wash. 683, 175 Pac. 294 (1918); *Fidelity Nat'l Bank v. E. H. Stanton Co.*, 93 Wash. 344, 160 Pac. 960 (1916); *Washington Trust Co. v. Keyes*, 79 Wash. 61, 139 Pac. 638, Ann. Cas. 1916A, 279 (1914) (This case, however, involved a written agreement contemporaneous to a note, but the separate agreement was itself ambiguous. Parol was admitted.)

¹⁵³ *White v. Armstrong*, 166 Wash. 346, 7 P.2d 12 (1932); *Reardan v. Cockrell*, 54 Wash. 400, 103 Pac. 457 (1909). To the contrary, holding that parol evidence is inadmissible to modify the implied undertaking resulting from an absolute indorsement and delivery of negotiable paper is *Allen v. Chambers*, 13 Wash. 327, 43 Pac. 57 (1895). To be distinguished, and seemingly properly decided, is *Keeler v. Commercial Printing Co.*, 16 Wash. 526, 48 Pac. 239 (1897), holding that parol evidence may be introduced to show that an apparently absolute transfer of a note by indorsement was actually only for security. This holding seems consistent with the usual view that absolute transfers may be shown to have been intended to be security transfers only.

¹⁵⁴ RCW 62.01.016 [NIL § 16].

¹⁵⁵ Section 3-306.

¹⁵⁶ See Shattuck, *Contracts in Washington, 1937-1957: Part II*, 34 WASH. L. REV. 345, 383 (1959); *Dickson v. Protzman*, 123 Wash. 247, 212 Pac. 249 (1923); *Post v. Tamm*, 91 Wash. 504, 158 Pac. 91 (1916).

¹⁵⁷ *Shuey v. Adair*, 18 Wash. 188, 51 Pac. 388 (1897).

¹⁵⁸ *E.g.*, *Lamberton v. Shannon*, 13 Wash. 404, 43 Pac. 336 (1896); *Allen v. Chambers*, 13 Wash. 327, 43 Pac. 57 (1895); *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977 (1895).

¹⁵⁹ *Handsaker v. Pederson*, 71 Wash. 218, 128 Pac. 230 (1912).

¹⁶⁰ Shattuck, *supra* note 156, at 381-82.

The Code section herein discussed does not, of course, refer to these matters of oral agreements and their effect on contemporaneous writings. Instead, it deals with the problem of contemporaneous writings and, in substance, adopts two rules: First, as to persons party to the transaction or knowing of the terms of the writing, the separate writing and the note or draft are to be read together. Second, they are not to be read together, however, to achieve the effect of non-negotiability. Both of these rules have been accepted in Washington.

The impact of the second rule, stated in subsection (2), is to obviate any possible holding that a note executed contemporaneously with another document, usually a mortgage, is rendered not negotiable because of provisions in the mortgage. For purposes of negotiability, but not necessarily of construction, the two documents are separate. Washington has recognized this for some time.¹⁶¹ Indeed, Washington recognizes, as do most states, that once the note has been determined to be negotiable, by its own terms, the negotiability "rubs off" on the security document accompanying it, and the holder may foreclose his mortgage free of defenses.¹⁶²

Concerning the interpretation of the two documents executed as part of one transaction, the Washington Court has, as the Code provides, construed them together.¹⁶³ This is to be supplemented by the oft-repeated Washington rule that conflicts between provisions in a note and simultaneously signed writing are to be resolved in favor of the terms in the note.¹⁶⁴ Of course, a holder in due course is not bound by limitations contained in the separate document of which he was not aware.¹⁶⁵

So willing is the Washington Court to construe together all documents executed as part of one transaction, that it has held that an acceleration clause in a mortgage (and not in the note) may be used

¹⁶¹ *Moore & Co. v. Burling*, 93 Wash. 217, 160 Pac. 420 (1916); *Barker v. Sartori*, 66 Wash. 260, 119 Pac. 611 (1911).

¹⁶² *American Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, 116 Pac. 837 (1911), *aff'd*, 67 Wash. 572, 122 Pac. 26 (1912).

¹⁶³ *Mallette v. Pohlman Inv. Co.*, 179 Wash. 654, 38 P.2d 357 (1934); *Wm. Brelle & Co. v. Green Mountain Lumber Co.*, 149 Wash. 158, 270 Pac. 425 (1928); *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801 (1909); *Gross v. Bennington*, 52 Wash. 417, 100 Pac. 846 (1909).

