INDEX

New Jersey Supreme Court

ASHER MAURER,
Plaintiff-Appellant,

—*vs*—

HENRY HAHN AND HERMAN POTOKER,
Defendants-Respondents.

Action at Law

NOTICE OF APPEAL.

To MESSRS. KRAEMER & SIEGLER,

ATTORNEYS FOR DEFENDANT, HENRY HAHN.

GENTLEMEN:

PLEASE TAKE NOTICE that the plaintiff in the above entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the judgment of the Supreme Court entered in this cause ordering a trial on the following ground:

1. That the Supreme Court erred in reversing the judgment of the Essex County Circuit Court and ordering a trial.

Dated February 15 1928.

Yours respectfully,

PHILIP J. SCHOTLAND,
Attorney for Plaintiff-Appellant.

Service of a true copy of the within Notice of Appeal is hereby acknowledged this 15th day of February, 1928.

KRAEMER & SIEGLER,
Attorneys for Defendant,
Henry Hahn.

New Jersey Supreme Court

No. 100 October Term, 1927.

ASHER MAURER,
Respondent,
—*vs*—
HENRY HAHN, impleaded, etc.,
Appellant,

Argued October 6, 1927; decided January , 1928

In a suit by the payee of a promisory note against an outside indorser, it appeared on motion for summary judgment, that the said indorser had indorsed a blank note to oblige the maker, and had restricted the authority to fill in name of payee to the name of a dealer from whom maker was to buy coal; that the date, amount and payee's name had been filled in by maker in presence of plaintiff's agent.

HELD: 1. The note was not negotiated to plaintiff;

2. That he was not a holder in due course; 3. that appellant indorser was not liable unless the note was filled up strictly in accordance with his authority; 4. that in this situation the entry of a summary judgment was erroneous.

Defendant's appeal from Essex Circuit Court.

Before Justices Parker, Minturn & Campbell.

For the appellant Joseph Kraemer.

For the respondent, Maurice S. Maurer.

The opinion of the Court was delivered by PARKER, J.

Under Section 15 of the Practice Act of 1912 (P. L. p. 377) and Rule 80 of this Court, the Circuit Court ordered a summary judgment in favor of the plaintiff as holder, and against the defendant appellant as an "outside endorser" of a promissory note bearing the signature of one Morez Potocker (afterwards adjudged a bankrupt) as maker and reading to the plaintiff as payee. As we conclude that plaintiff was not a "holder in due course" in the intendment of the Negotiable Instruments Act, and that the entry of a summary judgment was erroneous, the facts must be stated in some detail.

The plaintiff's brother, Herman Maurer, came to him and recommended a loan to Morez Potocker on his endorsed note of $3,000., at six months. The plaintiff acceded, gave Herman his check of $3,000. to the order of "Morris " Potocker, which was delivered by Herman to the latter and cashed. Herman brought back to plaintiff a note dated November 5, 1926 by Morez Potocker as maker, payable at six months at a bank in Newark, and to the order of Asher Maurer. It was endorsed in blank; "Herman Potocker: Henry Hahn (the appellant). Everything seemed regular enough but the affidavits disclose the following matters of fact, which could be accepted as true by a jury; that Herman Maurer was the agent of plaintiff to deliver the check, and accept the note; and consequently that the knowledge of Herman of any infirmity in the note was the knowledge of Asher, the plaintiff; that when Herman went with the plaintiff's check to Morez Potocker to get the note, that paper was in the following condition: the date was blank, the amount was blank, the time was blank, the payee's name was blank, and there was no signature of the maker. On the back Herman saw the endorsements (as the statute now calls them) of Herman Potocker and Henry Hahn. See C. S. 3742, sec. 63.

This of course presented a typical situation of filling up blanks in an incomplete instrument. It further appears, and from Herman Maurer's own affidavit, that in his presence, Morez Potocker, the maker, filled in date, time to run, payee's name, the amount, signed it, and delivered it to Herman as agent of plaintiff, and that Herman then delivered the check.

Bearing in mind that the question now before us is not the liability of Morez Potocker the maker, which is indubitable; or of Herman Potocker the first "indorser"(who, so far as appears made no defence) but of Henry Hahn the second indorser, the following provisions of the Negotiable Instruments Act are applicable:

Sec. 30. C. S. 3738. An instrument is *negotiated* when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer it is *negotiated by delivery*: if payable to order *it is negotiated by the indorsement of the holder completed by delivery.* (Italics mine).

Sec. 56, C. S. 3741. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face. * *

IV. 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.*

Sec. 14, C. S. 3736: Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein; and a

signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount; in order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time; but if any such instrument, *after completion, is negotiated to a holder in due course,* it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

Recurring to the facts, we gather from the affidavit of appellant Hahn, that he was asked by the maker a friend of his, to guarantee the payment of some purchases of coal which he expected to make, and which he said could be made on very advantageous terms with the aid of Hahn's indorsement, and that Hahn endorsed a blank note with the express agreement that it was to be used only as a guarantee in the purchase of coal; that he gave no authority to fill in the note for any purpose of discounting it; and that the insertion of plaintiff's name was contrary to his authority.

