

Washington Law Review

Volume 43 | Number 3

3-1-1968

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Recommended Citation

Richard Cosway, *Negotiable Instruments—A Comparison of Washington Law and the Uniform Commercial Code*, 43 Wash. L. Rev. 499 (1968).

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NEGOTIABLE INSTRUMENTS—A COMPARISON OF
WASHINGTON LAW AND THE UNIFORM
COMMERCIAL CODE

RICHARD COSWAY

PART 4. LIABILITY OF PARTIES

Section 3-401. Signature.

- (1) No person is liable on an instrument unless his signature appears thereon.
- (2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.

Subsection (1) is a rephrasing, without substantive change, of a former provision of the NIL.¹ The statutory words, "on the instrument," are very significant, for there is always the possibility that liability may exist against a non-signer on some basis other than on the instrument itself.² In suits on notes, the Washington rule is consistent with the provisions of the Code: non-signers are not liable.³ The interrelationship between community property law and the law of negotiable instruments may qualify this statement. If the "community" be thought of as a separate entity, that entity can be held on notes which do not bear "its name," as on a note signed by the husband.⁴ Indeed, in *Fies v. Storey*,⁵ a judgment was rendered indi-

¹ UNIFORM NEGOTIABLE INSTRUMENTS LAW § 18 (formerly WASH. REV. CODE § 62.01.018 (1955)) [hereinafter cited as NIL].

² See, e.g., *Swenson v. Stoltz*, 36 Wash. 318, 78 Pac. 999 (1904).

³ *Kietz v. Gold Point Mines, Inc.*, 5 Wn. 2d 224, 105 P.2d 71 (1940); *Bank of Cal. N.A. v. American Fruit Growers, Inc.*, 4 Wn. 2d 186, 103 P.2d 27 (1940); *Nielson v. Crossett*, 3 Wn. 2d 537, 101 P.2d 351 (1940); *Spokane Security Fin. Co. v. J. A. Anderson Co.*, 177 Wash. 554, 33 P.2d 102 (1934), 10 TUL. L. REV. 146 (1935); *Security State Bank v. Adkins*, 134 Wash. 94, 235 Pac. 18 (1925); *Frazey v. Casey*, 96 Wash. 422, 165 Pac. 104 (1917); *First Nat'l Bank v. Conway*, 87 Wash. 506, 151 Pac. 1129 (1915).

There are two decisions, both apparently involving situations controlled by the NIL, where § 18 ought to have been applied but was not mentioned. The cases seem wrongly decided, unless explained on the theory of the case in the preceding note, *viz.*, the liability was on an obligation apart from the note. Unhappily, some of the language in the opinions is not consistent with this analysis. The cases are: *Vancouver Nat'l Bank v. Katz*, 142 Wash. 306, 252 Pac. 934 (1927); *Hanson v. Northern Bank & Trust Co.*, 98 Wash. 124, 167 Pac. 97 (1917).

⁴ *Virginia Lee Homes v. Schneider & Felix Const. Co.*, 64 Wn. 2d 897, 395 P.2d 99 (1964); *First Nat'l Bank v. Estus*, 185 Wash. 174, 52 P.2d 1243 (1936); *Acme Fin. Co. v. Zapffe*, 161 Wash. 312, 296 Pac. 1050 (1931); *Peterson v. Zimmerman*, 142 Wash. 385, 253 Pac. 642 (1927); *Stevens v. Naches State Bank*, 136 Wash. 137, 238 Pac. 918 (1925); *Lincoln Trust Co. v. Spangler*, 121 Wash. 267, 209 Pac. 521 (1922), 32 YALE L.J. 405 (1923); *Kuhn v. Groll*, 118 Wash. 285, 203 Pac. 44 (1922); *Way v. Lyric Theater Co.*, 79 Wash. 275, 140 Pac. 320 (1914); *Lumbermen's Nat'l*

vidually against a divorced wife on a note signed only by the husband because the underlying debt was a community obligation. One would think that insofar as community liability is concerned, the matter ought to be viewed as a question of what assets are reachable rather than what persons are liable; thus, the Code's provision is not really material to the point.⁶ The signer's authority to bind the community assets will be essential if the holder of the instrument is to satisfy his claim from those assets.⁷ This question of authority is posed in other areas of representation as well, of course.⁸

One instrument which presents something of an anomaly is the bank money order, which appears to be an instrument drawn on a bank by someone other than an agent of that bank. Except for the printed designation of the bank as drawee, its name does not appear on the instrument. Nonetheless, the best available authority suggests that the bank is liable on the instrument.⁹

Subsection (2) is a restatement of former NIL section 18.¹⁰ Thus, one who signed a check "Hillyard Motors" was convicted of forgery because he had, without authority, signed a trade or assumed name.¹¹ The Code does not change this rule.

Section 3-402. Signature in Ambiguous Capacity.

Unless the instrument clearly indicates that a signature is made in some other capacity it is an indorsement.

This section must be read in the light of common sense and custom-

Bank v. Gross, 37 Wash. 18, 79 Pac. 470 (1905); Shuey v. Holmes, 20 Wash. 13, 54 Pac. 540 (1898).

⁶ 37 Wn. 2d 105, 221 P.2d 1031 (1950).

⁷ See, e.g., Swenson v. Stoltz, 36 Wash. 318, 78 Pac. 999 (1904); Clark v. Eltinge, 34 Wash. 323, 75 Pac. 866 (1904); Clark v. Eltinge, 29 Wash. 215, 69 Pac. 736 (1902).

⁸ Thus in *Balkema v. Grolimund*, 92 Wash. 326, 159 Pac. 127 (1916), neither the community nor the husband was liable on a promissory note executed by the wife on the mere allegation that she was acting for the benefit of herself and the community, absent authority from the husband or ratification by him. The strong presumption is that the wife's note was hers alone. In *Colagrossi v. Hendrickson*, 50 Wn. 2d 266, 310 P.2d 1072 (1957), the community was held liable on a note executed by a wife where either (a) it was within the family expense statute, WASH. REV. CODE § 26.20.010 (1958), or (b) the transaction was for a community purpose and authorized or ratified by the husband. Some of the cases in note 4 *supra* raise factual issues as to the extent the particular transaction was for the benefit of the community.

Normally, the signature of the husband is enough to bind the community, so if a wife also signs a note bearing her husband's signature, she is personally liable. *Northern Bank & Trust Co. v. Graves*, 79 Wash. 411, 140 Pac. 328 (1914).

⁹ See UCC §§ 3-403, 3-404.

¹⁰ Bailey, *Bank Personal Money Orders as Bank Obligations*, 81 BANKING L.J. 669, 676 (1964).

¹¹ WASH. REV. CODE § 62.01.018 (1955).

¹² *State v. Morris*, 38 Wn. 2d 927, 234 P.2d 478 (1951).

ary background. Unless it is so read, there seems to be created a conclusive presumption that *every* signature is an indorsement, unless the signer positively indicates to the contrary. Thus, a signature in a lower right hand corner of a note, not identified as that of a maker or drawer, might be construed as an indorsement. The Official Comment demonstrates that the drafters did not intend any such meaning—the location of the signature is sufficient, interpreted by custom, to show that the signer is a maker or drawer.

The Washington decisions illustrate the point that location of the signature raises a presumption that the signer's obligation is that of one who would normally sign in that spot. Thus, persons signing on the back are indorsers,¹² and those signing in the lower right hand corner of the front are makers.¹³ The precise nature of the inference to be drawn from the location of a signature is somewhat difficult to identify. One would conclude *a priori* that, as against a due course holder who did not know the background, one who signs in the maker's traditional spot may not introduce parol to show that he was, in fact, intended to be an indorser. That is to say, he cannot detract from his unconditional promise to pay for use of the conditions precedent to a secondary party's liability.¹⁴ As between the parties, however, it ought to be possible to show that one who signed as maker had in fact signed to accommodate the payee.¹⁵ The payee ought not be permitted to "bite the hand that fed him." In effect, the maker is thus permitted to show that he signed in a capacity different from that stated on the instrument.

Authority can be found that such a showing, at least in a suit other than one between the accommodated and the accommodating party, is precluded by the parol evidence rule.¹⁶ The intricacies of this rule are beyond the scope of this discussion, except to note that a different conclusion seems possible, for the matter turns on whether the writing is an integrated contract. One, designing to be an indorser, who signs

¹² *Cowles v. Matthews*, 179 Wash. 154, 36 P.2d 537 (1934); *Clausen v. Forehand*, 152 Wash. 310, 277 Pac. 827 (1929); *Northern Bank & Trust Co. v. Graves*, 79 Wash. 411, 140 Pac. 328 (1914); *Spencer v. Alki Point Trans. Co.*, 53 Wash. 77, 101 Pac. 509 (1909); *Wilkie v. Chandon*, 1 Wash. 355, 25 Pac. 464 (1890). Some very early cases, however, held that one who "backed" (indorsed) a note prior to its delivery became a co-maker. *Cowles v. Matthews, supra*; *Donohoe Kelly Banking Co. v. Puget Sound Sav. Bank*, 13 Wash. 407, 43 Pac. 359 (1896).

¹³ *Shead v. Moore*, 31 Wash. 283, 71 Pac. 1010 (1903).

¹⁴ Compare the liability stated under UCC § 3-413(1) and (3), *with* that under § 3-414.

¹⁵ UCC § 3-415 so provides.

¹⁶ *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977 (1895).

in the maker's spot can well argue that the writing does not integrate the agreement.¹⁷ Whatever the outcome on this level, the trier of fact would be hard put to be convinced that one who signs a note in the traditional maker's spot signed in a different capacity, so the question may be academic.¹⁸ The Official Comment makes it quite plain that the rule of law stated in section 3-402 is not to be avoided, easily, and states that parol evidence is admissible only for reformation.¹⁹

Washington decisions include a case whose fate under the Code may be uncertain. The case, *Bank of California v. Starrett*,²⁰ involved a note on which the defendant's signature appeared in the lower left hand corner of the face. The place usually occupied by the maker's signature was filled, and one issue in the case was the liability of the defendant as maker or indorser. He was held liable as *maker*, even though NIL section 17(6)²¹ provided: "Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser. . . ." The court may have reasoned that this section never became operative, because on the facts it was clear (at least to the court) that the defendant had signed as co-maker.²² One would predict, without excessive conviction, that the Code would result in a contrary decision, that the defendant is only an indorser. The reason is that, in Code language, this signature does not *clearly* indicate that it was made in a capacity other than that of indorsement. The circumstances certainly raise doubt as to what was intended by the signature in this unusual

¹⁷ In several Washington cases parol evidence appears to have been admitted to resolve the issue of the capacity in which a person signed. See, *e.g.*, *Northern Bank & Trust Co. v. Graves*, 79 Wash. 411, 140 Pac. 328 (1914); *Spencer v. Alki Point Trans. Co.*, 53 Wash. 67, 101 Pac. 509 (1909); *Shead v. Moore*, 31 Wash. 283, 71 Pac. 1010 (1903).

¹⁸ In *Shead v. Moore*, *supra* note 17, for example, three persons signed a note in the maker's spot, as follows:

D (defendant)
X (an insolvent party)
P (plaintiff)

In a suit by *P* for contribution from *D*, alleged to be a co-maker, *D*'s contention (accepted by the trial court) was that he was in reality a surety only. He testified that he had signed last, putting his signature at the top because there was no room elsewhere. The Supreme Court rejected this contention, relying on a "common practice for the maker of a note to affix his signature to the note first, the signature of the surety following." *Id.* at 285, 71 Pac. at 1012. *D* failed to overcome the presumption established by the face of the note that he was a maker for consideration. *Cf.* UCC § 3-414.

¹⁹ Related matters involving the parol evidence rule appear elsewhere in the code, particularly in UCC § 3-118, 3-119, 3-403, 3-414, 3-415, 3-416 and 3-606.

²⁰ 110 Wash. 231, 188 Pac. 410 (1920), 9 A.L.R. 177, 90 CENT. L.J. 394.

²¹ WASH. REV. CODE § 62.01.017(6) (1955). See also NIL §63 [WASH. REV. CODE §62.01.063 (1955)].

²² See BRITTON, BILLS AND NOTES §43 (2d ed. 1961).

spot, but that hardly overcomes the rule of law stated in the Code. In a decision under the Code, a Pennsylvania Common Pleas Court held persons who had signed on the back of an instrument were makers.²³ One factor in the case was similar to that being discussed, that is the circumstance that the spot where the makers would normally sign was filled. There were other factors, however, such as the use of a seal (more typical of makers than indorsers), and use of plural language in the note itself.

Section 3-403. Signature by Authorized Representative.

- (1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.
- (2) An authorized representative who signs his own name to an instrument
 - (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;
 - (b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.
- (3) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

The Code appears to have reduced to a fairly simple outline the difficult rules governing the interrelationship between the doctrines of the law of agency and those of negotiable instruments. Subsection (1) retains the principle of the NIL²⁴ and of Washington decisions²⁵ that the usual rules of agency apply to negotiable instruments and that there are no particular formal requirements for creation of an agency

²³Terkeltoub v. Caravan Motel, Inc., 3 U.C.C. REP. SERV. 494 (Pa. Common Pleas, Lawrence Co., 1966).

²⁴NIL § 19 [Wash. Rev. Code § 62.01.019 (1955)].

²⁵Sharpe Sign Co. v. Parrish, 33 Wn. 2d 883, 207 P.2d 758 (1949); Citizens Nat'l Bank v. Ariss, 68 Wash. 448, 123 Pac. 593 (1912); Bell v. Waudly, 4 Wash. 743, 31 Pac. 18 (1892).

to sign such paper. The phrase "or other representative" in the subsection, when read with the definition of the term "representative,"²⁶ makes the principle applicable to persons other than agents, and would include trustees. In *German-American Mercantile Bank v. Ripley*,²⁷ a stock subscription was signed by an individual, followed by the designation "Trustee." Since the negotiable instruments provisions of the Code do not, of course, apply to such a document, the presently discussed subsection is not controlling. Were the instrument within Article 3, however, a parol showing would be possible, between the immediate parties, that the signer was in fact signing only to obligate the trust, not to bind himself as an individual. The outcome of the case was that the signer was personally liable, for he had not introduced evidence to demonstrate that he had so signed. The result under the Code would be the same.

Subsections (2) and (3) are designed to govern the many varieties of factual patterns in which the form or location of a signature create doubt whether personal liability of a signer is intended. Perhaps because unnecessary, no rule is stated for the clearest case of the individual's non-liability where the form spells out precisely that he signed in a named capacity for a named principal, such as:

The A.B.C. Company,
By John Smith, Agent.

There is no doubt that if Smith (in the illustration) is authorized to bind the A.B.C. Co., Smith is not personally liable on the instrument, and A.B.C. Co. is liable.²⁸ If Smith is not so authorized, a different Code section applies²⁹ with different consequences.

The variations possible in the agent's signing shade from this case to the clear-cut case at the other extreme, where the agent signs only his name and fails to name his principal or to indicate his representative title, as a situation covered by subsection (2)(a). Thus, a signature "John Smith," to use the same agent involved in the preceding

²⁶ UCC § 1-201 (35).

²⁷ 124 Wash. 322, 214 Pac. 160 (1923).

²⁸ Braucher, *UCC Article 3—Commercial Paper—New York Variations*, 17 RUTGERS L. REV. 57, 70 (1962). That the pre-Code Washington rule is in accord, see *Washington Groc. Co. v. Citizens' Bank*, 132 Wash. 244, 231 Pac. 780 (1925) (dealing with a guaranty rather than a negotiable instrument).

²⁹ UCC § 3-304. For a dictum showing that the pre-code Washington rule accords with that section, see *Schwab v. Getty*, 145 Wash. 66, 258 Pac. 1035 (1927), 54 A.L.R. 1382.

illustration, binds Smith personally but does not bind A.B.C. Co., and is not subject to modification by parol.³⁰

Unfortunately for the sake of clarity, the situations between these two extremes have met with a variety of solutions in pre-Code law. Often the only missing ingredient from the signature is the word "by" in our first illustration. Thus, in *Union Mach. & Supply Co. v. Taylor-Morrison Logging Co.*,³¹ the note was in this form:

Two months after date I promise to pay . . . For value received, each and every party signing or endorsing this note hereby waives presentment, demand, notice of non-payment and protest thereof, and binds himself hereon as principal and not as surety, and agrees to remain bound notwithstanding any extension which may be made to any party liable on this note, consent being hereby given to such extensions. And each and every party signing this note as officer or agent of a corporation or copartnership, also binds himself individually as principal . . .

(Signed) Taylor Morrison Logging Co.
J. B. Wood, Pres.
J. L. Kahaley, Sec.

The Code deals, in the section now under discussion, only with the effect of the form of the signature; thus, under subsection (3) the individuals are not personally liable, unless the holder is able to demonstrate facts showing such liability. The actual decision in the case was in accord, although the relief sought was reformation. Apparently, admissibility of parol to show the actual circumstances and manifested intention respecting personal liability will not be limited to reformation suits under the Code.³²

³⁰ *Shuey v. Adair*, 18 Wash. 188, 51 Pac. 388 (1897), 39 L.R.A. 473; *Horton v. Haley*, 12 Wash. 74, 40 Pac. 624 (1895). In *Barnes v. Packwood*, 10 Wash. 50, 38 Pac. 857 (1894), a slight variation is presented. The note was signed by six individuals who did not indicate a representative capacity. Its terms were: "we or either of us promise to pay . . . for the use of the *Agricultural Fair Association*." The makers sought to show that the true intention was that they should be bound as trustees for this association and not as individuals. Parol was admitted on the theory of mistake, but nonetheless the individuals were held personally liable. It is certainly arguable that under the Code, too, parol would be admissible because the fair association is identified as a potential principal. This is not a case in which there is neither a representative label annexed to the signer's name nor a principal designated in the instrument.

³¹ 143 Wash. 154, 254 Pac. 1094 (1927).

³² Prior to the Code, evidence to support reformation had to be "clear and convincing." *Akers v. Sinclair*, 36 Wn. 2d 693, 226 P.2d 225 (1951). The Code does not seem to retain this burden. The phrasing in UCC § 3-403 "except as otherwise established" suggests a reference to "burden of establishing," in UCC § 1-201(8), where a preponderance of the evidence seems all that is required. For difficulties of proof under the Code, see *Holohan, Commercial Transactions*, 26 U. Prrt. L. Rev. 265, 287 (1964).

Only one step removed from this fact pattern is the circumstance wherein the signer discloses a principal but fails to indicate the capacity in which he signed. *Way v. Lyric Theater Co.*³³ provides an illustration, for the note in suit was signed:

Lyric Theater Company
Bert Muma
Theodore Peterson
James Anderson
G. H. Mueller.

The Washington decisions prior to the Code preclude the individuals' showing that they were understood by the immediate parties to have signed only in a representative capacity.³⁴ Under the Code, subsection (2)(b), these signers will be liable to a due course holder, but "as between the parties," parol evidence may be used to negative personal liability. Unlike the rule stated in subsection (3), in this circumstance the burden of convincing the fact-finder that no personal liability was intended rests on the signers.³⁵

There will often be influential facts in addition to the signature itself. For example, the note may be in the plural "We promise to pay," followed by signatures in the form of the *Way* case. Although the Code announces a rule in the correlative situation, a signing by

In *Karr v. Baumann*, 3 U.C.C. REP. SERV. 180 (N.Y. Sup. Ct., Nassau County, 1966), without reformation, it was held that a note signed:

Robert Bauman, Pres.
Central Coffee Shoppee, Inc.

bound the corporation, not the individual, with the result that the defense of usury was not available (under the New York doctrine denying this defense to a corporation). *Accord*, *Citizens Nat'l Bank v. Ariss*, 68 Wash. 448, 123 Pac. 593 (1912).

Daniel v. Glidden, 38 Wash. 556, 80 Pac. 811 (1905), is distinguishable. There a note seems to have identified the principal and also named the representative and his representative capacity. However, the representatives had been guilty of fraud and that liability, of course, was personal.

³³ 79 Wash. 275, 140 Pac. 320 (1914).

³⁴ *Moore v. Webster*, 191 Wash. 394, 71 P.2d 369 (1937), 82 A.L.R.2d 424, 439 (1962); *Farmers State Bank v. Lamon*, 132 Wash. 369, 231 Pac. 952 (1925), 42 A.L.R. 1072 (1926); *Way v. Lyric Theater Co.*, *supra* note 33; *Toon v. McCaw*, 74 Wash. 335, 133 Pac. 469 (1913), 1915A L.R.A. 590 (1915).

³⁵ In *Chips Distrib. Co. v. Smith*, 226 N.Y.S.2d 488 (Sup. Ct., Spec. Term, Nassau Co., 1966), a note was signed:

E. & R. Distributing, Inc.
Rita M. Smith
17 Continental Ave.
Glen Cove, Long Island, N.Y.

The note included a clause stating that "we" authorize confession of judgment under certain circumstances. The suit was to enforce in New York a judgment confessed in Pennsylvania against the individual signer, Smith, personally. Under UCC § 3-403 (2)(b), parol evidence was held admissible to show that Smith signed in a representative capacity, with the result that the judgment confessed against her individually was held void.

more than one person of an instrument in terms "I promise to pay,"³⁶ no rule has been found to cover the use of "We." One would conclude that such a usage is only one of many factors to be considered in deciding whether individual liability is intended. The "we" may be an editorial we, thus of no significance, or in the case of a corporate principal may be used to refer to the corporation,³⁷ again of no significance insofar as personal liability of the individuals is concerned.

Also covered by subsection (2)(b) is the circumstance in which the signer indicates his representative capacity without naming the party represented. An illustration is *Robertson v. Club Ephrata*,³⁸ in which a note, not naming a principal, was signed:

J. G. Dungan, President
F. R. Ahlquist, Secretary-Treasurer

The plaintiff, who was not a due course holder, sought to enforce the note against the two individuals who had signed. Parol evidence was admissible, said the court, to remove the ambiguity as to the personal liability *vel non* of the signers.³⁹ The result under the Code would be the same, although there seems to lurk a problem as to the effect of establishing the nonliability of the signer. Is the principal liable? Since his name does not appear on the instrument, under section 3-401 (1) it is certainly arguable that the principal is not liable. This produces the curious consequence that neither the principal nor the agent is liable, thus giving the payee substantially less than he had bargained for, and producing a windfall for the principal. One would suggest that if the parol is admissible to disclaim personal liability of an agent or other representative, its effect must also be to create liability on the principal's part.⁴⁰ The matter does not seem free from controversy, however.

Section 3-404. Unauthorized Signatures.

- (1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the

³⁶ UCC § 3-118(e).

³⁷ *Akers v. Sinclair*, 37 Wn. 2d 693, 226 P.2d 225 (1951).

³⁸ 48 Wn. 2d 285, 293 P.2d 752 (1956).

³⁹ There seems to be a strong presumption, however, that the signers are personally liable. See *Griffin v. Union Sav. & Trust Co.*, 86 Wash. 605, 150 Pac. 1128 (1915) (not a negotiable instrument).

⁴⁰ *Robertson v. Club Ephrata*, 48 Wn. 2d 285, 293 P.2d 752 (1956).

unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.

- (2) Any unauthorized signature may be ratified for all purposes of this Article. Such ratification does not of itself affect any rights of the person ratifying against the actual signer.

Subsection (1) restates the rule which has been followed in Washington for some time. In 1902, for example, the supreme court had before it a note signed "Jose & Carstens, Per Alfred Jose." It appeared that Jose had no authority to sign for Carstens, consequently (a) Carstens was not liable, but (b) Jose was.⁴¹ The only area of the law relating to authority to sign instruments that may be troublesome in Washington concerns the manner in which such authority may be granted.⁴² This detail is beyond the scope of the Code.⁴³

There seems to have never been doubt in Washington that an unauthorized signature might be ratified, consistently with subdivision (2).⁴⁴ No case has been found, however, extending this doctrine to a forged signature made without any semblance of authority. Under the Code, even such a signature may be ratified.

Section 3-405. Imposters; Signature in Name of Payee.

- (1) An indorsement by any person in the name of a named payee is effective if
- (a) an impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or
 - (b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or
 - (c) an agent or employee of the maker or drawer has supplied

⁴¹ *McNamara v. Jose*, 28 Wash. 461, 68 Pac. 903 (1902).

