INDORSEMENTS FOR COLLECTION:-- UNDER THE NEGOTIABLE INSTRUMENTS LAW AND THE UNIFORM COMMERCIAL CODE

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An indorsement which "constitutes the indorsee the agent of indorser" is by the Negotiable Instruments Law,[1] Section 36(2), classified as a restrictive indorsement. The prevalent use of this indorsement by the commercial world has been the source of much litigation, resulting in a perplexing confusion and conflict of decisions. Indeed the Uniform Commercial Code,[2] now in the state of preparation by the American Law Institute and the National Conference of Commissioners on Uniform Laws, has eliminated the use of the term "restrictive" entirely. Section 3-206 of the Code is intended to eliminate many of the difficulties which have arisen under the N.I.L. as presently constituted. These difficulties which the proposed Code seeks to avoid are occasioned by the application of provisions of the N.I.L. which approach the problem of the collecting agent from an entirely different point of view and upon an entirely different basic theory.

The legal effect of such a restrictive indorsement under the N.I.L. is provided for by two sections, Sections 37 and 47. Section 37 provides:

A restrictive indorsement confers upon the indorsee the right—

1. To receive payment of the instrument;
2. To bring any action thereon that the indorser could bring;
3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement.

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1. The Negotiable Instruments Law will hereinafter be referred to as the N. I. L.

2. The Uniform Commercial Code will hereinafter be referred to as the Code. The sections from the Code herein noted are from the May, 1949, draft.

Section 47 provides:

> An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise.

The provision of the Code, Section 3-206, relating to this type of endorsement, provides:

> When an indorsement states that it is "for collection," "for deposit" or that it is otherwise for the benefit or account of the indorser or another person.
>
> (a) if it is a blank indorsement no subsequent transferee except an intermediary or payor bank takes the instrument free of the indorser's rights;
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> (b) if it is a special indorsement it has the full effect of such an indorsement to the person named as indorsee who becomes the holder but remains subject to any obligation as a fiduciary.

By the omission of Section 47 of the N.I.L. in the Code and by the express language of Section 3-206 of the Code, several results are hoped to be reached. Although not always recognized by the courts as such, the implication if not the express effect of Section 47 of the N.I.L. has been that the instrument, after such an indorsement, becomes non-negotiable. Consequently the rights of subsequent holders of such a non-negotiable instrument are to be determined by the simple contract rules of assignment. The omission of this section and the elimination of the term "restrictive indorsement" has stripped from this type of indorsement the effect of non-negotiability. Under the Code a subsequent holder is permitted to assume the status of a holder in due course, if able to meet the other requirements of the Code for such a holder.

While an indorsement in blank for collection would under the Code apparently preclude a subsequent holder in due course under Section 3-304(4), in that all subsequent holders would by the form of the indorsement be a "purchaser with notice," a special indorsement for collection would not have this effect.

The problems raised by these provisions of the N.I.L. and the Code are graphically presented by the following fact situation: An endorser, by his indorsement, creates in his indorsee an agency for collection and the indorsee, in anticipation of a future collection of the instrument from the maker or drawer, pays to the indorser the amount of the instrument out of his

personal funds. At the maturity of the instrument it is dishonored. Two problems are thereby presented:[3]

(1) In an action by the indorsee against the maker or drawer of the instrument may he recover free of defenses which the latter party might have successfully set up in an action by the indorser, and

(2) May such an indorsee recover from the indorser the amount advanced to the latter?

I. *In an action by the indorsee for collection against the maker or drawer of the instrument, may the indorsee who has advanced the amount of the instrument, recover free of the defenses which the latter party might successfully set up in an action by the indorser?*

It is fundamental to the law of negotiable instruments that certain defenses, termed real defenses, are available against any subsequent holder or transferee whether or not he has assumed the status of a holder in due course. Thus the real defenses of capacity, fraud, duress, forgery, material alteration, illegality and discharge in bankruptcy are available to the maker or drawer of an instrument whether or not the plaintiff is a holder in due course or derives his title through a holder in due course. If therefore the maker or drawer of the instrument proves a real defense, it will be available against an indorsee for collection and the court will have no occasion to determine the status of such indorsee. This result would seem to follow whether the cases be decided under the N.I.L. or under the Code.[4]

If, however, the maker or drawer has a personal defense good against any subsequent holder not in due course and not deriving his title through such a holder, the question of a recovery by the indorsee for collection who has advanced to the indorser the amount of the instrument in anticipation of future collection from the maker or drawer is immediately raised. If the indorser

3. A related problem, not within the purview of the present discussion, arises where the form of the indorsement does not create the agency relationship, but by virtue of a separate contract between the indorser and indorsee, the indorsee is made a mere agent for collection. Should such an indorsee's rights, in an action against the maker or drawer of the instrument, be the same as or superior to those of an indorsee likewise made an agent for collection by the form of the indorsement rather than by separate contract?

4. CODE, § 3-305.

for collection is either a holder in due course himself, or derives his title through such a holder and is not himself a party to any fraud or illegality affecting the instrument, the indorser would have all of the rights of a holder in due course and might recover free of the maker's or drawer's defense.[5] Likewise the indorsee, being a holder[6] and deriving his title from his indorser for collection, the latter being a holder in due course himself or deriving his title through such a holder, should be entitled to a recovery free of the personal defense of the maker or drawer.

On the other hand, if the maker or drawer has a personal defense and the indorser for collection is neither a holder in due course nor derives his title through such a holder, a recovery by the indorsee for collection who has advanced the amount of the instrument to the indorser in anticipation of future collection from the maker or drawer is more difficult to justify under the N.I.L. in an action against the maker or drawer. The personal defense of the maker or drawer should, under the circumstances, be available against him unless the indorsee for collection is himself capable of becoming a holder in due course, or unless a recovery by him free of the maker's or drawer's defense is made possible by virtue of some rule of law beyond the provisions of the act.

A. *Under the provisions of the N.I.L.*

The indorsee for collection can conceivably fulfill the requirements of Section 52 of the N.I.L. Being the indorsee of an order instrument, he may be considered a "holder" as defined in Section 191. If at the time the instrument was negotiated to him it was complete and regular on its face; if he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; if he took it in good faith, having given value; and if he had no notice of any infirmity in the instrument or defect in the title of the indorser, he has seemingly met all of the requirements of a holder in due course.

