Defenses, Claims of Ownership and Equities--A Comparison of the Provisions of the Negotiable Instruments Law with Corresponding Provisions of Article 3 of the Proposed Commercial Code

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DEFENSES, CLAIMS OF OWNERSHIP AND EQUITIES—A COMPARISON OF THE PROVISIONS OF THE NEGOTIABLE INSTRUMENTS LAW WITH CORRESPONDING PROVISIONS OF ARTICLE 3 OF THE PROPOSED COMMERCIAL CODE.

By William E. Britton*

Sec. 1. Introduction

This article is the fourth in a series of articles in which the writer compares the provisions of the Negotiable Instruments Law with corresponding provisions of the Commercial Code, specifically, the statutory material with respect to real and personal defenses, claims of ownership and, also, the law with respect to a number of situations which arise out of defenses or claims of ownership and which, in a sense, are collateral thereto.

Sec. 2. Real and Personal Defenses and Claims of Ownership in General

In many respects, under the N.I.L., the treatment of defenses and claims of ownership, as regards rights of holders in due course and rights of holders not in due course—the very heart of the subject—is poorly done. Ample opportunity, therefore, is afforded to the Code to improve the statutory base.

The purpose of this section of this article is to note the sweep of the statutory law of the N.I.L. which deals with defenses and equities and to discuss those general sections of the N.I.L. which are involved in situations not covered by specific provisions.

On this general level the framers of the N.I.L. chose, as key concepts, the expressions: (1) "infirmity in the instrument" and (2) "defect in title," to stand, roughly, for the ideas of "defenses" and "claims of ownership." That these concepts, of "infirmities in the instrument" and "defects in title," phrased in figurative language, calling to mind infirmities in the human body and defective meat, vegetables or fruit, have not done more harm in the law than they have is due to the ingenuity of the courts, exercised in a spirit of tolerance and benevolence for those who draft statutes—a sine qua non for the success of any legal system which relies, and must rely,

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heavily upon statutory bases. The terms referred to appear in N.I.L. Sec. 52(4) where it is provided, among other things, that:

A holder in due course is a holder who has taken the instrument under the following conditions: . . . That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

N.I.L. Sec. 54 deals with the idea of notice of “any infirmity in the instrument” and “defect in title,” but does not define the terms themselves. Sec. 56, also, has something to say about notice of an “infirmity in the instrument” and of “defect in title.”

N.I.L. Sec. 55 does undertake to define the expression “defective title.” It reads:

The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

This definition of defective title is really not too bad. But its framers made no attempt to define the other expression: “infirmity in the instrument.”

Then, in N.I.L. Sec. 57 appears the declaration that “A holder in due course holds the instrument free from any defects of title of prior parties, and free from defences available to prior parties among themselves . . . .”—no reference to “infirmities in the instrument,” but bringing in, for the first time, the term: “defences.” The statutory ground work is, thus, of a loose and general character.

For these expressions: “infirmity in the instrument” and “defect in title” the Code uses, in Secs. 304 and 305, the terms “claim” and “defense.” These are far superior to the figurative expressions contained in the N.I.L. Moreover, the terms: “claim” and “defense” were wisely left undefined. Their meanings are to be found in common law and equity decisions. Definitions, often desirable, when carefully drafted, sometimes put courts in strait-jackets.

It would seem to serve no useful purpose to review any considerable number of cases under the N.I.L. which deal with various kinds of personal defenses with a view to determine whether decisions would be the same under the Code. The main thing the Code has done, on this general level, is to substitute for the expressions “infirmity in the instrument” and “defect in title,” the time-honored and highly respectable terms: “claim” and “defense.” Results under the two sets of concepts should be the same but the terminology of the Code is better.

Real defenses will be treated with some detail for if the survey lines
are drawn about the real defenses, the personal defenses, lying outside the field, can be dealt with in general terms.

Sec. 3. Real and Personal Defenses, in General

At common law, and under the N.I.L., defenses are of two kinds: those which are available as against holders in due course and those which are not available as against holders in due course. The term "real defense" is here used to refer to the former and the term "personal defense" is used to refer to the latter.

To enumerate the categories of real defenses, they are: (1) forgery; (2) execution without authority; (3) a species of fraud, sometimes referred to as fraud in the execution or in the inception—akin to forgery; (4) some kinds of duress; (5) material alteration; (6) non-delivery of an incomplete instrument; (7) incapacity, and (8) certain kinds of illegality based upon the specific language of statutes.

The so-called real defenses numbered from (1) to (6) are, in a sense, not true defenses though the use of this term is convenient. Rather, they are words used to describe various sets of facts which constitute fatal weaknesses in the plaintiff's case. They are all alike in the sense that each of them discloses an absence of reality of consent to be bound. Even in the fraud in the execution case the signer does not know enough about the transaction to constitute consent to be bound. In the language of the N.I.L. he has not "engaged" to pay or to order to pay. In the serious duress case the signer knows enough about the transaction to bind himself but he is freed from the consequences of such knowledge because no real volition accompanies his signing.

Real defenses (7) and (8) are defenses solely because of rules of public policy. Within certain limits the common law erected shields from contractual liability around those under incapacity, such as minors, insane persons and married women. A statute may denounce certain kinds of contracts, such as gambling contracts, in such strong language that the purported contract is void even in the hands of a holder in due course. All of these real defenses will be discussed in separate sections of this article.

Every other set of facts that, under some common law, equity or statutory, rule may be asserted defensively is a personal defense and accordingly not available against a holder in due course.

The N.I.L. Sec. 52(4) employs the term "infirmity in the instrument" and, in Sec. 57, the term "defense" to describe what are here called "personal defenses." Sec. 305 of the Code employs only the simple, but sweeping term "defenses," and thus, just as does the N.I.L., leaves to the law gen-
erally, outside the special rules of the law of negotiable instruments, the problem of settling what facts do and do not constitute defenses.

Sec. 305 of the Code reads as follows:

To the extent that a holder is a holder in due course he takes the instrument free from

(1) all claims to it on the part of any person; and
(2) all defenses of any party to the instrument with whom the holder has not dealt except
   (a) infancy, to the extent that it is a defense to a simple contract; and
   (b) such other incapacity, or duress, or illegality of the trans- action, as renders the obligation of the party a nullity; and
   (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and
   (d) discharge in insolvency proceedings; and
   (e) any other discharge of which the holder has notice when he takes the instrument.

All of the foregoing defenses, with particular reference to the real defenses, are the subject of separate sections of this article, following, with the exception of the defenses based on discharge, Code Sec. 305(2)(d) and (e), which will be discussed in a later article in this series which will deal with the subject of discharge.

Sec. 4. Forgery and Unauthorized Signatures

N.I.L. Sec. 23. When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.

Code Sec. 3-404(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 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.

Neither the N.I.L. nor the Code defines "forgery," hence, under the law, and under the Code, the fact situations which constitute forgery are ascertainable from judicial decisions. The Code, therefore, makes no change in the concept "forgery" for under each provision its meaning is derived from the same data.

The over-all operative effect of N.I.L. Sec. 23 is found in the declaration
that the "forgery" is "wholly inoperative." The concept "inoperativeness" is then broken down and possibly extended into three detailed illustrations of "inoperativeness," i.e., that subsequent to forgery there exists: (1) "no right to retain the instrument," and (2) "no right to give a discharge therefor," and (3) "no right to enforce payment thereof against any party thereto." The declaration that there is "no right" to do any of these three things, is further amplified by the clause "can be acquired through or under such signature."

Specifically, the provision, declaring that there is "no right to enforce payment thereof" has meant that a forged signature of a maker of a note, of the acceptor of a bill, of the drawer of a bill and of the indorser of a note or bill, cannot be held liable on the instrument by any holder, whether in due course or not in due course, or by any transferee of such instrument. This aspect of the legal effect of forgery is commonly expressed by the generalization that "forgery is a real defense." Results would be identical under the Code.

What does N.I.L. Sec. 23 mean by declaring that "no right to . . . give a discharge therefor . . . can be acquired through or under such signature"? This question seems not to have been discussed. The term "discharge" includes, payment, accord and satisfaction, material alteration, renunciation and acquisition at, or after, maturity in an obligor's own right. Sec. 23 seems to say that any act of purported discharge of an instrument, bearing such person's forged or unauthorized signature, is inoperative. It would be the apparent obligor who normally could discharge by payment, and by reacquiring in his own right. It would be the holder who would discharge by renunciation, cancellation, or by material alteration. The latter, of course, could be done by a stranger.

In so far as the purported signer's act of attempted discharge by payment or by accord and satisfaction, is concerned, N.I.L. Sec. 23 appears to say that his act is inoperative, i.e., no discharge and no ratification could flow therefrom. If this is so it constitutes a line of thought which could be used adversely to the decisions which hold that a forgery can be ratified. In so far as this provision concerns payments by a purported principal of an instrument bearing his unauthorized signature, it would appear to declare that the payment is inoperative. There may, of course, be "payments" which do not constitute ratification because of want of knowledge by the payor, but certainly there may be payments which do constitute ratifications in the law of agency. It is almost inconceivable that such a payment would not constitute a discharge despite the language of Sec. 23, except as against the forger or unauthorized agent. The law of agency should override contrary implications.
As regards discharges by cancellation, renunciation, and material alteration, acts which would be done by holders, there is no apparent reason why these acts of discharge should not operate as they normally do. No cases have been found on the point. It is reasonably predictable that a court would not accept the statement that there is no such thing as a discharge of a forged or unauthorized signature but would find some way out, if justice called for it.

What does the provision, in N.I.L. Sec. 23, stating that “no right to retain the instrument . . . can be acquired through or under such signature. . . .” mean? It would seem to mean that the party whose signature was forged or affixed without authority had a right to get it back. But, should he have such right in all cases? Suppose it is the signature of a maker that is involved. The note has gone through the hands of several indorsers. Should not the holder have the right to retain the instrument for the purpose of suit against prior indorsers, either on their indorsements or on the warranty theory? It would seem so. In other words, there will be cases where it would be proper for a court to allow a person, whose signature was forged or unauthorizedly affixed, to get it back but there surely would be cases where such party is amply protected by the facts used by him as a shield of defense against asserted liability, but where, if he were allowed to get the instrument back, it would work a hardship on the holder. A court could well work its way out of such apparent dilemma. Again, the point is, that the Code by not incorporating the detailed provision that there is “no right to retain such instrument” has removed the difficulty above noted.

One reason for going into the questions of the possible, curious effects of parts of the provision, contained in N.I.L. Sec. 23, which declares that where a signature has been forged that there is “no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto . . . .” is to note that the Code properly omits the quoted clause entirely and rests solely on the declaration that the forged signature is “wholly inoperative.”

The provision contained in N.I.L. Sec. 23 and Code Sec. 404, that forged or unauthorized signatures are “wholly inoperative,” being identical would produce identical results.

With respect to facts which will override the rule of non-liability, the N.I.L. provides: “Unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.” The corresponding language of the Code is: “Unless he ratifies it or is precluded from denying it.” The facts which have been held to preclude the setting up of forgery under the N.I.L. should be the same as those which should preclude one from denying the forgery. In this respect the verb
"setting up" should be identical in meaning with that of the verb "denying" the forgery.

One difference in language here appears. The N.I.L. uses the word "preclude" only. The Code expressly uses, not only the word "preclude," but also uses the words "ratifies it." It has been held\(^2\) that the word "preclude," as used in N.I.L. Sec. 23, includes the idea of ratification as well as that of estoppel. There are too few cases to warrant the conclusion that all courts, in jurisdictions where forgeries are capable of ratification, would hold that "ratification" is included in the term "preclude." The Code proceeds upon the assumption either that "ratification" is not included in the term "preclude" or that there is such doubt about it that it should be made express. This would seem to be a wise precaution. Hence, under the Code, the desirable result reached in \(\text{Strader v. Haley}^3\) would be assured.