⁴² *California Stucco Co. v. Marine Nat'l Bank*, 148 Wash. 341, 268 Pac. 891 (1928), 67 A.L.R. 1531 (1930), 4 WASH. L. REV. 42 (1929); *Coleman v. Seattle Nat'l Bank*, 109 Wash. 80, 186 Pac. 275 (1919), 12 A.L.R. 108 (1921); *Island Belt S.S. Co. v. J. & M. Cafe*, 103 Wash. 263, 174 Pac. 19 (1918).

⁴³ *But see* UCC § 3-403(1).

⁴⁴ *Johnson v. Wilbur-Ellis Co.*, 136 Wash. 340, 239 Pac. 1018 (1925); *Richards v. Jefferson*, 20 Wash. 166, 54 Pac. 1123 (1898).

UCC § 3-404 also postulates that one may be precluded from denying authority to sign. In *Bayley v. Hamburg*, 106 Wash. 177, 179 Pac. 88 (1919), such preclusion was found in somewhat unusual circumstances. It was held that since the principal had, in fact, received the proceeds under an indorsement forged in his name, he was not harmed and thus could not recover from the obligor on the theory that the obligor had not been discharged by his payment to the indorsee under the forged indorsement.

him with the name of the payee intending the latter to have no such interest.

(2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

This section of the Code is differently worded from its NIL predecessor, and the difference produces certain mechanical changes in working out the "fictitious payee" and "impostor" types of cases. The effect, however, is (with one exception to be noted hereinafter) essentially that of the previous statute. Thus, the previous statute was in terms of "bearer" paper, while the Code makes quite clear the point that in neither the fictitious payee nor the impostor circumstance is the paper "bearer." Somebody must indorse. Since, however, the Code does spell out that anyone can indorse, the effect is the same as was produced under the older approach—the signature is effective to transfer title to the paper to a subsequent holder. Whether the person so signing is guilty of the crime of forgery is another question, on which the Washington court has suggested that the crime may be false pretenses rather than forgery.⁴⁵

The Washington courts have recognized, in a variety of fact patterns, that one who deals with an impostor, as by drawing a check or draft⁴⁶ or executing a mortgage⁴⁷ to the assumed name of the impostor will bear the loss if the same person transfers the document to an innocent purchaser. The Code has broadened this rule in that the impostor need not be the one who actually indorses the paper. Although this will validate signatures by accomplices, it is unlikely that any substantial change in the practical application of the controlling principle is produced.

One Washington decision is worth specific attention. In *Goodfellow v. First National Bank*,⁴⁸ the impostor identified himself as the agent of *X* stating that *X* was desirous of borrowing money. The plaintiff, in order to lend the money, drew checks on the defendant bank, payable to the order of *X*. The impostor indorsed *X*'s name on the checks, and they were paid by the drawee-defendant. While the language of

⁴⁵ *Defiance Lumber Co. v. Bank of Cal.*, 180 Wash. 533, 41 P.2d 135 (1935), 99 A.L.R. 426, 10 WASH. L. REV. 209. The Code has no provision dealing with the criminal or civil liability of the impostor. UCC § 3-405(2).

⁴⁶ *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 Pac. 165 (1906).

⁴⁷ *Farmers & Mechanics Bank v. Western Loan & Bldg. Co.*, 103 Wash. 349, 174 Pac. 1 (1918).

⁴⁸ 71 Wash. 554, 129 Pac. 90 (1913), 44 L.R.A. (n.s.) 580.

the Code is somewhat obscure, the Official Comment⁴⁹ suggests that this indorsement is not effective. The Washington court likewise held the indorsement ineffective. The reason is that the impostor at no time identified himself as *X*, but as *X*'s agent. Thus in drawing the checks payable to *X*, the plaintiff-drawer did not issue the checks intending that the impostor have title—*X* the principal was to have title. The "agent" obviously could not have passed title by indorsing his own name, and when he signed the principal's name, his signature was ineffective. This seems altogether sound conceptually, but overly fine-spun practically.

Subparagraph (1)(b), dealing with "fictitious payees" (without so naming them) carries on the rule that the intention of the maker or drawer, or one signing in his behalf, determines whether the payee's indorsement is essential. The crux is, as was true in pre-Code law, whether the person so drawing or making the instrument intended the designated payee to have an interest in the paper. The typical instance where no such intention exists is that of the dishonest agent, who draws checks on his principal's account payable to designated payees (who may or may not be real people)⁵⁰ knowing full well that those designated payees are not entitled to the proceeds and intending to cash the checks himself. Under the Code, an indorsement by such a dishonest agent is effective; thus, if a drawee were to pay the checks, the drawee is protected.

Washington decisions include one case, or a series of cases from the same transaction, which produced somewhat unusual results. The agent whose conduct caused the harm was an agent of the federal government. He drew checks payable to named payees, intending to cash those checks himself. He, indeed, did cash them at a bank other than the drawee. The issue thus was, "Who bears the loss resulting from this payment?" If the Code is applied, the loss will fall upon the federal government, whose agent produced the loss. Since that agent signed the checks for the government, his intention that the named payees never receive the checks or proceeds should control, and thus his indorsement should be effective. In fact, however, the federal courts held to the contrary, denying the drawee bank's power to charge the drawer's (United States) account.⁵¹ There may be some legitimate

⁴⁹ Last paragraph of UCC § 3-405, comment 2.

⁵⁰ Crosswaite v. Pierce, 56 Wn. 2d 625, 355 P.2d 160 (1960).

⁵¹ United States v. National Bank of Commerce, 205 Fed. 433 (9th Cir. 1913); United States v. National Bank of Commerce, 224 Fed. 679 (9th Cir.), cert. denied, 241 U.S. 658 (1915).

doubt whether, faced with the multitudes of fiscal agents drawing checks for the federal government, the doctrine of the Code ought to apply. Perhaps the federal government is entitled to protection, and this was undoubtedly the thinking of the courts in deciding as they did. However, there is authority to the contrary, applying the fictitious payee rule against the government.⁵²

Having failed to be able to charge the loss to the drawer, the drawee bank next turned to the bank which had "cashed" the checks for the dishonest agent. Consistency would dictate that the drawee ought to have been successful, for if the defendant had received payment from the plaintiff-drawee on a check bearing a forged indorsement, that payment would have been recoverable as money paid under mistake of fact or, under the Code, on a theory of warranty of the presenting bank.⁵³ The Washington court, however, ruled against the plaintiff's recovery,⁵⁴ misrelying on a section of the negotiable instruments law.⁵⁵ The peculiar outcome in this series of cases dealing with the same instrument seems attributable to the presence of the federal government as drawer. Private parties involved in similar litigation must anticipate that the loss will fall on the drawer under subsection (1)(b).

Subsection (1)(c) constitutes a change in the law, which may be illustrated by the case of *Defiance Lumber Co. v. Bank of Cal.*⁵⁶ A dishonest foreman prepared time cards in the names of persons not actually employed, arranged to have those cards punched to indicate the hours of work, and submitted the cards to have pay checks drawn in the names of these fictitious workers. The checks were, in normal course, drawn by other representatives of the employer, payable to the bogus employees. The checks were then taken by the foreman, indorsed by him in the name of the payee, and cashed. Under the concept of the NIL, this was a forged indorsement because the person who "drew" or signed the check intended the designated payees to have an interest. The foreman's contrary intention was not a factor since he was not the drawer. The Code will change this, with the consequence that the foreman's indorsement in the names of the non-

⁵² *Forged Government Checks: Misallocation of Loss by the Federal Common Law*, 75 BANKING L.J. 659, 670 (1958). The related imposter rule has frequently been applied against the government. See, e.g., *United States v. Bank of America Nat'l Trust & Sav. Ass'n*, 265 F.2d 862 (9th Cir. 1960), 77 BANKING L.J. 223.

⁵³ UCC §§ 3-417, 4-207.

⁵⁴ *National Bank of Commerce v. Seattle Nat'l Bank*, 109 Wash. 312, 187 Pac. 342 (1920).

⁵⁵ NIL § 62 [WASH. REV. CODE § 62.01.062 (1955)]. See BRANNAN, *NEGOTIABLE INSTRUMENTS LAW* 330 (7th ed. Beutel 1948).

⁵⁶ 180 Wash. 533, 41 P.2d 135 (1935), 99 A.L.R. 426, 10 WASH. L. REV. 209.

existent employees will be effective. This means that the loss will fall on the drawer-employer, except to the extent that the foreman is able to pay for his misdeeds. His liability, civil and criminal, is not affected by the Code, because of subparagraph (2).

Section 3-406. Negligence Contributing to Alteration or Unauthorized Signature.

Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

Frequently, to prevent applying a real defense doctrine in a way which will protect a maker or drawer who has been negligent, the courts have utilized an estoppel or negligence argument. Illustrative Washington cases include some in which a drawer or maker allowed incomplete instruments to reach the hands of a dishonest employee, who sometimes completed the instrument in an unauthorized way. Pre-Code law normally treated this as a real defense, but Washington courts frequently protected a drawee or even a holder because of the drawer's negligence.⁵⁷ Since by another Code provision, section 3-115, the defense is converted into a personal defense, the negligence analysis is not necessary in this kind of case.

Insofar as carelessness of the maker is concerned, the altered instrument cases are not significantly different: one failing to use reasonable care in executing a note or check will be liable to a due course holder if someone avails himself of the opportunity to change the tenor of the paper. This result was probably not the solution reached by the

⁵⁷ Northern Pac. Ry. v. Spokane Valley Growers' Union, 132 Wash. 607, 232 Pac. 691 (1925), 43 A.L.R. 194 (1926), 9 MINN. L. REV. 569 (1925), 32 Case & Com. 111 (1926); Ladd & Tilton Bank v. Small, 126 Wash. 8, 216 Pac. 862 (1923).

Negligence has been significant in a wide variety of cases, all of them consistent with the rule of this Code provision. See Chamberlain v. Geer, 135 Wash. 340, 237 Pac. 719 (1925); Lovell v. Dotson, 128 Wash. 669, 223 Pac. 1061 (1924); Mills v. Hayden, 128 Wash. 67, 73, 221 Pac. 994, 997 (1924), 34 A.L.R. 1372 (1925) ("One who executes and sets afloat negotiable paper is chargeable with a much higher degree of diligence and caution than is chargeable to one who purchases in due and regular course."); Rensselaer Valve Co. v. Union Nat'l Bank, 122 Wash. 494, 210 Pac. 947, 213 Pac. 490 (1922); National Bank of Commerce v. Seattle Nat'l Bank, 109 Wash. 312, 187 Pac. 342 (1920); Bank of Commerce v. Bingham, 30 Wash. 484, 71 Pac. 43 (1902); Canadian Bank of Commerce v. Bingham, 46 Wash. 657, 91 Pac. 185 (1907).

majority of the courts prior to the Code,⁵⁸ although negligence even prior to the Code was effective to permit a drawee to charge a drawer with the full amount of a draft which had been raised, due to the drawer's carelessness in leaving blanks, or in some other manner permitting alteration.⁵⁹

The Code has probably extended the effect of the negligence doctrine in its provision dealing with negligence in facilitating an unauthorized signature. There is a flat statement of the Washington court that, "Negligence is no defense to an action of this character,"⁶⁰ referring to an unauthorized signature. The statement of the rule in section 3-406 contains an expression bound to be troublesome, in that the negligence of the party will preclude asserting a lack of authority as against a *holder in due course*. In some of the cases visualized by the drafters, the unauthorized signature will be an indorsement.⁶¹ Many words will be necessary to explain how one taking under a forged indorsement can be a *holder*.⁶² The end sought to be reached is desirable, but the language used is questionable.

Probably the most celebrated case in the law of negligence, insofar as negotiable instruments law is concerned, is the Washington case, *Defiance Lumber Co. v. Bank of Cal.*⁶³ The distinction of that case lies in the nature of the drawer's negligent acts because its entire *modus operandi* was considered. This is legitimate under the Code, too, although the typical cases will involve carelessness directly related to the handling of the particular item involved. Illustrative are the cases in which a check is drawn with blanks, permitting alteration, or in pencil, or in which a check is mailed to the wrong party who has the same name as the payee. Here the carelessness relates to the handling of the particular item. The *Defiance Lumber Co.* case, however, opens Pandora's box to an inquiry about the business acumen and care of the drawer.

A somewhat intermediate fact pattern involves the negligence of the drawer of a check in reconciling his accounts on the basis of returned

⁵⁸ See BRITTON, BILLS AND NOTES § 282 (2d ed. 1961).

⁵⁹ *Ibid.*

⁶⁰ *California Stucco Co. v. Marine Nat'l Bank*, 148 Wash. 341, 347, 268 Pac. 891, 893 (1928).

⁶¹ UCC § 3-406, comment 7.

⁶² This has already been a source of difficulty in an Oregon decision relying on the Code. *Gresham State Bank v. O. & K. Constr. Co.*, 231 Ore. 106, 370 P.2d 726 (1962), 48 IOWA L. REV. 1077 (1963).

⁶³ 180 Wash. 533, 41 P.2d 135 (1935), 99 A.L.R. 426, 10 WASH. L. REV. 209. Compare *Denbigh v. First Nat'l Bank*, 102 Wash. 546, 174 Pac. 475 (1918), where no negligence was shown in the hiring of an errand bookkeeper.

paid checks. Often, the case involves merely a failure to examine the returned vouchers, in which case section 4-406 states the applicable rules. The drawer may sustain the loss resultant from subsequent forgeries (or alterations) by the same dishonest handler of the check, or even the loss caused by failure to spot the forgery or alteration of the particular check. Not infrequently, however, the dishonest person is an employee of the drawer. Further, this employee may be the one charged by the employer with the task of reconciling the bank account, with the result that the employer is never informed about his forgeries or alterations. One could argue, on the basis of the *Defiance Lumber Co.* case that the negligence of the drawer-employer is established by his putting the "crook" in a position with too much control over the check writing process.⁶⁴ However, a recent Tennessee decision, interpreting the Code, did not go that far.⁶⁵ There, the drawer was a church and the loss was caused by the financial secretary who forged necessary signatures of a co-maker. Since the cancelled checks were mailed to the financial secretary, much time elapsed before the inroads on the treasury of the church were discovered. The loss was allowed to rest on drawee bank, apparently on the theory that its negligence in (a) not detecting the forged signature and (b) not noting that all of the checks were drawn payable to the financial secretary personally and many were indorsed by a local race track, was more blameworthy than the conduct of the church fathers in trusting this one who had a previously unblemished record. Both sections 3-406 and 4-406 invite this result, as is clearly demonstrated by subsection (3) of section 4-406.

Section 3-407. Alteration.

- (1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in
- (a) the number or relations of the parties; or
 - (b) an incomplete instrument, by completing it otherwise than as authorized; or
 - (c) the writing as signed, by adding to it or by removing any part of it.

⁶⁴ BRITTON, *BILLS AND NOTES* 372 (2d ed. 1961).

⁶⁵ *Jackson v. First Nat'l Bank*, 403 S.W.2d 109 (Tenn. Ct. App. 1966).

- (2) As against any person other than a subsequent holder in due course
- (a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;
 - (b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.
- (3) A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an incomplete instrument has been completed, he may enforce it as completed.

Probably the most striking departure from the NIL's organization is the consolidation of alteration and completion of paper. Only one substantive change seems to result from this re-shifting, which concerns the completion of paper in an incorrect but honest way. Paper so completed and not held by a due course holder was a nullity under the NIL.⁶⁶ This gave the maker or drawer a windfall by excusing his liability, even to the extent he had authorized its creation. The Code eliminates this windfall: A non-fraudulent completion of paper, even though unauthorized, will not preclude recovery to the extent that the issuer has authorized creation of liability. This is analogized to the alteration of complete paper which, if non-fraudulent, does not terminate the issuer's liability according to the original tenor.

The conceptual distinction between honest and fraudulent alteration is also a Code addition to previous statutory law. Some early Washington decisions can be identified as drawing the identical distinctions utilized by the Code, namely: honest, but misguided, alterations by a holder do not terminate liability on the instrument according to its original tenor; and alterations made by a stranger, *i.e.*, one not the holder, do not discharge the original obligations.⁶⁷ Thus, an obligor seeking to assert his discharge by virtue of an alteration of the paper he signed must be cautious to include reference to the fraudulent

⁶⁶ BRITTON, *BILLS AND NOTES* 197 (2d ed. 1961).

⁶⁷ *Hendrickson v. Lyons*, 121 Wash. 632, 209 Pac. 1095 (1922) (Non-negotiable instrument, on which see 6 CORBIN, *CONTRACTS* § 1317 (1962)); *Gould v. Gould*, 99 Wash. 204, 169 Pac. 324 (1917); *Lombardo v. Lombardini*, 57 Wash. 352, 106 Pac. 907 (1910), 32 L.R.A. (n.s.) 515; *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969 (1893); *Wolferman v. Bell*, 6 Wash. 84, 23 Pac. 1017 (1893).

nature of the change in stating his defense.⁶⁸ The burden of proof problems raised by the requirement of fraud have been discussed at another place.⁶⁹

The two preceding paragraphs have emphasized that an obligor on a negotiable instrument may be totally discharged by some kinds of alterations and completions or may be liable to the extent he had originally been willing to undertake liability to others. A third possibility is that the obligor may be liable to a larger or different extent from that he had contemplated. This will be the result if he permits incomplete paper, delivered or not, to get into circulation. Paragraph (3) puts the risk of improper completion on the issuer, by permitting a due course holder to recover on the instrument as completed. There is some Washington authority consistent with this approach.⁷⁰ In the case of altered paper, however, a due course holder typically recovers only according to the *original* tenor. The only exception will be one in which the negligence of the issuer has facilitated the change under the previous Code section. Of course, authorized modifications are chargeable to the person who authorized them.⁷¹

What constitutes a material alteration is basically a question of fact, within the guidelines set out in paragraph (1). The Washington reports include two decisions which take a peculiar turn. In *Maury v. Winlock & Toledo Logging Ry.*,⁷² the instrument was on its face due August 14. It was indorsed "The correct maturity date of this acceptance is July 28, 1925, instead of August 14, as shown on its face." The actual holding in the case was that the drawer was not discharged by this alteration, because he had consented. However, there is a worrisome dictum that, absent such consent or authorization, the signer would have been discharged. This dictum was the holding

⁶⁸ *Mandel v. Sedrish*, 3 U.C.C. REP. SERV. 526 (N.Y. Sup. Ct., King's Co., 1966).

⁶⁹ See the discussion of UCC § 3-307. Most difficult to deal with is *Lembo v. Federici*, 62 Wn. 2d 972, 385 P.2d 312 (1963).

⁷⁰ *Northern Pac. Ry. v. Spokane Valley Growers Union*, 132 Wash. 607, 232 Pac. 691 (1925), 43 A.L.R. 194 (1925), 9 MINN. L. REV. 569 (1925), 32 Case & Com. 111 (1926); *Baumeister Vollmer & Scott Bank v. Talbot*, 129 Wash. 509, 225 Pac. 238 (1924). See the discussion under UCC § 2-115.

⁷¹ The statutory language is that a party is discharged "unless that party assents or is precluded from asserting the defense." A party would, for example, be held to have assented to a change made by an authorized agent. *Maury v. Winlock & Toledo Logging & Ry. Co.*, 148 Wash. 572, 269 Pac. 815 (1928). One might be precluded from asserting the defense of alteration by something akin to estoppel, where he had previously paid instruments similarly altered. *Shields v. Schorno*, 51 Wn. 2d 737, 321 P.2d 905 (1958). Perhaps even a failure to raise the defense at an appropriate time will waive it. *Johnson v. Owen*, 184 Wash. 660, 52 P.2d 302 (1935).

⁷² 148 Wash. 572, 269 Pac. 815 (1928).

in an earlier case, *Washington Finance Corp. v. Glass*.⁷³ There a note, blank as to payee, had been signed by the defendant as co-maker. The understanding was that the note would be sold to somebody as a method of raising needed cash. The face amount of the note was 15,000 dollars, but since the sole prospective purchaser would invest only 11,000 dollars, a fictitious payment of 4,000 dollars was indorsed on the note and the payee's name was filled in by the firm which advanced the 11,000 dollars.⁷⁴ The court held that this indorsement was a material alteration. A wiser decision would have been to the contrary, for alteration consists in changing the original *form* of the document.⁷⁵ The Code does not speak to this problem.

Manyfold more difficult and more frequently presented is the issue whether a particular alteration is *material*. Most of the Washington decisions seem to be clearcut.⁷⁶ *Handsaker v. Pederson*,⁷⁷ on the other hand, is not. In that case a series of notes had been executed by *A*, payable to the defendants. The defendants had, in turn, indorsed them so that they could be discounted. The bank which discounted the notes would not buy them unless *B*'s name appeared also as maker, and to please the bank *B* signed as co-maker. This was done without the knowledge or consent of the defendants, and was held to discharge them. Under the Code, a change in the number or relations of the parties is material *only* if it changes the contract of an obligor. Did the addition of a co-maker change the contract of the indorser? The answer is believed to be affirmative—the contract was changed, and thus under the Code, too, the indorser is discharged. Believed to be

⁷³ 74 Wash. 653, 134 Pac. 480 (1913), 46 L.R.A. (n.s.) 1043.

⁷⁴ A brief departure from the point being developed ought to be made to call attention to how the Code might apply. Assume, thus, that the change by the added indorsement is an alteration, and we are faced with the question whether it was fraudulent. One would believe that it is not, so the holder may proceed under UCC § 3-407(2)(b). But a literal reading of this subsection produces an anomalous result, for the maker would be liable for \$15,000 (the larger original sum) and not the smaller sum advanced. Surely something other than a literal application of the statutory language is called for.

⁷⁵ Thus in *Davis v. Gutheil*, 87 Wash. 596, 152 Pac. 14 (1915), no alteration was found in the release of a co-maker, for alteration requires a "physical change" on the instrument by which its meaning is changed. See BRANNON, *NEGOTIABLE INSTRUMENTS LAW* 1203 (7th ed. Beutel 1948), stating, "The formal character of the instrument [in *Glass*] was unchanged and the defense of alteration arises only when the form is altered, not when a collateral matter is added, whatever may be the substantial effect thereof."

⁷⁶ *Hellar v. National City Co.*, 171 Wash. 585, 18 P.2d 480 (1933) (alteration of numbering of bonds—now under Article 8); *Gleason v. Brown*, 129 Wash. 196, 224 Pac. 930 (1924) (no alteration shown on the evidence); *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941 (1910), 23 *YALE L.J.* 313 (1914) (alteration of immaterial memoranda on the note); *Lombardo v. Lombardini*, 57 Wash. 352, 106 Pac. 907 (1910) (a more doubtful case, but one where under the Code there is no fraudulent change).

⁷⁷ 71 Wash. 218, 128 Pac. 230 (1912).

controlling are Code sections 3-414 (the indorser's contract), 3-507 (dishonor, which occurs on non-payment or non-acceptance at presentment), 3-501 (presentment), and particularly 3-504(3)(a). By the latter section, the presentment may be made "to any one of two or more makers." No longer is it essential that presentment be made to all co-makers. With this understanding, it seems clear that the indorser's contract was changed by addition of a co-maker, for prior to that addition the indorser could be charged only on a presentment to *A*, the first signer. Afterwards, however, a presentment to *B*, the second co-maker, seems clearly enough to constitute a presentment. The indorser did not agree to be bound on such terms! But again, what of the requirement of *fraudulent* change? Probably the addition of the co-maker was not such a modification under the circumstances; thus, the indorser remains liable according to the original terms, *i.e.*, on a note signed by *A*. Presentment to *A* would establish the indorser's liability, were *A* to dishonor.

Section 3-408. Consideration.

Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3-305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. Nothing in this section shall be taken to displace any statute outside this Act under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense *pro tanto* whether or not the failure is in an ascertained or liquidated amount.