The provisions of Section 47, N.I.L., however, by implication at least, prevent the indorsee for collection from acquiring the status of a holder in due course and relegate him to the status of a mere assignee of a non-negotiable instrument. The result

5. N. I. L. § 58.
6. N. I. L. § 191.

of Section 47, N.I.L., is to render the instrument non-negotiable after an indorsement for collection, under the N.I.L.,[7] such indorsement being termed "restrictive." Since after such an indorsement the indorsee for collection is merely the assignee of the indorser's rights, it would seem that nothing in the N.I.L. would prevent the maker or drawer from setting up a defense which he might have set up against the indorser.

To deny a recovery to such an indorsee for collection, after he has parted with value and otherwise meets the requirements of Section 52 of the N.I.L. may at first blush appear to be an unjust result. It should be remembered, however, that the same result is also reached where the assignee of non-negotiable paper seeks to recover from the obligor of the instrument. The obligor of a non-negotiable instrument is entitled to set up most defenses against subsequent assignees even though the assignee may be a bona fide purchaser of the assigned right. This result is reached not because of anything which the assignee has done or has not done, but simply because the obligor failed to execute an instrument meeting the requirements or negotiability under the N.I.L. Likewise, the indorsee for collection is denied a recovery against the drawer of the instrument, not because of anything which the indorsee failed to do to become a holder in due course, but simply because his indorser has chosen to utilize a method of instrument which by virtue of the N.I.L., Section 47, destroyed the negotiability of the instrument even though the instrument in its origin was negotiable.

It should be borne in mind that if the maker or drawer has by his statement or action estopped himself, the defense will not be available against the indorsee for collection, though the latter be considered a mere assignee.

Two sections of the N.I.L. would seem to permit the maker or drawer to set up personal defenses against the indorsee for collection, despite the latter's advancement of the amount of the instrument to the indorser. Section 37 (2), N.I.L., provides:

> A restrictive indorsement confers upon the indorsee the right—
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> (2) bring any action thereon that the indorser could bring;

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7. N. I. L. § 36(2).

Section 47, N.I.L., provides:

> An instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed * * * *

Beutel attempts an interpretation of these two sections which would permit an indorsee for collection to assume the status of a holder in due course.

> It should be noted that N.I.L. 47 which is invoked here does not provide that an instrument is non-negotiable after it is restrictively indorsed or discharged. It merely provides that the instrument remains negotiable until that event (having in mind, perhaps, conditional indorsements, secs. 33 and 39, conditional acceptances, sec. 141(1), qualified acceptances, sec. 142, and the like). Thereafter, the effect of transfer is governed by the appropriate sections, in this case secs. 36 and 37, and the equities of the case.... Sec. 191 provides, "In this act, unless the contents require otherwise, indorsement means indorsement coupled with delivery. When the term indorsement in sec. 47 is given this meaning it seems that the instrument would not lose its negotiability until after it was delivered to the restrictive indorsee. Thus the first restrictive indorsee under this interpretation might be a holder in due course if the form of the restrictive indorsement and the nature of the transaction were such as would permit it.[8]

In short, this interpretation would say that the restrictive indorsement by virtue of N.I.L., Section 47, would not become effective as rendering the instrument non-negotiable until a delivery to the restrictive indorsee had been completed; that the indorsee for collection might, the other requirements having been met, acquire the status of a holder in due course at the exact moment when the instrument became non-negotiable because of the restrictive indorsement completed by a delivery. This authority in the field of negotiable instruments, having set out with a fixed determination to permit a recovery by the restrictive indorsee free of personal defenses of the maker or drawer, would permit the indorsee by such questionable reasoning to acquire the status of a holder in due course. While no case has been found which follows this reasoning, several cases have reached the same result by other methods of reasoning.

Professor Britton, on the other hand, reaches the opposite conclusion.

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8. BRANNAN, NEGOTIABLE INSTRUMENTS LAW 615 (Beutel's ed. 1948).

> A restrictive indorsee for the benefit of the restrictive indorser, in his action against parties prior to the restrictive indorser, is subject to the same defenses to which his principal would be subject if he were plaintiff.[9]

A review of the cases indicates that Professor Britton's interpretation has appealed to the courts much more consistently than any other, and that this interpretation is recognized as the correct one by courts permitting the indorsee to recover on the basis of an estoppel.

In *Smith v. Bayer*,[10] an indorsee "for collection and return" was not permitted to recover free of the defense of the maker of prior payment and he was not permitted to introduce evidence that he was in fact the owner of a two-sevenths interest in his own right. The court said—

> We are therefore of the opinion that the present action was rightfully brought in the name of the plaintiff. It was open, however, as against him, to all defenses which could have been made if the notes had remained in the hands of the indorser and the action had been brought by it.[11]

A more basic discussion of the problem may be found in *Werner Piano Co. v. Henderson & Reese*.[12] The payee there indorsed the notes to the indorsee "for account of" the payee, and the indorsee took the instrument before maturity in good faith having advanced the amount of the instrument to the payee. The defendant maker of the notes set up the defense of failure of consideration. In holding that the indorsee took the notes subject to the defense, the court recognized the indorsement as restrictive under N.I.L., Section 36(2), and that the restrictive indorsee had only the rights given it by N.I.L., Section 37. The court declared,

> It follows that the court should have declared as a matter of law that the appellant (indorsee) was not an innocent purchaser for value of the notes, inasmuch as it had notice, by the restrictive indorsement of any defenses that the makers of the notes might have against the payee.[13]

While similar conclusions have been reached in other cases,[14]

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9. BRITTON, BILLS AND NOTES 266 (1943).
10. 46 Ore. 143, 79 Pac. 497 (1905).
11. *Id.* at 146, 79 Pac. at 498.
12. 121 Ark. 165, 180 S. W. 495 (1915).
13. *Id.* at 170, 180 S. W. at 496.
14. "The fact that the note has come into the possession of Wise [indorsee] in such manner as to enable him to sue upon it does not preclude

the language used by the court in *Mizell v. Hicks*,[15] is especially significant. Although the negotiability of the instrument was in "grave doubt" and there was evidence that the indorsee had advanced no value to the indorser, the court said,

> A restrictive indorsement protects the maker as well as the payee; it confers upon the indorsee the right to receive payment of the instrument and the right to bring any action upon the instrument which the indorser could bring. An indorsement "for deposit" establishes only an agency relationship between the payee and the indorsee bank; it does not carry the legal title to the instrument to the indorsee bank. The implication is clear that without more an indorsement for deposit does not shield the indorsee bank from the defenses available in the hands of the maker against the original payee.[16]

Facts sufficient to raise an estoppel against the drawer of a check were found by the New Jersey Court in *Atlantic City Nat. Bank v. Commercial Lumber Co.*[17] The payee had given the drawer a promissory note payable at the plaintiff bank. Unable to meet this note at maturity, the payee procured from the drawer the check in suit and deposited the same in its account at the plaintiff bank under an indorsement "for deposit only." The amount of the check was withdrawn apparently to pay the note held by the drawer. When presented for payment, the drawer's check was returned to the plaintiff bank, the drawer

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existence of the issues described. For the indorsement of Showers, on the record, is restrictive and of such kind as to make Wise merely the agent or trustee of Showers (sections 36, 37, Uniform Negotiable Instruments Act; article 5934, R. S. 1925), so that all defenses are available against him which would be proper as against Showers if he were the plaintiff." King v. Wise, 282 S. W. 570, 573 (Tex. 1926).