¹⁶⁴ *Walker v. Cascade Milk Products Co.*, 21 Wn.2d 615, 152 P.2d 603 (1944); *General Motors Acceptance Corp. v. Seattle Ass'n. of Credit Men*, 190 Wash. 284, 67 P.2d 882 (1937); *Van Tassell v. McGrail*, 93 Wash. 380, 160 Pac. 1053 (1916); *Lovell v. Musselman*, 81 Wash. 477, 142 Pac. 1143 (1914); *Commercial Nat'l Bank v. Johnson*, 15 Wash. 536 (1897); *Exchange Nat'l Bank v. Wolverton*, 11 Wash. 108, 39 Pac. 248 (1895).

¹⁶⁵ *Bowen v. Rury*, 117 Wash. 30, 200 Pac. 789 (1921); *American Sav. Bank & Trust Co. v. Helgesen*, *supra* note 162.

to accelerate the maturity of the note.¹⁶⁶ The cases from other jurisdictions are not harmonious on this, but the Code does not require a change in the Washington rule.¹⁶⁷

Section 3-120. Instruments "Payable Through" Bank.

An instrument which states that it is "payable through" a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument.

The function of this section has been stated as follows:

For many years, we have handled payable through drafts drawn (in most cases) on head offices of insurance companies, which drafts state that they are payable through our bank. In this type of operation, the insurance company is given an opportunity to inspect the drafts but substantially all other phases of the transaction are performed by us. In this type of case prior to the Code we were never certain as to what our status was, particularly, whether we were a payor bank or a collecting bank.

Under section 3-120 of the Code, this exact type of situation is dealt with and all doubt as to our status is removed.¹⁶⁸

In *Bartholomew v. First Nat. Bank of Everett*,¹⁶⁹ a draft was drawn, directed to a newspaper in Monte Cristo, Washington, "Via Everett National Bank." The check was presented to that bank which refused payment, and the action was instituted by the drawer to recover damages from the presenter for wrongful and malicious protesting and publishing of the protest. It was held, contrary to the position taken by the Code on the point, that the draft was ambiguous, but reasonably interpreted as designating the bank as the place where presentment for payment was to be made. Under the Code, obviously, the instrument is not treated as if drawn on the bank, for it is only an agent to collect.

Section 3-121. Instruments Payable At Bank.

A note or acceptance which states that it is payable at a bank is not of itself an order or authorization to the bank to pay it.

¹⁶⁶ Wilson v. Kirchan, 143 Wash. 342, 255 Pac. 368 (1927), noted, 23 ILL. L. REV. 183 (1928).

¹⁶⁷ See Note, 17 RUTGERS L. REV. 804 (1963); Britton, *Formal Requisites of Negotiability—The Negotiable Instruments Law Compared with the Proposed Commercial Code*, 26 ROCKY MOUNT. L. REV. 1, 5 (1953).

¹⁶⁸ Letter to members of the delegation from the Ohio Bankers Association investigating the operation of the Uniform Commercial Code in Massachusetts, from George I. Emery, Cashier, The First National Bank of Boston, July 29, 1960.

¹⁶⁹ 18 Wash. 683, 52 Pac. 239 (1898).

Three sections of the N.I.L., quoted below, are pertinent to the rights and obligations arising from domiciled paper:

Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; *but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part.* (Emphasis added.)¹⁷⁰

The Code's counterpart of this appears in section 3-604(3). It is obvious that instruments designated as payable at a bank are payable at a particular place within this rule.¹⁷¹

Where the instrument is made payable at a bank it is equivalent to an order to pay the same for the account of the principal debtor thereon.¹⁷²

The presently discussed Code section is the counterpart of this and is, as adopted in some of the western states and as proposed in Washington in the language appearing above, contrary to the N.I.L. provision. A note payable under the N.I.L. provision is, in effect, a check drawn on the bank designated as the place of payment.¹⁷³ In effect, therefore, the maker of such a note is secondarily liable under the N.I.L.¹⁷⁴ The bank is under a duty to pay such a note on presentment for payment, if the maker has funds on deposit therein sufficient to cover the item.¹⁷⁵ Under the Code, there is no such duty or even an authorization to the bank to pay, absent special instructions to that end.

A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.¹⁷⁶

The applicability of this section to a note payable at a bank is not clear. The general rule seems to be that this section does not so apply.¹⁷⁷ The Code, even though it is enacted as proposed in Wash-

¹⁷⁰ RCW 62.01.070 [NIL § 70].

¹⁷¹ An instrument due "at Spokane, Washington," though, is not payable at a special place within the meaning of this rule. *Bardsley v. Washington Mill Co.*, 54 Wash. 553, 103 Pac. 822 (1909).