The first sentence of this Code section poses a problem in practice and procedure, similar to that previously presented by the NIL. Apparently, lack of consideration must be pleaded and proved by the defendant.⁷⁸ The most recent case on the point, however, raises doubt whether this is literally true, for it suggests that want or failure of consideration need not be affirmatively pleaded.⁷⁹ Precise formulation of the rule of that case is difficult, however, because it appeared that the plaintiff had alleged consideration as an affirmative matter; thus

⁷⁸ As to pleading: *Lee v. Swanson*, 190 Wash. 580, 69 P.2d 824 (1937); *Poncin v. Furth*, 15 Wash. 201, 46 Pac. 241 (1896). As to proof: *West & Wheeler v. Longtin*, 118 Wash. 575, 204 Pac. 183 (1922); *State Bank v. Morrison*, 85 Wash. 182, 147 Pac. 875 (1915); *McKenzie & Gibbons v. Oregon Improvement Co.*, 5 Wash. 409, 31 Pac. 748 (1892). See also UCC § 3-307.

⁷⁹ *Mell v. Winslow*, 49 Wn. 2d 738, 306 P.2d 751 (1957).

a general denial was held to present the appropriate issue. Some of the earlier cases seem hyper-technical in their pleading refinements. For example, it has been held that an illegal consideration cannot be shown under an allegation of no consideration.⁸⁰ The Code does not resolve this issue, although it does clearly suggest that, even as between the original parties to a note, consideration is presumed, as was true under the negotiable instruments law.⁸¹

The second portion of the first sentence, following the "except," will clarify, if not change, Washington law. Many are the instances when a person will sign or indorse a note evidencing a prior debt on which the signer was not personally bound. Earlier decisions have held the signer liable if consideration could be found, and the typical finding was that an extension of time was such,⁸² or that forbearance from suit was enough,⁸³ or that the actual signing of the instrument implemented a prior understanding committing the signer and supported by consideration.⁸⁴ The Code's statement is more forthright, somewhat in line with an earlier Washington decision.⁸⁵ To be observed is the warning that the antecedent obligation referred to need not be the obligation of the signer! In the Washington cases, where one person signed a note for which the consideration passed to another, the court has usually found some justification in imposing liability on the signer because of some actual or presumed interest he had in the welfare of the primary debtor.⁸⁶ While this concern will usually be

⁸⁰ *Lyts v. Keevey*, 5 Wash. 606, 32 Pac. 534 (1893). *But see*, *Barbre v. Hibschan*, 77 Wash. 563, 137 Pac. 997 (1914) (finding of fact that a note was executed upon "a valuable consideration" is not objectionable as too general).

⁸¹ *GINETT v. GREENE*, 87 Wash. 40, 151 Pac. 99 (1915); *McKinley v. Miner Hill Consol. Mining Co.*, 46 Wash. 162, 89 Pac. 495 (1907); *Baker-Boyer Nat'l Bank v. Hughson*, 5 Wash. 100, 31 Pac. 423 (1892).

⁸² *Shrive v. Crabtree*, 149 Wash. 500, 271 Pac. 329, *modified*, 274 Pac. 712 (1928); *Knickerbocker Co. v. Hawkins*, 102 Wash. 582, 173 Pac. 628 (1918); *Hobson v. Marsh*, 69 Wash. 326, 124 Pac. 912 (1912); *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941 (1910), 23 *YALE L.J.* 313 (1914). See Comment, *Consideration in Suretyship Contracts in Washington*, 31 *WASH. L. REV.* 76, 81 (1956).

⁸³ *Shields v. Schorno*, 51 *Wn.* 2d 737, 231 P.2d 905 (1958); *Johnson v. S. L. Savidge, Inc.*, 43 *Wn.* 2d 273, 260 P.2d 1088 (1953); *Dittmar v. Frye*, 200 Wash. 451, 93 P.2d 709 (1939); *McHugh v. Rosaia*, 184 Wash. 463, 51 P.2d 616 (1935); *Nicholson v. Neary*, 77 Wash. 294, 137 Pac. 492 (1914) (claim must be well founded); *Galena Nat'l Bank v. Ripley*, 55 Wash. 615, 104 Pac. 807 (1909), 26 *L.R.A. (n.s.)* 993.

⁸⁴ *Dittmar v. Frye*, 200 Wash. 451, 93 P.2d 709 (1939).

⁸⁵ *Wilkie v. Chandon*, 1 Wash. 355, 25 Pac. 464 (1890).

⁸⁶ *First Nat'l Bank v. Estus*, 185 Wash. 174, 52 P.2d 1243 (1936); *Mallette v. Pohlman Inv. Co.*, 179 Wash. 654, 38 P.2d 357 (1934); *Moore v. Kildall*, 111 Wash. 504, 191 Pac. 394 (1920); *Flanagan v. American Minerals Prod. Co.*, 108 Wash. 569, 185 Pac. 609 (1919); *Skagit State Bank v. Moody*, 86 Wash. 286, 150 Pac. 425 (1915), 1916A *L.R.A.* 1215; *Lumbermen's Nat'l Bank v. Ellis H. Gross Co.*, 37 Wash. 18, 79 Pac. 470 (1905).

present, or the signer would not have become involved, concern for the debtor is not an essential under the Code.

There is nothing new in the provision that total want or failure of consideration is a defense to liability, as between the parties,⁸⁷ or that partial failure is a defense pro tanto.⁸⁸ But there is a significance in the language that the failure need not be demonstrably of a liquidated amount.⁸⁹

Need it be said that only man's imagination limits those things which may serve as consideration for a promise? A note may be given in exchange for a cross note⁹⁰ or to soothe a cross woman⁹¹ and be supported by consideration. Bonus notes⁹² and bogus notes⁹³ have been found to be consideration. Other forms of consideration are

⁸⁷ Eder v. Nelson, 41 Wn. 2d 58, 246 P.2d 230 (1952); Knowlton v. Walker Timber Co., 170 Wash. 436, 16 P.2d 815 (1932); Cummings v. Wilk, 150 Wash. 512, 273 Pac. 527 (1929); American Sav. Bank & Trust Co. v. Peterson, 112 Wash. 101, 191 Pac. 837 (1920) (no want or failure of consideration shown); Hornburg v. Larson, 93 Wash. 74, 160 Pac. 11 (1916); Preas v. Vollintine, 53 Wash. 137, 101 Pac. 706 (1909); Gross v. Bennington, 52 Wash. 417, 100 Pac. 846 (1909); Hardin v. Sweeney, 14 Wash. 129, 44 Pac. 138 (1896) (no want or failure of consideration shown); Walsh v. Cooper, 10 Wash. 513, 39 Pac. 127 (1895). The decision in J. M. Arthur & Co. v. Blackman, 63 Fed. 536 (N.D. Wash. 1894) would not be expected under the Code, for the outcome seems to have been predicated on the assumption that destruction of goods in the hands of a conditional buyer amounts to a failure of consideration. This, in turn, seems to rest on the archaic Washington rule that risk of loss in such instances is on the conditional seller. While the Code is surprisingly unclear on the point, the assumption seems to be justified that the buyer will bear the risk in such instances under UCC § 9-207 (which is really not applicable, for the buyer is in possession), and UCC § 2-509.

In Pacific Northwest Inv. Soc'y v. Cunningham, 54 Wash. 284, 103 Pac. 9 (1909), a note was given in payment of an installment for a bond. The note provided, "In case this note is not paid at maturity the said Bond . . . shall be void and of no effect." The note's maker contended there was no consideration, for on non-payment the note became void and consideration failed. This argument was rejected.

⁸⁸ See Hamilton v. Ramage, 89 Wash. 649, 155 Pac. 151 (1916); Christie v. Gmeiner, 62 Wn. 2d 808, 384 P.2d 812 (1963).

⁸⁹ This language also appeared in the NIL. An instrument may be given in exchange for several considerations, only some of which fail. Clearly, the doctrine of partial failure of consideration will apply. See Burton v. Dunn, 55 Wn. 2d 368, 347 P.2d 1065 (1960); Hamilton v. Ramage, *supra* note 88; Bay View Brewing Co. v. Tecklenberg, 19 Wash. 469, 53 Pac. 724 (1898). There are other cases, however, in which a single consideration will fail to meet the expectations of the issuer of a negotiable instrument. Is this diminution in value a "partial failure of consideration?" In Washington, an affirmative answer seems to be expectable, for there is pre-Code authority pointing in that direction. See Gunderson v. Green, 154 Wash. 201, 281 Pac. 731 (1929); Hamilton v. Mihills, 92 Wash. 675, 159 Pac. 887 (1916). There is, in short, no requirement that the "partial failure of consideration" consist in the failure of a severable portion of the consideration. The Gunderson decision, *supra*, seems to suggest that this sort of partial failure will be recognized only on a showing of fraud or in a deal involving a confidential relationship.

⁹⁰ Acme Fin. Co. v. Zapffe, 161 Wash. 312, 296 Pac. 1050 (1931).

⁹¹ Opitz v. Hayden, 17 Wn. 2d 347, 135 P.2d 819 (1943).

⁹² Steeple v. Max Kuner Co., 121 Wash. 47, 208 Pac. 44 (1922).

⁹³ Whitman Realty & Inv. Co. v. Day, 161 Wash. 72, 296 Pac. 171 (1931); Moore v. Kildall, 111 Wash. 504, 191 Pac. 394 (1920); McConaughy v. Juvenal, 73 Wash. 166, 131 Pac. 851 (1913).

indicated in the footnote.⁹⁴ Two further observations remain: (1) If a particular signer of an instrument has received consideration for his obligation, he will be liable even though someone else may not have received consideration for signing;⁹⁵ (2) If the instrument reaches a due course holder, the defenses of want or failure of consideration disappear.⁹⁶

Section 3-409. Draft not an Assignment.

- (1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.
- (2) Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance.

Subsection (1) really states two rules: (1) a check or draft is not an assignment; and (2) the drawee is not liable on the instrument until acceptance or certification. The second rule is merely an offshoot of the rule stated in section 3-401 that no person is liable on an instrument unless his signature appears thereon.⁹⁷

The Washington Court has often recognized the doctrine that a check or draft is not an assignment.⁹⁸ In only one instance, *Phinney v.*

⁹⁴ *Sanders v. General Petroleum Corp.* 171 Wash. 250, 17 P.2d 890 (1933) (gasoline station); *Goodsell v. Phillips*, 130 Wash. 120, 227 Pac. 13 (1924) (accommodation party, see UCC § 3-415); *Lincoln Trust Co. v. Spangler*, 121 Wash. 267, 209 Pac. 521 (1922), 32 YALE L.J. 405 (credit to third person); *National Fin. Co. v. Emerson*, 117 Wash. 297, 201 Pac. 4 (1921) (phonographs destroyed before the buyer (maker of the notes) received them—risk of loss on buyer however); *Owen v. Bausman*, 105 Wash. 412, 177 Pac. 792 (1919) (attorney's fees); *Harris v. Johnson*, 75 Wash. 291, 134 Pac. 1048 (1913) (possessory rights to real estate); *Aurora Land Co. v. Keevan*, 67 Wash. 305, 121 Pac. 469 (1912) (loan of money).

⁹⁵ *Allen v. Chambers*, 13 Wash. 327, 43 Pac. 57 (1895).

⁹⁶ *Jamieson & McFarland v. Heim*, 43 Wash. 153, 86 Pac. 165 (1906).

⁹⁷ *Steele v. Hellar*, 127 Wash. 140, 219 Pac. 879 (1923); *Anderson v. National Bank*, 146 Wash. 520, 264 Pac. 8 (1928); *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749 (1903). There once was a provision for "virtual" acceptance by a promise to accept, as was abortively sought to be used in *Citizens Bank v. Willing*, 109 Wash. 464, 186 Pac. 1072 (1920). The Code does not provide for such acceptances. See UCC § 3-410, comment 3. There is some doubt whether the rule announced in the Code as to non-liability of a drawee applied to non-negotiable instruments. See *Bleitz v. Bryant Lumber Co.*, 110 Wash. 437, 188 Pac. 509 (1920), *affirmance upheld on rehearing per curiam*, 113 Wash. 455, 194 Pac. 550 (1920). Because of UCC § 2-805, the same rule is applied to any instrument if it lacks negotiability only because of the omission of the words "order" or "bearer."

⁹⁸ *Stern v. Lone*, 32 Wn. 2d 785, 203 P.2d 1074 (1949) (thus a preference was made on payment); *Whorf v. Seattle Nat'l Bank*, 173 Wash. 629, 24 P.2d 120 (1933); *National Mkt. Co. v. Maryland Cas. Co.*, 100 Wash. 370, 170 Pac. 1009, 174 Pac. 479 (1918), 1 A.L.R. 450 (1919); *Sheets v. Coast Coal Co.*, 74 Wash. 327, 133 Pac. 433

State,⁹⁹ was temptation to protect a holder too great. There, a check was drawn on the drawer's deathbed, payable to a lifelong friend. The drawee refused to honor the check on presentment after the drawer's death. The parties to the dispute were the lifelong friend and the state, claiming escheat. Is there really any substantial doubt that the state will lose again, even under the Code, though there is clearly no statutory warrant for such a recovery?

The drawee's liability may be found to exist quite apart from the draft itself. For example, a third party beneficiary contract may exist, in which the payee of a draft is the beneficiary and the promisor is the drawee. Such third party beneficiary contracts are enforceable by the beneficiary.¹⁰⁰ Perhaps analogously, a drawee bank may, on occasion, be held on the theory that it has accepted a "special deposit," to be used only for the advantage of a particular party.¹⁰¹ The Code does not abolish such liability above and beyond the instrument itself. The statute's provision that a check or draft is not an assignment does not, or ought not, preclude an actual express assignment of a claim. The Washington court has failed to find an assignment in situations which are, at least, highly doubtful.¹⁰²

Section 3-410. Definition and Operation of Acceptance.

- (1) Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery or notification.
- (2) A draft may be accepted although it has not been signed by

(1913); *Frederick & Nelson v. Spokane Grain Co.*, 47 Wash. 85, 91 Pac. 570 (1907); *Wadhams v. Portland, V. & Y. Ry.*, 37 Wash. 86, 79 Pac. 597 (1905); *Commercial Bank v. Chilberg*, 14 Wash. 247, 44 Pac. 264 (1896).

⁹⁹ 36 Wash. 236, 78 Pac. 927 (1904).

¹⁰⁰ *Kelley & Brodock v. Greenough*, 9 Wash. 659, 38 Pac. 158 (1894).

¹⁰¹ *Big W. Oil Co. v. Moody*, 179 Wash. 95, 35 P.2d 1093 (1934); *Laing v. First Nat'l Bank*, 138 Wash. 227, 244 Pac. 679 (1926); *Collins v. Johnson*, 136 Wash. 256, 239 Pac. 393 (1925); *Pacific Bldg. & Loan Ass'n v. Central Bank & Trust Co.*, 127 Wash. 524, 221 Pac. 313 (1923); *Beehive Marketeria v. Citizens Bank*, 126 Wash. 526, 218 Pac. 237 (1923); *Washington Shoe Mfg. Co. v. Duke*, 126 Wash. 510, 218 Pac. 232 (1923), 37 A.L.R. 611 (1925); *Raynor v. Scandinavian-American Bank*, 122 Wash. 150, 210 Pac. 499 (1922), 25 A.L.R. 716; *Central Bank & Trust Co. v. Ritchie*, 120 Wash. 160, 206 Pac. 926 (1922); *Spiroplos v. Scandinavian-American Bank*, 116 Wash. 491, 199 Pac. 997 (1921), 16 A.L.R. 181 (1922); *Hitt Fireworks Co. v. Scandinavian Am. Bank*, 114 Wash. 167, 195 Pac. 13, 196 Pac. 629 (1921); *Stephens v. Chehalis Nat'l Bank*, 80 Wash. 254, 141 Pac. 340 (1914); *Taggart v. First Nat'l Bank*, 12 Wash. 538, 41 Pac. 892 (1895).

¹⁰² Compare RESTATEMENT, CONTRACTS § 163 (1932), with *Wadhams v. Portland V. & Y. Ry.*, 37 Wash. 86, 79 Pac. 597 (1905), and *Nelson v. Nelson Bennett Co.*, 31 Wash. 116, 71 Pac. 749 (1903).

the drawer or is otherwise incomplete or is overdue or has been dishonored.

- (3) Where the draft is payable at a fixed period after sight and the acceptor fails to date his acceptance the holder may complete it by supplying a date in good faith.

Pre-Code law required that an acceptance be in writing¹⁰³ but did not require, as does the Code, that it be written on the instrument. As a consequence, there are a few early decisions trying to identify the rudiments of a written acceptance.¹⁰⁴ Those decisions will have no role under the Code; the acceptance must be on the instrument itself.

In one or two instances, payees of instruments have sought to bind a drawee who had not accepted, using some conduct on the drawee's part as a device to estop the drawee from disclaiming liability. One attempt which properly failed is *Seattle Shoe Co. v. Packard*,¹⁰⁵ in which the drawee had paid several previous drafts and because of this was sought to be held on a draft subsequently presented but not accepted. All of us who have checking accounts will realize at once that acceptance of past drafts or checks does not establish a course of conduct dictating that subsequent checks and drafts be paid or accepted. Since the relationship between the drawee and drawer which authorizes drafts is a fluid one, what the drawee might be willing to do today does not speak to what he may do tomorrow.

Also somewhat troublesome has been the predicament of a bank which pays a check bearing a forged indorsement. It has been argued that such payment is an acceptance, for it shows the willingness of the drawee to accede to the order. The decisions have properly been contrary.¹⁰⁶ Acceptance is forward looking, designed to create an obligation to pay; payment, on the other hand, is designed to terminate an obligation to pay. The Code treats these matters somewhat differently. Although payment under a forged indorsement is not acceptance or certification, the drawee has converted the instrument under section 3-419(1)(c). Since the measure of the drawee's liability is the face

¹⁰³ *Sheets v. Coast Coal Co.*, 74 Wash. 327, 133 Pac. 433 (1913); *Wadhams v. Portland V. & Y. Ry.*, *supra* note 102; *Seattle Shoe Co. v. Packard*, 43 Wash. 527, 86 Pac. 845 (1906).

¹⁰⁴ *Citizens Bank v. Willing*, 109 Wash. 464, 186 Pac. 1072 (1920); *Plaza Farmers' Union Warehouse & Elevator Co. v. Ryan*, 78 Wash. 124, 138 Pac. 651 (1914).
¹⁰⁵ 43 Wash. 527, 86 Pac. 845 (1906).

¹⁰⁶ *Whorf v. Seattle Nat'l Bank*, 163 Wash. 629, 24 P.2d 120 (1933); *Anderson v. National Bank*, 146 Wash. 520, 264 Pac. 8 (1928).

amount of the instrument, the end result is as if the drawee had certified the check.

Section 3-411. Certification of a Check.

- (1) Certification of a check is acceptance. Where a holder procures certification the drawer and all prior endorsers are discharged.
- (2) Unless otherwise agreed a bank has no obligation to certify a check.
- (3) A bank may certify a check before returning it for lack of proper indorsement. If it does so the drawer is discharged.

There have been but few cases in Washington involving the liability of a certifying bank. The supreme court has had occasion to define a certified check and to compare it with other kinds of documents,¹⁰⁷ but there is nothing in that decision material to the provisions of this section of the Code. The decision does refer obliquely to the question whether payment may be stopped on a certified check, and the Code seems to suggest that it may not.¹⁰⁸ Such protestations are analogous to the jail inmate who shouts, "You can't put me in here." Both will take a law suit to find out.

One decision spells out the liability of a bank which certifies a check drawn against insufficient funds, stating: "It has been repeatedly held that a bank certifying a check without funds is not liable thereon, except to a bonafide holder for value."¹⁰⁹ This is in essence the rule announced by the Code in section 3-418. A separate statute makes such a certification a gross misdemeanor and further provides: "Any such check so certified by a duly authorized person shall be a good and valid obligation of the bank or trust company in the hands of an innocent holder."¹¹⁰ The words "innocent holder" in that statute probably must be equated to "holder in due course."

Section 3-412. Acceptance Varying Draft.

- (1) Where the drawee's proffered acceptance in any manner varies the draft as presented the holder may refuse the acceptance and treat the draft as dishonored in which case the drawee is entitled to have his acceptance cancelled.

¹⁰⁷ *Kohler v. First Nat'l Bank*, 157 Wash. 417, 289 Pac. 47 (1930).

¹⁰⁸ UCC §§ 4-303, -403.

¹⁰⁹ *National City Bank v. Titlow*, 233 Fed. 838, 841 (W.D. Wash. 1916).

¹¹⁰ WASH. REV. CODE § 30.16.010 (1961).

- (2) The terms of the draft are not varied by an acceptance to pay at any particular bank or place in the United States, unless the acceptance states that the draft is to be paid only at such bank or place.
- (3) Where the holder assents to an acceptance varying the terms of the draft each drawer and indorser who does not affirmatively assent is discharged.

Although there have been cases in Washington in which conditional acceptances have been taken by the holder of an instrument, no decision has been discovered respecting the effect thereof on the liability of parties. In *Schwabacher Hardware Co. v. Miller Sawmill Co.*,¹¹¹ the drawee accepted a draft "payable out of proceeds of N.W. Fisheries Co. contract when same becomes available." Under the Code, the holder would have the option to refuse this acceptance, and if he accepted it, the drawer and indorsers would be discharged. The actual outcome of the case, that the drawee was liable to the holder and was not permitted to apply such proceeds to a debt due it, would not be modified by the Code.

The Code, likewise, does not deal specifically with the problem raised in *Taylor v. Parish*,¹¹² where an acceptance was ambiguous. Parol evidence was admitted to clarify and remove the ambiguity. There is no reason to foresee a different decision from that reached.¹¹³ Sometimes the language used will not import an assent to be bound on any terms, in which case there is no acceptance¹¹⁴ and the instrument is dishonored.¹¹⁵

Subparagraph (2) rephrases NIL section 140¹¹⁶ which does not seem to have been involved in litigation. Apparently trade acceptances are frequently so written as to permit this kind of acceptance, and the Code makes specific incorporation of such language unnecessary.¹¹⁷

Section 3-413. Contract of Maker, Drawer and Acceptor.

- (1) The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as

¹¹¹ 90 Wash. 193, 155 Pac. 767 (1916).

¹¹² 86 Wash. 141, 149 Pac. 635 (1915).

¹¹³ See UCC § 3-119, comment 1.

¹¹⁴ *Plaza Farmers' Union Warehouse & Elevator Co. v. Ryan*, 78 Wash. 124, 138 Pac. 651 (1914).

¹¹⁵ UCC § 3-507(1) (a).

¹¹⁶ WASH. REV. CODE § 62.01.140 (1955).

¹¹⁷ See 1 PATON'S DIGEST 6, 44 (1940).

completed pursuant to Section 3-115 on incomplete instruments.

- (2) The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse.
- (3) By making, drawing or accepting the party admits as against all subsequent parties including the drawee the existence of the payee and his then capacity to indorse.

Subsection (1) states succinctly the liability of primary parties to negotiable instruments. There are no stated conditions precedent to the liability of the maker and acceptor, in contrast to the situation of the drawer and, in a later section, of the indorser.¹¹⁸ In at least one situation, however, presentment to one other than a maker or acceptor is a condition precedent to his liability: the case of a note or acceptance payable at a bank. The Code specifically requires presentment to the bank and, under certain circumstances, sanctions this by discharge of the maker or acceptor.¹¹⁹ Washington numbers among its decisions the case of *Bardsley v. Washington Mill Co.*,¹²⁰ in which the note in controversy called for payment "at Spokane, Washington." An installment of interest was not paid, and the holder, without presenting the instrument in Spokane, brought suit, relying on an acceleration clause. In holding the suit to be premature, the court relied upon the "general law" rather than the NIL,¹²¹ concluding that the instrument was payable at the place of business (in Spokane) of the maker. The holder's failure to give the maker an opportunity to pay there precluded acceleration. Although this decision has been criticized,¹²² there is no reason to foresee a different result under the Code.¹²³

¹¹⁸ UCC § 3-414.

¹¹⁹ UCC § 3-501(1) (c). There would be no departure from the decision reached in *Paoella v. Brunner*, 116 Wash. 677, 200 Pac. 481 (1921), for unless the bank at which the instrument is domiciled fails, the drawer, maker or acceptor is not discharged.

¹²⁰ 54 Wash. 553, 103 Pac. 822 (1909).

¹²¹ NIL § 70 [WASH. REV. CODE § 62.01.070 (1955)] stated: "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." The Court did not feel that the reference to "Spokane, Washington" designated a "special place" within the meaning of this language.

¹²² *Harrison v. Beals*, 111 Ore. 563, 22 Pac. 728, 732 (1924).

