On July 12, 1960, the plaintiff Rufo filed this action in assumpsit for breach of implied warranties of merchantability and fitness for intended purpose under Sections 2-314 and -315. He alleged that in March 1956, he had purchased a cylinder of liquified gas and that on December 8, 1957, the cylinder had exploded due to a defective valve manufactured by the defendant Bastian-Blessing Company. Rufo also claimed that he suffered personal injuries for which he was entitled to recover under Section 2-715(2)(b). The court affirmed the lower court's decision that the complaint on its face was barred by the four-year statute of limitations of Section 2-725(1). Since Section 2-725(2) states that "a breach of warranty occurs when tender of delivery is made," the court held that the statute of limitations began to run on the date of delivery and that the date of the explosion was irrelevant.

COMMENT

For a complete discussion of the problem presented in the instant case, see *Natale v. Upjohn Co.*, 236 F. Supp. 37 (D. Del. 1964), annot. 6 B.C. Ind. & Com. L. Rev. 783 (1964); *Gardiner v. Philadelphia Gas Works*, 413 Pa. 415, 197 A.2d 612 (1964), annot. 6 B.C. Ind. & Com. L. Rev. 90 (1964); *Engelman v. Eastern Light Co.*, 30 Pa. D. & C.2d 38 (Carbon County Ct. 1962).

W.P.S.

ARTICLE 3: COMMERCIAL PAPER

SECTION 3-104. Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note"

D'ANDREA v. FEINBERG

256 N.Y.S.2d 504 (Sup. Ct. 1965)

Annotated under Section 3-105, infra.

SECTION 3-105. When Promise or Order Unconditional

D'ANDREA v. FEINBERG

256 N.Y.S.2d 504 (Sup. Ct. 1965)

The plaintiff was the holder of a promissory note which had been indorsed by the president of the corporate maker, both in his official capacity and as an individual. The note contained the notation "as per contract" on its face. After presentment, dishonor and protest, the plaintiff brought this action seeking to hold the defendant personally liable.

In granting summary judgment for the plaintiff, the court held that the note was negotiable and that the plaintiff was a holder in due course. The note had fulfilled all the requirements for negotiability set forth in Section 3-104 with the possible exception that it did not contain an unconditional promise because of the notation "as per contract." The court noted, however, that under Section 3-105(1)(c) and the Comment thereto, the note was not made conditional because it referred to a separate agreement. It concluded that under Section 3-122(3), the plaintiff had a cause of action against the defendant upon demand following dishonor of the note.

A.S.G.

SECTION 3-122. Accrual of Cause of Action

D'ANDREA v. FEINBERG
256 N.Y.S.2d 504 (Sup. Ct. 1965)
Annotated under Section 3-105, supra.

SECTION 3-305. Rights of a Holder in Due Course

HEATING ACCEPTANCE CORP. v. PATTERSON
208 A.2d 341 (Conn. 1965)

The defendant purchased a furnace giving Holland Furnace Co. a promissory note as evidence of her obligation. Holland Furnace then indorsed and negotiated the note to the plaintiff. When the defendant defaulted in payment, the plaintiff brought suit on the note. Among her defenses, the defendant set out that she had signed the note in reliance on Holland Furnace's representation that it was a credit application. A verdict was returned for the plaintiff.

On appeal, the supreme court set aside the judgment on the verdict and ordered a new trial on the ground that evidence concerning prior convictions of the defendant had been improperly admitted. For purposes of the retrial, the court further held that the defendant was entitled to a charge defining fraud in the factum. Since the Negotiable Instruments Law, which governed this pre-Code transaction, contained no definition of fraud in the factum and previous case law had not clearly distinguished between fraud in the factum and fraud in the inducement, the court adopted as the common law definition of fraud in the factum—to be applied at retrial—the definition found in Section 3-305(2)(c) of the Code.