"The only action, therefore, which respondent could maintain is upon the note. Respondent being a restrictive indorsee, it follows that his right to maintain a suit on the right of his indorser (Citizen's State Bank) to bring an action on it." Follett v. Clark, 19 Wash. 2d 518, 520, 143 P. 2d 536, 537 (1943).

"Therefore the indorsement in fact falls within the second and third provision of the section [§ 36], and is restrictive. The effect of this is, under section 49 [N. I. L., § 47], that the notes, after being thus restrictively indorsed, were no longer negotiable. Moreover under section 39 [N. I. L., § 37], plaintiff indorsee under restrictive indorsement may bring an action on the notes that the indorsee could bring. The indorser could not recover against defendant because of the fraud. Plaintiffs rights, as indorsee, being so limited under section 39 [N. I. L., § 37] and the note not being negotiable under section 49 [N. I. L., § 47], it likewise may not recover." Union Trust Co. v. Matthews, 258 Mich. 433, 437, 242 N. W. 781, 783 (1932).

15. 8 N. Y. S. 2d 158 (N. Y. 1938).
16. *Id.* at 161.
17. 107 N. J. L. 492, 155 Atl. 762 (1931).

having stopped payment. The plaintiff bank, a restrictive indorsee of the instrument, then brought this action against the drawer who defended on the ground of a failure of consideration. The court declared,

> The Commercial Lumber Company (drawer) was estopped from setting up against the bank the defense of lack of consideration because the bank did exactly what the Commercial Lumber Company intended it to do, and that was to advance a credit to the Atlantic Woodworking Company (indorser) on the strength of its check, so that the note it held might be met. The Commercial Lumber Company, having put the Atlantic Woodworking Company in the position where it obtained a credit on the strength of its check, is estopped to deny its responsibility.[18]

Going on to discuss the problem at hand the court said,

> No doubt the restrictive indorsement in the present case created a trust and gave notice thereof to latter purchasers, but it in no sense gave notice of defenses which the maker might claim by reason of failure of consideration. . . . The English courts have taken the position that, where a payee deposits a check in his bank and receives credit therefor, the bank becomes a holder in due course thereof. Brannan Negotiable Instruments Law (4th Ed.) 288. The wisdom of such a ruling appeals to business exigencies. But whatever view may be taken of Section 47 of the Act, which is, as Professor Brannan pointed out, unnecessarily broad, Id. 317, still it is not so broad as to permit the maker of a check to assert defenses against a bank making advances on the strength of a check, which the maker intended it to make, so that a note which it had discounted would not be charged up against it.[19]

The result in this case seems sound in view of the facts which make the application of the principle of estoppel clearly applicable. No provision of the Negotiable Instruments Law prevents in any way the application of the principle of estoppel as between the indorsee for collection and the maker or drawer under appropriate circumstances.

A later decision, *Continental National Bank & Trust Co. v. Stirling*,[20] becomes so involved in the web spun by the various sections of the N.I.L. that it ignored the applicable sections and applied sections which obviously have no bearing at all upon

18. *Id.* at 494, 155 Atl. at 763.
19. *Id.* at 495, 155 Atl. at 763.
20. 65 Idaho 123, 140 P. 2d 230 (1943).

the problem at hand. The drawer entered into a contract to sell a certain amount of coal and drew a trade acceptance upon the purchaser who in turn accepted the draft. The drawer thereupon indorsed the instrument "for deposit only" and sold it to the plaintiff bank, receiving cash in payment. Prior to the time for the payment the drawer became insolvent, the coal was never delivered, and the acceptor (purchaser) attempted to set up the defense of failure of consideration in an action by the plaintiff bank. The court refused to allow the defense saying,

> This presents the problem of determining whether or not the drawer of the bill, after endorsing it "for deposit only" could then sell the paper to the bank in which the deposit was made, take the cash value and thereby convert the bank into a bona fide holder in due course as against the drawee and acceptor. It has been held, under a statute like our section 26-319 I.C.A. (Sec. 48, Uniform Negotiable Instruments Act), that one who had authority to endorse and deposit commercial items "had authority to waive the restrictive character of a special indorsement which he himself had placed on them and to collect them as though they had been generally indorsed."[21]

Going on, the court became even more hopelessly involved.

> The only reason for denying such authority seems to be the desire of protecting the acceptor until such time as he receives from the drawer the goods or other consideration for which the acceptance was made; in other words, to preserve his right of defense on grounds of failure of consideration. However, since the bill shows on its face that "it arises out of the purchase of goods from the drawer," but fails to disclose whether or not the goods have been delivered, there is nothing on the face of the bill to give notice or put the purchaser of the bill on inquiry as to whether or not the delivery of the goods has been made, or terms of any extraneous contract. [Citing cases]. The acceptor, having unqualifiedly promised to pay and having made no reference or qualification in relation to the future delivery of the goods for which the acceptance was made, should not be heard to plead non-delivery of the goods as a justification for refusal to pay the bill at maturity when in the hands of a purchaser for value before maturity without notice.
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> The holder of negotiable instruments is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicions of wary vigilance; he does

21. *Id.* at 129, 140 P. 2d at 232.

> not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. [citing cases.].[22]

Thus it is seen that a recovery was allowed by an indorsee for collection despite the acceptor's defense of failure of consideration. This result was reached without a mention of the N.I.L., Sections 36, 37, or 47, which sections most certainly should be the basis of a decision under the facts. What bearing N.I.L., Section 48, concerning the striking out of the indorsement not necessary to the holder's title, or the problem of "the restrictive character of a special indorsement" might have upon the present discussion is difficult to imagine.