¹²³ UCC § 3-604(3), in covering the point, eliminates the word "special." One has difficulty, however, in adapting the language of that section to the specific case, for

Because the maker's liability is primary, the mere circumstance that the holder is in possession of funds belonging to a co-maker does not require the holder to set-off these funds. He may proceed against the maker without first using such assets.¹²⁴ It would seem that one who holds a note merely as collateral may, in the same fashion, enforce the maker's liability on that note without the necessity of proceeding on the principal indebtedness.¹²⁵

The obligation of a maker or acceptor may be curtailed or even eliminated. For example, an acceptance made payable out of money due on a building contract creates no liability if there is no money thus due.¹²⁶ Similarly, a note which provides that in case suit is started the payee will look solely to the mortgaged property given to secure the note, and that no deficiency will be entered against the maker, will not support an action to enforce personal liability of the maker for principal or interest.¹²⁷ The Code expressly provides, in similar vein, that a drawer may eliminate recourse against himself.¹²⁸

The drawer's liability has also been held to be eliminated, at least vis-à-vis the drawee, by an appropriate reference to the background of the instrument, showing it to have been drawn under a letter of credit.¹²⁹ The Code covers this point in another section.¹³⁰ In most circumstances, however, the drawer's liability is a secondary one requiring, as the Code suggests, compliance with certain conditions precedent to liability.¹³¹

Subsection (3) carries forward a provision of the NIL¹³² which has been a source of trouble to the Washington court. Observation of the wording of the section demonstrates that the drawer admits the existence of the payee and his capacity to indorse. This means that

one must be doubtful how the maker would proceed to show he was ready and able to pay "at every place of payment specified."

¹²⁴ *Bank of Cal. v. Starrett*, 110 Wash. 231, 188 Pac. 410 (1920), 9 A.L.R. 177, 90 CENT. L.J. 394.

¹²⁵ *Scandinavian Am. Bank v. Appleton*, 63 Wash. 203, 115 Pac. 109 (1911).

¹²⁶ *Brinker v. Peoples Sav. Bank*, 144 Wash. 93, 256 Pac. 1025 (1927). Cf. *Schwabacher Hardware Co. v. Miller Sawmill Co.*, 90 Wash. 193, 155 Pac. 767 (1916), where the condition of the acceptance was in fact met. See also UCC § 3-412.

¹²⁷ *Saulsberry v. Wood*, 180 Wash. 340, 39 P.2d 592 (1935).

¹²⁸ UCC § 3-413(2).

¹²⁹ *Bank of East Asia, Ltd. v. Pana*, 140 Wash. 603, 249 Pac. 1060 (1926), 2 WASH. L. REV. 130 (1927).

¹³⁰ UCC § 5-111.

¹³¹ *Fick v. Jones*, 185 Wash. 365, 55 P.2d 334 (1936); *Spiroplos v. Scandinavian-American Bank*, 116 Wash. 491, 199 Pac. 997 (1921), 16 A.L.R. 181. This latter decision has been questioned, although not on the point here involved, in *Raynor v. Scandinavian-American Bank*, 122 Wash. 150, 210 Pac. 499 (1922), 25 A.L.R. 716 (1923).

¹³² NIL § 62 [WASH. REV. CODE § 62.01.062 (1955)].

as to a holder claiming under the indorsement of the payee, the maker is not permitted to gainsay the effectiveness of the indorsement made by the payee.¹³³ However, it does not mean that the drawer, maker or acceptor also admits that the payee did in fact indorse. A decision with dictum to the contrary on this point ought not be followed.¹³⁴

Section 3-414. Contract of Indorser; Order of Liability.

- (1) Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.
- (2) Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument.

An indorser's liability is of two kinds: (1) his contract to pay the instrument; and (2) his warranties about the instrument. The second form of liability is stated in another section of the Code.¹³⁵ In the presently discussed section is stated the contractual liability of the indorser—he must pay according to the tenor of the instrument at the time he indorsed. Thus, an indorser of a note promising payment of attorney's fees may be held liable for such fees.¹³⁶ This liability, however, is conditional on dishonor, notice and, in some instances, protest. Failure to comply with those conditions discharges his liability completely.¹³⁷ Compliance with those conditions, however, permits the holder or any subsequent indorser who has paid¹³⁸ to bring a

¹³³ *Castor v. Peterson*, 2 Wash. 204, 26 Pac. 223 (1891).

¹³⁴ *National Bank of Commerce v. Seattle Nat'l Bank*, 109 Wash. 312, 187 Pac. 342 (1920). See BRANNON, *NEGOTIABLE INSTRUMENTS LAW* 330 (7th ed. Beutel 1948).

¹³⁵ UCC § 3-417(2). Observe that the warranty liability is predicated on the act of transfer, not the act of indorsing. Thus an accommodation indorser who does not transfer makes no warranties.

¹³⁶ *Paragon Buying Serv., Inc. v. Sylbay Treaty Co.*, 3 U.C.C. REP. SERV. 67 (N.Y. Sup. Ct. 1966).

¹³⁷ UCC § 3-501. *Accord*, *Clausen v. Forehand*, 152 Wash. 310, 277 Pac. 827 (1929); *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113 (1906).

¹³⁸ *Downie v. Cooledge*, 48 Wn. 2d 485, 294 P.2d 926 (1956). The Code's rule is more extensive than that announced in *Downie*, for there the indorser, plaintiff, who was entitled to recover from a prior indorser, had in fact endorsed with recourse. Under the Code, he could recover even though *his* indorsement was without recourse.

successful action against the indorser alone¹³⁹ or with the maker.¹⁴⁰ There is no power granted to an indorser, similar to that of a surety, to require suit first against the principal obligor.¹⁴¹

The appropriate way to obviate this liability is to indorse "without recourse," placing these words prior to the signature. If the words appear below the signature, a parol evidence rule problem arises, for evidence will be necessary to relate the disclaimer to the signature. There is no definite Washington decision on this point.¹⁴² There are decisions, however, on other aspects of the parol evidence rule, but their lack of agreement is disappointing. All too frequently an indorser will be induced to sign by oral assurances that he will not be held liable. Bolstered by such assurances, he will sign his name without bothering to limit his liability by use of "without recourse." The emotional pulls are pretty strong in such cases, but the Official Comment is hard-hearted: the disclaimer may not be shown by parol.¹⁴³ The decisional law in Washington is ample to support almost anything a judge decides to do. He may exclude the evidence,¹⁴⁴ or admit it generally,¹⁴⁵ or for the limited function of establishing lack of consideration or fraud.¹⁴⁶ There is even a hint of another possible attack: admit the evidence for purposes of reformation, but not otherwise.¹⁴⁷ One would suppose that the Official Comment's strong language would be rather persuasive in this state of the decisional law. On the other hand, the Code itself permits use of parol to show the order in which persons signed. This is consistent with pre-code decisional law,¹⁴⁸ yet somewhat difficult to reconcile with the previously firm adherence to the parol evidence rule's exclusionary effect.

Pre-Code Washington decisions are to the clear effect that one who "indorses" a non-negotiable instrument is not liable as indorser but only as assignor.¹⁴⁹ These decisions are not valid if the only reason

¹³⁹ *Petri v. Manny*, 99 Wash. 601, 170 Pac. 127 (1918), 1 A.L.R. 1595; *Ginnett v. Greene*, 87 Wash. 40, 151 Pac. 99 (1915).

¹⁴⁰ *Gilmore v. Skookum Box Factory*, 20 Wash. 703, 56 Pac. 934 (1899); *Main v. Johnson*, 7 Wash. 321, 35 Pac. 67 (1893).

¹⁴¹ *Allen v. Chambers*, 13 Wash. 327, 43 Pac. 57 (1895). See WASH. REV. CODE § 19.72.100 (1959).

¹⁴² *Kolmitz v. Jansen*, 130 Wash. 308, 313, 226 Pac. 1023, 1026 (1924) (even if evidence admissible, on facts the indorser was liable).

¹⁴³ UCC § 3-414, comment 1.

¹⁴⁴ *Fidelity Nat'l Bank v. E. H. Stanton Co.*, 93 Wash. 344, 160 Pac. 960 (1916).

¹⁴⁵ *White v. Armstrong*, 166 Wash. 346, 7 P.2d 12 (1932).

¹⁴⁶ *Nethercutt v. Hopkins*, 38 Wash. 577, 80 Pac. 798 (1905).

¹⁴⁷ *Walsh v. Westcoatt*, 131 Wash. 314, 230 Pac. 160 (1924).

¹⁴⁸ *Tacoma Mill Co. v. Sherwood*, 11 Wash. 492, 39 Pac. 977 (1895).

¹⁴⁹ *Wm. P. Harper & Son v. Pacific Power & Light Co.*, 143 Wash. 456, 255 Pac.

for non-negotiability is the absence of the critical words "order" or "bearer." A very significant Code provision makes this section of the Code determinative of the liability of one who indorses such an instrument.¹⁵⁰

Section 3-415. Contract of Accommodation Party.

- (1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.
- (2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.
- (3) As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.
- (4) An indorsement which shows that it is not in the chain of title is notice of its accommodation character.
- (5) An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

The interaction of legal principles separately developed in distinct categories of the law frequently poses difficult problems. No exception is the admixture of negotiable instruments principles with principles of suretyship. The surety who indorses a note is a secondary party under either set of doctrines. His liability, thus, will be subject to defenses arising from three principal sources: (1) the law of simple contracts, such as the requirement of consideration, the effect of payment, and the like; (2) the law of negotiable instruments, such as the requirements of presentment, notice of dishonor, protest and the like; and (3) the law of suretyship, with its occasional discharge of the surety because of conduct involving a release or an extension of time to the principal debtor without the consent of the surety. So long as the surety occupied the secondary position on the note, no really great problems were presented under the pre-Code law.

949 (1927); *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159 (1914), 3 CALIF. L. REV. 144 (1915).

¹⁵⁰ UCC § 3-805.

Not infrequently, the actual relationship existing between parties to a note transaction will be misrepresented by the form of the note. The principal debtor, that is to say the one who, when the smoke clears, ought to bear the risk of having to pay, may appear on the note as a secondary party. This comes about in a situation wherein an obliging fellow makes a note payable to the principal debtor in order that the principal debtor may cash the note or otherwise use it to put himself in funds. The principal debtor appears as payee and, when he borrows the money, as indorser. Whatever the circumstances revealed by the note, the true relationship is such that ultimate responsibility ought to rest on the fellow who was befriended.

Section 3-415 of the Code deals with this kind of problem, but in subparagraph (1) the Code emphasizes that the reason why the principal debtor ought to bear the ultimate burden of payment is a consequence of the relationship that exists, not because of any lack of consideration for the friend's signing. The presence of consideration for the promise was thought to be determinative under pre-Code law.¹⁵¹ It does not determine whether or not a particular signature is an accommodation signature under the Code.¹⁵² Of course, absence of consideration may constitute a defense to the surety because his liability is contractual. Further, the nature of the suretyship contract is such that when community liability is sought to be imposed, absence of benefit to the community may be a defense.¹⁵³ Fundamental to the transaction, then, is an underlying suretyship relationship.¹⁵⁴

The note, however, says otherwise, and by virtue of paragraph (2) of section 3-415, the liability of the signer to one who takes for value is in the capacity in which he has signed. Thus, a maker is primarily liable, not entitled to presentment, notice and protest.¹⁵⁵ An indorser, however, whether he indorses before or after maturity, is secondarily liable, entitled to have presentment first made to the maker.¹⁵⁶ So

¹⁵¹ *Eder v. Nelson*, 41 Wn. 2d 58, 247 P.2d 230 (1952); *Lincoln Trust Co. v. Spangler*, 121 Wash. 267, 209 Pac. 521 (1922), 32 YALE L.J. 405 (1923).

¹⁵² UCC § 3-415, comment 2.

¹⁵³ *Peterson v. Zimmerman*, 142 Wash. 385, 253 Pac. 642 (1927).

¹⁵⁴ Corporate power to become a surety may be a factor, as in *O'Brien v. Turner*, 174 Wash. 266, 24 P.2d 641 (1933). Certain statutory provisions respecting suretyship will also become involved, as in *Kirkland Land & Improvement Co. v. Jones*, 18 Wash. 407, 51 Pac. 1043 (1898).

¹⁵⁵ *In re Hemrich*, 187 Wash. 21, 59 P.2d 748 (1936); *Bank of Cal. v. Starrett*, 110 Wash. 231, 188 Pac. 410 (1920), 9 A.L.R. 177, 90 CENT. L.J. 394; *First Bank v. Tjosevig*, 138 Wash. 231, 244 Pac. 736 (1926). To the extent that these cases may mean something more than this, they ought not be followed. That is to say, to the extent that they suggest that suretyship defenses are unavailable on negotiable instruments, they are rejected by the Code.

¹⁵⁶ The Washington decisions have not been too clear on this matter, for they

long as value is given for the instrument prior to maturity, the accommodation signer is liable even though the holder knew of the fact that the signature was an accommodation to another.¹⁵⁷ Usually, consideration moves to the person accommodated and this is sufficient to support the liability of the accommodation party.¹⁵⁸ Thus an extension of time of payment of a debt will be consideration for the added signature of a surety.¹⁵⁹ The detailed circumstances which under pre-Code law have been adequate to impose liability on an accommodation party will not be recited here,¹⁶⁰ because the Code has introduced something new. Let it be supposed that a debt on a note is due and without any extension or other change in the obligation a new signature is put on the note at the request of the holder. Pre-Code law would suggest that there is no consideration for the added signature, but the Code is to the contrary.¹⁶¹ The effect of an antecedent debt as consideration has, in this situation, been expanded.

The preceding paragraph has expanded the language of paragraph (2) of section 3-415 to demonstrate that the form of the note will determine the relationship of the parties insofar as negotiable instruments principles are significant. One who purchases a note without awareness of the underlying background is entitled to whatever solace he can gain from proceeding on the note as it is written. One who knows that there is an underlying suretyship relationship involved, however, meets other obstacles. The technicalities are familiar—a surety will be discharged by extension of time to which he has not consented, absent reservation of rights, or by releases of the principal debtor, and the like. The details are covered in another Code section,¹⁶² but by virtue of paragraph (3) of the presently discussed section, parol evidence is admissible to show the true underlying

seem to suggest that all accommodation parties, whatever their position on the note, occupy precisely the same position. *Continental Mut. Sav. Bank v. Elliott*, 166 Wash. 283, 6 P.2d 638 (1932); *Northern Bank & Trust Co. v. Graves*, 79 Wash. 411, 140 Pac. 328 (1914); *Gleeson v. Lichty*, 62 Wash. 656, 114 Pac. 518 (1911).

¹⁵⁷ *Goodsell v. Phillips*, 130 Wash. 120, 227 Pac. 13 (1924); *Metzger v. Sigall*, 83 Wash. 80, 145 Pac. 72 (1914); *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254 (1896).

¹⁵⁸ This point seems to have been overlooked in *Weeks v. Bussell*, 8 Wash. 440, 36 Pac. 265 (1894).

¹⁵⁹ *Katz v. Judd*, 108 Wash. 557, 185 Pac. 613 (1919); *Rattelmiller v. Stone*, 28 Wash. 104, 68 Pac. 168 (1902).

¹⁶⁰ Illustrative, along with the cases cited in the discussion of WASH. REV. CODE § 62A. 3-408, are *Pierce v. Lowenthal*, 161 Wash. 336, 295 Pac. 1021 (1931); *Northern Bank & Trust Co. v. Coffin*, 113 Wash. 326, 194 Pac. 404 (1920); *Nicholson v. Neary*, 77 Wash. 294, 137 Pac. 492 (1914); *Wilkie v. Chandon*, 1 Wash. 355, 25 Pac. 464 (1890).

¹⁶¹ UCC § 3-408. Cf. *Dittmar v. Frye*, 200 Wash. 451, 93 P.2d 709 (1939).

¹⁶² UCC § 3-606.

situation, and thus to open the door for those defenses, except as to a holder in due course without knowledge of the accommodation.¹⁶³ This does not mean that the parol evidence bars are down for all purposes. Thus one may not show that there was an oral agreement that he was not to be held liable at all.¹⁶⁴ But one who knows of the suretyship relationship must respect it insofar as suretyship defenses are concerned.¹⁶⁵ Such knowledge may be carried on the instrument itself in the case of an anomalous indorsement, not in the chain of title,¹⁶⁶ by virtue of paragraph (4). Another instance in which the form of the note will carry notice of the existence of a suretyship relation is a signature by one of two or more primary parties with the added words, "Payment guaranteed." By virtue of section 3-416(5) a presumption of accommodation arises.

The preceding discussion has involved the rights of the holder of the instrument, the creditor in the suretyship pattern. The final paragraph of section 3-415 controls the relative rights and duties of the accommodating and accommodated party *inter se*. The latter may not profit at the expense of the former, and so may not force ultimate responsibility on the surety.¹⁶⁷ If the surety pays, accordingly, he may have reimbursement which, under the Code, is a right of recourse on the

¹⁶³ The admissibility of parol evidence to establish the suretyship relationship seems to have been recognized in Washington. *Eder v. Nelson*, 41 Wn. 2d 58, 247 P.2d 230 (1952); *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724 (1906); *Bank of B.C. v. Jeffs*, 15 Wash. 230, 46 Pac. 247 (1896). There was, however, because of the wording of NIL § 119 [Wash. Rev. Code § 62.01.119 (1955)], some doubt whether this permitted use of all suretyship defenses in favor of one who signed as maker. *Dove v. Cowlitz Valley Bank*, 191 Wash. 429, 71 P.2d 555 (1937); *In re Henrich*, 187 Wash. 21, 59 P.2d 748 (1936); *Bradley Eng'r & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170 (1910).

¹⁶⁴ *Woodland State Bank v. McKean*, 118 Wash. 451, 203 Pac. 939 (1922), 22 COLUM. L. REV. 481 (1922); *Bank of Cal. v. Starrett*, 110 Wash. 231, 188 Pac. 410 (1920), 9 A.L.R. 177, 90 CENT. L.J. 394. Cf. *Raby v. Commercial Banking Corp.*, 3 U.C.C. REP. SERV. 491 (Pa. Sup. Ct. 1966) (accommodation nature of signature may be shown to defeat defense of usury where primary obligor was a corporation).

¹⁶⁵ This has not always been the Washington rule insofar as accommodation makers are concerned. *Kuhn v. Groll*, 118 Wash. 285, 203 Pac. 44 (1922). The matter may also be affected by collateral matters, such as reservation of rights or the existence of indemnity for the surety. *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669 (1899); *Boston Nat'l Bank v. Jose*, 10 Wash. 185, 38 Pac. 1026 (1894).

¹⁶⁶ As was decided in *Clausen v. Forehand*, 152 Wash. 310, 277 Pac. 827 (1929), the accommodation nature of the indorsement does not affect the requirement of notice of non-payment.

¹⁶⁷ *Lyons v. McNaughton*, 65 Wn. 2d 297, 396 P.2d 885 (1964); *Eder v. Nelson*, 43 Wn. 2d 536, 262 P.2d 180 (1953); *Eder v. Nelson*, 41 Wn. 2d 58, 247 P.2d 230 (1952); *Holland v. Tjosevig*, 109 Wash. 142, 186 Pac. 317 (1919), 90 CENT. L.J. 215 (1920); *Pease v. Syler*, 78 Wash. 24, 128 Pac. 310 (1914). A factual question is presented, however, whether the suretyship relationship actually exists. *Bettinger v. Scully*, 36 Wash. 596, 79 Pac. 203 (1905); *Shead v. Moore*, 31 Wash. 283, 71 Pac. 1010 (1903); *Furth v. Baxter*, 24 Wash. 608, 64 Pac. 798 (1901).

instrument itself.¹⁶⁸

In some states, a sixth paragraph is added, imposing warranty liability upon an accommodation party.¹⁶⁹ This points up a major point: the liability of an accommodation party who signs as indorser is that stated in section 3-414. Because the accommodation party is usually not a transferor or presenter of the instrument, the added warranty liability of section 3-417 is not imposed.

Section 3-416. Contract of Guarantor.

- (1) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.
- (2) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.
- (3) Words of guaranty which do not otherwise specify guarantee payment.
- (4) No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others.
- (5) When words of guaranty are used presentment, notice of dishonor and protest are not necessary to charge the user.
- (6) Any guaranty written on the instrument is enforceable notwithstanding any statute of frauds.

The observation made in introducing the discussion of the preceding section regarding the intermingling of legal principles derived from different categories is relevant here. One indorsing an instrument, adding words such as "Payment guaranteed," or "Collection guaran-

¹⁶⁸ This would seem to change the rule adopted in *Austin v. Hamilton*, 7 Wash. 382, 34 Pac. 1097 (1893). In that case the guarantor's right of reimbursement was distinguished from his right on the note. Thus, a provision for attorney fees in the note was held inapplicable to the suit for reimbursement.

¹⁶⁹ Penney, *New York Revisits the Code: Variations in the New York Enactment of the Uniform Commercial Code*, 62 COLUM. L. REV. 992, 1000 (1962).

teed," *on the instrument* prior to his signature becomes involved with two branches of the law, the law of suretyship and guaranty and the law of negotiable instruments. This Code section details the consequences of such an admixture, but does not go much beyond: it is not a restatement of the entire law of suretyship. It does, however, have an impact on signatures on non-negotiable instruments by virtue of section 3-805.

The signatures described in the preceding paragraph serve two functions: first, they transfer the instrument;¹⁷⁰ second, they create liability on the signer's part. The second function is covered by this section.

"Payment guaranteed" is essentially a waiver of the normal conditions precedent to the liability of an indorser.¹⁷¹ Washington's court was called upon at an early day to interpret these words on the back of a negotiable instrument: "For value received, payment of the within, at maturity, is hereby guaranteed, waiving demand, notice and protest. Henry Hewitt, Jr. For thirty days."¹⁷² Within the thirty day period, the signer was liable as if he had been the maker, insofar as negotiable instruments law principles are concerned. But what was his liability on the thirty-first day and thereafter? The court seems to have read out the thirty-day limitation, choosing to hold that the waiver was effective beyond that period. Perhaps a fairer interpretation would have been that the waiver was effective only for the thirty day period, but beyond that time the liability was that of the normal indorser. After all, his signature on the instrument meant something quite different from his signature on a separate document. It would, thus, scarcely be appropriate that the signer's liability terminate at the end of the thirtieth day.

"Payment guaranteed" prior to an indorsement raises not only negotiable instruments law problems, which have been discussed, but problems of suretyship and guaranty as well. The extent to which suretyship principles apply would seem to be determined by the contract undertaken. Although the Official Comment and the preceding paragraph of this discussion have referred to the signer's liability as that of co-maker, this must not be taken literally, for essential to the obligation is a recognition of suretyship principles. One would not doubt, for example, that an extension of time granted to the actual

¹⁷⁰ This aspect is governed by UCC § 3-202(4).

¹⁷¹ *Sherman, Clay & Co. v. Turner*, 164 Wash. 257, 2 P.2d 688 (1931).

¹⁷² *Seward v. Derickson*, 12 Wash. 225, 40 Pac. 939 (1895).

maker would discharge the guarantor, unless there was a reservation of rights or consent.¹⁷³ This defense arises from the law of suretyship, not from the law of negotiable instruments, and is thus preserved.

On the other hand, the doctrine of *Pain v. Packard*¹⁷⁴ as statutorily codified in Washington,¹⁷⁵ would not seem applicable. That is to say, the guarantor of payment is not permitted to require the creditor to proceed first against the primary maker. A recent Washington decision, therefor, is expected to be followed under the Code.¹⁷⁶ The explanation is that requiring suit against the maker as a condition precedent to a claim against the guarantor is not consistent with the guarantor's contract. He could have obtained the benefit of such a condition by using different words, and the Code permits this by the use of "Collection guaranteed."¹⁷⁷

Since most of the details of this Code section are without prior authority in Washington, this section will fill gaps in the law.

Section 3-417. Warranties on Presentment and Transfer.

- (1) Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that
- (a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and
 - (b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith
 - (i) to a maker with respect to the maker's own signature; or

¹⁷³ As in *Van de Ven v. Overlook Mining & Dev. Co.*, 146 Wash. 332, 262 Pac. 981 (1928). Analogously, a guarantor who pays may recover from the primary obligor. *Austin v. Hamilton*, 7 Wash. 382, 34 Pac. 1097 (1893).