In jurisdictions where a forgery is incapable of ratification,\(^4\) of course, the rule of the above case would not obtain. But Sec. 3-404(2) of the Code would change such rule for this provision reads: "Any unauthorized signature may be ratified for all purposes of this Article." This provision would also restate the agency rule under which a principal may ratify his signature where a person signed it purporting to act for and to have authority to bind such purported principal. The Code provision would not affect a rule in the law of agency, outside the law of negotiable instruments, not dealt with by Article 3 of the Code, under which forgeries may be incapable of ratification. Such rules would remain unchanged. And, of course, the new provision of the Code would have no necessary effect on the criminal law.

The last clause of Sec. 3-404(1) is new. It provides that the unauthorized signature "... operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value." The only person who could "pay it" would be the person whose name was unauthorizedly signed. Any person could "take it for value," that is, purchase it. That would mean that the payor, although his act of payment may or may not have constituted a ratification as regards the third party, promisee, the payor would have such rights against the actual signer as the law otherwise would give the payor against such person, if such person had signed his own name. And the same would be true as regards the rights of a purchaser for value in good faith. This provision is wise, though the same result should be reached under the N.I.L. Sec. 18, which provides: "One who signs in a trade or assumed name will be liable to the same extent as if he had signed his own name." That is, the actual signer is bound on the instrument whether there was or was not a ratification. To obviate the

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\(^2\)\(\text{Strader v. Haley, 216 Minn. 315, 12 N.W.2d 608 (1943).}\)

\(^3\)\(\text{Ibid.}\)

\(^4\)\(\text{The cases are discussed in Mechem, Outlines of Agency §§ 223-25.}\)
possibility that ratification might be held to mean that the actual signer
was not bound on the instrument after ratification, Sub-sec. 2 of Sec. 404
provides: "Such ratification does not, of itself, affect any rights of the
person ratifying against the actual signer."

The Code's provision with respect to forgery is superior to the cor-
responding provision of the N.I.L.

Sec. 5. Fraud as a Real Defense

N.I.L. No corresponding provision.

Code Sec. 305-(1) (2) (c). To the extent that a holder is a holder in due course
he takes the instrument free from (1) all claims to it on the part of any person;
and (2) all defenses of any party to the instrument with whom the holder has not
delt except (c) such misrepresentation as has induced the party to sign the instru-
ment with neither knowledge nor reasonable opportunity to obtain knowledge of
its character or its essential terms.

This section is new. Illinois and Wisconsin expressly incorporated in
their respective drafts of the N.I.L. the rule embodied in the Code Sec. 305
(1) (2) (c). The inclusion of the proposed new section is wise. The law
embodied therein is well established by common law cases in England and
America. There have been numerous cases, going back generally to the
leading case of Foster v. McKinnon.

In another place the present writer has summarized the cases in the
following language:

If a person is induced by fraud to sign a negotiable instrument under
circumstances where he does not know the nature of the instrument which
he signs but justifiably believes that he is signing a writing of entirely
different character, and where by the exercise of ordinary care he could not
have known the nature of the instrument which he is induced to sign, his
signature imposes no duty upon him to any holder, including a holder in
due course, because his signature is unaccompanied by the required con-
tractual intent.

Where such a signer does not know the nature of the instrument which
he signs but where, by the exercise of ordinary care, he could have discovered
the nature of such instrument, his signature imposes a contractual duty upon
him which is enforceable against him by a holder in due course, a holder
not in due course being subject to the signer's defense of fraud.

If the signer is literate and under the circumstances present at the time
he signs, could read the instrument signed by him and does not do so, he

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5 The cases are collected in Britton, Bills & Notes, § 130, at 566-86. The whole problem was
carefully reviewed in C.I.T. Corp. v. Panac, Cal. App., 149 P.2d 901 (1944); 25 Cal.2d 547,
6 L.R. 4 C.P. 704 (1869).
will be deemed negligent, his defense of fraud will be personal and not avail-
able as against a holder in due course.

If the signer is not able to read, either because of illiteracy, impaired
vision or because of other attendant circumstances, and there is present or
readily accessible no third party who could be called upon to read the instru-
ment, the signer will not be deemed negligent and his defense will be real
and available as against all holders including holders in due course.

The question as to what facts constitute negligence is for the jury under
proper instructions.

The burden rests upon the signer to convince the trier of the facts that
he signed the instrument under circumstances which impose no liability upon
him.

A few courts, at common law, held that the defense of non-negligent
execution was not available against a holder in due course.7

The language of Code 305(1)(2)(c) should reproduce the result in
the cases which accept the prevailing doctrine.

Four points should be mentioned. Subsection (2)(c), of Sec. 305,
in form, is a limitation on Sec. 305(2) but is not in form a limitation on
the introductory clause of Sec. 305(1). It should be a limitation on both
subsections (1) and (2). If subsection (c)—the Foster v. McKinnon doc-
trine—which makes a species of fraud a real defense, is not construed also
as a limitation on subsection (1) the anomaly would be presented of
declaring that, an indorser so situated, when sued could successfully defend
but he would not be able to recover his instrument from a remote holder,
for, apparently, "all claims" are cut off by subsection (1). This type of
case would be rare but it would be better drafting if it were clear that the
Foster v. McKinnon rule could be used offensively as well as defensively.

The cases have worked out the rule employing the language of negli-
gence. The Code does not use the language of negligence but substitutes
the phrase "... knowledge nor reasonable opportunity to obtain knowledge
of its character or its essential terms." While there is always a risk that
new language intended to reproduce a rule phrased in other terminology
will lead to divergent results and to unnecessary litigation, it would seem
likely that the new language of Sec. 305(2)(c) would not be interpreted
so as to produce results different from what are now produced by the use
of the terminology of negligence. Only time and litigation will tell.

Since the real defense based on fraud is analogous to forgery and to
material alteration, situations where the rules on burden of proof are not
always identical, it would have been desirable to have incorporated a rule
on the matter of burden of proof in the fraud case rather than to leave the
issue exposed to the risk of conflict of authority.

7 Britton, op. cit. supra note 5, § 130 at 556.
Sec. 305(1)(2) deals expressly only with the rights of holders. It omits reference to the corresponding rights of paying or accepting drawees. The rights of such parties should have been covered.

Sec. 305(2)(c) deals only with a certain species of fraud. Certain species of duress are strongly analogous to this kind of fraud. Duress is covered by Code Sec. 305(2)(b). The only difference between this kind of fraud and some kinds of duress is that the signer, in the one case is misled, by the kind of fraud defined to sign his name to a document which he does not understand while in the other the signer is not misled as to any fact but signs in fear of death or other serious harm. If justifiable ignorance creates a real defense, action, unaccompanied by any true volition should do likewise. This seems to be the law.¹ Sec. 305(2)(b) makes "duress" a real defense if the circumstances "render the obligation of a party a nullity." Existing case law, therefore, would be available in the process of interpretation.

Sec. 6. Non-delivery of a Completed Instrument

N.I.L. Sec. 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

At common law, unlike the law with respect to written contracts generally, delivery of a negotiable instrument was a condition precedent to the existence of the contract between the maker or drawer and the first holder. This rule arose out of the conception that a negotiable instrument

¹ State v. Wegener, 180 Iowa 102, 162 N.W. 1040 (1917); Fairbanks v. Snow, 145 Mass. 153, 13 N.E. 596 (1887).
was a species of property. Hence, the theft of the completed instrument by the payee, or first holder of a bearer instrument, gave rise to a defense which was available against a subsequent holder in due course. A few cases treated the defense of non-delivery of a completed instrument as a personal defense not available against a holder in due course.

Sec. 16 of the N.I.L., by its provision that: "Where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed" makes non-delivery of a completed instrument a personal defense although the instrument escaped from the maker or drawer without his negligent custody of the instrument after execution.

Non-delivery of a completed instrument by this issuer remains a personal defense under Sec. 306(c) of the Code. There is this difference in the matter of the burden of proof. Under N.I.L. Sec. 16, the last sentence, there is a presumption of delivery, whereas under the Code the non-delivery of an instrument is referred to as a defense, there being no preservation of the presumption of delivery, nor does the Code preserve the affirmative requirement of delivery set forth in Sec. 16 of the N.I.L. Deliveries upon conditions precedent and deliveries for a special purpose probably reproduce the results in the cases decided under N.I.L. Sec. 16. Deliveries on conditions subsequent are not provable under N.I.L. Sec. 16. Nothing is said affirmatively, in Sec. 306 of the Code, about conditions subsequent but the express reference in Sec. 306 to conditions precedent only should preserve the case law concerning the effect of the parol evidence rule on the non-provability of conditions subsequent.

Sec. 7. Non-delivery of Incomplete Instruments

N.I.L. Sec. 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery. Code Sec. 115(1). When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed. (2) If the completion is unauthorized the rules as to material alteration apply (Section 3-407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting.

10 Shipley v. Carroll, 45 Ill. 285 (1867); Kinyon v. Wohlford, 17 Minn. 239 (1871).
11 The cases are collected in Britton, op. cit. supra note 5, § 54.
12 Britton, op. cit. supra note 5, § 55.
At common law the non-delivery of an incomplete instrument was a real defense, and available as against a holder in due course, just as was the non-delivery of a completed instrument. The N.I.L. in Sec. 15, preserved the common law rule by its declaration that a non-delivered incomplete instrument would not be a valid contract "in the hands of any holder." Thus, under the N.I.L., the law with respect to non-delivered completed instruments is directly contrary to that with respect to incomplete instruments. Some courts, however, have held that the facts existing at the time of the escape of the instrument from the possession of the maker or drawer may be such as to estop the maker or drawer from setting up the defense of non-delivery of the incomplete instrument as against the drawee bank. But the estoppel is generally held not to run against the maker or drawer in favor of a holder in due course.

The superior position of a drawee bank over that of a holder in due course is said to arise from the antecedent contractual relations between the depositor and his bank which imposes a risk upon the bank either in deciding to honor or not to honor whereas a holder acts entirely at his own election.

Sec. 115(2) of the Code reverses the rule of N.I.L. Sec. 15 and makes non-delivery of an incomplete instrument a personal defense. This change is wise. The difference between a completed instrument and an incomplete instrument is not enough to justify diametrically opposite results as is true under the N.I.L. Also, it is difficult to justify, practically, an estoppel against the setting up of the defense of non-delivery as regards a drawee bank and not as against a holder in due course. These possible anomalies disappear under the Code.

The provision contained in Sec. 115(1), forbidding actions on incomplete instruments "until completed" is too sweeping in character. For example, there is no valid reason for refusing to permit an action by a holder of an instrument, complete in all aspects, except that it is blank as to the payee's name. A holder under a blank indorsement is not now required to fill it in. The holder of an instrument blank as to the payee's name should be able to sue upon it as a bearer instrument.
Sec. 8. Material Alteration

N.I.L. Sec. 124. Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

N.I.L. Sec. 125. Any alteration which changes (1) The date, (2) The sum payable, either for principal or interest; (3) The time or place of payment; (4) The number or the relations of the parties; (5) The medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

Code Sec. 407(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. (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.

Code Sec. 601(1)(f). The extent of the discharge of any party from liability on an instrument is governed by the sections on . . . fraudulent and material alteration. Sec. 407.

1. What are the facts which will constitute a material alteration?

N.I.L. Sec. 125 declares that "any alteration" which changes the date, the sum, the time of payment, the place of payment, including the addition of a place of payment, the number of parties, the relation of parties, the medium of payment, is a material alteration. Then Sec. 125 goes beyond these particularizations and adds a comprehensive statement, in general terms, by providing that "any other change or addition which alters the effect of the instrument in any respect, is a material alteration."