¹⁷² RCW 62.01.087 [NIL § 87].

¹⁷³ *Peninsula Nat'l Bank v. Pederson Constr. Co.*, 91 Wash. 621, 158 Pac. 246 (1916).

¹⁷⁴ 3 PATON'S DIGEST 3031 (1944).

¹⁷⁵ *Id.*, at 3032. A statement in an early Washington case that it is the maker's duty to remit to the bank designated for payment, and it is the holder's "duty" to present the instrument there, is not entirely accurate. *Dewing v. Crueger*, 7 Wash. 590, 35 Pac. 393 (1894).

¹⁷⁶ RCW 62.01.186 [NIL § 86].

¹⁷⁷ 3 PATON'S DIGEST 3042 (1944).

ington, will nonetheless discharge the maker of such a note if during a period of delay in presentment to the bank designated that bank should become insolvent.¹⁷⁸ This matter is controlled by section 3-502 and will be discussed in connection with that section.

The point to be observed from this discussion is that the presently discussed section of the Code relates only to the authorization or obligation on the part of a bank at which a note or draft is payable to pay that instrument. There is, in short, no such authorization or duty. The effect, however, of making it so payable, insofar as the making of tender and the need for presentment are concerned, is governed by other sections.

Section 3-122. Accrual Of Cause Of Action.

- (1) A cause of action against a maker or an acceptor accrues**
 - (a) in the case of a time instrument on the day after maturity;**
 - (b) in the case of a demand instrument upon its date or, if no date is stated, on the date of issue.**
- (2) A cause of action against the obligor of a demand or time certificate of deposit accrues upon demand, but demand on a time certificate may not be made until on or after the date of maturity.**
- (3) A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand.**
- (4) Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment**
 - (a) in the case of a maker, acceptor or other primary obligor of a demand instrument, from the date of demand;**
 - (b) in all other cases from the date of accrual of the cause of action.**

This section, without precise previous provision in the statutes, is designed to articulate the point at which a cause of action accrues to the end, it may be supposed, that a holder of an instrument may know when he is entitled to sue thereon and when the statute of limitations will begin to run so as to terminate the power to sue. There are other sections of the Code in which the conditions precedent to the liability

¹⁷⁸ HAWKLAND, COMMERCIAL PAPER, 27 (1959).

of parties, particularly secondary parties, are spelled out.¹⁷⁹ These statutes must, of course, be complied with in order to come within the terms of the undertaking of particular obligors.

Section (1)(a) states the rule that has generally been assumed to exist since the adoption of the N.I.L.¹⁸⁰ The assumption is that the debtor has the full day of maturity in which to pay, so the cause of action begins the next day. Prior to the N.I.L.'s adoption, the obligor had three additional days of grace in which to pay, and no cause of action accrued until the expiration of this period.¹⁸¹ In the case of an installment note, a cause of action arises for each instalment after its maturity, and the contract is divisible. Thus recovery of one installment does not preclude a subsequent action to recover an installment accruing after the first suit.¹⁸²

The maturity of the instrument may involve specific provisions in a particular note, which will govern. In *Loveday v. Parker*,¹⁸³ an instrument on its face matured on August 1, but the maker had indorsed on the back: "Should I make a transfer of my real estate before this note becomes due, I agree to pay the same on demand." A suit prior to August 1, in which the maker is alleged to have made a transfer of his real estate, is good against demurrer.

Extension and acceleration clauses have been somewhat troublesome, particularly where the statute of limitations is claimed to have barred action. Insofar as acceleration clauses are concerned, the court has adopted the rule that these are for the benefit of the obligee and can be waived by him, thus the cause of action does not accrue (within the meaning of the statute of limitations) until the ultimate due date.¹⁸⁴ In circumstances where the time of payment has been extended, the cause of action does not accrue until the expiration of the extension.¹⁸⁵

Clause (1)(b), concerning demand instruments, states the rule as it has been followed in Washington.¹⁸⁶

¹⁷⁹ *E.g.*, Sections 3-413, 3-414, 3-416, 3-501, 3-507, 3-511.

¹⁸⁰ *Hillman v. Stanley*, 56 Wash. 320, 105 Pac. 816 (1909).

¹⁸¹ *Joergenson v. Joergenson*, 28 Wash. 477, 68 Pac. 913 (1902).

¹⁸² *Davis v. Hibbs*, 73 Wash. 315, 131 Pac. 1135 (1913).

¹⁸³ 50 Wash. 260, 97 Pac. 62 (1908). See also *Herzog v. Herzog*, 23 Wn.2d 382, 161 P.2d 142 (1945), on the statute of limitations.