The question of the signer's power to execute a guaranty would also be raised. *Creditors' Claim & Adjustment Co. v. Northwest Loan & Trust Co.*, 81 Wash. 247, 142 Pac. 670 (1914), 1917A L.R.A. 737.

Obviously, consideration would be required for the guaranty, but one would think that UCC § 3-408 would apply to make this an affirmative defense placing the burden upon the signer, as in *O'Brien v. Turner*, 174 Wash. 266, 24 P.2d 641 (1933). Any consideration, such as an extension of time, would bind the guarantor. *Puget Sound Nat'l Bank v. Olsen*, 174 Wash. 200, 24 P.2d 613 (1933). Indeed, under UCC § 3-408, it may be doubted whether an extension is required.

Alteration of the contract would be a defense. *O'Connor v. Slatter*, 48 Wash. 493, 93 Pac. 1078 (1908).

¹⁷⁴ 13 Johns. R. 174 (N.Y. Sup. Ct. 1816).

¹⁷⁵ WASH. REV. CODE §§ 19.72.100-101 (1959).

¹⁷⁶ *Amick v. Baugh*, 66 Wn. 2d 298, 402 P.2d 342 (1965).

¹⁷⁷ *Accord*, *Macy v. Inland Empire Land Co.*, 145 Wash. 523, 260 Pac. 1073 (1927).

- (ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
 - (iii) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and
- (c) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith
- (i) to the maker of a note; or
 - (ii) to the drawer of a draft whether or not the drawer is also the drawee; or
 - (iii) to the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance provided "payable as originally drawn" or equivalent terms; or
 - (iv) to the acceptor of a draft with respect to an alteration made after the acceptance.
- (2) Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that
- (a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and
 - (b) all signatures are genuine or authorized; and
 - (c) the instrument has not been materially altered; and
 - (d) no defense of any party is good against him; and
 - (e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.
- (3) By transferring "without recourse" the transferor limits the obligation stated in subsection (2) (d) to a warranty that he has no knowledge of such a defense.
- (4) A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this

section, but if he makes such disclosure warrants only his good faith and authority.

Prior to the enactment of the Code, a person who paid an instrument was not protected by warranties made on indorsement or transfer.¹⁷⁸ To recover payment, he had to sue on the theory of money paid under mistake of fact, often with a gloss of comparative negligence.¹⁷⁹ The consequences of this absence of warranty are many, but they have not been of particular concern in Washington. In two sections, the Code makes a sweeping change by imposing warranty liability in favor of one who pays an instrument.¹⁸⁰ There are many details of this liability yet to be judicially worked out. One such concerns the complexities of the Statute of Limitations: when does the cause of action accrue, and is liability based on an oral or written contract?¹⁸¹ Another concerns the extent to which diligence on the part of the payor is a factor. Strangely enough, the Code seems to have two inconsistent provisions, requiring prompt action in one place,¹⁸² but not in the presently discussed section.¹⁸³ In one instance, that of missing indorsements, there may be room for difference of opinion as to whether an effective warranty is made, although superficially it would appear that absence of an indorsement necessary to the title of the presenter would equate to a breach of the warranty of title.¹⁸⁴ The circumstance of the forged indorsement is clearer, for certainly the forgery of an indorsement necessary to the presenter's title is a nullity¹⁸⁵ and thus the title is defective.

The circumstance of the forged signature of a maker or drawer is somewhat more complex. If the instrument is presented directly to the maker or drawer, he ought to know whether he executed the instrument or not, and if he pays there is little in his favor warranting recovery. Whether this is true of a large and complex operation, such as the United States Treasury, is subject to controversy, but the Code

¹⁷⁸ *National Bank of Commerce v. Seattle Nat'l Bank*, 109 Wash. 312, 187 Pac. 342 (1920).

¹⁷⁹ *Canadian Bank of Commerce v. Bingham*, 30 Wash. 484, 71 Pac. 53 (1902), 60 L.R.A. 955.

¹⁸⁰ UCC §§ 3-417, 4-207.

¹⁸¹ *United States v. Manufacturers Hanover Trust Co.*, 231 F. Supp. 160 (S.D.N.Y. 1964); see Luedemann, *Warranties on the Transfer of a Negotiable Instrument—UCC 3-417(2)*, 17 STAN. L. REV. 77, 82 (1964).

¹⁸² UCC § 4-207(4).

¹⁸³ For criticism, see Luedemann, *supra* note 181.

¹⁸⁴ O'Malley, *Liability for Missing Indorsements*, 81 BANKING L.J. 659 (1964).

¹⁸⁵ UCC § 3-404.

does not distinguish between large and small operators.¹⁸⁶ If the presenter actually knew that the signature of the maker or drawer was forged, however, his position in equity is hardly superior to the drawer or maker, so recovery is plausible. The wording of the Code on this point, however, seems destined to cause trouble, for it seems to assume that such a person may, with knowledge of the forgery, still act in good faith so as to keep the payment.¹⁸⁷

The forgery of a drawer's signature followed by payment by the drawee is the classic *Price v. Neal*¹⁸⁸ pattern. The drawee is not permitted to recover such payment, for under the Code the presenter warrants only that he does not know that there was a forgery. If the recipient of the money actually knew, then, when he received the payment that the signature of the drawer was forged, the paying drawee could recover on breach of warranty theory. This is the only exception, and carelessness on the part of the recipient of the money is of no import.

Finally, the Code deals with altered instruments. The traditional attitude has been that a drawee may be charged with knowledge of the drawer's signature, but not with knowledge of the form of the instrument at the time it was drawn. This being the underlying assumption, a drawee was permitted to recover payments made on altered instruments. The Code adopts this view. Payments made by primary parties, however, are treated differently. A maker of a note may be held to know the tenor of the instrument he executed, so if it is later altered and presented for payment, he should not pay the altered tenor. If he does, his payment will be final.¹⁸⁹ Again, the relative equities of the payor and payee are germane, and a non-due-course holder is disfavored by the Code's imposition of a warranty against alteration in this instance.¹⁹⁰

Paragraph (2) of this Code section is not a substantial departure from prior law, for the warranties on transfer have long been established.¹⁹¹ To be observed, however, is the theory of the Code: the warranties are imposed as a consequence of the *transfer* of the paper.

¹⁸⁶ Cf. *United States v. National Bank of Commerce*, 205 Fed. 433 (9th Cir. 1913).

¹⁸⁷ See UCC HANDBOOK 117-18 (1964); Tull, *New Mexico: Uniform Commercial Code: Warranties and the Myth of the "Shelter Provision,"* 4 NAT. RES. L.J. 398 (1964).

¹⁸⁸ 3 Burr. 1345 (1762).

¹⁸⁹ UCC § 3-418.

¹⁹⁰ UCC § 3-417(1) (c).

¹⁹¹ NIL §§ 65, 66 [WASH. REV. CODE §§ 62.01.065, .066 (1955)].

The indorsement is important only as a mechanism of transfer. Thus, an accommodation indorser will not be liable for the warranties here stated.¹⁹²

The warranties imposed are straight-forward enough, and they may be modified only modestly by the use of a qualified indorsement, "without recourse."¹⁹³ Even with such words, the indorser is not able to eliminate entirely his warranty undertaking, as is clearly stated in paragraph (3). Whether the addition of qualifying language militates against the transferee's being a due course holder is covered elsewhere.¹⁹⁴

Section 3-418. Finality of Payment or Acceptance.

Except for recovery of bank payments as provided in the Article on Bank Deposits and Collections (Article 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

This section, when read with the preceding section, sets the limits on recovery of payments made by mistake of fact. A typical illustration is money paid by a drawee against insufficient funds. In view of the fact that there is no warranty covering this situation made by the presenter under the preceding section, the payment is final and not recoverable. This was the rule followed prior to the Code.¹⁹⁵ The pre-Code cases were not always definitive as to what kinds of persons are protected by this finality doctrine,¹⁹⁶ but the Code makes it clear that only due course holders or persons who have in good faith relied on the payment are protected.¹⁹⁷

¹⁹² For criticism, see Luedemann, *supra* note 181, at 92.

¹⁹³ They may not be qualified by a prior or simultaneous parol agreement. *Fidelity Nat'l Bank v. Hosea*, 93 Wash. 344, 160 Pac. 960 (1916).

¹⁹⁴ UCC § 3-302; *Banner Meat Co. v. Rieger*, 125 Wash. 142, 215 Pac. 334 (1923) (indorsee may be a holder in due course); *American Sav. Bank & Trust Co. v. Helgesen*, 64 Wash. 54, 116 Pac. 837 (1911), *aff'd*, 67 Wash. 572, 122 Pac. 26 (1912).

¹⁹⁵ *Oregon Iron & Steel Co. v. Kelso State Bank*, 129 Wash. 109, 224 Pac. 569 (1924), 38 A.L.R. 178; *Spokane & E. Trust Co. v. Huff*, 63 Wash. 225, 115 Pac. 80 (1911), 33 A.L.R. (n.s.) 1023.

¹⁹⁶ *Zwickel v. American Sav. Bank & Trust Co.*, 69 Wash. 211, 124 Pac. 386 (1912); *Canadian Bank of Commerce v. Bingham*, 46 Wash. 657, 91 Pac. 185 (1906) (may have allowed recovery of the money from the recipient predicated on its negligence; not a factor under the Code). See 2 B.C. IND. & COMM. L. REV. 383 (1961).

¹⁹⁷ *Accord*, *National City Bank v. Titlow*, 233 Fed. 838 (W.D. Wash. 1916); *Merchants' Bank v. Superior Candy & Cracker Co.*, 41 Wash. 653, 84 Pac. 604 (1906).

Finality is accorded to payment and acceptance. Because of the use of credit and debit entries in accomplishing payment between banks, pre-Code decisions were in conflict as to when payment had occurred. Hopefully, the Code has narrowed the zone of controversy by its specific provisions.¹⁹⁸

Section 3-419. Conversion of Instrument; Innocent Representative.

- (1) An instrument is converted when
 - (a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or
 - (b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or
 - (c) it is paid on a forged indorsement.
- (2) In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument.
- (3) Subject to the provisions of this Act concerning restrictive indorsements a representative, including a depository or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.
- (4) An intermediary bank or payor bank which is not a depository bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (Sections 3-205 and 3-206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor.

It has long been recognized in Washington that a negotiable instrument is property subject to conversion.¹⁹⁹ Although subsection (1) is a restatement of existing law, it does not state the entire law; there

¹⁹⁸ UCC §§ 4-213, 4-303.

¹⁹⁹ *Plymouth Collateral Co. v. First Nat'l Bank*, 188 Wash. 344, 62 P.2d 734 (1936) (theory not stated); *California Stucco Co. v. Marine Nat'l Bank*, 148 Wash. 341, 268 Pac. 891 (1928), 67 A.L.R. 1531, 4 WASH. L. REV. 42.

are other ways in which an instrument may be converted. For example, in *Clapp v. Johnson*,²⁰⁰ a debtor had pledged a note, payable to a third person but indorsed in blank. After the debt was satisfied, the bank (pledgee) returned the note to the *payee*. The pledgee was held liable for the face amount of the note, plus interest, on the theory of conversion. If paragraph (1) is read as an exhaustive list of the ways in which an instrument may be converted, the rule of the *Clapp* case is changed. However, it is inconceivable that this is the intended consequence, and one is not committed to read the conversion methods listed as exclusive.

The excessive attention focused on refusal to return an instrument and on payment under forged indorsements is due to the doubt in this area of pre-Code law.²⁰¹ Washington seems to have recognized that a drawee converts an instrument by paying on a forged indorsement.²⁰² There is some suggestion that the theory of liability is that of quasi-contract,²⁰³ but this seems of doubtful applicability to a paying drawee. Quasi-contract suggests unjust enrichment, and the drawee has not received any funds by which it is enriched. Since another person collecting from the drawee under a forged indorsement is enriched, however, quasi-contract is directly relevant. Unless the statute of limitations is a factor, both the drawee and the person receiving the money are subject to a tort suit.

A modest excitement was stirred by a decision in Massachusetts under the Code,²⁰⁴ raising a question as to whose property is converted in the circumstances of payment under a forged indorsement. The problem is posed by paragraph (3) of the presently discussed section, due to its reference to the "true owner." The holding was that the *drawer* is *not* the true owner; but the decision is not without its critics.²⁰⁵ Since the person whose name was forged will normally be

²⁰⁰ 186 Wash. 327, 57 P.2d 1235 (1936).

²⁰¹ See BRITTON, *BILLS AND NOTES* § 146 (2d ed. 1961).

²⁰² *Anderson v. National Bank*, 146 Wash. 520, 264 Pac. 8 (1928).

²⁰³ *Bruce v. First Nat'l Bank*, 180 Wash. 614, 41 P.2d 779 (1935).

The first Code decision on the point accords with the Washington court's dictum that the drawee is liable either in a tort suit or in a suit predicated on implied contract (quasi-contract). *Weilersbacher v. Pittsburg Brewing Co.*, 3 U.C.C. REP. SERV. 311 (Pa. Sup. Ct. 1966). The decision reached is not, however, compelled by the Code. The Code states that the drawee is liable for conversion, but it does not detail the theory or set a statute of limitations. UCC § 3-122 states a limitation period, but it pertains to liability on the instrument not to liability dehors the instrument (as here by conversion) and not to warranty liability.

²⁰⁴ *Stone & Webster Eng'r Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358 (1962), 99 A.L.R.2d 628.

²⁰⁵ Compare the discussions in 43 B.U.L. REV. 144 (1963), and 4 B.C. IND. & COMM. L. REV. 449 (1963).

the true owner, it is he who benefits by recovery on a theory of conversion. The person paying the instrument under the forged indorsement will proceed on a theory of warranty under section 3-417, rather than on a theory of conversion. The drawer will be protected because the drawee will not be permitted to charge his account for the sum paid out on the forgery.²⁰⁶

This difference in theory is not entirely academic, because the liability of banks which innocently convert paper by handling it after a forged indorsement may or may not be discharged by the bank's having paid over to the person instituting collection. The presently discussed section relieves such a bank from liability to the extent it has paid over, so a payee whose name was forged must look to the drawee or to the dishonest forger in most instances.²⁰⁷ The drawee, however, who has the advantage of the warranties stated in section 4-207, may be relentless in pursuing any bank in the collection chain, for change of position is no defense to that section's liability.²⁰⁸ Once the drawee starts this chain of recovery, each collecting bank (whether it has remitted or not) is also liable on a theory of breach of warranty; thus the protection arising from change of position is somewhat illusory.

The effect of restrictive indorsements, referred to in paragraphs (3) and (4), is substantially circumscribed by the Code's theory that banks in the normal collection chain are governed only by instructions received from their immediate customers and only by restrictive indorsements of such customers. Other banks may ignore those prior indorsements, and thus are not held as converters.²⁰⁹

The quantum of liability stated in the Code sharpens the rule previously announced in Washington, for the decisional law suggests that the liability of any converter is the face amount of the instrument.²¹⁰ This is the Code's measure insofar as the drawee is concerned, but that amount is subject to reduction by any other converter on a showing that the face amount of the note would not have been paid in any event, as where the obligor is insolvent.

²⁰⁶ UCC § 4-401.

²⁰⁷ The actual result reached in two Washington cases may be changed by this rule: *Plymouth Collateral Co. v. First Nat'l Bank*, 188 Wash. 344, 62 P.2d 734 (1936); *California Stucco Co. v. Marine Nat'l Bank*, 148 Wash. 341, 268 Pac. 891 (1928). In both cases liability was imposed on a bank in the collecting chain.

²⁰⁸ UCC § 4-207(3) specifically so provides.

²⁰⁹ UCC §§ 3-205, 3-206, 4-203, 4-205.

²¹⁰ *Clapp v. Johnson*, 186 Wash. 327, 57 P.2d 1235 (1936).

PART 5. PRESENTMENT, NOTICE OF DISHONOR AND PROTEST**Section 3-501. When Presentment, Notice of Dishonor, and Protest Necessary or Permissible.**

- (1) Unless excused (Section 3-511) presentment is necessary to charge secondary parties as follows:
 - (a) presentment for acceptance is necessary to charge the drawer and indorsers of a draft where the draft so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its date of payment depends upon such presentment. The holder may at his option present for acceptance any other draft payable at a stated date;
 - (b) presentment for payment is necessary to charge any indorser;
 - (c) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, presentment for payment is necessary, but failure to make presentment discharges such drawer, acceptor or maker only as stated in Section 3-502(1)(b).
- (2) Unless excused (Section 3-511)
 - (a) notice of any dishonor is necessary to charge any indorser;
 - (b) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, notice of any dishonor is necessary, but failure to give such notice discharges such drawer, acceptor or maker only as stated in Section 3-502(1)(b).
- (3) Unless excused (Section 3-511) protest of any dishonor is necessary to charge the drawer and indorsers of any draft which on its face appears to be drawn or payable outside of the states and territories of the United States and the District of Columbia. The holder may at his option make protest of any dishonor of any other instrument and in the case of a foreign draft may on insolvency of the acceptor before maturity make protest for better security.
- (4) Notwithstanding any provision of this section, neither presentment nor notice of dishonor nor protest is necessary to charge an indorser who has indorsed an instrument after maturity.

The conditions precedent to the liability of secondary parties (drawer and indorser) are succinctly stated in this Code section:

(1) presentment; (2) dishonor (implied as a requirement); (3) notice of dishonor; and (4) protest. These do not represent any general change in the law, although there are particular details incorporated in the Code which are different from pre-Code law.

There is virtually no decisional law in Washington with respect to presentment for acceptance. An important reminder is that refusal of acceptance often equates to a dishonor of the bill of exchange, creating an immediate cause of action against the drawer and indorsers.²¹¹ In this context, however, a bank's refusal to "accept" or certify a check is not such a dishonor;²¹² the drawer and indorsers may be held only if payment is refused.

With respect to presentment for payment, the Washington law is consistent with the flat requirement of the Code that there be presentment (absent excuse) or the *indorser* is discharged completely.²¹³ Paragraph (4) of the section, however, reverses the law previously followed. Pre-Code decisions have not distinguished an indorser after maturity from the pre-maturity indorser and have held both entitled to notice, after presentment and dishonor.²¹⁴ The reasons for this about face are stated in the Official Comment.

The extent to which drawers of checks and other drafts are affected by non-presentment and lack of notice is a matter on which Washington decisions have not been uniform.²¹⁵ Under the Code, there is no discharge if the drawer complies with the specific requirements of section 3-502(1)(b). The extension of the principle to makers and acceptors of instruments payable at banks is new. These parties are obviously primary parties as to whom presentment is not required. However, by domiciling the paper at the bank, that is to say, by

²¹¹ UCC §§ 3-507, 3-413, 3-414.

²¹² UCC § 3-411.

²¹³ *Anderson v. Sperry*, 155 Wash. 300, 284 Pac. 102 (1930); *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113 (1906).

In *Legal Discount Corp. v. Martin Hardware Co.*, 199 Wash. 476, 91 P.2d 1010 (1939), 15 WASH. L. REV. 54 (1940), the defendant was both drawer and indorser of a trade acceptance. The court discharged him as an indorser who had not received notice, because the drawee had previously accepted the draft. Under the Code, however, the person who signs both as drawer and indorser would be discharged, one would think, only by the most technical rule of discharge, not the least technical. Thus, if he could be held either as indorser or drawer, he ought to be liable. The problem was not really presented to the court in the cited case, because in pre-Code law the distinction between discharge of drawers and indorsers was made only in the case of checks.

²¹⁴ *Bardshar v. Chaffee*, 90 Wash. 404, 156 Pac. 388 (1916).

²¹⁵ *Fick v. Jones*, 185 Wash. 365, 55 P.2d 334 (1936) (contrary to Code rule); *Mosher v. Philips*, 124 Wash. 118, 213 Pac. 484 (1923) (consistent with Code rule); *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912 (1911) (consistent with Code rule).

making it payable there, the maker or acceptor has provided an easy mechanism for payment, and if the holder fails to use that mechanism, with consequent loss of funds to the maker, the holder bears the loss. Washington decisions were contrary, however, so the rule is changed in this state.²¹⁶

The instrument may be made payable at a spot other than a bank. In this case, the maker is not discharged by non-presentment, even though he may have arranged for payment at the spot stated. In effect, all the maker has done in such circumstances is to make a *tender* of payment, which importantly terminates his liability for interest and subsequent collection costs,²¹⁷ but which is not the same as payment. Somewhat troublesome is the tie-in of a clause making the note payable at a particular place coupled with an acceleration clause if there is nonpayment of an installment or of interest. Since the Code has no direct rule on the matter, the common sense approach of pre-Code cases will be followed. By those cases, the holder may not accelerate payment unless he has sought payment at the designated place or has given the maker an opportunity to pay, or has explained why such conduct would have been fruitless.²¹⁸

The tie-in between acceleration clauses and the requirements of this Code section will be troublesome at another point. If a holder has accelerated the time of payment, the indorsers (and the drawer) are entitled to appropriate notice as of then.²¹⁹ Thus, if an instrument permits acceleration on non-payment of interest or an installment thereof, the holder who accelerates must immediately present the instrument to the primary party and, on dishonor, notify the indorser. The resulting discharge of the prior indorsers, however, is personal. This means that if thereafter the instrument is negotiated to due course holders, the indorsers are liable even though no notice was

²¹⁶ *Northwestern Nat'l Bank v. Pearson*, 102 Wash. 570, 173 Pac. 730 (1918). (Note the provision of UCC § 3-121 as adopted in Washington.)

²¹⁷ UCC § 3-604.

²¹⁸ *Hartge v. Capeloto*, 136 Wash. 538, 241 Pac. 5 (1925); *James v. Brainard-Jackson & Co.*, 64 Wash. 175, 116 Pac. 633 (1911); *Bardsley v. Washington Mill Co.*, 54 Wash. 553, 103 Pac. 822 (1909). The *Bardsley* decision was criticized in *Harrison v. Beals*, 111 Ore. 563, 222 Pac. 728 (1924).

Normally, of course, there is no requirement of presentment prior to suit against the maker whether the note is domiciled or not. *Hillman v. Stanley*, 56 Wash. 320, 105 Pac. 816 (1909). If the instrument is not domiciled, the burden seems to rest on the obligor to accomplish payment; thus the statement in *Delaney v. Nelson*, 132 Wash. 472, 232 Pac. 292 (1925), that he has a right to pay at his place of residence does not seem correct.

²¹⁹ *Anderson v. Sperry*, 155 Wash. 300, 284 Pac. 102 (1930); *Chamberlain v. Cobb*, 129 Wash. 549, 225 Pac. 414 (1924); *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113 (1906).

given.²²⁰ The troublesome point may concern the liability of the indorser who, having failed to collect after acceleration, indorses it to a due course holder. Is he an indorser after maturity within the meaning of paragraph (4)? The predicted answer would be that he is not, for nonpayment of interest is not a dishonor of the instrument and does not affect a due course holder.²²¹ However, the chances are that the indorser who transfers in these circumstances can be held on some warranty theory²²² to which presentment is not a condition precedent.

Paragraphs (2) and (3) of the section greatly simplify the governing rules in the areas covered. The major change will be the limiting of the requirement of protest to drafts drawn or payable outside of the United States. Previously, the geographical limit was the state.²²³ Insofar as notice is concerned, there is no change insofar as the indorser is completely discharged for lack of notice,²²⁴ but the rule is clarified as to the effect of failure to notify a drawer or obligor on any instrument payable at a bank.

Section 3-502. Unexcused Delay; Discharge.

- (1) Where without excuse any necessary presentment or notice of dishonor is delayed beyond the time when it is due
 - (a) any indorser is discharged; and
 - (b) any drawer or the acceptor of a draft payable at a bank or the maker of a note payable at a bank who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer, acceptor or maker is not otherwise discharged.
- (2) Where without excuse a necessary protest is delayed beyond the time when it is due any drawer or indorser is discharged.

The absolute discharge accorded to indorsers because of a delay in presentment follows precisely the rule under the NIL.²²⁵ The rule

²²⁰ UCC § 3-602.

²²¹ UCC § 3-304(4) (f).

²²² UCC § 3-417.

²²³ NIL §§ 129, 152 [WASH. REV. CODE §§ 62.01.129, .152 (1955)]; Fosdick v. Government Mineral Springs Hotel Co., 115 Wash. 127, 196 Pac. 652 (1921).