A more recent case in which the court again ignored the sections of the N.I.L. applicable to this type of indorsement is *First Nat. Bank of Quitman v. Moore.*[23] The drawer unsuccessfully sought to set up a prior payment of the check to the indorser in an action by the indorsee who had previously advanced the amount of the instrument to the indorser. The drawer, at the time he made the payment to the indorser, knew that the check had been deposited in the indorsee bank and the indorser exhibited a deposit slip with a penciled notation indicating that the check has been deposited "for collection." In allowing a recovery by the indorsee bank, the court said that the "bank became the owner and holder of said check for value in due course" stating that the drawer was "negligent" in not ascertaining whether or not the bank had actually allowed the indorser to withdraw the amount of the check from his account. It is submitted that the result reached is correct although the correctness of the court's conclusion that the bank was a holder in due course is open to doubt. Even if we assumed that Section 47, N.I.L. were to destroy the negotiability of the instrument and that after the indorser were allowed to withdraw the amount of the check the bank became thereby a mere assignee for value of the indorser's rights to the instrument, still the drawer had notice of the assignment and in making a payment to the assignor, did so at his own risk. Since the defense of payment by the drawer (obligor) is based upon facts arising after the time of the assignment to the indorsee bank and after notice of the

22. *Ibid.*
23. 220 S. W. 2d 694 (Tex. 1949).

assignment was received by the drawer (obligor), the latter, upon simple contract principles of assignment could not set up the defense against the indorsee bank.[24]

It is submitted that a fair interpretation of Sections 36, 37 and 47, N.I.L., will preclude an indorsee for collection from becoming a holder in due course, notwithstanding the fact that such an indorsee can otherwise meet the requirements of N.I.L., Section 52, simply because at the time he receives the instrument it is non-negotiable. While it is undoubtedly true that in making an advancement of the amount of the instrument to the indorser he does so in anticipation or expectation of the future collection of the instrument from the drawer or maker of the instrument, the form of the indorsement renders the instrument non-negotiable. An indorsee of a non-negotiable instrument under such a situation, even though he be considered a "holder" of the instrument, is a mere assignee for value, subject to all defenses which would be available to the obligor of any other simple contract. It should be remembered, however, that an assignee of a right under a simple contract is shielded from certain defenses, especially those arising after the obligor has notice of the assignment, and those which the obligor may be estopped to set up.

B. *Under the provisions of the Uniform Commercial Code.*

Section 3-206 of the Code expressly applies to indorsement "for collection," "for deposit" or where it is stated to be for the benefit of the indorser or some third person. It thus deals with the type of indorsements termed "restrictive" by the N.I.L., Section 36(2) and (3). While not within the subject of this discussion, it is interesting to note that an indorsement purporting to prohibit further transfer or negotiation restrictive under N.I.L., Sections 36(1), is not covered by the Code in Section 3-206, which deals with the other types of indorsements recognized as restrictive under the N.I.L.

The Code has eliminated the use of the word "restrictive" as used in the N.I.L. and has omitted Section 37, N.I.L. This new approach to the indorsements recognized as restrictive under Section 36 (2) and (3) has removed any implication that such

24. RESTATEMENT, CONTRACTS § 167(1) (1932). CODE, § 3-206, Purposes of Changes 2 (1949).

an indorsement renders the instrument non-negotiable. The Code does, however, make a very vital distinction between blank and special indorsements for collection. Section 3-206 provides:

> When an indorsement states that it is "for collection," "for deposit" or that it is otherwise for the benefit or account of the indorser or other person
> (a) if it is a blank indorsement no subsequent transferee except an intermediary or payor bank takes the instrument free of the indorser's rights;
> (b) if it is a special indorsement it has the full effect of such an indorsement to the person named as indorsee who becomes the holder but remains subject to any obligation as a fiduciary.

Because of this distinction between blank and special indorsements "for collection" it is necessary that the effect of the distinction be fully appreciated.

(1) *Effect of a blank indorsement for collection.*

Paragraph (a) of Section 3-206 was intended by the framers of the Code for the protection of bank depositors and others who indorse in blank but add the indicated words. "The purpose of such an indorsement is to *restrict the transfer of the instrument* to the collection process, and any subsequent holder is on notice of that fact. He is also on notice that the instrument was delivered or intended to be delivered to an agent or other fiduciary, of whose identity he is necessarily uncertain. He is therefore not free to take the instrument in reliance on the assumption that the person with whom he deals is that fiduciary and is acting in accordance with the authority given him by the indorser."[25]

Thus the Code while eliminating the use of the term "restrictive" from the actual section, has expressly recognized, as will be later seen, that a blank indorsement for collection is in fact restrictive, in the sense that there cannot thereafter be a holder in due course.[26] That a blank indorsement for collection retains

25. It is interesting to note that the word "restrict" cannot be legislated from our legal vocabulary by simple omission.

26. The use of the term "restrictive" in the N. I. L., in light of § 47, seems to be a restriction on further negotiability of the instrument, through the form of indorsement. Such an indorsement is, although not termed "restrictive" by the Code, in fact a restriction on future holders, not permitting them to become holders in due course, because of the form of the indorsement.

the effect of a restrictive indorsement under the N.I.L. is borne out by other sections of the Code. Section 3-204(2) provides:

> (2) An indorsement in blank specifies no particular indorsee, and may consist of a mere signature. *An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed or indorsed in blank for collection.*[27]

After a blank indorsement for collection it is clear that no subsequent holder could be a holder in due course because he would, because of the form of the indorsement, be a purchaser with notice. The pertinent parts of the section dealing with notice to the purchaser is Section 3-304, Subsections (1) and (4).

> (1) Notice means that upon all the facts and circumstances known to the purchaser he has reasonable grounds to believe that there is an infirmity in the instrument or a claim against it or that it is over due or dishonored.
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> (4) Except as provided with respect to conditional, trust or collection indorsements in the course of bank collections (Section 3-642), the purchaser also has notice of a claim *against the instrument if it has been previously indorsed conditionally* or in such a manner as to prohibit further negotiation or *in blank for collection.*

Since under Section 3-302 of the Code a holder in due course is defined as "a holder who takes the instrument . . . (a) without notice . . . of any . . . claim against it on the part of any person," and since by Section 3-304(4) the purchaser has "notice of a claim against the instrument if it has been previously indorsed . . . in blank for collection," it would seem clear that after a blank indorsement for collection there could never be a holder in due course. Such a person would therefore have only the rights of one not a holder in due course.[28]

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27. No interpretation of this section is here attempted. Two things about this section strike one as interesting, however. First, if an order instrument after a blank indorsement cannot be negotiated by delivery alone, then some indorsement will be necessary by the blank indorsee for collection. Does this section not convert a blank indorsement for collection into a special indorsement? Second, if an indorsee for collection under a blank indorsement converts the indorsement into a special indorsement by placing his name as special indorsee, is such indorsement then covered by subsection *a.* or *b.* of § 3-206 of the Code?