¹⁸⁴ *Haggard v. Sanglin*, 69 Wash. 151, 124 Pac. 373 (1912); *White v. Krutz*, 37 Wash. 34, 79 Pac. 495 (1905); *First Nat'l Bank of Snohomish v. Parker*, 28 Wash. 234, 68 Pac. 756, 92 Am. St. Rep. 828 (1902).

¹⁸⁵ *Miller v. Miller*, 90 Wash. 333, 156 Pac. 9 (1916); *White v. Krutz*, note 181 *supra*. In the *White* case an extension agreed to by a mortgagor was effective even against a transferee of the mortgaged property who had no knowledge of the extension.

¹⁸⁶ *Harrisburg Trust Co. v. Shufeldt*, 78 Fed. 292 (C. A. Wash. 1897); *Rushlight v. McLain*, 23 Wn.2d 189, 182 P.2d 62 (1947); *Herzog v. Herzog*, 23 Wn.2d 382, 161 P.2d 142 (1945); *Chatos v. Levas*, 14 Wn.2d 317, 128 P.2d 284 (1942); *Northwestern*

Clause (2) states the rule that has been almost, if not completely, universally followed.¹⁸⁷ The certificate of deposit is sufficiently unlike other demand instruments to require this separate and distinct treatment. Though there has been no clearcut decision on the point, one opinion does suggest that a claim on a deposit may be used as a set-off against the bank, without a prior demand for payment.¹⁸⁸ It is conceivable that this rule survives the adoption of the Code.

Clause (3), while technically consistent with the obligations of secondary parties, is not consistent with the purpose of the statute of limitations. Under this clause, a claim against the drawer of any draft (and this would include a check)¹⁸⁹ and the indorser of any instrument accrues only on demand after dishonor. Concerning the indorser, it seems fairly clear that the statute of limitations problem is usually moot, because a claim against him can be lost by delay in presentment, notice and (occasionally) protest.¹⁹⁰ A question seems to be posed, though, which this writer is reluctant to undertake to answer: Observe that the demand requirement may be satisfied by a notice of dishonor. What, though, is the effect of a waiver of such notice? The Code clearly recognizes that presentment, notice and protest can be waived.¹⁹¹ Does it follow that the holder of such a note can, by the simple expedient of never demanding payment, prevent the running of the statute of limitations?

This very problem is much more acute in the case of the drawer for he is, in effect, discharged only to the extent of harm by unexcused delay.¹⁹² In states not having the Code, the problem has most frequently been resolved by decisions that the statute of limitations runs in favor of the drawer from the date of issue or, at most, from a short time thereafter.¹⁹³ The basic theory is that the holder ought not be permitted to prolong indefinitely the accrual of a cause of action against the drawer, merely by delaying performance of the conditions precedent to his liability. Though not involving the precise point here

Nat'l Bank v. Pearson, 102 Wash. 570, 173 Pac. 730 (1918); *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138 (1896).

¹⁸⁷ BRITTON, *BILLS & NOTES* 481 (2d ed. 1961).

¹⁸⁸ *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504, 162 Pac. 870 (1917), noted (on another point), 15 MICH. L. REV. 512 (1917).

¹⁸⁹ Section 3-104.

¹⁹⁰ Section 3-501.

¹⁹¹ Section 3-511.

¹⁹² Section 3-502.

¹⁹³ *Boston, Bills and Notes: Statute of Limitations on Checks*, 15 OKLA. L. REV. 36 (1962).

involved, a Washington decision is consistent with this policy.¹⁹⁴ The Code seems to have rejected this theory.¹⁹⁵

Further, this section of the Code has rejected the heretofore compelling analogy between certified checks and certificates of deposits, by which Courts have tended to apply the rule stated in subsection (2) to the liability of certifying banks. The Code treats all acceptors alike in subsection (1), accruing the cause of action on the date of execution or issue.¹⁹⁶

Though the first three sub-sections state the rules for determining the accrual of a cause of action, and though as we have seen this is pertinent to the statute of limitations, this section of the Code is obviously not intended to replace the statutes stating the limitation period,¹⁹⁷ or the statute¹⁹⁸ and decisions¹⁹⁹ as to how it may be tolled.

Subsection (4), pertaining to the allowance of interest as damages for nonpayment or delay in payment, has been modified in several of the states, so as to negate the running of interest before demand on cashier's checks or certified checks.²⁰⁰ It has, to date, always been proposed for adoption in Washington in its original form, as stated above.