²²⁴ Codd v. Von Der Ahe, 92 Wash. 529, 159 Pac. 686 (1916).

²²⁵ NIL § 70 [WASH. REV. CODE § 62.01.070 (1955)].

respecting drawers and obligors on other instruments payable at banks is, however, changed in some respects. Under the former statute, drawers of instruments other than checks were discharged completely in the manner of indorsers, by delay in presentment.²²⁶ This, of course, is not so under the Code. Further, pre-Code law did not clearly state the effect of non-presentment of notes payable at a bank, so the Code has a clarifying effect on the point.

With respect to the liability of drawers of checks, the policy is the same as was enforced previously. One Washington decision seems to say that presentment for payment to the drawee bank is always a condition precedent to the drawer's liability on the check, whether the drawee has failed or not.²²⁷ This decision seems to have overlooked or misinterpreted the statute, and most of the cases hold that the drawer is discharged only to the extent of loss caused by the failure of the drawee bank.²²⁸ Under the Code, the drawer need only assign his claim against the failed bank to the holder of the instrument to relieve himself from liability.

The failure of the drawee bank is the only cause of loss considered by the Code. There may be others, but they will be quite rare. In *Hunt v. Panhandle Lumber Co.*,²²⁹ the payee of a check held it until the drawer had closed the account and absconded with the funds. The payee then sought to recoup his loss by imposing a mechanics lien or logger's lien against property owned by the defendant. The decision was against the payee's asserted lien, by application of the "two innocents rule." The Code is not addressed to this kind of case, in which the loss is sustained by a person other than the drawer and not a party to the instrument.

Section 3-503. Time of Presentment.

- (1) Unless a different time is expressed in the instrument the time for any presentment is determined as follows:
 - (a) where an instrument is payable at or a fixed period after a stated date any presentment for acceptance must be made on or before the date it is payable;

²²⁶ BRITTON, *BILLS AND NOTES* § 195 (2d ed. 1961).

²²⁷ *Fick v. Jones*, 185 Wash. 365, 55 P.2d 334 (1936).

²²⁸ *Generaux v. Petit*, 172 Wash. 132, 19 P.2d 911 (1933); *Pugh v. Doupe*, 130 Wash. 498, 228 Pac. 301 (1924); *Peninsula Nat'l Bank v. Hans Pederson Const. Co.*, 91 Wash. 621, 158 Pac. 246 (1916); *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912 (1911).

²²⁹ 66 Wash. 645, 120 Pac. 538 (1912).

- (b) where an instrument is payable after sight it must either be presented for acceptance or negotiated within a reasonable time after date or issue whichever is later;
 - (c) where an instrument shows the date on which it is payable presentment for payment is due on that date;
 - (d) where an instrument is accelerated presentment for payment is due within a reasonable time after the acceleration;
 - (e) with respect to the liability of any secondary party presentment for acceptance or payment of any other instrument is due within a reasonable time after such party becomes liable thereon.
- (2) A reasonable time for presentment is determined by the nature of the instrument, any usage of banking or trade and the facts of a particular case. In the case of an uncertified check which is drawn and payable within the United States and which is not a draft drawn by a bank the following are presumed to be reasonable periods within which to present for payment or to initiate bank collection:
- (a) with respect to the liability of the drawer, thirty days after date or issue whichever is later; and
 - (b) with respect to the liability of an endorser, seven days after his indorsement.
- (3) Where any presentment is due on a day which is not a full business day for either the person making presentment or the party to pay or accept, presentment is due on the next following day which is a full business day for both parties.
- (4) Presentment to be sufficient must be made at a reasonable hour, and if at a bank during its banking day.

Subsection (1) weaves together the time requirements for presentation for both payment and acceptance. Instruments having a fixed maturity date must be presented for payment or acceptance on or before that date, and must be presented for payment on that date. Presentment for acceptance is not required in such cases unless the instrument so provides or unless the place of payment is other than the residence or place of business of the drawee.²³⁰ Nonetheless, a

²³⁰ UCC § 3-501(1) (a).

refusal to accept prior to the maturity date is a dishonor, giving the holder an immediate cause of action against the drawer and indorsers.²³¹

Instruments payable after sight will require presentment for acceptance,²³² and the presentment must be made a reasonable time after date or issue. This reasonable time rule applies, it will be noted, to demand instruments as well, although the Code introduces a clarifying point. In the case of demand instruments, presentment must be made a reasonable time after each party becomes liable on an instrument. Thus a presentment may be timely with respect to some but not all of the secondary parties to an instrument. Demand instruments will normally be presented for payment rather than acceptance (since a bird in the hand is worth two in the bush), but they may be presented for acceptance.²³³

Another instance in which the time for presentment may differ among the parties to an instrument is stated in paragraph (2), dealing with checks. For the first time, a definition of reasonable time for indorsers is different from that for the drawer. The thirty-day time limit established as prima facie controlling for the liability of the drawer of an uncertified check drawn and payable within the United States is much longer than the accepted pre-Code period.²³⁴ The seven-day and thirty-day periods are only presumed to be the reasonable limits on presentment for payment. Thus, a check drawn in Seattle on a Seattle bank may be mailed to a payee in Japan. Since the instrument is drawn and payable in Seattle, the thirty-day time limit is presumed to govern, but under the circumstances it is unlikely that it would actually control.²³⁵

The provision respecting the time for payment of accelerated paper, that is to say, that it be presented within a reasonable time after the acceleration, is consistent with pre-Code decisions in Washington.²³⁶

The details stated in paragraphs (3) and (4) are refinements of NIL provisions which have not been interpreted by the Washington court.

²³¹ UCC § 3-507(1)(a).

²³² UCC § 3-501(1)(a).

²³³ The refusal of a drawee bank to certify a check is not, however, a dishonor of the instrument, because the drawee bank is not obligated to certify. UCC § 3-411(2).

²³⁴ See *Generaux v. Petit*, 172 Wash. 132, 19 P.2d 911 (1933); *German-American Bank v. Wright*, 85 Wash. 460, 148 Pac. 769 (1915).

²³⁵ Braucher, *U.C.C. Article 3—Commercial Paper—New York Variations*, 17 RUTGERS L. REV. 57, 74 (1962).

²³⁶ *Anderson v. Sperry*, 155 Wash. 300, 284 Pac. 102 (1930).

Section 3-504. How Presentment Made.

- (1) Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder.
- (2) Presentment may be made
 - (a) by mail, in which event the time of presentment is determined by the time of receipt of the mail; or
 - (b) through a clearing house; or
 - (c) at the place of acceptance or payment specified in the instrument or if there be none at the place of business or residence of the party to accept or pay. If neither the party to accept or pay nor anyone authorized to act for him is present or accessible at such place presentment is excused.
- (3) It may be made
 - (a) to any one of two or more makers, acceptors, drawees or other payors; or
 - (b) to any person who has authority to make or refuse the acceptance or payment.
- (4) A draft accepted or a note made payable at a bank in the United States must be presented at such bank.
- (5) In the cases described in Section 4-210 presentment may be made in the manner and with the result stated in that section.

The technical requirements of presentment have been substantially reduced by the Code. In essence, all that is required is a demand for payment or acceptance. The instrument need not be shown, unless the obligor requests to see it.²³⁷ If he does demand its exhibition the presenter has a reasonable time in which to comply.²³⁸ There is a temptation to say that the requirements are so far minimized that a telephoned demand for payment is a sufficient presentment. The pre-Code rule was well established to the contrary, however,²³⁹ and the question seems sufficiently open under the Code to make caution the better part of valor. In short, a face-to-face or mailed demand ought to be used. Whether the Code actually requires this caution is

²³⁷ UCC § 3-505.

²³⁸ *Ibid.*

²³⁹ *Cowles v. Matthews*, 179 Wash. 154, 36 P.2d 537 (1934); 3 PATON'S DIGEST OF LEGAL OPINIONS 3202 (1944).

conjectural. The simplistic definition of presentment in paragraph(1) does not outlaw a telephoned demand. True, the obligor may demand to see the instrument, but unless he does so, the presentment is accomplished by the demand without exhibition. If when telephoned, he demands to see the instrument, the holder may then make face-to-face or mailed presentment.

On the other hand, paragraph (2) states approved methods of presentment and none of them clearly condone use of the telephone. Paragraph (2)(c) permitting presentment at the place of acceptance may be a clue, for the demand for payment made by telephone may be made at the transmitting end and thus not at the place specified. There is, however, no requirement of presentment at the places named. Finally, one departure which the Code has authorized permits presentment in limited instances by notice that an instrument is being held. In the governing Code section, a *written* notice is required.²⁴⁰ This obviously means that telephoned notices are not adequate for compliance with the particular means of presentment there authorized. One may generalize from this that they are not adequate otherwise either.²⁴¹

A detail about which pre-Code decisions differed is clarified by this section. There was some doubt whether a bank could make proper presentment by mailing an instrument directly to the obligor or to the drawee.²⁴² The Code permits such presentment.²⁴³

Paragraph (3) deals with the person to whom presentment is to be made. Subparagraph (a), by permitting presentment to any one (and not all) of multiple makers, acceptors or drawees reverses the heretofore followed Washington law.²⁴⁴ Presentment to all such parties was formerly required.

Subparagraph (b) may, or may not, change the rule followed in *Aisted v. Grim*.²⁴⁵ There, presentment made to an attorney representing the obligor was held to be insufficient. This seems to be the expected result under the Code, because there is no presumption, cer-

²⁴⁰ UCC § 4-210.

²⁴¹ See *The Law of Presentment of Checks for Payment*, 78 BANKING L.J. 650-51 (1961).

²⁴² *Spokane Valley State Bank v. Lutes*, 133 Wash. 66, 233 Pac. 308 (1925); *Morris-Miller Co. v. Von Pressentin*, 63 Wash. 74, 114 Pac. 912 (1911).

²⁴³ UCC §§ 3-504, 4-204.

²⁴⁴ *Codd v. Von Der Abe*, 92 Wash. 529, 159 Pac. 686 (1916); *Benedict v. Schmieg*, 13 Wash. 476, 43 Pac. 374 (1896), 36 L.R.A. 703.

²⁴⁵ 35 Wn. 2d 883, 215 P.2d 877 (1950).

tainly, that an attorney has authority to accept or pay. On the other hand, parol evidence could be used to establish that authority and thus justify the presentment.²⁴⁶

Paragraph (4) is consistent with other sections of the Code respecting the presentment of instruments payable at a bank. Though under the Washington version²⁴⁷ the fact that an instrument is payable at a bank is not equivalent to an authorization on the bank to pay, other sections demonstrate that such domiciling of the paper may have the effect of tender.²⁴⁸ Further, unless presentment is made at the bank, loss caused by the bank's failure will lodge with the holder.²⁴⁹

Section 3-505. Rights of Party to Whom Presentment is Made.

- (1) The party to whom presentment is made may without dishonor require
 - (a) exhibition of the instrument; and
 - (b) reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and
 - (c) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and
 - (d) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.
- (2) Failure to comply with any such requirement invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance.

The provisions stated here are necessary to establish limits on the otherwise loose requirements imposed for presentment in the previous section. In the parlance of the NIL, by contrast, these specific rights of the obligor were stated as absolute requirements to be met in all cases, not merely when demanded by the payor or obligor. Certainly a payor must demand surrender of the document on payment of the principal sum and notation of any partial payments of principal. For that matter, payments of interest, too, should be noted. Any present-

²⁴⁶ By analogy to UCC § 3-403.

²⁴⁷ UCC § 3-121.

²⁴⁸ UCC §§ 3-501, 3-502, 3-604(3).

²⁴⁹ UCC § 3-502.

ment, thus, ought to be met with a requirement of display of the instrument, but the holder is given a second chance if he cannot comply. The question whether presentment by telephone is permissible has been adverted to in the discussion of the previous section, but is relevant here also. Certainly it would not be effective if the obligor asserts his rights under this section, and probably is not effective even though such demand is not made.²⁵⁰

Section 3-506. Time Allowed for Acceptance or Payment.

- (1) Acceptance may be deferred without dishonor until the close of the next business day following presentment. The holder may also in a good faith effort to obtain acceptance and without either dishonor of the instrument or discharge of secondary parties allow postponement of acceptance for an additional business day.
- (2) Except as a longer time is allowed in the case of documentary drafts drawn under a letter of credit, and unless an earlier time is agreed to by the party to pay, payment of an instrument may be deferred without dishonor pending reasonable examination to determine whether it is properly payable, but payment must be made in any event before the close of business on the day of presentment.

The matters covered in this section have not been the subject of reported Washington decisions. The Official Comments, comparing the Code and the NIL, are thus indicative of the changes worked in Washington.

One observation seems necessary concerning the effect of retention of an instrument by a drawee beyond the stated period. Such retention is not, absent a demand for return, a conversion.²⁵¹ Nor is it here described as an acceptance; thus, it seems to amount to a dishonor of the instrument.²⁵² However, because of section 4-302, a payor bank will become accountable for an item retained too long. This requires that the payor bank settle for the instrument by midnight of the day of receipt and, further, that it pay or return the item by midnight of the following day. The effect of this accountability on the liability of indorsers seems unclear.²⁵³

²⁵⁰ See the discussion at text accompanying note 239.

²⁵¹ UCC § 3-419.

²⁵² UCC § 3-507.

²⁵³ If the payor bank has made a provisional settlement and fails to act within its

Section 3-507. Dishonor; Holder's Right of Recourse; Term Allowing Re-Presentation

- (1) An instrument is dishonored when
 - (a) a necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time or in case of bank collections the instrument is seasonably returned by the midnight deadline (Section 4-301); or
 - (b) presentment is excused and the instrument is not duly accepted or paid.
- (2) Subject to any necessary notice of dishonor and protest, the holder has upon dishonor an immediate right of recourse against the drawers and indorsers.
- (3) Return of an instrument for lack of proper indorsement is not dishonor.
- (4) A term in a draft or an indorsement thereof allowing a stated time for re-presentation in the event of any dishonor of the draft by nonacceptance if a time draft or by nonpayment if a sight draft gives the holder as against any secondary party bound by the term an option to waive the dishonor without affecting the liability of the secondary party and he may present again up to the end of the stated time.

In the discussion of the previous section, mention was made of the effect of failing to give an acceptance within the times specified therein. This section clearly states that these circumstances amount to a dishonor of the instrument, the view of the Washington court under the NIL. The consequence is that the presenter must take whatever steps are necessary, after dishonor, to hold secondary parties.²⁵⁴ The effect of certain provisions of article 4 has been discussed in connection with section 3-506.

There seems to have been no Washington decision respecting the other details of this section.

midnight deadline, the drawer and indorsers seem to be discharged because this equates to final payment under UCC § 4-213. See CLARKE, BAILEY & YOUNG, *BANK DEPOSITS AND COLLECTIONS* 77 (1959). No express provision has been discovered for the circumstance in which no provisional credit is given within the requirement of UCC § 4-202 that the payor settle by midnight of the day of receipt.

²⁵⁴ *Ostrander v. Yokohama Specie Bank*, 153 Wash. 427, 279 Pac. 585 (1929).

Section 3-508. Notice of Dishonor.

- (1) Notice of dishonor may be given to any person who may be liable on the instrument by or on behalf of the holder or any party who has himself received notice, or any other party who can be compelled to pay the instrument. In addition an agent or bank in whose hands the instrument is dishonored may give notice to his principal or customer or to another agent or bank from which the instrument was received.
- (2) Any necessary notice must be given by a bank before its midnight deadline, and by any other person before midnight of the third business day after dishonor or receipt of notice of dishonor.
- (3) Notice may be given in any reasonable manner. It may be oral or written and in any terms which identify the instrument and state that it has been dishonored. A misdescription which does not mislead the party notified does not vitiate the notice. Sending the instrument bearing a stamp, ticket or writing stating that acceptance or payment has been refused or sending a notice of debit with respect to the instrument is sufficient.
- (4) Written notice is given when sent although it is not received.
- (5) Notice to one partner is notice to each although the firm has been dissolved.
- (6) When any party is in insolvency proceedings instituted after the issue of the instrument notice may be given either to the party or to the representative of his estate.
- (7) When any party is dead or incompetent notice may be sent to his last known address or given to his personal representative.
- (8) Notice operates for the benefit of all parties who have rights on the instrument against the party notified.

The penalty for failure to give notice to a secondary party, it will be recalled, is absolute discharge of indorsers²⁵⁵ and a limited discharge of drawers.²⁵⁶ Subsection (1) identifies the parties who may give the required notice. As was true under the NIL²⁵⁷ the notice once given operates for the benefit of all parties on the instrument who have rights against the party notified. There is, thus, no requirement of

²⁵⁵ UCC §§ 3-501, 3-502. *Black v. Emporium Dry Goods Co.*, 129 Wash. 100, 224 Pac. 591 (1924).

²⁵⁶ UCC § 3-502.

²⁵⁷ NIL §§ 92, 93 [WASH. REV. CODE §§ 62.01.092, .093 (1955)].

duplication of notices by each party who may be in a position to recover from a prior party.

In stating the time required for effective notice, paragraph (2) distinguishes between banks and other persons, the former being required to act more promptly than the latter. The rules here stated are much less complex and less onerous than those of the NIL.²⁵⁸ Particularly troublesome have been the cases involving installment notes, notes bearing interest payable in installments, and notes with acceleration clauses. If an indorser is to be held to make good any part of the instrument, principal or interest, he must receive notice within the stated time after the nonpayment thereof.²⁵⁹ If the holder elects to accelerate, notice must be given within the prescribed time after he accelerates.²⁶⁰ There is no stated time limit on the exercise of the power to accelerate, so presumably this power may be exercised within a reasonable time after the accelerating event, and in one case this was as long as seventy days.²⁶¹ All of these time limits, it must be remembered, apply to the first notice given. Once that notice is given, the person so notified has a similar length of time to notify parties liable to him.

The mechanism for notice is not elaborate, as a reading of paragraph (3) of the section demonstrates. Somewhat capriciously, it would seem from the obligor's point of view, the Code retains the NIL's rule that notice is effective when mailed, even though it is not in fact delivered.²⁶² One would expect a court to be on the look-out for loop-holes, and if there were any demonstrated fault in the mailing or addressing, the notice would not be effective. This may account for *Benedict v. Schmieg*,²⁶³ in which a notice mailed without mentioning the street address of the recipient was held ineffective. Surely the size of the town is a factor to be weighed.

Paragraphs (5)(6) and (7) simplify the requirements for notifying one who may be said to serve in a representative capacity. Although these provisions are couched in simpler language and in language containing less detail, the substantive principles at work were recognized by specific NIL provisions.²⁶⁴

²⁵⁸ NIL §§ 102-04 [WASH. REV. CODE §§ 62.01.102-.104 (1955)].

²⁵⁹ *Chamberlain v. Cobb*, 129 Wash. 549, 225 Pac. 414 (1924).

²⁶⁰ *Anderson v. Sperry*, 155 Wash. 300, 284 Pac. 102 (1930).

²⁶¹ *Wagner v. Benjamin*, 120 Wash. 532, 207 Pac. 1045 (1922).

²⁶² NIL § 105 [WASH. REV. CODE § 62.01.105 (1955)].

²⁶³ 13 Wash. 476, 43 Pac. 374 (1896), 36 L.R.A. 703.

²⁶⁴ NIL §§ 97, 98, 99, 100, 101 [WASH. REV. CODE §§ 62.01.097, .098, .099, .100, .101 (1955)].

Section 3-509. Protest; Noting for Protest.

- (1) A protest is a certificate of dishonor made under the hand and seal of a United States consul or vice consul or a notary public or other person authorized to certify dishonor by the law of the place where dishonor occurs. It may be made upon information satisfactory to such person.
- (2) The protest must identify the instrument and certify either that due presentment has been made or the reason why it is excused and that the instrument has been dishonored by nonacceptance or nonpayment.
- (3) The protest may also certify that notice of dishonor has been given to all parties or to specified parties.
- (4) Subject to subsection (5) any necessary protest is due by the time that notice of dishonor is due.
- (5) If, before protest is due, an instrument has been noted for protest by the officer to make protest, the protest may be made at any time thereafter as of the date of the noting.

The word "protest" in the parlance of the law of negotiable instruments has a very narrow meaning, as this section makes clear. There appears to be a usage extending the meaning of protest to include all of the steps constituting conditions precedent to the liability of secondary parties.²⁶⁵ Of course, this usage will not modify the express provisions of the statute. However, a formal protest might well be effective as a notice of dishonor, if the circumstances showing the dishonor are stated.

Details of the differences between pre-Code law and the Code's provision are stated adequately in the Official Comments.

Section 3-510. Evidence of Dishonor and Notice of Dishonor.

The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

- (a) a document regular in form as provided in the preceding section which purports to be a protest;
- (b) the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;

²⁶⁵ *Maury v. Winlock & Toledo Logging Ry.*, 148 Wash. 572, 269 Pac. 815 (1928).

- (c) any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

This section is, of course, without prior statutory counterpart. Subsections (b) and (c) permit less formal evidence of nonpayment and notice than has heretofore been possible. The first subsection would seem to remove the problem posed in *Maury v. Winlock & Toledo Logging & Ry.*,²⁶⁶ where a plaintiff had alleged protest, but not notice of dishonor. The evidence showed a protest stating that formal notices had been sent, which was held sufficient to admit evidence about presentment, notice of dishonor and the like. The decision assumes that the burden of presenting this evidence rests with the plaintiff; under the Code, however, the protest form would raise a presumption of dishonor and notice (stated in the protest) to be overcome by the opposite party.

Section 3-511. Waived or Excused Presentment, Protest or Notice of Dishonor or Delay Therein.

- (1) Delay in presentment, protest or notice of dishonor is excused when the party is without notice that it is due or when the delay is caused by circumstances beyond his control and he exercises reasonable diligence after the cause of the delay ceases to operate.
- (2) Presentment or notice or protest as the case may be is entirely excused when
- (a) the party to be charged has waived it expressly or by implication either before or after it is due; or
 - (b) such party has himself dishonored the instrument or has countermanded payment or otherwise has no reason to expect or right to require that the instrument be accepted or paid; or
 - (c) by reasonable diligence the presentment or protest cannot be made or the notice given.
- (3) Presentment is also entirely excused when
- (a) the maker, acceptor or drawee of any instrument except a

²⁶⁶ *Ibid.*

documentary draft is dead or in insolvency proceedings instituted after the issue of the instrument; or

- (b) acceptance or payment is refused but not for want of proper presentment.
- (4) Where a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor and protest for nonpayment are excused unless in the meantime the instrument has been accepted.
- (5) A waiver of protest is also a waiver of presentment and of notice of dishonor even though protest is not required.
- (6) Where a waiver of presentment or notice or protest is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

A threshold question is presented by this section: Where lies the burden of proof with respect to the matters enumerated herein? This question, indeed, is pertinent to all of Part 5 of article 3, and the answer is only inferentially derivable from the Code. By section 3-307, production of an instrument entitles a holder to recover "unless the defendant establishes a defense." If non-presentment, failure of notice of dishonor or lack of protest is thought of as a defense, the burden would seem to rest on the defendant, obligor, to prove non-compliance with those conditions. The rule has been well established to the contrary, however, in pre-Code law. The plaintiff, holder, is required to allege and prove compliance with the conditions precedent to defendant's liability.²⁶⁷ The Code, it is believed, does not change this rule. The defenses referred to in section 3-307 are contractual defenses to liability, not failure to perform conditions precedent to that liability. Thus, the plaintiff (holder) must establish that the conditions have been met, or that they are excused by this section, before he may recover. The wording of Official Comment 5 to the presently discussed section supports this conclusion in stating: "The excuse is established only by proof that reasonable diligence has been exercised without success" Were the burden otherwise located, this phrasing would not be accurate.

²⁶⁷ *Fick v. Jones*, 185 Wash. 365, 55 P.2d 334 (1936); *Galbraith v. Shepard*, 43 Wash. 698, 86 Pac. 1113 (1906); *Bay View Brewing Co. v. Grubb*, 24 Wash. 163, 63 Pac. 1091 (1901).

