ARTICLE 3: COMMERCIAL PAPER

SECTION 3-106. Sum Certain

(1) The sum payable is a sum certain even though it is to be paid

(e) with costs of collection or an attorney's fee or both upon default.

(2) Nothing in this section shall validate any term which is otherwise illegal.

ANNOTATION

*FIRST SAV. AND LOAN ASS'N v. HELDMAN
79 N.J. Super. 65, 190 A.2d 400 (1963)

Heldman was indebted to First Savings on an installment promissory note which contained a provision calling for the payment of reasonable attorney's fees in the event of collection by law or through an attorney. In the subsequent attachment suit, the trial court entered a default judgment in favor of First Savings for the amount owing and attorney's fees, holding that under New Jersey case law, even if no statute authorized such a clause, it was valid so long as no rule of court forbade it. Section 3-106(2), it went on to say, "leaves local law unchanged."

S.L.P.

SECTION 3-116. Instruments Payable to Two or More Persons

An instrument payable to the order of two or more persons

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

CASES ANNOTATED UNDER OTHER SECTIONS

HOWARD v. ZILCH
— Mass. —, 190 N.E.2d 77 (1963)

See the Annotation to Section 3-413(2), infra.

SECTION 3-303. Taking for Value

A holder takes the instrument for value

(a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or

(b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or

(c) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person.

* Code construed but did not govern the case.

CASES ANNOTATED UNDER OTHER SECTIONS

UNITED REFRIGERATOR CO. v. APPLEBAUM
410 Pa. 210, 189 A.2d 253 (1963)
See the Annotation to Section 3-415(5), infra.

SECTION 3-306. Rights of One Not Holder in Due Course

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

(c) the defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose (Section 3-408); and

ANNOTATION

*NEBOSHEK v. BERZANI
— Ill. —, 191 N.E.2d 411 (1963)

In 1961, the holder of a promissory note allegedly executed by the defendant obtained a judgment by confession. The judgment was subsequently opened to permit the defendant to file an answer and a bill of particulars in which he alleged a number of defenses including fraud in the procurement, want of consideration, and non-delivery of the note. Counsel for the holder agreed to a postponement of the hearing on the holder's motion to confirm the judgment because of the inability of the maker's attorney to be present, but the trial judge denied postponement and found for the holder by default.

Upon appeal, the court reversed and remanded the case for retrial, holding that the trial court abused its discretion in denying the postponement. The court compared the applicable sections of the controlling Negotiable Instruments Law with Sections 3-401, 3-306(c) and 3-408 of the Uniform Commercial Code and concluded that under both statutes "practically the same rule with reference to execution and delivery was in effect." Since the defendant's pleadings were verified, the presumption of a valid delivery as provided by Section 16 of the NIL was destroyed, and the holder therefore had the immediate burden of proving delivery of the note or that he was a holder in due course.

S.L.P.

SECTION 3-401. Signature

(1) No person is liable on an instrument unless his signature appears thereon.

(2) A signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature.

CASES ANNOTATED UNDER OTHER SECTIONS

*NEBOSHEK v. BERZANI
— Ill. —, 191 N.E.2d 411 (1963)
See the Annotation to Section 3-306(c), supra.

* Code construed but did not govern the case.

SECTION 3-403. Signature by Authorized Representative

(1) A signature may be made by an agent or other representative, and his authority to make it may be established as in other cases of representation. No particular form of appointment is necessary to establish such authority.

(2) An authorized representative who signs his own name to an instrument

(a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

(b) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.

(3) Except as otherwise established, the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

ANNOTATION

IN THE MATTER OF LASKIN

316 F.2d 70 (3d Cir. 1963), reversing 204 F. Supp. 106 (E.D. Pa. 1963)

The facts of this case may be found in an annotation in 4 B.C. Ind. & Com. L. Rev. 108 & B.C. U.C.C. Co-Ord. 176. The court, on appeal, reversed, basing its reversal on the lower court's incorrect application of the Uniform Commercial Code rather than applying principles of bankruptcy. A complete discussion and analyzation of this case will be contained in a note to be included in the Winter, 1964 issue of the Review, 5 B.C. Ind. & Com. L. Rev. No. 2 (1964).

ANNOTATION

UNIVERSAL LIGHTNING ROD, INC. v. RISCHALL ELEC. CO.

24 Conn. Sup. 399, 192 A.2d 50 (1963)

Harold Rischall signed a promissory note in the amount of $590 payable to Universal Lightning Rod in the following manner: "Rischall Electric Company, Inc., [and under this designation] Harold M. Rischall." The word "we" was used with the promissory language of the note and the note had been prepared at the direction of Rischall. An action was brought by Universal against Rischall seeking to hold him personally liable on the promissory note.

The court held that under Section 3-403 Rischall was personally liable since he signed the note without indicating any representative capacity and had offered no evidence sufficient to prove otherwise. Judgment in the amount of the note plus a reasonable attorney's fee was entered for Universal.

B.M.H.

SECTION 3-408. Consideration

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

CASES ANNOTATED UNDER OTHER SECTIONS

*NEBOSHEK v. BERZANI
— Ill. —, 191 N.E.2d 411 (1963)

See the Annotation to Section 3-306(c), supra.