Even though the section is broadly worded, there seems no reason to doubt that particular variations may be allowed. For example, there is no reason to foresee that a court might not apply a different rule for computing interest to notes given for stock subscriptions, as it has done in the past.²⁰¹ Further, the statutes²⁰² and decisions²⁰³ concerning interest on state, municipal and other government obligations are not impliedly repealed by adoption of the Code.

Section 3-201. Transfer: Right To Indorsement.

(1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has

¹⁹⁴ *Brooks v. The Trustee Co.*, 76 Wash. 589, 136 Pac. 1152 (1913).

¹⁹⁵ *BAILEY, BANK CHECKS* § 1.17 (1962).

¹⁹⁶ *Id.*

¹⁹⁷ RCW ch. 4.16.

¹⁹⁸ RCW 4.16.270 (specifically mentioning bills and notes).

¹⁹⁹ *E.g.*, *Dolby v. Fisher*, 1 Wn.2d 181, 95 P.2d 369 (1939); *Pederson v. Jordan*, 177 Wash. 379, 32 P.2d 114 (1934); *O'Brien v. Turner*, 174 Wash. 266, 24 P.2d 641 (1933); *Van de Ven v. Overlook Mining & Dev. Co.*, 146 Wash. 332, 262 Pac. 981 (1928); *Griffin v. Lear*, 123 Wash. 191, 212 Pac. 271 (1923); *Warnock v. Itawis*, 38 Wash. 144, 80 Pac. 297 (1905).

²⁰⁰ *Braucher, UCC Article 3—Commercial Paper—New York Variations*, 17 *RUTGERS L. REV.* 57, 65 (1962).

²⁰¹ *Seattle Trust Co. v. Pitner*, 18 Wash. 401, 51 Pac. 1048 (1898).

²⁰² *E.g.*, RCW 36.29.040, 39.56.010, 39.56.020, 35.49.030, 28.48.100.

²⁰³ *E.g.*, *State ex rel. Strahorn v. Stout*, 43 Wash. 501, 86 Pac. 848 (1906); *State ex rel. Capital Nat'l Bank v. Young*, 22 Wash. 547, 61 Pac. 725 (1900).

himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

- (2) A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.
- (3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

With one minor exception, to be commented upon in connection with paragraph (3) of this section, the Washington Court has, in following the N.I.L., taken an approach entirely consistent with the provisions of the Code.

In a very early case,²⁰⁴ it was recognized that the owner of negotiable paper will not always be the holder thereof, for the note in suit was payable to an agent, yet suit by the principal (who was shown to be the actual owner) was permitted. The court mentions specifically that the indorsement of the designated payee, the agent, was not required. Though this was not technically a "transfer" problem, the holding is consistent with the first paragraph of this section. Many cases have recognized the right of a transferee, such as an assignee for collection, to recover on the paper.²⁰⁵ The Court has recognized the difference between the rights of the transferee, and the rights of the holder, particularly the due course holder.²⁰⁶ This difference is emphasized in the last ten words of clause (3) of the Code section.

That the transferee, even without technical negotiation, is invested with the rights of his transferor has often been recognized. Most frequently, the transferor has been demonstrated to be a due course holder, with the result that the transferee has all the rights of such

²⁰⁴ *Stinson v. Sachs*, 8 Wash. 391, 36 Pac. 287 (1894).

²⁰⁵ *First Nat'l Bank v. Moore*, 137 Fed. 505 (9th Cir. 1905); *Metzger v. Sigall*, 83 Wash. 80, 145 Pac. 72 (1914); *Seattle Nat'l Bank v. Emmons* 16 Wash. 585, 48 Pac. 262 (1897); *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138 (1896); *Riddell v. Prichard*, 12 Wash. 601, 41 Pac. 905 (1895); *McDaniel v. Pressler*, 3 Wash. 636, 22 Pac. 209 (1892).

²⁰⁶ *O'Connor v. Slatter*, 46 Wash. 308, 89 Pac. 885 (1907), 48 Wash. 493, 93 Pac. 1078 (1908).

holder.²⁰⁷ The Code makes one exception to this, in that no reacquirer who was a participant in any fraud or illegality²⁰⁸ or who at any time he held the instrument had knowledge of any defense or claim may assert the rights of the due course holder from whom he reacquires.²⁰⁹ The Washington Court has not had occasion to pass upon this question, though it has adverted to the problem.²¹⁰

There is believed to be one situation wherein a transferee, even though he is not a due course holder, may find himself in a superior position to that of his transferor. This situation involves the rules of set-off, a matter not specifically covered by the Code, where frequently an assignee will, under normal contract rules, be free of claims assertable against his transferor. The issue here is quite apart from the Code and from any statute respecting negotiability;²¹¹ suffice it only to note that prior to the Code, there have been decisions protecting assignees from set-offs which could have been asserted had there been no assignment.²¹² The Code does not seem to alter this rule. The matter will be relevant to a discussion of section 3-306.