The distinction between delay in presentment, stated in paragraph (1), and non-presentment, stated in paragraph (2), is very hard to identify. The thought is, of course, that the circumstances justifying delay are of limited duration, but the factual patterns establishing this kind of circumstances may be hard to distinguish from those presenting a permanent inability. The problem existed under the NIL also.²⁶⁸

Whether a particular holder has been excused temporarily or permanently from the need for presentment, notice or protest is a question of fact. Mere inconvenience will not permanently excuse, although a temporary substantial inconvenience might permit delay. The distance separating the holder from the place of payment, coupled with some hardship in making the trip, will not excuse presentment.²⁶⁹ Nor is presentment shown to have been excused merely for the reason that the maker's whereabouts are unknown, unless the holder can demonstrate that he made some reasonable effort to locate the maker or to present the instrument at his usual place of business or residence.²⁷⁰ If presentment is made at such a place and neither the party to accept nor anyone authorized to accept for him is present, presentment is excused.²⁷¹

Waiver will dispense entirely with presentment, notice or protest. While a waiver of protest is also a waiver of presentment and notice of dishonor,²⁷² a waiver of notice of dishonor does not waive presentment.²⁷³ An automatic acceleration clause does not have the effect of a waiver of notice;²⁷⁴ *a fortiori* an optional clause would not have this effect.

The waiver may come about by conduct after maturity. Thus, in *Cowles v. Matthews*,²⁷⁵ a drawer or indorser who, with full knowledge of the holder's neglect in presentment, promised nonetheless to pay, was held liable. No consideration is necessary for such a promise.

²⁶⁸ BRITTON, BILLS AND NOTES § 189 (2d ed. 1961).

²⁶⁹ *Hunt v. Panhandle Lumber Co.*, 66 Wash. 645, 120 Pac. 538 (1912) (mail could have been used).

²⁷⁰ *Aisted v. Grim*, 35 Wn. 2d 883, 215 P.2d 877 (1950); *Wagner v. Benjamin*, 120 Wash. 532, 207 Pac. 1045 (1922).

²⁷¹ UCC § 3-504(2) (c). See *Ostrander v. Yokohama Specie Bank*, 153 Wash. 427, 279 Pac. 585 (1929).

²⁷² UCC § 3-511(5); *Wilkie v. Chandon*, 1 Wash. 355, 25 Pac. 464 (1890).

²⁷³ *Cowles v. Matthews*, 179 Wash. 154, 36 P.2d 537 (1934). The cases, however, are in conflict. BRITTON, BILLS AND NOTES 532 (2d ed. 1961).

²⁷⁴ *Clausen v. Forehand*, 152 Wash. 310, 277 Pac. 827 (1929).

²⁷⁵ 179 Wash. 154, 36 P.2d 537 (1934).

A provision of the NIL reads: "Presentment for payment is not required in order to charge an indorser where the instrument was made or accepted for his accommodation and he has no reason to expect that the instrument will be paid if presented."²⁷⁶ This section was misconstrued in one famous case, because the word "accepted" was read in a lay sense, rather than in its technical sense.²⁷⁷ Subsequent decisions corrected this error.²⁷⁸ The important portion of the NIL is restated by the Code: if the party has no reason to expect that an instrument will be accepted or paid, he is not entitled to have presentment made. This last sentence would, if literally followed, mean that in the case of a maker's insolvency, known to an indorser, the indorser could not expect payment to be made, and thus presentment would seem to be excused. The rule, however, is otherwise.²⁷⁹ On the other hand, if insolvency proceedings involving the maker have been instituted after execution of the note, presentment is excused.²⁸⁰

Paragraph (6) is a restatement of pre-existing law.²⁸¹ There seems to be less room for dispute when the waiver is in the body of the instrument,²⁸² than where it appears on the back of the instrument. The Code retains the NIL rule that a waiver before a particular indorser's signature binds him only. The solution thus given is possibly too glib to be helpful, for the form of the waiver may well be controlling. For example, if the waiver indorsed on the back of an instrument were in terms: "The following indorsers waive . . .", it would certainly be effective to bind all indorsers below the language. Indeed, the use of the plural might be enough to extend the waiver beyond the immediate signer.²⁸³

²⁷⁶ NIL § 80 [WASH. REV. CODE § 62.01.080 (1955)].

²⁷⁷ *Fosdick v. Government Mineral Springs Hotel Co.*, 115 Wash. 127, 196 Pac. 652 (1921).

²⁷⁸ *Legal Discount Corp. v. Martin Hardware Co.*, 199 Wash. 476, 91 P.2d 1010 (1939), 15 WASH. L. REV. 54 (1940).

²⁷⁹ *Black v. Emporium Dry Goods Co.*, 129 Wash. 100, 224 Pac. 591 (1924). There are two contrary decisions: *Gleeson v. Lichty*, 62 Wash. 656, 114 Pac. 518 (1911); *Fosdick v. Government Mineral Springs Hotel Co.*, 115 Wash. 127, 196 Pac. 652 (1921). The latter case involved insolvency of the maker at the time the note was executed, which the Washington court seems to treat differently from supervening insolvency. The former decision may be accountable to the fact that the indorser, whose liability was in issue, was an officer of the insolvent corporate maker.

²⁸⁰ UCC § 3-511(3)(a).

²⁸¹ NIL § 110 [WASH. REV. CODE § 62.01.110 (1955)].

²⁸² *As in Furth v. Baxter*, 24 Wash. 608, 64 Pac. 798 (1901).

²⁸³ *Loveday v. Anderson*, 18 Wash. 322, 51 Pac. 463 (1897). This pre-NIL decision may, however, be explained as one on which the NIL took a contrary approach.

PART 6. DISCHARGE**Section 3-601. Discharge of Parties.**

- (1) The extent of the discharge of any party from liability on an instrument is governed by the sections on
- (a) payment or satisfaction (Section 3-603); or
 - (b) tender of payment (Section 3-604); or
 - (c) cancellation or renunciation (Section 3-605); or
 - (d) impairment of right of recourse or of collateral (Section 3-606); or
 - (e) reacquisition of the instrument by a prior party (Section 3-208); or
 - (f) fraudulent and material alteration (Section 3-407); or
 - (g) certification of a check (Section 3-411); or
 - (h) acceptance varying a draft (Section 3-412); or
 - (i) unexcused delay in presentment or notice of dishonor or protest (Section 3-502).
- (2) Any party is also discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money.
- (3) The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument
- (a) reacquires the instrument in his own right; or
 - (b) is discharged under any provision of the Article, except as otherwise provided with respect to discharge for impairment of recourse or of collateral (Section 3-606).

Paragraph (1) is merely a catalog or index of the circumstances in which liability on an instrument may be discharged. The details involved in the particular means of discharge are discussed in connection with the governing Code section.

Paragraph (2) retains the rule of the NIL, by which an act or agreement which would discharge liability on a simple contract will discharge liability on a negotiable instrument. Release of one of several makers of a note may fall within this rule.²⁸⁴ If the maker

²⁸⁴ Pacific Southwest Trust & Sav. Bank v. Mayer, 138 Wash. 85, 244 Pac. 248

who is released is an accommodation party, however, and this is known to the releasor, another section becomes operative.²⁸⁵ An agreement surrendering a note in consideration of a new undertaking would have the effect of discharging the note, if the new undertaking was actually performed or agreed to,²⁸⁶ but not if the new arrangement is not finalized.²⁸⁷ Liability on a note may, of course, be merged into a judgment, and this would be effective under paragraph (2) of the Code's provision; but judgment against a maker will not discharge an indorser,²⁸⁸ nor does a judgment against one co-maker bar action against another who was not within the jurisdiction.²⁸⁹ These illustrations are samples of the kinds of things that may discharge liability on simple contracts. They are not intended to be an exhaustive list of such matters.

The third paragraph of this section is a simplification and clarification of prior law. To be observed is that the discharge stated therein is effective if one who has no right to recover on an instrument either (a) reacquires it, or (b) is discharged. In a typical situation, this person will be a maker, but if the maker is an accommodation maker, someone else will bear ultimate responsibility. In such a case, the maker's payment will not discharge the liability of the person accommodated.²⁹⁰

If the maker acquires the instrument prior to maturity, there is still a possibility of liability on his part if he renegotiates the paper²⁹¹ or if by chance it reaches the hands of a holder in due course.²⁹² A somewhat different problem arises if the paper is returned to one of several co-makers and he thereafter reissues it. Though his liability is clear, it is doubtful whether the co-makers are liable to one knowing the circumstances.²⁹³

(1926); *North Pacific Mortgage Co. v. Krewson*, 129 Wash. 239, 224 Pac. 566 (1924), 53 A.L.R. 1415; *cf. Johnson v. Stewart*, 1 Wn. 2d 439, 96 P.2d 473 (1939) (where intention was shown to release only some but not all of the co-makers, the rule of the *Krewson* case does not apply). See 4 CORBIN, CONTRACTS § 931 (1951).

²⁸⁵ UCC § 3-306.

²⁸⁶ *Washington Seminary of the Church of the United Brethren in Christ v. Hunt*, 45 Wash. 571, 88 Pac. 1034 (1907).

²⁸⁷ *Shuey v. Adair*, 18 Wash. 188, 51 Pac. 388 (1897), 39 L.R.A. 473.

²⁸⁸ *Petri v. Manny*, 99 Wash. 601, 170 Pac. 127 (1918), 1 A.L.R. 1595.

²⁸⁹ *Bradley Eng'r & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170 (1910).

²⁹⁰ *Downie v. Cooledge*, 48 Wn. 2d 485, 294 P.2d 926 (1956) (although here the instrument was paid and reacquired by an indorser); *Pease v. Syler*, 78 Wash. 24, 138 Pac. 310 (1914).

²⁹¹ *State Fin. Co. v. Moore*, 103 Wash. 298, 174 Pac. 22 (1918).

²⁹² UCC § 3-602.

²⁹³ *First Nat'l Bank v. Harris*, 7 Wash. 139, 34 Pac. 466 (1893).

Section 3-602. Effect of Discharge Against Holder in Due Course.

No discharge of any party provided by this Article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument.

Although the NIL did not have a general provision respecting the personal nature of the discharge,²⁹⁴ it seems not to have been doubted that discharges worked by that statute were not effective against due course holders. The Washington decisions illustrating this involve payment. If the payor does not demand surrender of the instrument (if it is not overdue) or demand notation of payments on the instrument, his payment will not discharge him as to a due course holder.²⁹⁵

The provisions of this section exclude the operation of discharges accomplished outside the Code, as by bankruptcy of one or more of the parties.

Section 3-603. Payment or Satisfaction.

- (1) The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties. This subsection does not, however, result in the discharge of the liability
 - (a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; or

²⁹⁴ NIL § 122 [WASH. REV. CODE § 62.01.122 (1955)] did stipulate that renunciation did not affect the rights of due course holders.

²⁹⁵ *Kopple v. Bugge*, 168 Wash. 182, 11 P.2d 236 (1932); *Kelley v. Bausman*, 98 Wash. 686, 168 Pac. 181 (1917); *Carr v. Jones*, 29 Wash. 78, 69 Pac. 646 (1902); *Commercial Bank v. Toklas*, 21 Wash. 36, 56 Pac. 927 (1899); *Merrill v. Muzzy*, 11 Wash. 16, 39 Pac. 277 (1895) (reasoning predicated on the assumption that payment is only a personal defense); *Dewing v. Crueger*, 7 Wash. 590, 35 Pac. 393 (1894). In *Reardan v. Cockrell*, 54 Wash. 400, 103 Pac. 457 (1909), 50 L.R.A. (N.S.) 87, the doctrine seems to have been extended so as to protect one who, because he purchased after maturity, was not a due course holder. The case ought not be followed. See *Chafee, Rights in Overdue Paper*, 31 HARV. L. REV. 1104, 1123 n.56 (1918).

- (b) of a party (other than an intermediary bank or a payor bank which is not a depository bank) who pays or satisfies the holder of an instrument which has been restrictively indorsed in a manner not consistent with the terms of such restrictive indorsement.
- (2) Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee (Section 3-201).

Paragraph (1) brings together many facets of the mechanism and effect of payment. The payor is discharged to the extent of his payment or satisfaction to the holder.²⁹⁶ This means, first of all, that payments of a portion of the principal sum discharge only pro tanto. Thus, in a very early case, a note calling for payment of 1000 dollars, with a collateral agreement that it would be valued at 500 dollars "in coin," was held not totally discharged by payment of 500 dollars in currency.²⁹⁷ The issue of the effectiveness of an "accord and satisfaction" on paying less than an owed debt is not covered by this section of the Code, and is thus left to general law.²⁹⁸ The leading case involving a note appears to be *Baldwin v. Daly*,²⁹⁹ which announces: "And while it is true that courts have disagreed on the question whether the payment of a part of a debt is a sufficient consideration to support an agreement for the release of the whole, this court has taken part with the courts holding such contracts to be founded on a sufficient consideration . . ." The reliability of this sweeping statement, however, is suspect, and the Washington view is anything but clear.³⁰⁰

The Code principle also requires payment to the holder. A substantial amount of litigation, however, has been involved with payments to other persons claimed to be agents of the holder. The major issues in such cases are entirely factual: did or did not the circumstances, interpreted by custom and usage, show authority to receive the pay-

²⁹⁶ A payee who has received payment cannot collect a second time. *Sutherland v. Pallister*, 50 Wash. 552, 97 Pac. 745 (1908).

²⁹⁷ *Westbrook v. Chapman*, 1 Wash. Terr. 227 (1867).

²⁹⁸ UCC § 1-103.

²⁹⁹ 41 Wash. 416, 419, 83 Pac. 724, 725 (1906).

³⁰⁰ *Shattuck, Contracts in Washington, 1937-1957*, 34 WASH. L. REV. 24, 56 (1959); Note, *Contracts*, 30 WASH. L. REV. 93, 104 (1955); Quigley, *The Doctrine of Foakes v. Beer in Washington*, 16 WASH. L. REV. 42 (1941).

ment.³⁰¹ A closely related issue involves payment to the holder under circumstances in which the holder is subject to another's claim. Certainly a payment made without knowledge of that claim is protected.³⁰² Note that under the Code, the payment is protected even if it is made with knowledge of the third party claim, with certain exceptions. This provision is in substantial accord with the policy of a 1961 statutory enactment regarding adverse claims against banks.³⁰³

Many are the factual disputes whether payment or satisfaction has been accomplished.³⁰⁴ The burden of proof rests with the party claiming payment, for this is an "affirmative defense."³⁰⁵ The payment may be in money, property or services.³⁰⁶ Whether a renewal note "pays" or discharges an earlier, original note seems to be a matter determined by the parties' intention.³⁰⁷ The controlling principle regarding what an agent is authorized to accept in payment is, at least for collecting banks, stated elsewhere.³⁰⁸

The Code has no provisions governing the application of payments, so common law principles will control.³⁰⁹ Nor is there a provision respecting the time at which payment is effectuated, so the Washington

³⁰¹ *Smith v. Keating*, 52 Wn. 2d 391, 326 P.2d 60 (1958); *Bjorkstam v. Federal Land Bank*, 138 Wash. 456, 244 Pac. 981 (1926); *Burt v. Schoening*, 138 Wash. 187, 244 Pac. 381 (1926); *First Nat'l Bank v. Hessel*, 133 Wash. 643, 234 Pac. 662 (1925); *Delaney v. Nelson*, 132 Wash. 472, 232 Pac. 292 (1925); *Canadian Bank of Commerce v. Sesnon Co.*, 68 Wash. 434, 123 Pac. 602 (1912); *Warnock v. Itawis*, 38 Wash. 144, 80 Pac. 297 (1905); *Davis v. Erickson*, 3 Wash. 654, 29 Pac. 86 (1892). *Cf. Bayley v. Hamburg*, 106 Wash. 177, 179 Pac. 88 (1919) (payment under an indorsement forged by payee's agent discharged the payor, where the proceeds actually reached the payee).

³⁰² *Doucette v. Old Nat'l Bank & Union Trust Co.*, 161 Wash. 159, 296 Pac. 570 (1931); *cf. Woodworth v. School Dist. No. 2*, 92 Wash. 456, 159 Pac. 757 (1916); *Woodworth v. School Dist. No. 2*, 103 Wash. 677, 175 Pac. 321 (1918) (may have followed the principle announced in the statute cited in the following footnote).

³⁰³ WASH. REV. CODE § 30.20.090 (1961).

³⁰⁴ *Peterson v. Schoonover*, 42 Wn. 2d 621, 257 P.2d 209 (1953); *Wallin v. Carlson*, 150 Wash. 294, 272 Pac. 731 (1928); *Barron v. Robinson*, 67 Wash. 656, 122 Pac. 343 (1912), are illustrative.

³⁰⁵ *Federal Rubber Co. v. M. M. Stewart Co.*, 180 Wash. 625, 41 P.2d 158 (1935); *Creditors Ass'n v. Fry*, 179 Wash. 339, 37 P.2d 688 (1934); *Hanson v. Moses Inv. Co.*, 103 Wash. 218, 174 Pac. 25 (1918); *Bingham v. Domer*, 94 Wash. 253, 162 Pac. 355 (1917); *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736 (1902). That proof of payment is often a tricky business see *Russo-Chinese Bank v. National Bank of Commerce*, 187 Fed. 80 (9th Cir. 1911); 206 Fed. 646 (9th Cir. 1913), *aff'd*, 213 Fed. 633 (9th Cir. 1914), *aff'd* 241 U.S. 403 (1916).

³⁰⁶ *Northern Sav. & Loan Ass'n v. Casey*, 143 Wash. 596, 255 Pac. 659 (1927); *Blaser v. Meeker*, 125 Wash. 379, 216 Pac. 1 (1923); *Burnham v. Rowley*, 111 Wash. 656, 191 Pac. 811 (1920).

³⁰⁷ *Boston Nat'l Bank v. Jose*, 10 Wash. 185, 38 Pac. 1026 (1894); 3 PATON'S DIGEST 2948 (1944).

³⁰⁸ UCC § 4-211. See *Reconstruction Fin. Corp. v. Lyon*, 179 Wash. 673, 38 P.2d 1029 (1934).

³⁰⁹ UCC § 1-103. See *Associated Indem. Corp. v. Del Guzzo*, 195 Wash. 486, 81 P.2d 516 (1938); *Dietrich Bros. v. Anderson*, 183 Wash. 574, 48 P.2d 921 (1935).

view will continue to be that in the case of mailed payments, it is receipt not dispatch that signals payment.³¹⁰

Paragraph (2) is a new provision, extending the concept of "payment for honor," a matter on which no Washington decisions have been found.

Section 3-604. Tender of Payment.

- (1) Any party making tender of full payment to a holder when or after it is due is discharged to the extent of all subsequent liability for interest, costs and attorney's fees.
- (2) The holder's refusal of such tender wholly discharges any party who has a right of recourse against the party making the tender.
- (3) Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender.

The rule stated in subsection (1) has been effective in Washington for some time.³¹¹ To be observed is the requirement that the tender be of the full amount due. This seems to be the rule announced in Washington,³¹² although there are two cases difficult to accommodate to the rule. In *Ward v. Thorndyke*,³¹³ a debtor tendered part cash and the balance in the form of a ninety-day note. The holding was that this tender, when refused, terminated the liability for interest only as to the cash amount. It would appear that a proper tender would have required tender in cash of the full amount, so no tender at all was accomplished.³¹⁴ In *Matzger v. Page*,³¹⁵ an argument was made that failure to tender the interest due upon the accrued interest for three days intervening between maturity and the date of tender rendered the tender ineffectual. The argument was rejected as too trifling. Such a holding is questionable, for the creditor seems entitled to the full amount of his claim, unless he is estopped by his conduct.³¹⁶

³¹⁰ *Weatherwax v. Johnson*, 161 Wash. 80, 296 Pac. 182 (1931).

³¹¹ *Northern Bank & Trust Co. v. Slater, Watt & Co.*, 123 Wash. 528, 212 Pac. 1063 (1923).

³¹² *Kleeb v. McInturff*, 71 Wash. 419, 128 Pac. 1076 (1912); *Loveday v. Parker*, 50 Wash. 260, 97 Pac. 62 (1908); *Kirkland Land & Improvement Co. v. Jones*, 18 Wash. 407, 51 Pac. 1043 (1898).

³¹³ 65 Wash. 11, 117 Pac. 593 (1911).

³¹⁴ UCC § 2-511(2).

³¹⁵ 62 Wash. 170, 113 Pac. 254 (1911).

³¹⁶ *Zeimantz v. Blake*, 39 Wash. 6, 80 Pac. 822 (1905).

The problem of the amount to be tendered is, admittedly, very difficult when tender is made after maturity. Since a quick determination of the interest due may produce error, it is difficult for the creditor to make an immediate decision whether to accept the amount tendered. If the tender is intended to discharge an obligation on an instrument containing an acceleration clause, another factor enters in. Must the tender be of the full amount as accelerated, or only of the overdue amount? The answer will depend upon whether the holder has accelerated the instrument, for if he has not, only the amount overdue need be tendered.³¹⁷

Paragraph (2) is a redraft of an NIL provision³¹⁸ not litigated in this state. Paragraph (3) involves the effect of domiciled paper. The requirement of presentment at the place of payment in case of instruments payable at a bank has been discussed elsewhere.³¹⁹

Section 3-605. Cancellation and Renunciation.

- (1) The holder of an instrument may even without consideration discharge any party
 - (a) in any manner apparent on the face of the instrument or the indorsement, as by intentionally cancelling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or
 - (b) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.
- (2) Neither cancellation nor renunciation without surrender of the instrument affects the title thereto.

This section consolidates two methods by which liability on an instrument may be discharged: (1) cancellation and (2) renunciation. The pre-Code statutory counterparts were not thus amalgamated, but the result is essentially the same as it was in pre-Code law.

Unfortunately, the Washington decisions, beginning with *Baldwin v. Daly*,³²⁰ appear to have misconstrued the NIL's provisions respect-

³¹⁷ *Weinberg v. Naher*, 51 Wash. 591, 99 Pac. 736 (1909).

³¹⁸ NIL § 120(4).

³¹⁹ See discussion under UCC §§ 3-501, 3-502, 3-504.

³²⁰ 41 Wash. 416, 83 Pac. 724 (1906). See also *Morlar v. Schultz*, 153 Wash. 51, 279 Pac. 105 (1929); *Kuhn v. Groll*, 118 Wash. 285, 203 Pac. 44 (1922); *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941 (1910), 23 YALE L.J. 313 (1914). The requirements imposed by NIL § 122 [WASH. REV. CODE § 62.01.122 (1955)], counterpart to a portion of UCC § 3-605, were held applicable only to valid instruments. Thus an oral rescission was effective on an instrument executed without consideration. *Hornburg v. Larson*, 93 Wash. 74, 160 Pac. 11 (1916).

ing renunciation. In essence, the error made was in the assumption that the requirements stated for renunciation are broadly applicable to all releases. Thus, an oral release sustained by consideration, as in an accord and satisfaction, has been held ineffective. It will be recalled that a person's liability on a negotiable instrument may be discharged by "any . . . act or agreement . . . which would discharge his simple contract for the payment of the money."³²¹ Novations and releases for consideration³²² are to be subsumed under this provision, and are not affected by the formalistic requirements for gratuitous renunciation or cancellation stated in UCC section 3-605.³²³

The Code retains the wording of the NIL that it is the *holder* who may renounce or cancel. A release by a former holder, thus, will not be effective.³²⁴ Under the NIL, as discussed in the preceding paragraph, the Washington rule erroneously interpreted the requirement of a writing very broadly, applying it to releases supported by consideration. This rule, however, was not applied to releases by persons other than the holder.³²⁵ An oral release, supported by consideration, by such a person was, therefore, valid. It will be valid under the Code by virtue of UCC section 3-601(2).

A holder may renounce his rights against some, but not all, of the persons liable on an instrument. The effect of such conduct on the liability of other parties is governed by another Code section.³²⁶

The Code makes clear that an unintentional cancellation does not result in discharging the liability of parties to an instrument.³²⁷ It is less precise in dealing with the effect of surrender of the instrument, but a gloss has already been put on this section by a judicial construction that an intent to discharge the instrument is requisite to a discharge.³²⁸

³²¹ UCC § 3-601(2).

³²² In *Ginnett v. Greene*, 87 Wash. 40, 151 Pac. 99 (1915) there is a dictum that a novation must be in writing as if it were a renunciation. See the cases cited in note 320 *supra*.