28. CODE, § 3-206, provides:

"Unless he has the rights of a holder in due course any person takes the instrument subject to:

(a) all valid claims to it on the part of any person; and

(b) all defenses of any part which would be available in an action on a simple contract; and

An indorsee for collection who took the instrument under a blank indorsement for collection and who advanced to his indorser the amount of the instrument in anticipation of future collection from the maker or drawer, would in an action against such maker or drawer, because of the form of the indorsement, be precluded from being a holder in due course.[29] As one not a holder in due course he would be subject to all defenses which the maker could have set up against the indorser, unless the maker or drawer would be precluded from setting up the defense upon the basis of estoppel or under the simple contract principles of assignment.[30]

In conclusion it can be stated that the framers of the Uniform Commercial Code have eliminated the use of the term "restrictive" as applied to indorsement and have omitted the provision of Section 47, N.I.L., which would render an instrument nonnegotiable after indorsements termed "restrictive" by Section 36, N.I.L. They have, however, retained the effect of an indorsement falling under the description of "restrictive" in the N.I.L. and have seemingly extended the effect to conditional indorsements. Thus it may be said that all indorsements classified as "restrictive" under Section 36(2) and (3) N.I.L., except special indorsements of that class, all indorsements classified as "restrictive" under Section 36(1), N.I.L. (although now considered by the Code separately) and all conditional indorsements have the effect under Section 3-304 of the Code of making any subsequent holder a purchaser with notice so as to prevent his becoming a holder in due course.

(c) the defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose; and

(d) the defense that the plaintiff or a person through whom he holds the instrument acquired it by theft. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party."

29. The argument might be made that since § 3-304 of the Code makes a purchaser one with notice only if the instrument "has been previously indorsed in blank for collection," that such section does not apply to the purchaser *at the time of* the indorsement in blank for collection. Such an argument would seemingly not be a valid one and would be similar to the one advanced in BRANNAN, *op. cit. supra* note 8, at 615.

30. A conditional indorsement or one prohibiting the further indorsement of the instrument, as defined by § 3-205 of the Code, would seem to have the same effect, in that under § 3-304(4) of the Code, such indorsements, because of their form, would make all subsequent holders holders with notice. This in effect prevents a conditional indorsee from being a holder in due course, which effect was not necessary under the N. I. L. See CODE, § 3-205, Purposes of Changes 3 (1949).

Little, it would seem, has been accomplished. There is no difference in effect at least, in saying that an indorsement renders an instrument non-negotiable or in saying that an indorsement does not render the instrument non-negotiable but it prevents there being a holder in due course. Except for certain procedural advantages, one not a holder in due course of a negotiable instrument is no better off than an assignee of a non-negotiable instrument.

(2) *Effect of Special Indorsement for Collection.*

Paragraph (b) of Section 3-206 of the Code seems to have changed completely the effect of a special indorsement for "collection," "for deposit" or which otherwise by the form of the indorsement is the benefit or account of the indorser or another person. This type of indorsement would be classified as "restrictive" under Sections 36 (2) and (3) of the N.I.L. and presumably would, under Section 47, N.I.L., destroy the negotiability of the instrument.

The purpose of the framers of this subsection is declared to be:

> Such a special indorsement is an assurance to any subsequent holder that the indorsee is authorized to deal with the instrument on behalf of the indorser or another; and in the absence of notice that the indorsee is acting in breach of his fiduciary duty as provided in the section on notice to purchaser such a holder is free to assume that the indorsee is acting properly and in accordance with his authority.
>
> The provision is intended to change the result of such decisions as *Gulbranson-Dickinson Co. v. Hopkins,* 170 Wis. 326, 175 N.W 93 (1919), which held that an indorsee under an indorsement in trust could not be a holder in due course and must take the instrument subject to any defenses or equities good against his indorser. Even a collecting agent may become a holder in due course under such an indorsement if he advances money and acquires a lien on the instrument in good faith without notice of anything wrong. The provision also has the effect of permitting the indorsee to negotiate the instrument further, although he of course remains subject to any personal liability for breach of his obligation as a fiduciary. Under the section on notice to purchaser the form of the indorsement is not of itself notice to any subsequent holder which will prevent him from taking the instrument as a holder in due course, although he may still have notice of a breach of the fiduciary obligation apart from the indorsement.[31]

31. CODE, § 3-206, Purposes of Changes 3 (1949).

Gulbranson-Dickson Co. v. Hopkins,[32] used by the framers of the Code as an example of the type case which 3-206(b) of the Code is intended to change, seems to have been a most unfortunate choice and has been misunderstood. In that case the payee of a note negotiated it by an indorsement restrictive under N.I.L. Section 36(3). The indorsee named was a bank and the indorsement was for the account of the plaintiff, the beneficiary under the indorsement, who had given the indorser value for the instrument. Upon a dishonor by the maker of the note, the restrictive indorsee turned the notes over to the beneficiary who in turn brought suit upon the note. The maker set up the defense of failure of consideration. While it is true that the court held that "the indorsement rendered the instrument non-negotiable" it must be remembered that the plaintiff was not the indorsee under the restrictive indorsement, but was in fact the beneficiary under the indorsement. As such beneficiary, the plaintiff was neither a payee nor indorsee and could not have been a "holder" under the definition of Section 191, N.I.L. It is elementary that before one can become a holder in due course one must first be a "holder." Even if we should assume that the restrictive indorsee, the bank, when it "returned" the note to the plaintiff, indorsed it to him, the plaintiff, although a holder, would not become a holder in due course since no value was given for this last indorsement of the restrictive indorsee bank.

The Code has provided a new definition of holder in Section 1-201 (17):

> 17. *"Holder" means a person who has possession of a* negotiable document of title or a *negotiable instrument* or investment security *so issued or indorsed that he can negotiate it.*

Thus before a person standing in the position of the plaintiff in the case under discussion could become a holder in due course under the Code, he must first meet the Code's requirements for being a holder. Since the form of the special indorsement, being for the account of the plaintiff, would not affect the negotiable character of the instrument, and since the plaintiff would be a "person who has possession of a negotiable instrument," he could thus be termed a holder if the instrument "was so indorsed that he can negotiate it."