The rights of security holders in negotiable instruments have been settled entirely in accordance with paragraph (2) of this section.²¹³

²⁰⁷ *Wells v. Duffy*, 69 Wash. 310, 124 Pac. 907 (1912); *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193 (1911); *Gross v. Bennington*, 52 Wash. 417, 100 Pac. 846 (1909); *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923 (1901); *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254 (1896).

²⁰⁸ As to the limits suggested by these words, see Britton, *Holder in Due Course—A Comparison of the Provisions of the Negotiable Instruments Law With Those of Article 3 of the Proposed Commercial Code*, 49 Nw. U.L. Rev. 417, 446 (1954).

²⁰⁹ Professor Braucher has written: "In 1954 the Chase National Bank criticized the Code provision that a transferee of an instrument 'who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.' The criticism was answered in 1955, but was noted by the Law Revision Commission and renewed by the Clearing House. The clarification now suggested is to refer to notice 'at the time he acquired the instrument.'

"This solution is a dubious one. It would affect two types of cases: (1) A is induced by fraud to make a note to B, who gives it to C, an innocent donee; C learns of the fraud, sells the note to D, a holder in due course, and later reacquires the note from D; (2) A is induced by fraud to make a note to B, who pledges it to C, a holder in due course with power of sale; C learns of the fraud, sells the note to D, a holder in due course, and later reacquires the note from D. In both cases the Code seems to remit C to his former rights. The Clearing House proposal would allow C to assert whatever rights D had. In the pledge case, C's former rights might include the benefits of his power of sale, and in that event, the two rules might reach the same result." Braucher, *UCC Article 3—Commercial Paper—New York Variations*, 17 RUTGERS L. REV. 57, 66 (1962).

²¹⁰ *Moyses v. Bell*, 62 Wash. 534, 114 Pac. 193 (1911).

²¹¹ BRITTON, *BILLS AND NOTES* § 153 (2d ed. 1961).

²¹² *Harrisburg Trust Co. v. Shufeldt*, 87 Fed. 669 (9th Cir. 1898); *National Bank of Commerce v. Galland*, 14 Wash. 502, 45 Pac. 35 (1896).

²¹³ *Credwson v. Shultz*, 254 Fed. 24 (9th Cir. 1918); *In re Dungeness Timber Co., Inc.*, 50 F. Supp. 370 (W.D. Wash. 1942) (attorney's charging lien); *John Davis & Co. v. Bedgisoff*, 155 Wash. 127, 283 Pac. 665 (1930); *Guaranty Security Co. v. Coad*, 114 Wash. 156, 195 Pac. 22, 197 Pac. 326 (1921); *National Bank of the Republic v. Hines*, 112 Wash. 352, 192 Pac. 899 (1920); *Shultz v. Credwson*, 95 Wash. 266, 163

Under paragraph (3), it is quite clear that the transferee of order paper without indorsement does not become a due course holder, until the indorsement is actually affixed. This is in accord with the Washington view, generally.²¹⁴ The single case not consistent with this rule is *Kiley v. Bugge*,²¹⁵ which held in substance that an estoppel in pais may be a substitute for negotiation. The facts were that the defendants had executed in favor of the payee a note and mortgage, intending it to be used to discharge a prior mortgage. The payee, instead, transferred it *without indorsement* to the plaintiff, without ever having discharged the prior mortgage. In an action by the plaintiff to foreclose the mortgage, it was held that even though no indorsement of the payee appeared, the maker was precluded by the "two innocents" rule from asserting the defense of failure of consideration. This case has been widely criticized,²¹⁶ and will not be effective under the Code.

The presumption of ownership deriving from possession under a valid indorsement is important, largely because it will entitle the possessor to recover on the instrument unless the defendant-obligor establishes a defense.²¹⁷ Two early Washington decisions²¹⁸ illustrate the significance of the presence of the indorsement. In the *Brooks* case, the Court said:

Nor did the court err in permitting the notes to be received in evidence over appellants' objection that the execution of their assignment was not duly proven. The note contained the following indorsement: "Pay to the order of Mary A. Brooks, without recourse, Charles F. Emery Real Estate Loan Company [the payee], per R. M. Palmer, Treasurer." Possession of the note, coupled with the indorsement in question, was sufficient prima facie to establish that plaintiff was the owner and holder thereof, and that it was unpaid.²¹⁹

There is, finally, one little curiosity about subsection (3), in that

it gives the taker for value the right to have the "unqualified" indorse-Pac. 734 (1917); *Canadian Bank of Commerce v. Sesnon Co.*, 68 Wash. 434, 123 Pac. 602 (1912).