COMMENT

The court expressly states that this case cannot be used as authority for subsequent Code cases and that it is merely adopting as a common law definition of fraud in the factum the Code definition found in Section 3-305(2)(c). This subsection, however, is explicitly intended to cover situations such as the present one. Comment 7 to Section 3-305, which discusses fraud in the factum, states: "The common illustration is that of the maker who is tricked into signing a note in the belief that it is merely a receipt or some other document."

R.G.K.

FIRST NAT'L BANK v. HUSTED
205 N.E.2d 780 (Ill. 1965)
Annotated under Section 9-206, infra.

SECTION 3-403. Signature by Authorized Representative

GOLDEN DAWN FOODS, INC. v. CEKUTA
205 N.E.2d 121 (Ohio Ct. App. 1964)

Cekuta Brothers Food Market, Inc. purchased goods from the plaintiff giving in exchange a cognovit note as evidence of its obligation. The defend-

ants were corporate officers of Cekuta Brothers Food Market, Inc. who signed only their names to the note without giving any indication of their representative capacity. In an action to hold the defendants personally liable on the note, the trial court found for the defendants, admitting evidence on the question of the signers' capacity and held that they had signed in a representative capacity. The court of appeals agreed that parol evidence should have been admitted since it was not clear on the face of the note that the defendant did not sign in a representative capacity.

There was also some question as to whether the note had been executed in blank. The court of appeals concluded that it had been, but remanded the case to determine whether the plaintiff had the authority required by Section 3-407(1)(b) to fill in the blank note.

COMMENT

It is not clear whether the Code should have been applied in the instant case. The plaintiff corporation took cognovit judgment against the defendants on March 22, 1962. This would seem to indicate that the note was executed before July 1, 1962, the effective date of the Code in Ohio.

Even if it is assumed that the Code was in effect, the court's decision to admit parol evidence was incorrect under Section 3-403. Subsection (1) of this section states that a corporate officer can sign in a representative capacity without being liable on the instrument. However, Subsection (2)(a) makes him personally liable if he gives no indication on the instrument of his representative capacity. Under Comment 3, moreover, parol evidence will not be admitted if there is no indication on the instrument that the signature was made representatively. In illustrating this principle, the Comment states that if "Arthur Adams" signs without giving any indication that he is signing for "Peter Pringle" Corporation, then "Arthur Adams" is personally liable and parol evidence is "inadmissible . . . to disestablish his obligation."

If it is assumed that the Code was not in effect, the decision seems questionable under Ohio law. Both the Negotiable Instruments Law and Ohio case law would have prohibited the use of parol evidence in the present case. Section 20 of the Ohio Negotiable Instruments Law demanded some evidence of a representative capacity before a signer could be relieved of personal liability, but parol evidence was admitted only if the instrument in question contained an ambiguous signature. See *Canton Prov. Co. v. Chaney*, 46 Ohio L. Abs. 513, 70 N.E.2d 687 (Ct. App. 1945). Ohio case law has held that parol evidence will be admitted when it is "reasonably" apparent on the face of the instrument that the signers signed representatively. *Rodd v. McCann*, 103 Ohio App. 55, 144 N.E.2d 263 (1957). In the present case there was "no notation" of the defendants' "having signed in some representative capacity."

Thus, it is not at all certain under Code or pre-Code law how the court could have used as its criterion the fact that "the instrument does not clearly show on its face that it was not signed by the makers in some representative capacity."

W.P.S.

LEAHY v. MCMANUS
206 A.2d 688 (Md. 1965)

On April 15, 1957, McManus and Delauney signed a note which read in part, "we promise to pay to the order of A. Hamilton Leahy-One Thousand and no/100-Dollars." The note also bore the stamped name of Multi-Krome Color Process, Inc., of which McManus was Chairman of the Board of Directors and Delauney was Treasurer. Neither designated any representative capacity when he signed.

In an action on the note against McManus, the court of appeals affirmed the lower court's conclusion that the defendant was not personally liable. One who signs a note made by a corporation is prima facie liable to the payee. However, if there is a conflict in the permissible evidence relating to the circumstances of signing, the signer is not liable if he can show an understanding between himself and the payee that there was to be no personal liability. The court of appeals held that the facts of the present case indicated such an understanding between Leahy and McManus. Although the Uniform Commercial Code was not in effect at the time in Maryland, the court stated that Sections 3-402 and -403 embody this principle.