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32. 170 Wis. 326, 170 N. W. 93 (1919).

That the indorsement of the plaintiff as beneficiary under such special indorsement is not only unnecessary but impossible, is borne out by the provision of the Code, Section 3-204, which provides:

> (1) A special indorsement specifies the person to whom or to whose order it makes the instrument payable. Any instrument specially indorsed becomes payable to the order of the special indorser (indorsee)[33] and may be further negotiated only by his indorsement.

Since the indorsement of the special indorsee bank, rather than the indorsement of the plaintiff beneficiary under the special indorsement, is necessary for further negotiation, the plaintiff could not assume the status of a holder in due course because he could not meet the Code's requirements for being a holder.[34]

It is submitted that under the fact situation presented by *Gulbranson-Dickinson Co. v. Hopkins,* a court deciding the case under the provisions of the Code would be driven to the same result as that reached by the Wisconsin court under the N.I.L. The plaintiff, under the special indorsement to the bank for plaintiff's account, could not acquire the status of a holder in due course and would therefore be subject to the same defenses which would have been available in an action on a simple contract.

Even if we admit without argument that the result of the principal case works an injustice, still the framers of the Code have not succeeded in removing the injustice under the Code provisions. The problem there presented, however, arose out of an indorsement for the benefit of a third person, formerly termed restrictive under N.I.L., Section 36(3), and such problems are not presented by an indorsement for collection or for the benefit of the indorser, which indorsements were termed restrictive under N.I.L., Section 36(2).

The result which the framers hoped to reach has, however,

33. Obviously this is a typographical error and should read "indorsee" rather than "indorser."

34. As stated previously, even if the special indorsee bank, in turning the instrument over to the plaintiff, had indorsed it to the plaintiff, the latter would not be a holder in due course. While meeting the requirement of CODE § 1-201 (17) so that he could be classed as a "holder," he could not then be a holder in due course because he would have given no value for the bank's indorsement. Furthermore, it is interesting to note that the indorsee bank, prior to the indorsement of the plaintiff, while meeting the Code requirement for a holder would likewise be unable to recover as a holder in due course because the bank gave no value for the indorsement to it, the value having been given to the indorser by the beneficiary.

been accomplished insofar as indorsements for collection are concerned. Under the Code a special indorsement for collection is to be treated as any other special indorsement and the form of such special indorsement would have no effect upon the future negotiability of the instrument nor would it be said to constitute the purchaser a holder with notice. Thus if the special indorsee could meet the other requirements of the Code for holders in due course, he could assume such status and recover free of the personal defenses of the drawer or maker of the instrument.

(3) *Conclusion as to Effect of Code.*

A review of the sections of the Code applicable to indorsements for collection, leads to the conclusion that with one major exception the *effect* of such an indorsement has remained unchanged. Thus in an action by an indorsee for collection against the maker or drawer of the instrument, where the indorsee has advanced the amount of the instrument to the indorser in anticipation of a future collection of the instrument from the maker or drawer, his recovery free of the personal defenses which the maker or drawer might have set up against the indorser will depend entirely upon the form of the indorsement.

If the form of the indorsement is blank, the indorsee who advanced the amount of the instrument out of his personal funds will necessarily be a purchaser, but because of the form of the indorsement he will be a purchaser with notice. He cannot under such circumstances acquire the status of a holder in due course and will be subject to all defenses available against his indorser as if the suit had been brought upon a simple contract.

If on the other hand the form of the indorsement is special, the indorsee who has advanced the amount of the instrument out of his personal funds, will not because of the form of the indorsement be declared a purchaser with notice. Thus if he can otherwise meet the requirements of a holder in due course, he will be entitled to recover free of the personal defenses which the maker or drawer might have set up in an action by the indorser.

II. *May an indorsee for collection, upon dishonor by the maker or drawee, recover from the indorser after the former has advanced the amount of the instrument in anticipation of future collection?*

That such an indorser should be liable to his indorsee under such circumstances cannot be seriously questioned. The indorsee in advancing his personal funds to his indorser has done so solely in anticipation of the future collection from the maker or drawer of the intrument. His expectation that upon a subsequent dishonor he will be reimbursed by his indorser is quite natural. The only question which concerns us therefore should be whether or not under the provisions of either the N.I.L. or the Code, he is permitted to do so.

A. *Under the provisions of the N.I.L.*

To find a basis of recovery in the sections of the N.I.L. has proven difficult if not impossible. This fact was recognized at an early date and the N.I. L. was for that reason, among others, severely criticized at the turn of the century.[35]

Professor Britton assumes that technically an indorser of the class defined in N.I.L., Section 36(2) is not, by virtue of any provision of the N.I.L., made liable to a subsequent holder because his indorsement is not unqualified within the meaning of the last paragraph of Section 66, N.I.L. Conceding that in justice the indorser should be held liable to the indorsee, Professor Britton states:

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35. Speaking of § 37 of the N. I. L., Dean James Barr Ames felt that neither an indorsee for collection nor the beneficiary under a trust indorsement as defined in § 36(3) of the N. I. L., could recover in an action against the indorser, even though the indorser or the beneficiary had given the indorser value for the instrument. Ames at this time was involved in a dispute with Judge Brewster concerning the interpretation and effect of certain sections of the act, including § 37, and proposed the following hypothetical case:

A, a holder of the note payable to his order, sells it to B and is about to indorse it to him, but at B's request, indorses it to X in trust for B, instead of to B directly. At the maturity of the note the maker is insolvent, but A is solvent. By this section X, the indorsee, may sue anyone that his indorser can sue. In other words, he may sue the insolvent maker, but he cannot sue the solvent indorser, A. Judge Brewster sees no injustice to B in the inability of X, his trustee, to sue A, upon the latter's indorsement. Let us hope that the learned judge will never find himself in B's position. Ames, *The Negotiable Instruments Law, A Word More,* 14 HARV. L. REV. 442, 446 (1901).

But see Brewster, *The Negotiable Instruments Law—A Rejoinder to Dean Ames,* 15 HARV. L. REV. 26 (1901).