²¹⁴ *Swanson v. Mohr*, 169 Wash. 461, 169 Pac. 461 (1932); *Willett v. Central Yakima Ranches Co.*, 126 Wash. 587, 219 Pac. 20 (1923); *Hanson v. Roesch*, 104 Wash. 257, 176 Pac. 349 (1918); *Puget Sound State Bank v. Washington Paving Co.*, 94 Wash. 504, 162 Pac. 870 (1917), noted 15 MICH. L. REV. 512 (1917); *Swenson v. Stoltz*, 36 Wash. 318, 78 Pac. 999 (1904); *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414 (1900).

²¹⁵ *Kiley v. Bugge*, 165 Wash. 677, 5 P.2d 1038 (1931), noted, 45 HARV. L. REV. 1112 (1932).

²¹⁶ BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENTS LAW 545 (7th ed. 1948); 45 HARV. L. REV. 1112 (1932).

²¹⁷ Section 3-307(2).

²¹⁸ *Brooks v. James*, 16 Wash. 335, 47 Pac. 751 (1897); *D. M. Osborne & Co. v. Stevens*, 15 Wash. 478, 46 Pac. 1027 (1896).

²¹⁹ 16 Wash. 335, 337-38 (1897).

ment of the transferor. The curiosity is that the Code does not tell us the difference between a qualified and an unqualified indorsement. As a matter of fact, the words "qualified indorsement" do not appear in the Code.²²⁰ Clearly what is meant by "unqualified" is that it shall be with recourse.

Section 3-202. Negotiation.

- (1) Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery.
- (2) An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.
- (3) An indorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less it operates only as a partial assignment.
- (4) Words of assignment, condition, waiver, guaranty, limitation or disclaimer of liability and the like accompanying an indorsement do not affect its character as an indorsement.

There is a wealth of wisdom in the opening sentence of paragraph (1) of this section. Negotiation is a particular form of transfer: one which makes the transferee the holder of the paper, and this means: "a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank."²²¹ Herein lies the clue to some of the real defenses. A taker may act in all innocence and purchase for full value an instrument bearing a forged indorsement which is necessary to his title. It is of no concern that he adequately fulfills all of the "in due course" requirements of the Code or of the N.I.L.; his claim is lost on an entirely different ground: he is not the holder.

The details about negotiation spelled out in subsection (1) do not vary from previous law. Order paper can only be negotiated by indorsement and delivery. It has been held, for example, that where an instrument payable on its face to the order of "Holdorf Oyster Co.," was indorsed: "Pres. Dwight Holdorf; Sec. Opal Holdorf," the in-

²²⁰ Section 3-414 omits these words.

²²¹ Section 1-201(20).

dorsement (failing to designate the payee company) was ineffective to make the transferee the holder.²²² The Code does not change the appropriate rule.²²³

It has usually been recognized, as the Code provides, that bearer paper may be negotiated by delivery only.²²⁴ The single exception to this²²⁵ seems erroneously decided. Under the Code, the case would be decided contrary to its actual holding for two reasons: First, once the paper had been indorsed in blank, it would be bearer paper (and thus negotiable by delivery) until subsequently specially indorsed. Second, what the questioned indorsement amounted to was a bank transit number placed on the check as an indorsement. Under the Code, one bank may transfer to another by any indorsement identifying the transferor, and this would include the use of the transferor's transit number.²²⁶

There seems to be no Washington decision respecting the rules stated in paragraph (2). In connection with the requirement that the indorsement be written "by or on behalf of the holder," there is no reason to suppose that this will change the result in the case of *Glaser v. Connell*²²⁷ previously alluded to. There, it will be recalled, the payee was designated as the "Holdorf Oyster Co.," and the indorsement, without indicating that the company as such indorsed, was merely: "Pres. Dwight Holdorf; Sec. Opal Holdorf." Though in a manner of speaking, such an indorsement may be "on behalf of the holder," this circumstance is not apparent from the face of the indorsement. All that the Code seems to accomplish is to insure that an indorsement for the Holdorf Oyster Co., by the president and secretary, would be sufficient. The indorsements actually used were not such.