Has Sec. 407 of the Code added to or subtracted from the concept of material alteration as set forth in N.I.L. Sec. 125? The Code expressly includes Sec. 125(4) of the N.I.L., i.e., the clause: "the number or the
relation of the parties." No change here. The Code does not expressly refer to alterations of the date, the sum, the time or place of payment, the medium of payment, or the addition of a place of payment, as material. Are they made so by any general language of Sec. 407? It is believed that all of the enumerations contained in N.I.L. Sec. 125 would be derived from the general language contained in Code Sec. 407 which provides: "Any alteration is material which changes the contract of any party thereto in any respect," because all of the enumerations of N.I.L. Sec. 125 describe sets of facts which do "change the contract" of one or more parties to the instrument. Without the express inclusion in Code Sec. 407, of Sec. 125(4) it might have been possible to hold that any addition of names or any change in relationship of parties might constitute a material alteration even if no change in the contract of any party was thereby effected.

How does the general language, defining a material alteration in N.I.L. Sec. 125, compare with the general language defining a material alteration in Code Sec. 407? Sec. 125 of the N.I.L. throws the emphasis upon alterations of "the effect of the instrument in any respect." Sec. 407 of the Code throws the emphasis upon alterations "which changes the contract of any party thereto in any respect." The question comes down to this: do any and all sets of facts which alter "the effect of the instrument in any respect," also constitute "changes in the contract of any party thereto in any respect." The answer is, in part, speculative. Every "change in the contract" would certainly "alter the effect of the instrument." Would every alteration of the "effect of the instrument in any respect" also constitute a "change in the contract" of some party thereto? Probably, though it is possible to think that the language of Sec. 125, in this respect, may be microscopically broader than that contained in Sec. 407 of the Code. In any event it seems preferable, for clarity sake, to harness the general definition of material alterations to the idea of "changes in the contract" than to the somewhat looser term "alteration of the effect of the instrument."

The Code proposes that unauthorized completions of instruments issued in incomplete form shall constitute material alterations. This topic is discussed in the section of this article which immediately follows here. The matter is mentioned here because the unauthorized completion of an incomplete instrument, issued or not issued, which escapes from the maker or drawer, constitutes sets of facts which fall within the concept of material alterations.

Turning now to the comparison of the legal effects of material alterations under the N.I.L. and Code, what are the specific questions which may be raised? N.I.L. Sec. 124 declares that "where a negotiable instrument is materially altered, it is avoided. . . ." This language appears in a section
entitled: "Discharge of Negotiable Instruments." Hence the verb "avoided" is used in the sense of "discharge." The Code does not use the verb "avoided" but does use the term "discharge" in both subsections (a) and (b) of Sec. 407(2). Hence, thus far, there should be identity of meaning.

The next question is: do all material alterations under the N.I.L. result in discharge or only some of them, and, similarly, do all material alterations under the Code result in discharge or only some of them. Are the inclusions and exclusions under the N.I.L. and Code identical or different? Specifically, fraudulent material alterations and innocent material alterations must be considered; also material alterations both fraudulent and innocent by holders, by transferees who are not holders and by strangers, i.e., non-owners and non-holders. And finally, as against what parties does a discharge operate as such?

The N.I.L. Sec. 124 makes no distinctions between material alterations which were innocently affected and those which were fraudulently made. The instrument is avoided in each instance. Sec. 407 of the Code draws a distinction between the legal effect of fraudulent material alterations and innocent material alterations. An instrument which is fraudulently and materially altered is discharged, for the section reads: "... alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed. ..." Sec. 407 continues and provides: "no other alteration discharges any party. ..." The Code thus restores a common law rule adopted by some courts. The change is wise for the holder of an instrument which he or some one innocently altered, although not a holder in due course, should be able to sue upon the negotiable instrument and not be forced to lose the advantages thereon and be required to sue on the underlying debt.

Sec. 124 of the N.I.L. speaks of discharging "the instrument" while Sec. 407 of the Code speaks of discharging "any party whose contract is thereby changed." There may be some room for variation in result but it would seem to be largely theoretical rather than practical.

Who are the parties under the N.I.L. and the Code whose acts of materially altering instruments will have the effect of discharge? Under the N.I.L. there is no limitation for Sec. 124 merely says: "Where a negotiable instrument is materially altered ..." apparently meaning by anybody. This language includes owning and non-owning holders and transferees of unindorsed paper payable to the order of the transferor, strangers in possession, rightly or wrongly. The Code speaks only of alterations "by the holder." This is not good, for instruments altered by transferees of unindorsed paper, who are not holders under N.I.L. Sec. 191 nor under Sec.

16 See Williston, Discharge of Contracts by Alteration, 18 Harv. L. Rev. 105, 115 (1904).
1-201(20), should have the same effect as alterations by holders. This may have been a "slip of the pen" which the courts would patch up, but some courts elect to "hew to the literal line and let the chips fall where they may." The language of the Code is too restrictive. More debatable, perhaps, is the matter of material alterations by strangers, at common law sometimes called "spoilation." Under N.I.L. Sec. 124, it would seem "spoilation" is included in Sec. 124. At common law in England, "spoilation" avoided the instrument. This rule was codified in the English Bills of Exchange Act.

At common law in the United States, alteration by a stranger, i.e., agent of the obligor, or obligee acting without authority, or a thief, finder or other wrongful possessor, did not avoid the instrument. By adopting the language of the English Bills of Exchange Act, Sec. 124 of the N.I.L. would seem to have adopted the English rule. But in the few cases which have arisen under Sec. 124, involving the doctrine of "spoilation," the courts have continued to apply the American common law rule, usually with little if any consideration of the effect of the language of Sec. 124. The Code is defective in not having cleared up this problem.

Against what persons does the discharge from material alteration operate? Sec. 124 of the N.I.L. provides that a materially altered instrument "is avoided except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers." N.I.L. Sec. 124 continues by declaring that: "When a materially altered instrument is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

The corresponding language of Sec. 407 of the Code is: "As against any person other than a subsequent holder in due course 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. . . . A subsequent holder in due course may in all cases enforce the instrument according to its original tenor. . . ."

To compare these provisions. Under Sec. 124 of the N.I.L., the instrument is declared not discharged as against the one who altered the instrument, nor discharged as against one who authorized the alteration or who "assented" to, i.e., ratified the alteration. Sec. 407 of the Code also uses the term "assents," so these identical terms would produce the same results. It would have been better to have used the term "ratifies" as the Code does in the forgery Sec. 404(1). The Code expression, "or is precluded from asserting the defense," would include the party who "authorized" the

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17 Davidson v. Cooper, 13 M. & W. 343 (1844).
18 § 64 (1).
19 Dinsmore v. Duncan, 57 N.Y. 573 (1874).
20 Jeffrey v. Rosenfeld, 179 Mass. 506, 61 N.E. 49 (1901).
alteration but is broader than the N.I.L. term. The Code's phrasing is better because of its breadth and because it employs the same expression as is used in Sec. 404(1) dealing with forgery.

It is difficult to see what purpose is served by the statement, of N.I.L. Sec. 124, that a material alteration is not avoided as against "subsequent indorsers," for N.I.L. Secs. 65 and 66 provide that qualified and unqualified indorsers warrant, "that the instrument is genuine and in all respects what it purports to be." This statement includes a warranty against material alteration as well as against forgeries. The Code, properly, omits references, in this section, to the liability of indorsers of materially altered instruments.

At common law, when a negotiable instrument was discharged by material alteration the discharge operated against holders in due course as well as holders not in due course. This rule was changed by the N.I.L. by permitting a holder in due course to recover upon the materially altered instrument "according to its original tenor." Sec. 407 of the Code retains this rule by the employment of the same language.

What changes in the law are effected by the Code's declaration, in Sec. 115, "If the completion [of an incomplete instrument] is unauthorized the rules as to material alterations apply"? This statement of policy is carried out by Sec. 407 of the Code which provides: "Any alteration of an instrument which changes the contract of any party thereto in any respect, including any such change in (b) an incomplete instrument, by completing it otherwise than as authorized."

Under Secs. 14 and 15 of the N.I.L. dealing with incomplete instruments, the legal effects of unauthorized completion are set forth in these sections but they are not denominated "material alterations." What changes in the law are thus proposed?

Case (1), an instrument, blank as to amount, issued by the maker or drawer to the payee with authority to fill it up for $100.00. The payee fraudulently fills it up for $200.00. Under the N.I.L. an innocent drawee could debit $200.00 and a subsequent holder in due course could recover $200.00. The same result would follow if the filling up of the instrument were unauthorized but innocently filled up. The same result should follow under Sec. 407 of the Code for subsection 3 provides: "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." The results under the N.I.L. and the Code

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21 Jones v. Ryde, 5 Taunt. 488 (1814); Birmingham Nat. Bank v. Bradley, 103 Ala. 109, 15 So. 440 (1893).
are thus identical. Both the N.I.L. and the Code are defective in not having expressly declared the rights of an innocent drawee.

Case (2). Same facts as in Case (1) except that the holder in possession is not a holder in due course. Under N.I.L. Sec. 14 the non-holder-in-due-course may enforce the instrument, only if it is “filled up strictly in accordance with the authority given and within a reasonable time.” Under Sec. 407(2) (b) the non-holder-in-due-course of an instrument which was issued or escaped when incomplete, and completed in excess of authority may enforce it only “according to the authority given.” The omission from the Code of the term “strictly,” probably would be inconsequential. The limitation, contained in the N.I.L. Sec. 14, restricting the right of one who is not a holder in due course to recover upon the instrument in accordance with the authority given to acts of completion done “within a reasonable time,” is not continued in the Code. This omission also would seem to be of little consequence.

So it appears that the Code’s proposal to call “unauthorized completions of incomplete instruments” “material alterations” is a change in terminology only, a policy which is usually not commendable for it tends to confusion.

Sec. 9. Material Alteration Resulting from Negligent Execution

N.I.L. No corresponding Section. Code Sec. 406. 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.

The rule, stated above, embodies the doctrine of Young v. Grote. The present writer stated the rule, deduced from the cases, in the following language.

In another connection the present writer stated the rule, deduced from the cases, in the following language.

In most jurisdictions a party to a negotiable instrument, issued by the maker or drawer complete in form, which is subsequently materially altered by the insertion of words and figures in spaces therein negligently left by the maker or drawer, is estopped as against a good faith drawee to set up such material alteration.

In a few jurisdictions there is a similar estoppel as against a holder in due course, the majority of cases holding that there is no estoppel in such case.

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23 4 Bing. 253 (1827).
24 The cases are collected in Barron, op. cit. supra note 5, § 282.
Will Sec. 406 of the Code reproduce the case law? In one respect there is an intentional change in the law in those jurisdictions which now hold that there is no estoppel against a holder in due course in such case. The section adopts the rule, in a minority of jurisdictions, which erect the estoppel equally as against a holder in due course and as against a drawee. It is believed that this policy of removing the conflict of authority is wise.

Does the inclusion of the words "an unauthorized signature" extend the rule beyond existing cases? The answer is uncertain. In one case the court suggested that where a depositor had a rubber stamp of his signature and it is used by a third party to affix the depositor's name to a check without his authority, the drawee bank would have the right to debit the depositor's account, if the depositor had been negligent in his custody of the rubber stamp. It is believed that the policy of extending the estoppel to unauthorized signatures—if this is an extension—is desirable. What situations of fact would be covered, in addition to the rubber stamp signature case, would be difficult to predict. It is believed that the added language would not expand or otherwise affect the case law on agency by estoppel. Probably the added language would include the theft of engraving plates containing signatures if the theft had been facilitated by negligent custody.