> Some difficulty is encountered, however, in reaching this result because it involves the conversion of the restrictive indorsement into an unqualified indorsement. It might be said that since the act which brings about the need for conversion of the restrictive indorsement into an unqualified indorsement occurs subsequent to the restrictive indorsement, parol testimony would be admissible for the purpose of removing the restrictive words, their purpose having been accomplished, thus leaving the indorsement of the first restrictive indorser in the form of an unqualified indorsement.[36]

Even if the court were willing to follow so tedious a line of reasoning, it would apparently not lead to the result which Professor Britton desired. Even if the indorsement for collection under such circumstances is admitted to be unqualified under the terms of N.I.L., Section 38,[37] such an indorsee could hardly base his cause of action upon the warranties of an unqualified indorser under Section 66, N.I.L.,[38] because such warranties extend only to "subsequent holders in due course." In light of Section 47, N.I.L., such an indorsee can hardly claim to be a holder in due course of a negotiable instrument.

It must be constantly borne in mind, however, that to hold that such an indorsement, under Section 47, N.I.L., renders the instrument non-negotiable and that subsequent parties, including the indorsee, become mere assignees, does not prevent a recovery under simple contract principles of assignment. Even an assignor for value of a simple contract is held to make certain warranties; he warrants to the assignee that he will do nothing to defeat or impair the value of the assignment, that the right,

36. BRITTON, *op. cit. supra* note 9, § 69.

37. N. I. L. § 38, states:

A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's words "without recourse," or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument.

38. N. I. L., § 66, states:

"Every indorser who indorses without qualification warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivision one, two and three of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

as assigned, actually exists and is subject to no limitations or defenses other than those stated or apparent at the time of the assignment, and that the token writing or evidence of the right delivered to the assignee is genuine and what it purports to be. Thus if an indorser for collection having received the advancement from his indorsee, does anything to defeat or impair the value of the assigned instrument, or if there are defenses which he did not make known to the indorsee which were not apparent at the time of the indorsement, or if the instrument were not genuine, he could be held liable on the basis of his warranties as the assignor of a non-negotiable contract right.[39] While such warranties do not insure a recovery in all cases, as where the maker or drawer becomes insolvent, it does permit the indorsee to recover in a substantial number of cases.

Another theory of recovery which has been used in allowing a recovery by the indorsee is restitution or money had and received.[40]

B. *Under the provisions of the Code.*

Since the form of an indorsement for collection would not affect the negotiability of the instrument, Section 3-422, Code, would presumably allow an indorsee for collection to recover from the indorser under the stated facts. Section 3-422 provides:

> (1) Every indorser who does not specify to the contrary on the instrument engages that upon dishonor and any necessary notice of dishonor and protest he will pay the amount of the instrument to the holder or to any subsequent indorser who takes it up. If he transfers the instrument for consideration he also gives the warranties of a transferor under the preceding section.[41]

39. RESTATEMENT, CONTRACTS, § 175 (1932). See also WILLISTON, CONTRACTS, § 445, 445A (rev. ed. 1936).

40. White v. National Bank, 102 U. S. 658 (1880).

41. CODE, § 3-421, provides:

"(1) Unless otherwise agreed any party who transfers an instrument for consideration warrants to his transferee or any subsequent holder if such person takes the instrument in good faith

(a) that all signatures are genuine or authorized and that the instrument is not materially altered; and

(b) that the title conveyed is good and its transfer rightful and that no defense of any party is good against the transferor; and

(c) that the transferor has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer or an unaccepted instrument.

(2) Unless otherwise specified on the instrument any such transferor gives to a party who pays or accepts in good faith the warranties of a

(2) "Without recourse" or words of similar import added to an indorsement limits the liability of the indorser to the following warranties:

(a) that all signatures are genuine or authorized and that the instrument is not materially altered; and

(b) that the title conveyed is good and its transfer rightful; and

(c) that the indorser has no knowledge of any defense of any party good against him, or of any insolvency proceedings instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

Under this section "every indorser," whether or not he has received value for the instrument,[42] warrants that he will pay the amount of the instrument to the holder, in the absence of an expression of a contrary intention contained on the instrument. It should be noted that the warranties of an indorser are not limited to "subsequent holders in due course"[43] but extend as well to "the holder or any subsequent indorser who takes it up."

Unless the form of the indorsement for collection, either special or blank, can be said to indicate a contrary intention, the indorser for collection falling within the broad term "every indorser" should be held liable to his indorsee who has advanced the amount of the instrument from his personal funds "upon dishonor and any necessary notice of dishonor and protest."

While the question presented under the stated facts does not extend to the rights of an indorsee for collection who has made no advancement out of his personal funds, the wording of Section 3-422 seems sufficiently broad to permit a recovery by such an indorsee against the indorser. Most certainly an indorsee for collection who has made no advancement to his indorser could make no claim for a payment from his indorser. Unquestionably such result was not intended by the framers of the Code. What method is to be utilized in preventing this obviously unjust result is unimportant to the present discussion except insofar as it has a bearing upon an indorsee who has advanced value to

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person obtaining payment or acceptance if he were himself obtaining payment or acceptance.

(3) 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.

42. CODE, § 3-422, Purposes of Changes 1 (1949).

43. N. I. L. § 66.

his indorser. If in order to prevent a recovery by the indorsee who has made no advancement, the form of an indorsement for collection is interpreted as indicating a contrary intention under Subsection (1), Section 3-422, the unfortunate result will be to likewise deny to the indorsee who has advanced value, the benefits of this subsection.

If the indorsee, under the stated facts, is denied the benefits of Section 3-422 (1), Code, nothing has been accomplished insofar as the present problem is concerned. Such indorsee would then be left in the same position that he has found himself under the N.I.L. and would be forced to base his claim for recovery upon the warranties of an assignor for value or upon the theory of restitution of money had and received.

III. *Conclusion.*

The narrow situation herein considered arises, as has been previously stated, from facts under which it appears that an indorser, by his indorsement, has created in his indorsee an agency for collection and the indorsee has, in anticipation of the future collection of the instrument from the maker or drawer, paid the amount of the instrument to the indorser out of his personal funds.

The frequency with which this siutation has presented itself indicates the common use of such an indorsement in the commercial world. If such an indorsement is to be recognized and permitted by our law, then the two basic problems herein discussed will likewise present themselves. Neither the N.I.L. nor the Code is the source of either problem. They are inherent in and arise solely from the facts. It is true that a uniform act may make the solution of these problems more or less difficult, depending upon the draftsmanship of their framers and the skill of the courts in interpreting the applicable sections. So long, however, as this form of indorsement is permitted to be used, these basic problems will present themselves and require a solution. They arose under the common law, they arise under the N.I.L., and they will continue to arise under the Code in whatever form it may be adopted.