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

(2) The drawer engages that upon dishonor of the draft and any necessary notice of dishonor or protest he will pay the amount of the draft to the holder or to any indorser who takes it up. The drawer may disclaim this liability by drawing without recourse.

ANNOTATION

HOWARD v. ZILCH
— Mass. —, 190 N.E.2d 77 (1963)

Howard, an accommodation maker on a note payable by Zilch to a bank, paid the bank the balance of the note after Zilch's bankruptcy. During the bankruptcy proceedings and after his discharge, Zilch made oral promises to Howard that he would reimburse him for all payments which he had made on the defaulted note. Later, Zilch orally directed his attorney to draw a check upon funds due Zilch from a tort action for the amount which Howard had paid on the defaulted note. The check was made payable to both Howard and Zilch and was endorsed by the latter who delivered it to Howard. The following day, pursuant to Zilch's orders, the attorney stopped payment on the check and so notified Howard. In an action to recover the amount of the check, Howard, as holder of the check, claimed that the check was a valid written promise to pay on demand the amount stated to meet the requirements of c. 259 § 3 of Mass. Gen. Laws which provides: that a promise to pay a debt discharged in bankruptcy must be contained in some writing signed by the debtor or by some other person authorized by him. On appeal, the court reversed and entered judgment for Howard, holding that the attorney's signature on the check was a promise, as provided in Section 3-413, and thereby met the requirements of the statute.

COMMENT

There should have been no question as to whether the check was a writing sufficient to memorialize the agreement. However, there were other important

* Code construed but did not govern the case.

questions which the court did not decide. Instead of suing on the contract, could Howard have sued Zilch on the endorsement of the check? Section 3-802 allows the holder of a dishonored check to maintain an action based either on the underlying obligation or, in the alternative, on the instrument. However, the relationship between Howard and Zilch was not as holder and endorser, but as joint payees on the same check. Because of this, it would not be possible to hold Zilch liable on the instrument; but could Howard recover from the drawer, attorney? Although theoretically it may be possible, the practical considerations would make it improbable because Section 3-116 only allows such a check to be enforced if both payees join in the action as parties plaintiff. Thus, the action was upon an oral promise *evidenced* by the check for statute of frauds purposes but not on the instrument itself.

R.I.D.

SECTION 3-415. Contract of Accommodation Party

(5) An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

ANNOTATION

UNITED REFRIGERATOR CO. v. APPLEBAUM
410 Pa. 210, 189 A.2d 253 (1963)

Several checks were issued to a named payee signed in the name of a corporate drawer by its officers. The officers also endorsed the checks as individuals. The drawee dishonored the checks for insufficient funds. Upon the officers' refusal to pay the checks after proper demand and notice, the payee brought an action against the endorsers as individuals. The officers alleged in their answer that they had endorsed the checks *solely* as accommodation endorsers for the payee, they received no consideration and they therefore were not liable to the payee. Payee appealed from the denial of its motion for judgment on the pleadings.

In affirming, the court held that a trial was necessary to determine whom the endorsers accommodated since, under Section 3-415(5), if the payee is found to be the party accommodated, the endorsers, as accommodation parties, would not be liable to the payee on the checks.

COMMENT

In a footnote, the court properly expressed confusion over plaintiff's allegation of consideration and defendant's denial of receipt of "any value or consideration." An accommodation party is liable to a holder for value under Section 3-415(1) even though he received nothing himself for the obligation. Conceptually, the consideration which went to the party accommodated supports the promise of the accommodation party. However, if the holder had in fact given nothing for the instrument to the party from whom he took it (no value as defined in Sections 3-303 and 1-201(44)), an accommodation party would not be liable. Thus, if the drawer was in fact the party accommodated in the above case and the payee had given *him* nothing in the way of value, defendants would have an additional defense. The parties had certainly not made this distinction in framing their pleadings if, indeed, such a distinction had been intended.

B.M.H.

SECTION 3-802. Effect of Instrument on Obligation for Which It Is Given

(1) Unless otherwise agreed where an instrument is taken for an underlying obligation

(a) the obligation is pro tanto discharged if a bank is drawer, maker or acceptor of the instrument and there is no recourse on the instrument against the underlying obligor; and

(b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation.

CASES ANNOTATED UNDER OTHER SECTIONS

HOWARD v. ZILCH

— Mass. —, 190 N.E.2d 77 (1963)

See the Annotation to Section 3-413(2), supra.

ARTICLE 8: INVESTMENT SECURITIES

SECTION 8-317. Attachment or Levy Upon Security

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

(2) A creditor whose debtor is the owner of a security shall be entitled to such aid from courts of appropriate jurisdiction, by injunction or otherwise, in reaching such security or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

ANNOTATION

UNITED STATES v. BRODY

213 F. Supp. 905 (D. Mass. 1963)

Prior to the commencement of an action by the United States against a delinquent taxpayer and his insurer to foreclose tax liens on the taxpayer's life insurance policies, the United States served upon the insurer a notice of levy on all of the taxpayer's property in the insurer's possession. Two endowment policies issued to the taxpayer provided that at their maturity, insurer would pay the taxpayer the face value of the policies upon demand and sur-