Would the words "substantially contributes to a material alteration" expand, contract or leave unchanged existing case law? The answer would be conjectural. It would depend, in part, upon the respective views of courts as to the meaning of these words. In any event the foundation for a new argument designed to stretch or contract the present law is laid.

Sec. 406 confines the estoppel as against holders in due course and drawees who "pay" the instrument. The status of a certifying bank or acceptor of a bill is left "up in the air." It should have been expressly provided for. Moreover, the gap thus left could get the problem of estoppel or not, as against a certifying bank of checks negligently executed, tangled up with the problem of the status of a drawee bank which certifies a check altered by erasures and substitutions.

Sec. 406 erects the estoppel in favor of payors "in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business." (Emphasis added.) The injection of the additional requirement of payment "in accordance with the reasonable commercial standards of the drawee's or payor's business." is highly objectionable for the reasons which the present writer has set forth elsewhere.

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Sec. 406 may project one question more vividly than it appeared at common law, and that is this. At common law the erection of the estoppel occurred only with respect to that kind of negligent execution which permitted material alteration by the insertion of words and figures in blank spaces on a completed instrument which were deemed negligently left by the maker or drawer. The estoppel was not carried so far as to enable one to claim that it was negligence to draw an instrument with lead pencil or washable ink. This may have been illogical but the courts, having had difficulty in justifying the rule in the first place, simply confined it in a strait-jacket: "Thus far we go and no farther."

Under Sec. 406 the doctrine is dignified by statutory language with nothing contained therein suggesting its confinement to common law fact situations. If the courts interpret the term "negligence" as used in Sec. 406, historically, that is, finding the meaning of the term solely in common law cases and cases under the N.I.L., then there would be no predictable extension of the rule to the lead pencil, washable ink and similar cases. But courts do not always interpret statutory language as they used it in opinions at common law, and wisely so oftentimes. No one can predict what would happen, along this line, under Sec. 406. It would have been preferable to have confined Sec. 406 expressly to the fact situations which had been recognized by the courts at common law rather than to have used the term "negligence" without limitation. If this change should lead to the requirement that "the man in the street" must be as careful as a bank usually is, the expansion of the law would be highly undesirable.

Sec. 10. Comparison of Drafting Policies with Respect to Analogous Problems

The "Fraud in the Execution" cases and the "Negligent Execution" cases are strikingly analogous. Yet the drafting policies disclosed are dissimilar. Sec. 305(1)(2)(c), which deals with the fraud case, makes no provision for the paying, accepting or certifying drawee. Only holders in due course acquire rights under the section. Under Sec. 406, which deals with the Negligent Execution case, the section erects the estoppel in favor of holders in due course and paying drawees but says nothing about the position of an accepting or certifying drawee. This is not good.

Again, both rules were worked out at common law by the use of the terminology of negligence. Sec. 406 retains the language of negligence but Sec. 305 rejects it and substitutes the language of "knowledge" and "the reasonable opportunity to obtain knowledge." Was this variation intentional or accidental? It will require litigation to find out. Analogous problems, at common law, which have been worked over by the courts with identical terminology, when cast into statutory form should retain the use
of the same terminology unless there is a highly persuasive reason for variation. There seems to be none here.

Sec. 11. Claims of Ownership Specifically Considered

There are, perhaps, four situations where claims of ownership become involved: (1) where there is no defense between the original parties and some remote party acquires possession or title under circumstances which gives rise to a right of restitution in a prior party and such prior party seeks to recover the instrument or its proceeds in a direct attack upon the party in possession or who holds the legal title; (2) where the facts are the same as in Case (1) but where the party in possession or who holds the legal title sues an obligor who has no defense of his own and where the party who has the right of restitution from the plaintiff is not a party to the litigation and the defendant attempts to set up in defense the right of restitution in such third party; (3) where there is an outstanding claim of ownership, or right of restitution, in a third party and where the defendant, prior party, possesses also a personal defense of his own and where the plaintiff, holder, has knowledge of the facts which create the right of restitution but does not have knowledge of defendant's own personal defense, and the question is whether the plaintiff, who, admitted, is not a holder in due course as regards the outstanding claim thereby is rendered a non-due course holder as regards the unknown defense of the defendant; and (4) where there is an outstanding claim of ownership in a third party and such party seeks to recover the instrument, or its proceeds, in a direct attack against an innocent purchaser who is not a holder in due course because his purchase took place after maturity.

In all of these four cases the outstanding claim of ownership, or right to restitution, is not referred to expressly in the N.I.L. but is an appropriate term to describe what a former holder has as a result of a subsequent party's acquisition of what the N.I.L. calls "a defect in title." The Code, in Secs. 304 and 305, uses the simple term "claim" instead of the term "defect in title." The new terminology is preferable for it throws the emphasis upon the outstanding legal or equitable right rather than upon the wrong which creates the duty to return the instrument. The whole body of law outside the Code is thus thrown open for use in determining whether the "claim" is well founded or not.

To comment specifically upon each of the four cases referred to. Case (1) presents the question, both under the N.I.L. and the Code, as to whether the plaintiff is or is not a holder in due course. As far as the nature of the claim of plaintiff is concerned, results under the Code should be the same as under the N.I.L. for it is law and equity outside the statute which determines validity of the claim. But the facts which constitute one a holder
in due course under the N.I.L. are not quite the same as are the facts which constitute one a holder in due course under the Code. The present writer has discussed this question at some length elsewhere.\textsuperscript{28}

Case (2) is considered in the section immediately following this section of this article under the heading: \textit{Right of a Party to Set Up in Defense a Claim of a Third Party.}

Case (3), the case of double equities, the present writer has discussed elsewhere.\textsuperscript{29}

Case (4) is the overdue paper problem. It has been discussed brilliantly by Professor Chafee.\textsuperscript{30} The present writer attempted to summarize Professor Chafee's article elsewhere.\textsuperscript{31} A further attempted condensation is as follows:

The bona fide purchaser of an overdue instrument, under the English rule, takes subject to all equities of ownership as well as equities of defense.

The American cases, generally, protect the bona fide purchaser of an overdue instrument if the circumstances are such that the owner of the equity may be deemed estopped by his voluntary transfer to the wrongdoer.

Some American cases confine protection of the bona fide purchaser of an overdue instrument to those claims of ownership of claimants who were not in the chain of title. That is latent equities alone are shut out. Substantially an equal number of cases deny such protection, thus reflecting the English rule.

A few cases protect the bona fide purchaser after maturity from equities of ownership which are not discoverable by inquiry from the maker or drawee.

With but few exceptions the cases deny protection to a bona fide purchaser after maturity from a thief or finder of a bearer instrument, whether the instrument was lost or stolen before or after maturity.

Chafee's investigation into the problem leads him to the conclusion that a bona fide purchaser of overdue paper should take free from all equities of ownership including those of an owner who lost a bearer instrument or from whose possession such an instrument was stolen.

Neither under the N.I.L. nor under the Code would an innocent purchaser after maturity be protected on the ground that he is a holder in due course. The result is that the Overdue Paper Problem would remain the same under the Code as it is under the N.I.L. and was at common law, but subject to the following observation. It might be that some results would be changed by the Code resulting from its rejection of the rule of Sec. 52(2) of the N.I.L. which requires, for due course holding, that the instrument be purchased "before it is overdue," and its substitution, in Sec. 302 of the rule: "A holder in due course is a holder who takes the instrument (c)
without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.\[^{32}\]

**Sec. 12. Right of a Party to Set Up in Defense a Claim of a Third Party**

The problem here raised concerns the right of a party who when sued on the instrument, has no defense of his own, to set up in defense an outstanding legal or equitable title, or other right of restitution, owned by a third party who is not a party to the litigation.

At common law an obligor on a negotiable instrument could successfully defend an action against himself if the plaintiff could not prove the genuineness of all indorsements necessary to his title, assuming that the issue of genuineness had been properly tended by the pleadings.\[^{33}\] The rule remains the same under the N.I.L.\[^{34}\]

At common law, by the weight of authority, a party to a bill or note when sued thereon was not allowed to set up in defense an outstanding equity of ownership or comparable right of restitution in a third party not a party to the action,\[^{35}\] nor could such party defeat an action against himself by showing that the plaintiff acquired title in an illegal transaction.\[^{36}\]

Under the N.I.L. the law with respect to the *jus tertii* is fragmentary and chaotic in that it springs from statutory provisions involving inconsistent policies. To survey the various situations: (1) there is no doubt but that under Sec. 23—the forgery section—a defendant may successfully set up an outstanding legal title in a party whose necessary indorsement had been forged.

(2) Under Sec. 22,\[^{37}\] a party to a bill or note, when sued thereon, cannot set up in defense the right of disaffirmance of an infant or corporate indorser.

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\[^{33}\] Lancaster v. Baltzell, 7 Gill & J. (Md.) 468 (1836).
\[^{36}\] Tindal v. Childress, 2 Stew. & P. (Ala.) 250 (1832); Roberts v. Taylor, 7 Post. (Ala.) 251 (1838); Rumping v. Arkansas Nat. Bank, 121 Ark. 202, 180 S.W. 749 (1915); Higginbotham v. McGrearty, 185 Mo. 95, 81 S.W. 883 (1904). Many other cases in accord and contra are collected in *Bartron, Buits & Notes*, § 160 at 766.
\[^{37}\] N.I.L. § 22: The indorsement or assignment of the instrument by a corporation or an infant passes the property therein, notwithstanding that from want of capacity the corporation or infant may incur no liability thereon.
(3) Under Secs. 60, 61 and 62, the maker, drawer and indorser of an instrument when sued thereon cannot set up in defense the incapacity of the payee existing at the time of issuance.

(4) Other cases of incapacity are not provided for, in the N.I.L., thus giving rise to a possible opposing rule but also suggesting that the rule of Secs. 22, 60, 61 and 62 is illustrative of the broader principle that a party to a bill or note cannot set up a right of restitution of any indorser whose indorsement is deemed voidable because of incapacity and that the same may be so extended by analogy.

(5) Under Sec. 39 of the N.I.L. no party to a bill or note above a conditional indorser may successfully defend the action brought by a holder by showing the non-fulfillment of the condition.

Thus far all of the sections of the N.I.L., above referred to, emerge from the same legal policy, i.e., the policy of denying the defendant the right to set up the *jus tertii*.

(6) What does the N.I.L. have to say about the widely varied and more numerous situations where the plaintiff, not a holder in due course, has a title, acquired by fraud, illegality, etc., which may be subject to a right of restitution in a third party, not a party to the action? The N.I.L. does not come to grips with this problem. It is dealt with in a sort of "back-handed" way by implications from N.I.L. Secs. 51, 88, 119 and the last sentence of Sec. 59. The reasoning is somewhat long and involved and has been set forth by the present writer elsewhere, but suffice it to say that the net effect of these implications is to suggest a rule just the opposite of the specific rules contained in the several sections above commented on.

With respect to the broad issue under the N.I.L., in cases where the plaintiff acquired the instrument by fraud or in breach of trust or in an illegal transaction, the cases continued, as at common law, to be in conflict and without much consideration of the sections of the N.I.L. which had a bearing on the problem. The important consideration now is to note what the Code proposes to do with the full sweep of the *jus tertii* problem.

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88 N.I.L. § 60: The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse. N.I.L. §§ 61 and 62 use the same language with respect to drawers and acceptors.
89 N.I.L. § 39: Where an instrument is conditional, a party required to pay the instrument may disregard the condition, and make payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.
40 Britton, op. cit. supra note 36, § 159.
41 The cases are collected in Britton, op. cit. supra note 36 at 761-70.
N.I.L. Sec. 22 is reproduced by Code Sec. 207(1)(a) wherein it is provided:

Negotiation is effective to transfer the instrument although the negotiation is made by an infant, a corporation exceeding its powers or any other person without capacity.