³²³ See BRITTON, *BILLS AND NOTES* 653 (2d ed. 1961). The requirement of a writing appears also in UCC § 1-107, again dealing with relinquishment of claims without consideration.

³²⁴ *Fisher v. Woodruff*, 25 Wash. 67, 64 Pac. 923 (1901).

³²⁵ *National Ass'n of Creditors, Inc. v. Menish*, 144 Wash. 150, 257 Pac. 241 (1927).

³²⁶ UCC § 3-606. For relevant pre-Code Washington decisions see *North Pac. Mortgage Co. v. Krewson*, 129 Wash. 239, 224 Pac. 566 (1924), 53 A.L.R. 1416; *Davis v. Gutheil*, 87 Wash. 596, 152 Pac. 14 (1915), 16 COLUM. L. REV. 80 (1916).

³²⁷ As was true in pre-Code law. *Gleason v. Brown*, 129 Wash. 196, 224 Pac. 930 (1924).

³²⁸ *American Cement Corp. v. Century Transit Mix, Inc.*, 3 U.C.C. REP. SERV. 426 (N.Y. Sup. Ct., 1966).

Section 3-606. Impairment of Recourse or of Collateral.

- (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
 - (a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or
 - (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.
- (2) By express reservation of rights against a party with a right of recourse the holder preserves
 - (a) all his rights against such party as of the time when the instrument was originally due; and
 - (b) the right of the party to pay the instrument as of that time; and
 - (c) all rights of such party to recourse against others.

At many points in the discussion of the impact of article 3 on Washington law reference has been made to the uncertain results following from the interaction of suretyship and bills and notes principles. This particular section is the most significant one in which this interrelationship is dealt with. Herein are detailed the various suretyship defenses which can be expected to arise in a bills and notes situation.

The major change worked by this Code section will, so far as Washington is concerned, lie in the basic assumption that the true relationship of the parties, rather than the relationship established on the instrument, determines the availability *vel non* of suretyship defenses. Under the NIL, the effect of extensions of time of payment was dependent on the position occupied by the parties on the instrument. Thus, an accommodation maker (who appeared on the paper as the principal debtor, but who was really a surety because of the

accommodation nature of his signing) was held not to be discharged by a binding extension of time granted to a payee-indorser who was the party accommodated.³²⁹ The rule will be otherwise under the Code. If a holder knows that the maker is an accommodation maker having a right of recourse against the accommodated payee, the holder's grant of an extension of time to the payee will be covered by this Code section. It will, thus, discharge the accommodation maker, unless he consents³³⁰ or unless rights against him are reserved.³³¹ Indorsers and drawers, whether for accommodation or not, will be discharged by extensions granted to makers or acceptors.³³²

The NIL's statement of the rule regarding the effect of extensions of time was, perhaps, more accurate than is the Code's in one respect. The extension granted must be a *binding* one,³³³ and the NIL expressly so provided.³³⁴ The Code is not specific on the point,³³⁵ but it is

³²⁹ *Dove v. Cowlitz Valley Bank*, 191 Wash. 429, 71 P.2d 555 (1937); *Continental Mut. Sav. Bank v. Elliott*, 166 Wash. 283, 6 P.2d 638 (1932); *Bradley Eng'r & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170 (1910); *First Nat'l Bank v. Fowler*, 54 Wash. 65, 102 Pac. 1038 (1909). The law in Washington prior to enactment of the NIL is, however, consistent with the rule under the Code. *McDougall v. Walling*, 21 Wash. 478, 58 Pac. 669 (1899); *McDougall v. Walling*, 19 Wash. 80, 52 Pac. 530 (1898); *McDougall v. Walling*, 15 Wash. 78, 45 Pac. 668 (1896); *cf. Culbertson v. Wilcox*, 11 Wash. 522, 39 Pac. 954 (1895). The community property law concept may affect this rule, as in *McKee v. Whitworth*, 15 Wash. 536, 46 Pac. 1045 (1896).

³³⁰ Obviously a consenting surety is not discharged. *Yakima Hardware Co. v. Strickler*, 156 Wash. 369, 286 Pac. 853 (1930); *McDougall v. Walling*, 15 Wash. 78, 45 Pac. 668 (1896).

³³¹ The Code retains the rule continuing the surety's liability if there is an express reservation of rights. Earlier decisions are in accord: *Moore v. Dark*, 52 Wn. 2d 555, 327 P.2d 429 (1958); *Davis v. Gutheil*, 87 Wash. 596, 152 Pac. 14 (1915), 16 *COLUM. L. REV.* 80 (1916); *Merchants' Bank v. Bussell*, 16 Wash. 546, 48 Pac. 242 (1897); *Bank of B.C. v. Jeffs*, 15 Wash. 230, 46 Pac. 247 (1897); *Boston Nat'l Bank v. Jose*, 10 Wash. 185, 38 Pac. 1026 (1894).

³³² *Yakima Hardware Co. v. Strickler*, 164 Wash. 155, 2 P.2d 90 (1931). This is derived from the general suretyship principal. *Nelson v. Flagg*, 18 Wash. 39, 50 Pac. 571 (1897); *Binnian v. Jennings*, 14 Wash. 677, 45 Pac. 302 (1896); *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140 (1894).

There will always be the possibility of factual disputes, such as whether the extension was actually granted after the surety became liable, *Rattelmiller v. Stone*, 28 Wash. 104, 68 Pac. 168 (1902), or whether an extension had in fact been granted, *Boston Nat'l Bank v. Jose*, 10 Wash. 185, 38 Pac. 1026 (1894).

Note the specific provision of UCC § 4-108 which, in effect, permits banks to extend the time of payment.

³³³ Thus, an extension which is contrary to public policy has been held ineffective so a surety is not discharged thereby. *Boyd v. Cochrane*, 18 Wash. 281, 51 Pac. 383 (1897). Usually, the reason for argument about the binding effect of a particular extension involves the presence or absence of consideration, as in *Van de Ven v. Overlook Mining & Dev. Co.*, 146 Wash. 332, 262 Pac. 981 (1928); *Price v. Mitchell*, 23 Wash. 742, 63 Pac. 514 (1901); *Bank of B.C. v. Jeffs*, 18 Wash. 135, 51 Pac. 348 (1897); *Staver & Walker v. Missimer*, 6 Wash. 173, 32 Pac. 995 (1893).

³³⁴ NIL § 120(6) [WASH. REV. CODE § 62.01.120(6) (1955)].

³³⁵ *Penny, A Summary of Articles 3 and 4 and Their Impact in New York*, 48 *CORNELL L.Q.* 47, 72 (1962).

highly doubtful that any change in the controlling principle was intended.

The Code's treatment of releases or other forms of discharge granted by a holder to a principal debtor follows traditional lines,³³⁶ but agreements or covenants not to sue may be differently treated. In suretyship theory, an agreement not to sue or covenant not to sue was thought of as a release with reservation of rights, not discharging the surety.³³⁷ The Code, however, seems to equate agreements not to sue with releases and to require, in all cases, an express reservation of rights against persons having a right of recourse from the party released.³³⁸

Impairment of collateral, the final suretyship defense treated, is given the same effect as is given by usual suretyship law.³³⁹

The surety has certain other rights not expressly covered by this section of the Code. If he pays, he has a right to reimbursement from the principal debtor. The Code gives this right by section 3-603(2). He may compel the principal debtor to exonerate him. There is no specific Code provision on this, but the right may be preserved by section 1-103. The surety has a statutory right, in Washington, to compel the creditor to proceed first against the principal debtor.³⁴⁰ An indorser, as such, does not have this right.³⁴¹ It may be argued, however, that a surety who signs as indorser should have the protection of these statutes.³⁴²

³³⁶ The discharge of a principal, by the voluntary act of the creditor, will release the guarantor. *Keane v. Fidelity Sav. & Loan Ass'n*, 173 Wash. 199, 22 P.2d 59 (1933). This resultant discharge flows from the affirmative act of the releasor. A surety is not discharged if the principal is discharged by operation of law, as by delay in presenting a claim against the principal's estate. *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254 (1896).

The effect of the release of one of several co-makers will be governed by UCC § 3-606(2). See *North Pac. Mortgage Co. v. Krewson*, 129 Wash. 239, 224 Pac. 566 (1924).

³³⁷ BRITTON, BILLS AND NOTES 682 (2d ed. 1961).

³³⁸ Penney, *supra* note 335.

³³⁹ In the Washington cases, the rulings denying the discharge to one who appears as maker must be ignored. Otherwise, the rulings are consistent with the Code's rule. See *Seattle Discount Corp. v. Hollywood Inv. Co.*, 184 Wash. 14, 49 P.2d 475 (1935); *Northern Bank & Trust Co. v. Slater, Watt & Co.*, 123 Wash. 528, 212 Pac. 1063 (1923); *Bradley Eng. & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170 (1910). It has generally been held that a bank which holds a note is not required to offset against it sums on deposit. *Kirkland Land & Improvement Co. v. Jones*, 18 Wash. 407, 51 Pac. 1043 (1898); *Bank of B.C. v. Jeffs*, 15 Wash. 230, 46 Pac. 247 (1896).

³⁴⁰ WASH. REV. CODE §§ 19.72.100, .101, .140, and .141 (1965).

³⁴¹ *Allen v. Chambers*, 13 Wash. 327, 43 Pac. 57 (1895).

³⁴² BRITTON, BILLS AND NOTES § 301 (2d ed. 1961).

PART 7. ADVICE OF INTERNATIONAL SIGHT DRAFT**Section 3-701. Letter of Advice of International Sight Draft.**

- (1) A "letter of advice" is a drawer's communication to the drawee that a described draft has been drawn.
- (2) Unless otherwise agreed when a bank receives from another bank a letter of advice of an international sight draft the drawee bank may immediately debit the drawer's account and stop the running of interest pro tanto. Such a debit and any resulting credit to any account covering outstanding drafts leaves in the drawer full power to stop payment or otherwise dispose of the amount and creates no trust or interest in favor of the holder.
- (3) Unless otherwise agreed and except where a draft is drawn under a credit issued by the drawee, the drawee of an international sight draft owes the drawer no duty to pay an unadvised draft but if it does so and the draft is genuine, may appropriately debit the drawer's account.

This section of the Code has no previous statutory counterpart, and no Washington decision relevant to the section has been discovered.

PART 8. MISCELLANEOUS**Section 3-801. Drafts in a Set.**

- (1) Where a draft is drawn in a set of parts, each of which is numbered and expressed to be an order only if no other part has been honored, the whole of the parts constitutes one draft but a taker of any part may become a holder in due course of the draft.
- (2) Any person who negotiates, indorses or accepts a single part of a draft drawn in a set thereby becomes liable to any holder in due course of that part as if it were the whole set, but as between different holders in due course to whom different parts have been negotiated the holder whose title first accrues has all rights to the draft and its proceeds.
- (3) As against the drawee the first presented part of a draft drawn in a set is the part entitled to payment, or if a time draft to

acceptance and payment. Acceptance of any subsequently presented part renders the drawee liable thereon under subsection (2). With respect both to a holder and to the drawer payment of a subsequently presented part of a draft payable at sight has the same effect as payment of a check notwithstanding an effective stop order (Section 4-407).

- (4) Except as otherwise provided in this section, where any part of a draft in a set is discharged by payment or otherwise the whole draft is discharged.

The Washington statutory enactments prior to the Code³⁴³ were the provisions of the NIL. The Official Comments explain the departures the Code makes from those statutes.

Section 3-802. Effect of Instrument on Obligation for Which It is Given.

- (1) Unless otherwise agreed where an instrument is taken for an underlying obligation
- (a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and
 - (b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.
- (2) The taking in good faith of a check which is not postdated does not of itself so extend the time on the original obligation as to discharge a surety.

A variety of factual patterns has posed the issue whether a check or other instrument is in "payment" of a particular obligation. The word "obligation" in this context (and it is believed as it is used in the Code section) does not necessarily mean "debt." One may "pay" the "price" of goods or services by using a negotiable instrument—the price being the underlying obligation in the particular transaction. The decisions are virtually impossible to reconcile or structure, for two reasons: *First*, the intention of the parties is the dominant factor,

³⁴³ WASH. REV. CODE §§ 62.01.178-183 (1965).

and this is a question of fact.³⁴⁴ *Second*, the context in which the question is posed may produce considerations more significant than the abstract logical proposition that a check or note is or is not payment.

For example, in *Berliner v. Greenberg*³⁴⁵ one partner, in an effort to reach a settlement, had delivered a check payable to the other partner. The payee indorsed the check, but he did not cash it. This was held not to be an accord and satisfaction, no doubt indisputably on the facts because the drawer had stopped payment. The theory expressed was that the accord and satisfaction are accomplished on *cashing* the check.

Compare with this the decision in *Maryatt v. Hubbard*³⁴⁶ where a buyer of real property (a greenhouse) drew her check payable to the seller. The seller retained the check for some time, but the check was not cashed. The issue was whether payment had been accomplished for purposes of the Statute of Frauds. The holding was that payment had been made for this purpose. Obviously, a different time was selected for the critical event of payment in this case from the one selected in *Berliner*, but the outcome in each case was the desirable one.

A third case in the sequence might well be *Engstrom v. Benzel*,³⁴⁷ in which a seller of goods in a "cash sale" accepted a check in payment. After several weeks' delay, the check was eventually cashed, and the buyer's trustee in bankruptcy argued that this late "payment" constituted a preferential transfer. There was no preference, said the Court, because the check was only "conditional payment" and title to the goods passed only at the time the check was actually paid in cash.

This last case seems to illustrate the basic enigma—we habitually think of checks (as distinguished from notes) as the medium of payment, not as the means of evidencing debt. Yet an unpaid check really represents only an obligation to pay. For some purposes this obligation is good enough to equate to payment, but unless a bird in the bush is worth one in the hand, the check is scarcely the same payment as dollars would be.

Frequently, a conditional buyer will "pay" the down payment by giving his note. Thereafter, for good cause, the seller will rescind the

³⁴⁴ *Vancouver Nat'l Bank v. Katz*, 142 Wash. 306, 252 Pac. 934 (1927).

³⁴⁵ 37 Wn. 2d 308, 223 P.2d 598 (1950).

³⁴⁶ 33 Wn. 2d 325, 205 P.2d 623 (1949), 8 A.L.R.2d 245.

³⁴⁷ 191 F.2d 689 (9th Cir. 1951).

contract, with the consequence that (a) unpaid portions of the price are not recoverable and (b) portions of the price already paid are forfeited.³⁴⁸ What about the note given for the down payment? The very fact that a suit will be needed to enforce it clearly suggests that the down payment was not "paid" in any lay sense. Yet ought the conditional buyer be better off by his having given a note than he would have been had he actually paid (and thus lost) the down payment? The Washington decisions have usually enforced the note, on the theory that it was payment and not an unperformed obligation under the conditional sales contract.³⁴⁹ Thus the obligor must pay his note.

The presently discussed section of the Code has only oblique significance in these cases. It could be argued, for example, that the giving of a check on which the obligor is the drawer is not payment within the Statute of Frauds, and thus *Maryatt v. Hubbard*³⁵⁰ is no longer valid. A contrary holding is expectable, however, because the Code provision relates only to the enforceability of the underlying obligation while the check is outstanding. It does not identify the event which constitutes payment for purposes of the Statute of Frauds.³⁵¹

Insofar as the enforceability of the underlying obligation is disposed of by the Code, the Washington decisions seem entirely consistent with the rule adopted. Subparagraph (1)(a) has a counterpart in *Scott v. Seaboard Sec. Co.*³⁵² In that case, a conditional seller accepted a cashier's check payable to his own order in payment of the balance of the price. Although the seller never received dollars, he was held to have been paid. The reason he did not receive dollars was that payment had been stopped, but the court concluded that payment may not be stopped on such an instrument. The Code would produce the same result.³⁵³

³⁴⁸ The rule here announced seems to govern real property security transactions and pre-Code personal property security transactions.

³⁴⁹ *Zackovich v. Jasmont*, 32 Wn. 2d 73, 200 P.2d 742 (1948); *Van Geest v. Willard*, 27 Wn. 2d 753, 180 P.2d 78 (1947); *McHugh v. Rosaia*, 184 Wash. 463, 51 P.2d 616 (1935); *Vickerman v. Kapp*, 167 Wash. 464, 9 P.2d 793 (1932). However, in *Hartmeier v. Eiseman*, 34 Wn. 2d 225, 208 P.2d 918 (1949), the court held that a question of fact is presented whether a check was given in payment.

³⁵⁰ 33 Wn. 2d 325, 205 P.2d 623 (1949).

³⁵¹ Cf. *Kensil v. City of Ocean City*, 89 N.J. Super. 342, 215 A.2d 43 (1945) (decision obviates the Code rule by treating it as overly technical as applied to the particular case).

³⁵² 143 Wash. 514, 255 Pac. 660 (1927). Cf. UCC § 4-211; *Reconstruction Fin. Corp. v. Lyon*, 179 Wash. 673, 38 P.2d 1029 (1934).

³⁵³ *Ruskin v. Central Fed. Sav. & Loan Ass'n*, 3 UCC REP. SERV. 151 (N.Y. Sup. Ct. Queens County, 1966).

Attention must be paid to another statute which provides:³⁵⁴

The taking of a promissory note or other evidence of indebtedness for any labor performed, material furnished, or equipment supplied for which lien is created by law, shall not discharge the lien therefor, unless expressly received as payment and so specified herein.

Suppose a landowner were to deliver a cashier's check to a contractor, but because of later insolvency of the bank that cashier's check was not paid? Does the lien survive? Under the Uniform Commercial Code's provision, standing alone, it would appear that the lien would not survive, for the underlying debt or obligation would have been pro tanto discharged (to the amount of the check). On the other hand, the lien survives if the specific lien statute is applicable. Until we are told, however, what is meant by "or other evidence of indebtedness," we cannot be certain whether the lien statute does apply. It would seem that the cashier's check is not "evidence of indebtedness" as a note is, and thus the doctrine of *ejusdem generis* would make the lien statute inapplicable.

Paragraph (1)(b) has its counterpart in Washington decisions dealing with renewal notes. The outcome of the cases is consistent with the Code's approach, because if the renewal note is not paid, the original obligation is enforceable.³⁵⁵ As a general proposition, giving a note does not change the nature of the original obligation.³⁵⁶ There may, however, be situations in which a person's rights on the instrument may be different from those on the underlying obligation. For example, a surety who guarantees payment of salary may not guarantee payment of the salary check to a holder who has received the check from the payee.³⁵⁷ The determining factor seems to be whether or not the underlying guaranteed obligation was assigned to the holder of the check.

The instrument and the underlying obligation are, however, enough connected that a discharge on the instrument discharges the obligation. Delay in handling the instrument, thus, may work a forfeiture of the

³⁵⁴ WASH. REV. CODE § 60.04.140 (1959). See *Llewellyn Iron Works v. Littlefield*, 74 Wash. 86, 132 Pac. 867 (1913).

³⁵⁵ *Dove v. Cowlitz Valley Bank*, 191 Wash. 429, 71 P.2d 555 (1937); *Vancouver Nat'l Bank v. Katz*, 142 Wash. 306, 252 Pac. 934 (1927); *Exchange Nat'l Bank v. Hunt*, 75 Wash. 513, 135 Pac. 224 (1913).

³⁵⁶ *Tucker v. Brown*, 20 Wn. 2d 740, 150 P.2d 604 (1944); *Lally v. Anderson*, 194 Wash. 536, 78 P.2d 603 (1938).

³⁵⁷ *National Mkt. Co. v. Maryland Cas. Co.*, 100 Wash. 370, 170 Pac. 1009, 174 Pac. 479 (1918), 1 A.L.R. 450.

capacity to recover either on the instrument or on the underlying indebtedness.³⁵⁸

Probably the most significant words in all of subparagraph(1) are the first three: "Unless otherwise agreed." These words permit factual inquiries in every case, and further they permit emphasis on particular facts at the expense of others. The "rule of law" announced by the Code thus reverts to a construction of the facts to ascertain the intention of the parties.

There is no counterpart of subsection (2) in Washington decisional or statutory law prior to the Code's adoption.

Section 3-803. Notice to Third Party.

Where a defendant is sued for breach of an obligation for which a third person is answerable over under this Article he may give the third person written notice of the litigation, and the person notified may then give similar notice to any other person who is answerable over to him under this Article. If the notice states that the person notified may come in and defend and that if the person notified does not do so he will in any action against him by the person giving the notice be bound by any determination of fact common to the two litigations, then unless after seasonable receipt of the notice the person notified does come in and defend he is so bound.

The Washington court has, in the only relevant decision discovered, announced a rule contrary to that of the Code section.³⁵⁹ The significance of the Code's rule is illustrated by the case in which the Washington rule was announced, because a series of cases in federal and state courts was necessary, and the ultimate outcome reached was inconsistent.³⁶⁰

Section 3-804. Lost, Destroyed or Stolen Instruments.

The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.

³⁵⁸ *Goodwin v. Bear*, 122 Wash. 49, 209 Pac. 1080 (1922) (extends the rule beyond that required by the Code). See UCC § 3-501.

³⁵⁹ *National Bank of Commerce v. Seattle Nat'l Bank*, 109 Wash. 312, 187 Pac. 342 (1920).

³⁶⁰ See the discussion in connection with UCC § 3-405.

Though there is no particular Washington decision on the point, the rule was settled elsewhere that the owner of a lost instrument could sue thereon.³⁶¹ In such a suit, under the Code as it appears in Washington, the trial court has discretion in demanding an indemnity bond. In some states, the courts are required to demand security.³⁶² The probabilities are that in most cases a bond will be required even though on the facts claimed to exist by the plaintiff it would be impossible for a holder in due course to enter the picture. Thus, even though a payee has lost unindorsed paper, if he tries to recover he will be faced with a demand for posting security. His argument that no possible harm can come to the payor, inasmuch as there cannot be another holder of the instrument, will be unavailing.³⁶³

Section 3-805. Instruments Not Payable to Order or to Bearer.

This Article applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this Article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument.

The significance of this Code section is stated in the Official Comment and in two important articles.³⁶⁴ Probably the greatest importance lies in the impact on the liability of transferors of non-negotiable paper. If the only obstacle to negotiability is absence of the words "bearer" or "order," this Code section imposes the warranty and contract liability of the transferor of negotiable paper upon the transferor of non-negotiable paper. The section would not, however, change the rule adopted in *Virginia Lee Homes, Inc. v. Schneider & Felix Constr. Co.*,³⁶⁵ because there were other obstacles to negotiability.

Nor would the section change the rule adopted in *North Am. Bond & Mortgage Co. v. Twohy*.³⁶⁶ In that case, suit was instituted on a note and a separate guaranty. The note was payable to the payee *or order*, but the guaranty described the undertaking as payable only to the payee. The guarantor was held not to be liable, for a negotiable

³⁶¹ BRITTON, *BILLS AND NOTES* 184 n.17 (2d ed. 1961).

³⁶² Penney, *New York Revisits the Code: Some Variations in the New York Enactment of the Uniform Commercial Code*, 62 COLUM. L. REV. 992 (1962).

³⁶³ As in *Mar v. Washington Mut. Sav. Bank*, 64 Wn. 2d 793, 394 P.2d 367 (1964).

³⁶⁴ Goodrich, *Nonnegotiable Bills and Notes*, 5 IOWA L. BULL. 65 (1920); Willier, *Nonnegotiable Instruments*, 11 SYRACUSE L. REV. 13 (1960).

³⁶⁵ 64 Wn. 2d 897, 395 P.2d 99 (1964).

³⁶⁶ 159 Wash. 442, 293 Pac. 717 (1930).

note is entirely different from a non-negotiable one; thus the guaranty did not cover the negotiable document. The Code does not, of course, convert non-negotiable instruments into negotiable instruments. All it does is to make certain of its statutory edicts applicable both to negotiable and to certain kinds of non-negotiable paper. The NIL, however, did not apply in any respect to non-negotiable documents.³⁶⁷

³⁶⁷ *Bleitz v. Bryant Lumber Co.*, 113 Wash. 455, 194 Pac. 550 (1920). The NIL, however, was often applied in cases not involving negotiable notes, perhaps by analogy. See, *e.g.*, *Frederick & Nelson v. Spokane Grain Co.*, 47 Wash. 85, 91 Pac. 570 (1907).