Under such indorsement either of the following situations may arise:

1. The indorsee, after advancing his money to the indorser,

may find that the maker or drawer has a valid defense to the instrument as against the indorser. If the indorser is insolvent, or the indorsee is otherwise unable to secure a reimbursement from his indorser, this question will arise: Should the indorsee under such circumstances be permitted to recover on the instrument in an action against the maker or drawer, free of the latter's defense?

2. The indorsee, after parting with his money to the indorser may find himself unable or unwilling to attempt a recovery for the amount of the instrument from the maker or drawer. This question will therefore arise: Should such an indorsee be permitted to recover on the instrument in an action against the indorser the amount of the instrument which he has previously advanced to the latter?

Whether we decide that the indorsee should or should not be permitted a recovery in both instances, the draftsmanship of the framers of a particular statute should be judged by the ease and certainty by which a court is led by the statute to reach a chosen result. A statute is not therefore necessarily defective or imperfectly drawn simply because the framers have failed to agree with us that the result which we would have reached is the correct one. Consequently, any criticism of either the N.I.L. or the Code as it regards the situation under discussion must be two-fold. First, is the end result selected by the framers a desirable one, and second, assuming that the result selected is a desirable one, are the provisions of the statute well designed to insure that the result will consistently be reached by the several courts which will have occasion to apply it?

The N.I.L has met criticism almost from its inception. That it would require revision was clearly prophesied as early as 1901 when Dean Ames, after a criticism of some dozen sections, including Section 37, said that the N.I.L. would "establish rules opposed alike to justice and well established law. Their enactment must inevitably be followed, sooner or later, by additional legislation to remedy the evils they would introduce.[44] This prophecy, while largely directed at the end results selected by the framers of the N.I.L. and not necessarily at their draftsmanship, has at long last been justified. After a half a century,

44. Ames, *supra* note 35, at 449.

with the attendant changes in commercial practices relating to the handling of commercial paper, the American Law Institute and the National Conference of Commissioners of Uniform Laws are now engaged in a "complete revision and modernization of the Uniform Negotiable Instruments Law."[45]

In evaluating the work of the framers of the Code, we must, as has been previously stated, view it from two separate points of view.

(1) *As to the result reached.*

(a) Under the N.I.L., the indorsee, under the stated facts, was not be permitted to recover from the maker or the drawer free of the personal defenses which the latter might have successfully set up against the indorser. In most instances, however, such a recovery might be had either upon the application of the doctrine of estoppel, or upon basic contract principles of assignment, depending upon the facts in a given case.

Under the Code, the indorsee, under the stated facts, would not be permitted to recover from the maker or the drawer free of the personal defenses which the latter might have successfully set up against the indorser, if the indorsement was a blank indorsement. In most cases a recovery might be had upon the application of the doctrine of estoppel or upon basic contract principles of assignment. If, however, the form of the indorsement is special, the indorsee would be permitted to recover under specific code provisions, depending upon the facts in the given case. Thus it is seen that the end result remains the same under both the N.I.L. and the Code, except in the case of a special indorsee for collection.

(b) Under the N.I.L., the indorsee, under the stated facts was not by virtue of any provision of the N.I.L. given the right of recovery against his indorser. His recovery will depend thereupon upon the application of a principle of law not included in that act, such as restitution for money had and received, or the warranties of an assignor of a simple non-negotiable instrument.

Under the Code, the question of the indorsee's recovery will depend upon whether or not Section 3-422 is interpreted as permitting a recovery. If such an interpretation is not made as will

45. CODE, § 3-101, Comment (1949).

permit his recovery under this section, then, as under the N.I.L., the recovery by the indorsee will depend upon the application of other principles of law not included in the act.

(2) *As to the effectiveness of the statute.*

(a) Under the N.I.L., the provisions of Sections 36, 37 and 47 seem sufficiently clear. Section 47 provides that the indorsement under the stated facts renders the instrument non-negotiable. Thus there cannot thereafter be a holder in due course and the indorsee will necessarily take his rights subject to personal defenses which the maker or drawer may have. The difficulties of the court in applying these sections has not, for the most part, been caused by any defect in draftsmanship, but by a refusal of the courts to reach the result demanded by the sections, or by a failure to recognize and apply the applicable sections of the N.I.L.

Under the Code the indorsement under the stated facts would not destroy negotiability. However, if the form of the indorsement is in blank, while the instrument would remain negotiable, the indorsee could not because of the form of the indorsement assume the status of a holder in due course. He would, by the form of the blank indorsement be declared to be a purchaser with notice. If, however, the form of the indorsement is special, the indorsee could assume the status of a holder in due course, if otherwise meeting the requirements for such holding. The form of the special indorsement would not constitute him a holder with notice.

Whether or not the Code will result in more consistent decisions from the courts called upon to interpret and apply it, will depend upon the courts' willingness to reach the end result and upon the recognition and application of the applicable sections.

(b) Under the N.I.L. the indorsee under the stated facts is given no specific remedy against his indorser. Under the Code, however, the indorsee is given a remedy if Section 3-422 is interpreted as being sufficiently broad to include him.

Most certainly there are grounds for reasonable doubt as to whether the Code section is applicable so as to give the indorsee this specific remedy. If it is interpreted as not being applicable, the indorsee will be left as he now finds himself under the N.I.L., forced to base his claim upon the doctrine of restitution for

money had and received or upon the contract principle of warranties of an assignor of a simple contract.

From this discussion it may be seen that the changes of the Code in both theory and wording have been many and far reaching. It is undoubtedly true that the merits of the Code cannot be fully judged from the application of its provisions to one or two isolated problems. It is quite possible that such chance application will quite accidentally uncover weaknesses in individual sections not at all common to the great bulk of the revision.

If, however, any generalization is permitted from such a narrow application of the few sections of the Code here attempted, the Code should not be expected to be the panacea for all the ills of the commercial world. After a half-century in American courts most of the language of the N.I.L. has been given specific and concrete legal meanings understood alike by the commercial world and the legal profession. It appears unfortunate that a revision might not have been made which would have left more of this wording intact and unchanged. In so completely changing the language of the N.I.L., so many new terms having been introduced, so many old terms having been given new meanings, and so many sections having been reworded, a lengthy period of uncertainty seems assured if the Code is adopted in its present form. It will require many years and much judicial interpretation before the legal result under a given set of facts can be as accurately forecasted under the Code, as at present under the N.I.L.

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