The Code provision is superior because it is not confined to infant and corporate incapacity but includes all other kinds of incapacity.

N.I.L. Secs. 60, 61 and 62, dealing with incapacity of the payee, are reproduced by Code Sec. 413(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.

N.I.L. Sec. 39, dealing with conditional indorsements, is reproduced by Code Sec. 205, but with one beneficial exception, as to a part of the rule, in favor of collecting and paying banks:

Code Sec. 205. Neither a conditional indorsement nor one purporting to prohibit further transfer of the instrument prevents its further transfer or negotiation, and the transferee may enforce payment in disregard of the limitation; but the indorsee and any other subsequent transferee except a collecting or payor bank takes the instrument or its proceeds subject to any rights of the indorser.

What does the Code propose with respect to the right of a defendant to set up the jus tertii when the plaintiff has acquired the instrument by fraud, or in breach of trust or in an illegal transaction? Under the N.I.L., from Secs. 51, 88, 119, and the last sentence of Sec. 59, implications, some strong and some weak, it seems that the right of restitution in a third party may be set up.

The Code collides head on with this result and lays down the broad rule that the outstanding jus tertii cannot be set up. This is a commendable change. All of the Code's provisions on the various phases of the jus tertii problem are consistent, i.e., it cannot be set up except where the outstanding jus tertii is a legal title, one resulting from a forged indorsement of the claimant's name. These desirable changes are accomplished by the sections quoted below.

Code Sec. 207(1). Negotiation is effective to transfer the instrument although the negotiation is

(a) made by an infant, a corporation exceeding its powers, or any other person without capacity; or

(b) obtained by fraud, duress or mistake of any kind; or

(c) part of an illegal transaction, or

(d) made in breach of duty.

(2) Except as against a subsequent holder in due course such negotiation is subject to rescission, the declaration of a constructive trust or any other remedy permitted by law.
Sec. 207(1)(a) retains the principle of N.I.L. Sec. 22 and desirably extends it to all other cases of incapacity.

Sec. 207(1)(b)(c) and (d) desirably reverse the principle of N.I.L. Sec. 88 and the last sentence of Sec. 59.

The Code also proposes the same results, as those required by Code Sec. 207, through other sections.

Code Sec. 306. 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 party which would be available in an action on a simple contract; and
(c) the defenses of want of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose; and
(d) the defense that he 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.

It is Sec. 306(d) that deals with the *jus tertii* problem. To take the minor one first. Under the first sentence a defendant, having no defense of his own, may successfully defend if the plaintiff stole the instrument or acquired it, with knowledge, from one who did steal it. This seems to have been the common law rule.\(^4^2\) The same result probably would be reached under the N.I.L.\(^4^3\)

The second sentence of Code Sec. 306(d) adopts the sweeping principle that the defendant who has no defense cannot set up the right of restitution in a third party. Note that the case of a plaintiff who is a finder, or who with knowledge acquired the instrument from a finder, cannot be met by the defense that he was such, thus producing a result different, and it is believed, justifiably so, than in the theft case.

And finally, the Code expressly repudiates the rule of N.I.L. Secs. 88 and 119 that payment, in order for it to operate as a discharge must have been made in due course. N.I.L. Sec. 88 reads:

> Payment is made in due course when it is made at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

The proposal to repudiate the present rule that a payment, to operate as a discharge, must be made without knowledge of an outstanding right of restitution is accomplished by Code Sec. 603 which reads:

> (1) The liability of any party is discharged to the extent of his payment


\(^4^3\) The problem is discussed in Barron, *op. cit. supra* note 36 at 762-66.
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 reversal of the principle of N.I.L. Sec. 88 is eminently wise. It seems odd to leave the amount of the indemnity up to the decision of an interested party, as the Code does, instead of the court.

Sec. 13. Fictitious Payees

N.I.L. Sec. 9(3). The instrument is payable to bearer when it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable.

Code Sec. 405(1). An indorsement by any person in the name of a named payee is effective if . . . (b) a person signing as or on behalf of a drawer intends the payee to have no interest in the instrument; or (c) an agent or employee of the drawer has supplied him with the name of the payee intending the latter to have no such interest.

The present writer, elsewhere, has summarized the result of the cases under N.I.L. Sec. 9(3) as follows:

Case 1. “If an instrument is made payable to the order of a designated payee whether such payee is a real person or a non-existing person and the person who made the instrument so payable, whether such person was the drawer himself, or an agent of the drawer, or a forger of the drawer’s name, and such person intends that the designated payee shall have no interest in the instrument and further intends that the person to whom he, in fact, issues the instrument shall have the interest therein, such instrument is treated just as if it were payable to bearer on its face.”

Case 2. “Conversely, if an instrument is made payable to the order of a designated payee whether such payee is a real person or a non-existing person, and the person who made the instrument so payable, whether such person was the drawer himself, or an agent of the drawer or a forger of the drawer’s name, and whether induced by fraud or mistake to do so and such person intends that the designated payee shall have the interest in the instrument and that it shall be issued to such payee, and such person delivers such instrument to the fraudulent agent of the drawer or to a fraudulently procuring third party, and the party thus in possession of the instrument indorses the payee’s name, such indorsement operates as a forgery, as an instrument so drawn is not deemed payable to bearer under N.I.L. Sec. 9(3) but is payable to order.”

The typical situation in Case 1 arises where an agent has authority to sign his principal’s name as the drawer of checks, and so draws a check, oftentimes a series of checks, intending never to send such checks to the

44 Britton, op. cit. supra note 36 at 696.
payees but intending to indorse the payee's name himself and obtain the proceeds, from some bank or other third party other than the drawee bank, and does so, the check being ultimately paid by the drawee bank. As between the drawer, depositor, and the drawee bank, who loses? Under N.I.L. Sec. 9(3) the bank's debit of the check to the depositor's account is proper because the check is declared by the section to be payable to bearer. The payee's indorsement is not forged.

The typical situation in Case 2 arises with respect to a fraudulent employee who does not have authority to sign his employer's name as the drawer of checks but usually has the duty of preparing checks from invoices received and payrolls and of obtaining the signature of the drawer from that agent or officer of the employer who does have authority to sign the employer's name. To accomplish this fraud, obviously the fraudulent agent must have false invoices or payroll sheets to present to the authorized agent in order to obtain the drawer's signature. The intent of the fraudulent agent is the same in both cases—he intends to embezzle the proceeds. The two cases differ in this: in Case 1 the fraudulent agent is "the party making it so payable." Therefore, the resulting check is payable to bearer with the consequence that the loss will ultimately be thrown upon the depositor. In Case 2 the fraudulent party is not "the party making it so payable." The signing officer, who was fraudulently induced to sign the check is "the party making it so payable," therefore the resulting check is not payable to bearer but is payable to order with the consequence that the loss will fall, in the first instance upon the drawee bank and ultimately upon the party who dealt with the fraudulent agent. The fraudulent agent is, of course, ultimately liable.

A number of years ago the American Bankers' Association recommended to the several states that the fictitious payee section of the N.I.L. Sec. 9(3), be so amended that most of the cases in Case 2 would, thereafter, be controlled by the rule in cases that fall in Case 1, i.e., that the losses from the forged indorsement cases be lifted from both the drawee and collecting banks and be thrown upon the depositor. The specific amendment to Sec. 9(3) took the form of the recommendation that there be added to Sec. 9(3) the following clause:

"... or known to his employee or other agent who supplies the name of such payee,"

so that Sec. 9(3), if amended would read:

"The instrument is payable to bearer when it is payable to the order of a fictitious or non-existent person, and such fact was known to the person making it so payable or known to his employee or other agent who supplies the name of such payee."

This amendment has been made in several states. Hence in these states
the number of fictitious payee situations is greatly expanded. The Code, Sec. 405, incorporates this amendment, with slightly changed phraseology. The Code provision reads:

"An indorsement by any person in the name of a payee is effective if...
(b) a person signing as or on behalf of a drawer intends the payee to have no interest in the instrument, or (c) an agent or employee of the drawer has supplied him with the name of the payee intending the latter to have no such interest."

What changes in the present law concerning fictitious payees are proposed in Sec. 405 of the Code? Basically, nothing of material consequence. Some changes in phaseology have been made and these are important and should serve useful purposes in jurisdictions where the courts have not yet worked out a rationale of fictitious and non-fictitious payee problems, for the reason that the Code eliminates some confusing language incorporated in N.I.L. Sec. 9(3).

Both in the common law cases and in N.I.L. Sec. 9(3) the words "fictitious or non-existing person" never function except to confuse any person who had but slight acquaintance with the cases. A person "fictitious" in fact, or "non-existing person" could be real in the sense that the indorsement of no other person would pass title. Conversely, a person, real in fact, could be fictitious under the section because in both situations no legal consequences flowed from factual fictitiousness or factual non-existence or from factual non-fictitiousness or actual existence but the legal consequences flowed solely from the intention of the "person making it (the instrument) so payable." The Code's proposal to throw out these confusing expressions is wise.

The Code's further proposal not to declare so-called fictitious paper to be payable to bearer but to provide that the indorsement of the payee's name, in a case controlled by the section, shall operate as genuine for the purpose of passing title, is also wise. It has always been confusing for the statute to say that an instrument which factually is payable to order shall be treated just as if it were payable to bearer on its face. It was never necessary for the law to so provide, for all that was ever desired was for the indorsement to operate to pass title. Accordingly, the Code provides:

"An indorsement by any person in the name of a named payee is effective, . . . ."

As a matter of fact fictitious paper is always indorsed by the fraudulent party for otherwise he would not be able to negotiate it. The Code gives such effect to his signature and also to that of "any person," thus giving effect to an indorsement by the fraudulent agent's confederate as well as to that of the fraudulent agent himself.

The Code's provision that "an indorsement by any person in the name
of the named payee is effective," is defective in this: that the section does not state "effective" for what purpose. It should be effective for the purpose of passing title only and not effective for the purpose of imposing liability upon the person whose indorsement was so made. No court would ever impose such liability but the section might well have expressly provided for non-liability, particularly so since the draftsmen were careful to provide that "Nothing in this section shall affect the criminal or civil liability of the person so indorsing." This sentence might well have continued by adding the clause: "or the civil liability of the person whose indorsement was so signed."

Case 3. The cases of double signatures, where one signer falls within the meaning of the first paragraph above quoted, and where the other signer falls within the meaning of the second paragraph above quoted, may be summarized as follows:45

"If an instrument is made payable to the order of a designated payee, whether such payee is a real person or a non-existing person, and two or more persons cooperate in signing the drawer's name thereto, one or more of which signers intend that the designated payee shall have no interest in the instrument and the same parties further intend that the person to whom he or they in fact issue the instrument shall have the interest therein, and the remaining co-signers intend that the designated payer shall have the interest in the instrument and that it shall be issued to such payee, the cases are in conflict on the question as to which of the two groups of signers constitute 'the person making it (the instrument) so payable'."

What about Case 3, the double signature case under Sec. 405 of the Code? Neither the N.I.L. nor the Code takes cognizance of this type of case. It remains quite serious under the N.I.L. However, under N.I.L. Sec. 9(3), as amended, virtually the entire problem of double signatures disappears because the intent is determined by that of the fraudulent agent, not only as regards his own signature but as regards the signature of the co-agent who is defrauded into signing, hence the failure to deal with the double signature situation is essentially inconsequential.

If one approves the broad policy contained in the amendment to Sec. 9(3) of the N.I.L.—and the common law cases were already moving in that direction46—a policy which is contained in Sec. 405 of the Code, this section is an improvement over N.I.L. Sec. 9(3).