As provided in paragraph (3), an indorsement must be of the entire instrument or of the entire unpaid portion thereof, and any attempted partial indorsement is merely a partial assignment.²²⁸

The Washington Court's position respecting the addition of words

²²² *Glaser v. Connell*, 47 Wn.2d 622, 289 P.2d 364 (1955).

²²³ See also *Nat'l City Bank of Seattle v. Titlow*, 233 Fed. 838 (W.D. Wash. 1916) (certificate of deposit payable to the order of "ourselves" requires the indorsement of the issuer).

²²⁴ *Hellar v. Nat'l City Co.*, 171 Wash. 585, 18 P.2d 480 (1933); *Doucette v. Old Nat'l Bank & Union Trust Co.*, 161 Wash. 159, 296 Pac. 570 (1931).

²²⁵ *Bowles v. Billik*, 27 Wn.2d 629, 178 P.2d 954 (1947), noted, 23 WASH. L. REV. 74 (1948).

²²⁶ Section 4-206.

²²⁷ Note 222 *supra*.

²²⁸ *Swanson v. Mohr*, 169 Wash. 461, 14 P.2d 8 (1932).

of assignment or guaranty to an indorsement is not entirely clear. The court has uniformly held that the addition of words of guaranty to an otherwise unqualified indorsement do not preclude the effectiveness of the indorsement as a transfer of the paper.²²⁹ The Code upholds this rule. However, in *Wilson v. Pearce*,²³⁰ the court took a different view as respects the addition of words of assignment. The court treated this transfer as an assignment only, but the Code would deem this to be an indorsement. To be observed is that the rule of subsection (4) is limited to the addition of words of assignment to the indorsement on the paper itself. It is the signature on the negotiable paper that is of primary importance and which constitutes the indorsement. Words of assignment at such a spot are surplusage. If the transferor wants to assign rather than negotiate, the available method is by separate written assignment. This type of writing will constitute a simple assignment both under the Code and under prior law.²³¹

Section 3-203. Wrong Or Misspelled Name.

Where an instrument is made payable to a person under a misspelled name or one other than his own he may indorse in that name or his own or both; but signature in both names may be required by a person paying or giving value for the instrument.

No decisions or statutes, other than the N.I.L.'s counterpart to this section,²³² have been found in Washington. The Official Comments spell out the changes produced by the Code.

Section 3-204. Special Indorsement; Blank Indorsement.

- (1) A special indorsement specifies the person to whom or to whose order it makes the instrument payable. Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement.
- (2) An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed.

²²⁹ *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254 (1896); *Nat'l Bank of Commerce v. Galland*, 14 Wash. 502, 45 Pac. 35 (1896).

²³⁰ 57 Wn.2d 44, 355 P.2d 154 (1960).

²³¹ *Wolarich v. Van Kirk*, 36 Wn.2d 212, 217 P.2d 319 (1950).

²³² RCW 62.01.043 [NIL § 43].

- (3) The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

The major contribution of this section is to clarify a point which has been much discussed but on which there is no particular Washington authority. This point involves the effect of a special indorsement on paper that was once bearer paper, either because originally issued on its face payable to bearer, or because indorsed in blank. The Code removes the conflicting provisions of the N.I.L. which have been the source of trouble, and adopts the rule that a special indorsement on any paper which was bearer prior to that indorsement is effective. This means that the indorsement of the designated special indorsee is always required for further negotiation.²³³

The other details spelled out in this section do not depart from established principle. That a special indorsement designates the particular indorsee and that the further indorsement of that one is required, as stated in paragraph (1), has been true in Washington.²³⁴ On the other hand, a blank indorsement specifies no indorsee and thus makes the paper payable to bearer.²³⁵ The transfer of such paper without subsequent indorsement is not irregular,²³⁶ so a taker may become a holder in due course.

Paragraph (3) is in the precise words of the present statute.²³⁷

[This discussion will be continued in a subsequent issue.]

²³³ Britton, *Transfers and Negotiations Under the Negotiable Instruments Law and Article 3 of the Uniform Commercial Code*, 32 TEX. L. REV. 153, 162 (1953).

²³⁴ Puget Sound State Bank v. Washington Paving Co., 94 Wash. 504, 162 Pac. 870 (1917), noted, 15 MICH. L. REV. 512 (1917).

²³⁵ National Sur. Corp. v. Dore, 187 Wash. 274, 60 P.2d 12 (1936).

²³⁶ Broadway Bank of Kansas City v. Whittaker, 177 Wash. 62, 30 P.2d 993 (1934).

²³⁷ RCW 62.01.035 [NIL § 35].