COMMENT

See *Golden Dawn Foods, Inc. v. Cekuta*, annotated supra.

W.P.S.

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

PARK STATE BANK v. ARENA AUTO AUCTION, INC.
207 N.E.2d 158 (Ill. 1965)

The defendant issued a check on December 17, 1963, and mailed it to Plunkett Auto Sales, Rockford, Illinois. The check was in fact intended for another Plunkett in Alabama. On January 3, 1964, Plunkett in Rockford signed his name to the check, presented it to the plaintiff bank, where he was known and where he had previously cashed a check from the defendant, and received cash in exchange. On January 9, 1964, the check was returned to the plaintiff because the defendant had stopped payment. The defendant explained to the plaintiff that the check had been sent to the wrong Plunkett. Shortly thereafter, the defendant again issued a check to the same payee and again mailed the check to Plunkett in Rockford, who unsuccessfully tried to cash this check at the plaintiff bank. Plunkett disappeared, and the plaintiff brought suit against the defendant to recover the amount of the first check. The circuit court found for the plaintiff.

The appellate court affirmed the circuit court's judgment. Since both parties had conceded the fact of forgery, the court initially concluded that a forgery had been committed. It then held that Section 3-406 precluded the defendant from asserting Plunkett's lack of authority to make the signature as a defense against the plaintiff since the defendant by its own negligence had substantially contributed to the making of the unauthorized signature.

Considering the erroneous mailing of the second check and the banking custom as to the routine handling of checks, the court further reasoned that an opposite holding would require a receiving bank to question even those persons who were known to the bank and who were presenting checks in routine business from makers also known to the bank and that such a requirement would hamper business and the banking process. This was not the intent of the legislature in passing Section 3-406.

COMMENT

(1). It was unnecessary for the court to find that a forgery had been committed. Plunkett's signature was clearly unauthorized within the meaning of Section 1-201(43) and this is all that Section 3-406 requires.

(2). The court did not state whether the plaintiff was a "holder in due course" or "other payor" under Section 3-406, thus avoiding a problem posed by the Code itself: Is the transferee of an unauthorized signor a "holder" under the Code?

Technically, it seems that such a transferee is not a holder. Under Section 3-404(1), an unauthorized signature is "wholly inoperative as that of the person whose name is signed." As a result, there is no negotiation of the instrument to the transferee under Section 3-202(1), and without this the transferee is not a holder under Section 1-201(20). See *Stone & Webster Eng'r Corp. v. First Nat'l Bank & Trust Co.*, 345 Mass. 1, 184 N.E.2d 358 (1962). This does not mean that "holder in due course" must be deleted from Section 3-406. The section also mentions the defense of material alteration, and even though an unauthorized signature completely undermines a person's status as a holder under the Code, a material alteration does not do so. See, e.g., Section 3-407.

The plaintiff bank, therefore, qualified for Section 3-406 protection under "other payor," not "holder in due course." In view of this fact, the second part of the court's opinion, seemingly offered as an independent ground for its decision, takes on added importance. Under Section 3-406, an "other payor" must show that he paid the instrument "in accordance with the reasonable standards of . . . [his] business."

R.G.K.

SECTION 3-407. Alteration

GOLDEN DAWN FOODS, INC. v. CEKUTA
205 N.E.2d 121 (Ohio Ct. App. 1964)
Annotated under Section 3-403, supra.

ARTICLE 4: BANK DEPOSITS AND COLLECTIONS

SECTION 4-103. Variation by Agreement; Measure of Damages; Certain Action Constituting Ordinary Care

ROCK ISLAND AUCTION SALES, INC. v. EMPIRE PACKING CO.
204 N.E.2d 721 (Ill. 1965)
Annotated under Section 4-302, infra.