45 Britton, op. cit. supra note 36 at 711. Many of the cases are reviewed in Portland Postal Employees' Credit Union v. United States National Bank of Portland, 171 Ore. 40, 135 P.2d 467 (1943).

46 There are cases where an employee fraudulently procures the signature of his employer as drawer, by the use of forged invoices and the like, and indorses the payee's name—a true forged indorsement case—where the courts, in many cases, have allowed the drawee to debit the drawer's account under the forged indorsement on the ground that the employer has been negligent in setting up his administrative machinery, thus making it easier for a fraudulent employee to forge indorsements on the checks of his employer intended for remittance to creditors. The cases are collected in Britton, op. cit. supra note 36 at 663-78.
Sec. 405 of the Code is defective in not having expressly provided for fictitious indorsees. Sec. 9(3) of the N.I.L. also omitted reference to fictitious indorsees, and while such a case may be rare it has arisen and should have been provided for.\textsuperscript{47}

**Sec. 14. Effect of Issuance of an Instrument to a Payee as a Result of the Payee’s Fraud or the Issuer’s Mistake**

Case 1. Where a known person, by fraud, induces another to issue his note or check to such known payee, obviously the payee gets a title. The payee acquires a voidable title or, what the N.I.L. calls, a “defective title.” The indorsement by the payee of his own name, obviously is not a forgery. An innocent purchaser would take title free from the maker’s or drawer’s defense. This situation is dealt with by the N.I.L. and the Code with like results.

Case 2. Where a person, by fraudulent impersonation of another, induces the maker or drawer to issue an instrument to the imposter under the fraudulently assumed name, does the imposter acquire title to the instrument or only possession? Stated otherwise, does the imposter’s indorsement of the instrument in the fraudulently assumed name constitute a forgery or does the imposter acquire a voidable title just as he does in Case 1? The result of the cases can be stated as follows:

“Where a person, by fraudulent impersonation of another in person induces the maker of a note or the drawer of a check to draw the instrument payable to the order of the person impersonated and to issue the same to the imposter, the imposter acquires title thereto. His indorsement in the name of the designated payee is not a forgery.

“Where the imposter conducts fraudulent negotiations by impersonation by mail, telegraph or telephone, by the weight of authority the imposter similarly gets title to the instrument and his indorsement of the payee’s name is not a forgery.”\textsuperscript{48}

“An instrument may be issued by the maker or drawer to a person other than the designated payee under varied circumstances where such party in possession does not get title thereto, as for example when it is issued to one who fraudulently represents himself to be an agent of the payee.”\textsuperscript{49}

The N.I.L. contains no specific provision dealing with the impersonation cases, other than Sec. 23, the section which deals generally with the subject of forgery.

Sec. 405 of the Code proposes to deal expressly with the impersonation cases. It provides:

An indorsement by any person in the name of a named payee is effective

\textsuperscript{47} Hall v. Bank of Blasdell, 306 N.Y. 336, 118 N.E.2d 465 (1954) is such a case.


\textsuperscript{49} The cases are collected in Britton, op. cit. supra note 36 at 715-28.
if (a) an imposter 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.

The proposal would codify the impersonation cases where there is face-to-face dealing by the imposter with his victim, and would also codify the majority of the cases where the imposter works through the mails, by telegraph or telephone but would change the result of the minority rule wherein it is held that in such cases the imposter acquires possession only, his indorsement of the payee's name being treated as a forgery.

The majority rule seems preferable. The Code's proposal is wise.

Suppose the drawer of an order check by mistake mails it to a person of the same name as that of the intended payee and the person who receives the check indorses the payee's name. Is such indorsement a forgery or does the indorsee acquire a "defective title"? This case is analogous to the imposter cases.

The result of the cases can be stated in the following language.

"Where an order instrument gets into the possession of a person of the same name as that of the intended payee or special indorsee, without negligence of the maker, drawer or special indorser, i.e., through the independent act of a third party, the indorsement of the name of such payee or special indorsee by the party in possession is a forgery.

"Where an instrument gets into the possession of a person of the same name as that of the intended payee or special indorsee through the negligent act of the maker, drawer, remitter or indorser, the cases are in conflict on the question whether the indorsement of the party in possession is or is not a forgery."

The N.I.L. contains no provision dealing with this problem, other than Sec. 23—the forgery section. Nor does the Code deal with this specific problem. It should have done so.

Sec. 15. The Doctrine of Price v. Neal

In the oceans, with their infinite motions, there are some so important that they have been surveyed and are known by names conferred upon them. Faults, from which earthquakes rise and molten lava shoots out its devastating streams are also known by proper names. Similarly, in the moving law and in the fissures of the at times static legal crust, there is some law that is known by the name of the case which started the movement. Such a case is Price v. Neal.51

It seems that one Lee, short on funds and long on the belief that he could circumvent the criminal law, forged the name of one Sutton to two

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50 The cases are collected in Britton, op. cit. supra note 36 at 725-28.
bills of exchange, each for £40 and each payable to the order of one Ruding, directed to one John Price, as drawee. Each of these bills came into the hands of one Edward Neal for value, one of which had been accepted by the drawee and the other not. The drawee paid both the accepted bill and the non-accepted bill to Neal. The purported drawer, Sutton, on learning of this attempted raid upon his funds, and, in cooperation with the drawee, Price, called on Scotland Yard, or some equivalent agent, to track down the forger. He was soon caught and, Lord Mansfield tells us, was hanged, even before the father of Commercial Law handed down his famous decision which informed Mr. Price that he could not get back the £80 which he had theretofore paid Mr. Neal, in the belief that the drawer’s purported signature was genuine.

Mr. Yates, counsel for the nervous Neal, who feared for his £80, aroused as much, perhaps, as was Erskine at another time, but with less law to back him up but apparently the persuasive oratory released by Counsel Yates in Old Guild Hall so completely won over Lord Mansfield to the view that Mr. Neal could keep the money, that the great judge stopped Barrister Yates before he had reached his peroration and, from the Bench, uttered his famous dictum: “This is one of those cases that could never be made plainer by argument,” and then, bringing down his gavel with a ringing rap on the bench, the Chief Justice terminated the famous case with the words: “Postea to the defendants.” From then on Price v. Neal has adorned or marred, as the case may be, some of the pages of legal history.

Lord Mansfield’s silencer that the case could never be made plainer by argument remains true in 1955, though perhaps in a different sense than that which accompanied its utterance. Many have tried to make it plainer by searching for reasons which would harmonize Price v. Neal with the rules in analogous situations: Ames, Keaner, Wigmore, Woodward and others have tried it, but for the most part, their discoveries have been regarded as so academically esoteric that very little use has been made of them by the courts.

The rule is here. It was codified in Sec. 62 of the N.I.L., or at least a good portion of it was and the rest has been added by judicial accretion. The rule of the case, and of Sec. 62, that money paid out by an innocent drawee on an instrument bearing the forged signature of the drawer cannot be recovered from an innocent purchaser is commonly regarded as an exception to the rule that money paid out on mutual mistake of material fact,
or, as otherwise phrased, in misreliance upon a supposed duty, is non-recoverable.

How far has, or may, such exceptional rule be carried by analogy? Where should it meet an effective stop sign? To survey actualities and possibilities:

(1) Forged drawer's signature—*Price v. Neal*, proper;

(2) Forged drawer's signature, but the instrument being accepted by the drawee, either prior to the holder's acquisition of title, or subsequent thereto;

(3) Genuine signature of the drawer, but the instrument being non-debitable to his account, because his signature was void for want of capacity, or because of statutory illegality;

(4) Genuine signature of the drawer but the instrument being non-debitable to his account because it was incomplete when stolen from the drawer or lost by him and its escape was deemed not the result of the drawer's negligence;

(5) Genuine signature of the drawer but the instrument being non-debitable to his account because it was acquired from the drawer under circumstances which gives rise to a real defense—the fraud in the execution case;

(6) Genuine signature of the drawer the instrument being non-debitable to his account because it was paid in disregard of a valid stop payment order;

(7) Genuine signature of the drawer, accompanied by a forged document of title, properly debitable to the account of the drawer;

(8) Genuine signature of the drawer, the instrument being subsequently altered by non-apparent erasures and substitutions, and being non-debitable, as altered, to his account;

(9) Genuine signature of the drawer, the instrument being subsequently altered by the non-apparent insertion of words and figures in blank spaces in a completed instrument negligently left by the drawer, and probably, properly debitable to his account;

(10) Genuine signature of the drawer, the instrument bearing the forged indorsement of the payee's or special indorsee's name and thus being non-debitable to the drawer's account;

(11) Genuine signature of the drawer of an overdraft, properly debitable to his account;

(12) Forged signature of the maker on a promissory note or bond paid by the maker or issuer;

(13) Another series could be conceived of wherein various combinations of two or more of the above generalized situations are present in the same case.

Undoubtedly, other cases could be thought of but enough is pointed out in the above series to make evident the sweeping potentialities for extending or for refusing to extend the *Price v. Neal* analogy.
Only some of these cases, so far as known, have been presented to common law courts and only some of them to courts which had to pass upon the issues under the fragmentary treatment of the problem provided by N.I.L. Sec. 62. But all of these situations, and perhaps more, are well within the bounds of probable presentation and some of them, lying on the periphery of the field, have been presented.

It is not proposed here to discuss existing cases under any of the above enumerated classes of cases nor to speculate on the possible or probable results in those cases, which, so far as known, have not arisen. Something along these lines has been done by the present writer elsewhere. What is proposed is to compare the proposals of the Code in these areas with N.I.L. Sec. 62.

N.I.L. Sec. 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

2. The existence of the payee and his then capacity to indorse.  

Code Sec. 418. 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 sections, payment or acceptance of any instrument is final in favor of a holder in due course.

Code Sec. 417(1). Unless otherwise agreed any person who obtains payment or acceptance and any prior transferor warrants to a party who pays or accepts in good faith

(a) that he has good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has the title; and

(b) that he has no knowledge or (sic) any effective direction to stop payment; and

(c) that the instrument has not been materially altered, and that he has no knowledge that the signature of the maker or drawer is unauthorized, except that such warranties are not given by a holder in due course who has taken a draft drawn on or accepted by a bank after such alteration or signature or by a holder in due course of a note. This exception applies even though a draft has been accepted “payable as originally drawn” or in equivalent terms.

(2) Unless otherwise agreed any party who transfers an instrument for consid-

\cite{23 Britton, Bills & Notes §§ 135-41.}
eration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that

(a) all signatures are genuine or authorized; and

(b) the instrument has not been materially altered; and

(c) the transfer is rightful; 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 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.

Directing attention to the first clause of Code Sec. 418, excepting from the section the provisions contained in Article 4—Bank Deposits and Collections—which have to do with the recovery of bank payments: this exclusion, from Sec. 418, has reference to sections in Article 4 which have to do with final and provisional payments. They do not affect the Price v. Neal problem or its corollaries.

The second “except” clause, having to do with breach of warranty, will be discussed below.

What does Sec. 418 do that is or is not done by N.I.L. Sec. 62? The Price v. Neal situations, enumerated above, will be taken up in the order there set forth.

(1) N.I.L. Sec. 62, by declaring that the acceptor admits the genuineness of the drawer’s signature, deprives the acceptor of the defense that the drawer’s signature was forged as against a good faith purchaser. Decisions have extended this result to payors of accepted and unaccepted bills such that the drawee cannot recover the money so paid from a good faith purchaser of the bill. This is Price v. Neal proper.

Sec. 418 of the Code accomplishes the same result by declaring that “payments or acceptance of any instrument is final in favor of a holder in due course.” [The present writer proposes to comment upon what, to him,
seems an improper use of the term "holder in due course," but since this term carries through the series, comment will be made after the various situations have been considered.]

(2) The case of the accepted forged check is commented under (1) above. Results the same under N.I.L. Sec. 62 and the Code Sec. 418.

(3) Instrument void for want of capacity in the drawer or void because of illegality. Under N.I.L. Sec. 62 the acceptor admits the capacity of the drawer. Therefore the admission should have the same effect as the acceptor's admission of the genuineness of the drawer's signature. Courts likely would extend this to drawees who paid unaccepted bills. Same result under Sec. 418 of the Code because such an acceptance or payment is "final."

With respect to the illegal instrument the writer knows of no case. Result is uncertain under the N.I.L. Under the Code, no recovery by drawee because the payment is expressed to be "final."

(4) With respect to the case of the incomplete instrument which got into circulation without negligence of the drawer, is filled up, and, under assumed circumstances, where the drawee could not lawfully debit the drawer's account, there are no known cases of actions by drawees against the party so paid. Result under the N.I.L. is uncertain. Under the Code acceptor is bound and drawee cannot recover because "payment or acceptance of any instrument is final. . . ."

(5) Also with respect to the fraud in the execution case where a real defense exists, there are no known cases. Result under the N.I.L. uncertain. Under the Code the drawee loses because his payment or acceptance "is final."

(6) Payment by drawer's mistake after a valid stop-payment order. Cases in conflict under the N.I.L. Under the Code, no recovery by drawee unless the party receiving payment had knowledge of the stop order. This result comes from Code Sec. 417(h) which provides for a warranty by the person receiving payment to the drawee "that he has no knowledge or (sic) any effective stop payment order."

(7) Genuine instrument accompanied by a forged document of title. No recovery under N.I.L. No recovery under the Code for such payment "is final."

(8) At common law the acceptor of an altered bill could successfully set up the defense of material alteration. Also the payor of an accepted altered bill or of an unaccepted altered bill could recover from the party to whom payment was made. Under the N.I.L. it has been held, in two cases . . .

\[Springs v. Hanover Nat. Bank of City of New York, 209 N.Y. 224, 103 N.E. 156 (1913).\]
widely known cases, that a bank which certified a check, altered as to the
payee’s name, was bound thereby. This result was reached under that
portion of N.I.L. Sec. 62 which provides: “The acceptor by accepting this
instrument engages that he will pay it according to the tenor of his accept-
ance,” the courts interpreting the phrase “tenor of his acceptance” as meaning
the tenor of the bill at the time of acceptance. This decision extends the
responsibilities of drawees beyond the boundaries fixed at common law.
Presumably, but not beyond doubt, the common law rule would be repro-
duced under N.I.L. Sec. 62 with respect to payments of unaccepted bills and
checks.

Under Sec. 418 of the Code both acceptances and payments would be
final because the section so declares, but Sec. 418 here incorporates by
reference Sec. 417, which deals with, among other things, the problem of the
liability of paying and accepting drawees of altered bills.

Sec. 417(1) (c) of the Code provides:

Unless otherwise agreed any person who obtains payment or acceptance
and any prior transferor warrants to a party who pays or accepts in good
faith that the instrument has not been materially altered and that he has
no knowledge that the signature of the maker or drawer is unauthorized,
except that such warranties are not given by a holder in due course who has
taken a draft drawn on and accepted by a bank after such alteration or
signature or by a holder in due course of a note. The exception applies even
though a draft has been accepted “payable as originally drawn” or in
equivalent terms.

Consider first the case of the payment of an unaccepted or uncertified
altered draft (i.e., a bill of exchange) or check. The party who obtains the
payment, acceptance or certification “warrants to a party who pays or accepts
in good faith . . . that the instrument has not been materially altered.”
This reproduces, basically, the common law rule because the drawee may
sue on the warranty and recover the money so paid, and an action upon
the acceptance or certification could be defeated by pleading the warranty.
The drawee would lose this cause of action if he paid or accepted in bad
faith, as for example, if the instrument bore evidence of apparent alterations.
This limitation is proper and would follow also from Sec. 304(1)(a) of
the Code.

Take next the case of the acceptance of a materially altered draft or
check or the payment thereof. In this case the party who obtained the
acceptance or certification or payment makes no warranty to the drawee

68 Wells Fargo Bank & Union Trust Co. v. Bank of Italy, 214 Cal. 155, 4 P.2d 781 (1931); Nat.
City Bank of Chicago v. Nat. Bank of Republic, 300 Ill. 103, 132 N.E. 832 (1921). These cases
were quite generally disapproved: 19 CALIF. L. REV. 210 (1931); 22 CALIF. L. REV. 260 (1933);
16 ILL. L. REV. 615 (1922); 29 MICH. L. REV. 503 (1931); 6 MINN. L. REV. 405 (1922); 40 YALE
or acceptor for Sec. 417(c) reads: "... except that such warranties are
not given by a holder in due course who has taken a draft drawn on and
accepted by a bank after such alteration. ..." The drawee is liable on
his acceptance and if the drawee pays, the latter has no cause of action for
its recovery. Thus the Code has codified the decisions in the California and
Illinois cases. The question of policy involved is determined largely by
one's attitude toward Price v. Neal: i.e., the question whether it should be
restricted to its narrowest limits or expanded.

After the decisions in the California and Illinois cases, the common
law rule was restored if the drawee certified the check "payable as originally
drawn." The last sentence of Code Sec. 417(1)(c) renders such qualified
certification inoperative.

Sec. 417(1)(c) of the Code also imposes upon the party who obtains
the drawee's acceptance or the drawee's or maker's payment a warranty to
the drawee or maker "that he has no knowledge that the signature of the
maker or drawer is unauthorized." If, therefore, the holder of the instru-
ment knew at the time he acquired title that the maker's or drawer's signature
was forged or unauthorized, the maker or drawee could recover the money
paid out on the instrument. Price v. Neal never prevented the drawee from
recovering from the forger or from a person who acquired title from the
forger with knowledge of the forgery. 56

At common law and under N.I.L. Sec. 62, one who acquires title to a
forged instrument under circumstances deemed negligent—for example,
in taking the instrument from a stranger—in some cases would be liable to
the drawee, in others not. Sec. 417(1)(c) by implication provides that the
drawee may not recover from such party. This would seem to be the prefer-
able result.

One observation concerning the holder in due course aspect of the
provision in Code Sec. 417(1)(c) declaring that "such warranty (i.e.,
against forgery and material alteration) is not given by a holder in due
course who has taken a draft drawn on and accepted by a bank after altera-
tion or signature or by a holder in due course." This provision allows the
holder in due course to keep the money or to enforce the acceptance. The
point is this: the holder in due course status is fixed by reason of the facts
existing at the time of acquiring title but the legal position of such holder
in due course as regards the antecedent certifying bank, ought to be deter-
mined by the facts existing at the time of his suing on the certification or at
the time of payment by the certifying bank. If a holder in due course learns,
after he acquired title as a holder in due course, that the bank has certified
an altered or forged check he should not be allowed to enforce the certifica-

56 The cases are collected in Britton, op. cit. suprana 56 at 626-34.
tion or to retain the payment. Suppose a person took a counterfeit bill, not knowing it to be a counterfeit, and subsequently learns that he has a counterfeit bill. He then passes the bill off as genuine. Would it be contended that he has not brought himself within the statute making it a crime knowingly to pass counterfeit currency and would not the party, who innocently took the counterfeit money, have a right to recover from the party who knowingly passed it to him? The cases are analogous. The certifying bank should not be compelled to pay the holder of the instrument known by him to have been altered or forged prior to certification. This state of facts might be rare but seems to the present writer bad policy to force the bank to pay such a party. As Ames pointed out:60 "A holder who acquired the bill in good faith and with due care, but afterward discovered or suspected the forgery, could not honestly collect an unaccepted bill, or procure an acceptance, and if he should collect it, would be bound to refund the money." Let him go back on the party who negotiated the instrument to him. The use of the term "holder in due course" in this connection is improper.

A further point, which to the present writer is disturbing. The whole of Code Sec. 417 sets up the rules above referred to and then permits the parties to throw all of them out and to set up any rule, or rules, which they see fit to agree upon. The introductory phrase of Code Sec. 417(1) reads: "Unless otherwise agreed. . . ." and so on. This is legal anarchy.

This abdication in favor of the parties' wishes is especially anomalous for the reason that the draftsmen, after telling the parties that they can ignore Sec. 417 and do what they please, strangely enough tell the parties—i.e., a certifying bank—that if it certifies the check "payable as originally drawn," this agreement is inoperative. The section can't have it both ways. The phrase "Unless otherwise agreed. . . ." should be stricken from Code Sec. 417(1). This phrase is properly used in Sec. 417(2), dealing with warranties to subsequent holders but not properly used in Code Sec. 417(1).

One further point, and this has to do with the use of familiar terminology with an unfamiliar meaning. The term "warranty" in the law of commercial paper has been used to describe certain obligations which run from a holder or transferor to a transferee or indorsee, but never to describe the legal relation between one who surrenders an instrument for payment. There may be quasi-contractual obligations present but they have never been called warranties. A holder may, of course, "warrant" something to the drawee, and indeed the familiar indorsement accompanied by the statement: "prior indorsements guaranteed" is such a warranty. But for a statute to use the term "warranty" to describe legal duties of holder to one who

“pays” the instrument, certainly historically, is a misnomer. A statute, of course, may use a term in a new sense, but generally speaking, the closer the meaning of statutory terms is made to coincide with the accepted meaning the greater clarity and certainty thereby will be promoted. A statute could deal with “cattle,” and, somewhere, tucked away in a list of definitions, we might find that “for the purposes of this act the term ‘cattle’ shall include ‘horses,’ ‘hogs’ and ‘sheep’” but such drafting policy should win no medals for excellence.

(9) A completed instrument is altered by the insertion of words and figures therein in blank spaces negligently left by the drawer. What are the drawer’s rights against the party to whom its payment of an uncertified altered check or of a certified altered check is made? Code Sec. 406 permits a good faith drawee to debit the account of the drawer and upon the instrument as altered. But suppose the drawer’s account will not stand the debit. May the drawee recover the money from the party to whom payment was made? Results under the N.I.L. are not known. Presumably, the drawee could recover from the party to whom payment was made except in the case of a certification after alteration in which case the courts likely would follow the rule in the California and Illinois cases.

Under Code Sec. 417 no distinction is drawn between alterations effected by erasures and substitutions and those effected by the insertion of words and figures in blank spaces negligently left by the drawer. Presumably, therefore, the drawee’s rights and liabilities would be the same in both cases.

(10) What are the drawee’s rights to recover money paid out under forged indorsements? Recovery was allowed at common law. No section of the N.I.L. deals specifically with this problem other than the general section on forgery, Sec. 23, which makes the forged indorsement inoperative. Restitution is allowed on a quasi-contract theory.

The same result would follow under the Code Sec. 417(1)(a) for a “transferor warrants to a party who pays or accepts in good faith that he has good title to the instrument. . . .” The difference would be that the action of the drawee, under the Code, could be brought on a warranty theory. His quasi-contract remedy, presumably, would still remain.

(11) May the drawee who has paid an overdraft recover the payment from the party who received the same? At common law the drawee was not allowed recovery. This rule continued under the N.I.L. This case was assimilated to the Price v. Neal rule. The result would be the same under

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62 The cases are collected in Burrton, op. cit. supra note 56, § 139 at 641-50.
63 Chambers v. Miller, 13 C.B. (N.S.) 128 (1862).
Code Sec. 418 because "payment or acceptance of any instrument is final in favor of a holder in due course."

(12) May a person whose signature was forged as the maker of a note and who pays the same recover the money so paid? He could not do so at common law. Presumably, the same result would be reached under N.I.L. Sec. 62, although this section makes no reference to makers of notes but the attitude of the courts to the effect that there is enough contained in N.I.L. Sec. 62 to evidence the intention to codify the Price v. Neal rule and all its corollaries would suggest this result. The same result should follow under Sec. 418 of the Code for such payment is included among those declared to be final and Code Sec. 417 imposes no warranty other than that the party receiving payment is ignorant of the forgery.

Sec. 16. Some Problems Created by Forged Instruments

Take a typical case of a check drawn by M upon the D bank and payable to the order of P. P’s indorsement is forged. The check comes into the hands of an innocent party, A. A deposits the check in the B bank. B bank obtains payment, under the forged indorsement, from the drawee, D. What causes of action are thus created?

The N.I.L. contains no section which deals specifically with any of the possible causes of action. Solution is, therefore, found in common law decisions, basically in the quasi-contract field.

The principal causes of action which can arise out of a payment by a drawee under a forged indorsement and the law with respect thereto may be summarized as follows.

(1) D, claiming that the indorsement of P was not forged may be sued by its depositor M. Assuming forgery, the debit is wrongful. M can require D to remove the wrongful debit. This is true under N.I.L. Sec. 23 and would be true under Code Sec. 404(1) for in each the forged signature is declared to be "wholly inoperative."

(2) D, after the removal of the erroneous debit to M’s account, may sue A, and in some cases, the B bank and recover the money as money paid out in mutual mistake of material fact.

(3) P, the owner of the check, though out of possession, has not been paid. What possible sources of recovery are presented to him? He has three conceivable possibilities: (a) to get the money from the drawer, M; (b) to get it from the collecting bank, B, or its depositor, A; or (c) to get it from the drawee, D. How does the law treat each of these possible causes of action? These cases will be taken up in order.

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65 Mather v. Maidstone, 18 C.B. 273 (1856); Young v. Latham, 63 Ala. 519; Tyler v. Bailey, 71 Ill. 34 (1873); Allen v. Sharpe, 37 Ind. 67 (1871); Third Bank v. Allen, 59 Mo. 310 (1875).

66 The cases are collected in Britton, op. cit. supra note 56, § 139 at 641-49.
DEFENSES, CLAIMS OF OWNERSHIP AND EQUITIES  

(a) It is believed that P should be able to recover from M. P has a right to get back his check. He can present it to D. If D refuses to pay because it thinks the debit of M's account is rightful, P can take the necessary proceedings on dishonor and should recover. If the issue of forgery is still undetermined, D should be a party to P's suit against M. If P cannot get his check back he should be able to sue upon it as on a lost instrument.

(b) P may try to recover from A or the collecting bank, B. P's attempt to "cut across lots" and recover the money from the party who collected from the drawee is obviously anomalous for we know the drawee, D, unquestionably has a right to recover from the party to whom it paid. Two people, normally, cannot have concurrent rights to recover the same money. But, it is conceivable, they might have the right in the alternative. That is, P might be regarded as subrogated to D's cause of action if D were not suing. In any event, it is well established that P can recover from the party who collected from D. The Code contains a provision dealing with this problem, to be discussed after reference to the entire series is made.

(c) P may try and recover from D. Here, again, an anomaly is presented. When the drawee has paid out its own money, under the forged indorsement, what has it done that could ground a cause of action against it in favor of P? The drawer has done nothing more than if a depositor deposited $100 in currency and then received credit and a bank teller through inadvertence or design threw the deposited currency into the bank's waste basket or furnace. Nonetheless many courts have allowed P to recover from D. Theories of liability vary. Where recovery is allowed the drawee is regarded as a converter or as a constructive acceptor. Other courts hold there is no right in P to recover from D on any theory. The cases are sharply in conflict. The Code contains a provision on this problem to be discussed after reference is made to the entire series.

The above cases exhaust P's possible causes of action in his desire to collect the money called for by the check.

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69 The cases are collected in Barron, op. cit. supra note 56, § 146 at 681-87. One of the leading cases supporting recovery is L. & N. R.R. Co. v. Citizens' & Peoples' Nat. Bank of Pensacola, 74 Fla. 385, 77 So. 104 (1917). One of the leading cases denying recovery is Gordon Fireworks Co. v. Capital Nat. Bank, 236 Mich. 271, 210 N.W. 263 (1926). A case in accord is Miller v. Northern Bank, 239 Wis. 12, 300 N.W. 738 (1941).
One other lawsuit could develop out of the forged indorsement problem. The drawer might sue the party to whom the drawee paid. The cases, though not numerous, are about equally divided as to whether recovery by M can be had. The basic cause of action is that of the drawee against the party to whom it paid. M cannot sue such party in the absence of an assignment, either actual or by operation of law, from the drawee to the drawer. In case of insolvency of the drawee, after its payment under a forged indorsement, it would be obviously unjust to permit the drawer to recover from the party paid by the drawee, for this money should go back to the drawee so that all creditors could participate equally in its distribution.

The N.I.L. contains no provisions with respect to any of the problems commented on in this section, other than Sec. 23, which deals generally with the principal effects of forgery.

The Code, however, contains the following:

Sec. 419 (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 return it; or
(c) it is paid on a forged instrument.

(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) A representative, including a depositary 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.

The Code Sec. 419(1)(c), therefore, rejects those cases which hold that the drawee by paying under the forged indorsement is not liable, on any theory, to the party whose indorsement was forged, and accepts those cases which hold that the drawee thereby becomes a converter. It is believed that this solution is unwise. Suppose the drawee, one minute after payment, discovers the forged indorsement and that it immediately credited the depositor's account and by special messenger sent the check to the holder. There is no more reason for regarding the drawee's act as a conversion than there would be for regarding the drawee as a converter if the holder lost the check and the finder brought it to the drawee asking that the drawee return the check to the owner. If this is plausible then the act of the drawee's

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payment, in and of itself, cannot be tortious. What does the bank do thereafter that might make it a converter? About the only step it would take would be to send the cancelled check to the drawer. What is wrong with this? The holder still has a right to get possession of the check and either he or the drawee could recover possession. It is, of course, usually held that the innocent vendor of stolen personal property is liable as a converter thereof but this rule is not extended to the innocent sale or handling of commercial paper.\(^7\) An innocent drawee should not *vi et armis* be forced into that position. A different question would be presented if the drawee refused to return or to obtain return of the check to the holder. The bank, of course, might not want to do this for fear it would turn out that no indorsement had been forged. The bank would have to take its chances on its course of action. But, it should seem reasonably evident that the drawee should not be characterized as a tortious converter by reason of the sole act of attempted payment under the forged indorsement but that is exactly what the Code Sec. 419(1)(c) does. It is believed this solution is unwise.

The Code, apparently, codifies in a kind of back-handed way, the prevailing view that the holder, whose indorsement was forged, may recover from the party who collected from the drawee. Code Sec. 419(3) declares that such person “is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.” Let us look at this language. The section is saying that the collecting party “is not liable in conversion or otherwise to the true owner. . . .” This would seem to be an unqualified declaration of the non-liability of the collecting party to the “true owner.” But the section proceeds to say “beyond the amount of any proceeds remaining in his hands.” The implication from the closing clause is that such a party would be liable in this amount. But the section nowhere says that such party is liable. How can he be liable when the section is saying affirmatively that he is “not liable in conversion or otherwise”? If the implication from the last clause is to be given any effect as imposing liability, i.e., in cutting down the universality of declaration of non-liability, then in what kind of action would he be liable? Would he be liable in conversion or otherwise, and what guidepost is there to the “otherwise” cause of action?

Again, who is the “true owner”? Is this a reference to the “true owner” of the instrument or the “true owner” of the proceeds? They are not the same. The drawee is the “true owner” of the proceeds and the holder is the “true owner” of the check.

It is not apparent why the unusual phrasing—“A representative, including a depositary or collecting bank”—is used in the section. The problem concerns the liability of the person who got the money under the

forged indorsement from the drawee. This could be the forger, or a purchaser from the forger or someone who collects in behalf of the forger, or other purchaser or an agent thereof. This idea could be more simply and more clearly expressed than it is.

The present writer has expressed, elsewhere, his opinion of the undesirability of tacking on to the concept of "good faith" the shifting and unpredictable element here referred to as "the reasonable commercial standards applicable to the business of such representative. . . ." 72

It is believed that the policy adopted by Sec. 419(3) is open to as strong objections as is the policy of making a drawee liable in conversion for paying an instrument under a forged indorsement and that the earlier cases represented a sounder policy. This tangle ought to be unwound first between the depositor and his bank, then the bank should get its money from the party to whom it paid. The holder could go against the depositor simultaneously. But this is not the way the cases developed. The issues, in this series of forged indorsement cases, would appear more vividly than they do if, in the same court, after the fact of forgery had been determined, there was pending simultaneously, an action by the drawee against the party to whom it paid; an action by the holder, whose indorsement was forged, against the drawee and also against the same defendant in the drawee's suit; and also an action against the drawer of the check. And, for good measure, the drawer might be suing the party who collected from the drawee. Such a congeries of cases might generate some ideas concerning election of remedies and assignments by operation of law.

Basic difficulties, which the courts have always had with actions by the holder against the drawee or against the party who was paid by the drawee, entirely aside, there is something on the practical side in support of the holder’s actions against the party who was paid by the drawee and that is this: such a suit will settle all the liabilities around the quadrilateral. This is true, only on the assumption that the fact of forgery has been determined so as to be binding on all parties, or, if not so binding then that all parties who are interested in the determination of the fact of forgery vel non are parties to the litigation.

The inclusion of the provision, contained in Code Sec. 419(2), fixing the measure of damages of the drawee, when sued for conversion, as the "face amount of the instrument"—the accepted rule—is wise, assuming that there has been no material alteration as to the amount prior to the drawee's payment, or, if so, that there had been no certification subsequent to alteration.

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Sec. 16. General Conclusions

There is much good drafting and policy decisions in the sections of the Commercial Code which have been the subject of this article. The Code’s handling of the over-all problem of real and personal defenses is ably done on both the policy and drafting levels. The Code’s section on forgery is better than that of the N.I.L. The incorporation of a section dealing with fraud as a real defense seems preferable to omitting it as the N.I.L. did. The Code’s solution of the jus tertii problem, both on the drafting and policy side, is a welcome substitute for the fragmentary and contradictory treatment accorded it by the N.I.L. The codification of the doctrine of Young v. Grote, i.e., material alteration resulting from the negligent leaving of blank spaces in a completed instrument, is wise, on the policy level, but the drafting of the same on such broad language may well lead to undesirable extension of the rule. The codification of the doctrine of Price v. Neal is far better than Sec. 62 of the N.I.L. which sought the same object. The superiority of the Code’s provision lies largely in the fact that analogous situations are expressly provided for rather than leaving them to conjecture as the N.I.L. did. The analogous case of the position of a bank which certifies an altered check, in the opinion of the writer, is not well done and might well give rise to unexpected and undesired results. The Code’s treatment of the fictitious payee problem, consolidating with it the impersonation case rule, is preferable to N.I.L. Sec. 9(3). The Code’s section failed to provide a rule for the delivery of an instrument to a person of the same name as the payee, and also to provide for the fictitious indorsee case. These problems should have been covered. The Code’s handling of the status of the drawee which pays under a forged indorsement is open to serious question.

Despite the excellencies of this portion of Article 3 of the Code, there are a number of sections that could profit from more study and from redrafting. No one expects perfection in drafting but if we are going to streamline the highways of our commercial law we ought to do everything we can to insure that it has adequate expansion joints, that the shoulders be hard, that there will be no unexpected road hazards, that the curves will be well-banked, that the bridges will stand the attack of the elements, and, that in all respects, we will build the best highway possible. Reconstruction and repair work done now will cost little compared to the cost after traffic begins to move over the new road and the accidents occur.