On the above facts which at least raised a fair jury question as to the circumstances under which the note was indorsed in blank and thereafter filled up and delivered and on the provisions of the statute above quoted we reach the following conclusions:

1. That the note was not negotiated to the plaintiff in the sense specified in the Statute. If Hahn had been named as payee, and the note in complete form delivered to plaintiff for value and without

knowledge of any restricted authority, a different case might be presented; but in this case Hahn was not the payee and plaintiff was; the instrument was not complete until his name and the other details had been filled in. A note is not "negotiated" to its payee. Asbury Park &c., Co. v. Megill, 4 Adv. 1022, 1024. 133 Atl. 181.

2. By the same authority, plaintiff was not a holder in due course, because the instrument had not been negotiated to him.

3. Hahn was under Sec. 14, a "person who became a party thereto prior to its completion." Hence, unless the instrument after completion, was negotiated to a holder in due course he was not liable unless, again, it had been filled up strictly in accordance with the authority given; and that authority, in the matter of selecting a payee, was limited to naming the coal dealer from whom the maker, as he told Hahn, expected to buy.

The plaintiff relies on the decision in Mechanics Bank vs. Chardavoyne, 69 N. J. L. 256, in which the present Chief Justice wrote the opinion of the Court of Errors and Appeals. It is to be noted, however, that the Mechanics Bank was not the payee named in the note, and particularly that the case did not arise under the Negotiable Instruments Act but under the common law. In the later case of De Jonge vs. Woodport Hotel & Land Co. 77 N. J. L. 233, in the same court, the same Chief Justice applied the statute to a note ostensibly of the company as maker, signed by its treasurer, to the order of one McLoughlin, and endorsed by him to the plaintiffs. It was held error to exclude testimony tending to show that McLoughlin, payee, had taken the note for the treasurer's individual debt, as such testi-

mony indicated defective title in the payee and would have put the plaintiffs to their proof of being holders in due course. The case, though not precisely in point, is illustrative of the fact that the administration of the law of negotiable instruments is now dependent upon the construction of the language of a statute, and that a plaintiff, in order to recover, must bring himself within its terms. This the present plaintiff so far has, as we think, conspicuously not done.

The judgment is reversed and the case will be remanded to take its ordinary course.

Essex County Circuit Court

ASHER MAURER, *Plaintiff,* —*vs*— HENRY HAHN AND HERMAN POTOKER, *Defendants.*	*Action at Law.* *Notice of Appeal.*

To MAURICE S. MAURER, Esquire, Attorney for Plaintiff:

SIR:

PLEASE TAKE NOTICE that HENRY HAHN, one of the defendants in the above-entitled cause, appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause, on the following grounds:

1. Because the summary judgment herein illegally deprived this defendant of a trial by jury.

2. Because the Court erred in entering summary judgment for the amount of the full principal of the note, to wit, Three thousand ($3,000.00) dollars, and interest and protest fees, although said note was payable in six monthly installments of five hundred ($500.00) dollars each, and there was default in the payment of each of the said installments, but no notice of dishonor of the said installments was given to this defendant, the endorser of said note, except for the default in the last and sixth installment of Five hundred ($500.00) dollars.

Respectfully yours,

KRAEMER & SIEGLER,
Attorneys for Defendant, Henry Hahn..

ESSEX COUNTY CIRCUIT COURT.

ASHER MAURER, *Plaintiff,* —*vs*— HENRY HAHN AND HERMAN POTOKER, *Defendants.*	*Action at Law.* *Affidavit of Service of Notice of Appeal.*

STATE OF NEW JERSEY } ss:
ESSEX COUNTY. }

Irving W. Cohen, being duly sworn according to law upon his oath deposes and says that on the eleventh day of August, 1927, he served the within Notice of Appeal upon the within named Maurice S. Maurer, Attorney at Law for the plaintiff in the above entitled action by leaving a true copy of the same at this office No. 207 Market street, Newark, N. J., with his clerk or the person in charge of the same during business hours.

IRVING W. COHEN,

Sworn and subscribed to before me this eleventh day of August, 1927, at Newark, New Jersey.

SAMUEL GEORGE COHEN,
An Attorney at Law of New Jersey.

STATE OF NEW JERSEY }
ESSEX COUNTY. } ss:

Albert H. Freeman, SPECIAL Deputy Sheriff of the County aforesaid, being duly sworn, on his oath deposes and says that on the 17th day of May, A. D., 1927, he delivered personally to the said defendant,

Herman Potoker,

a true copy of the within summons and complaint, with a ten days' notice endorsed thereon.

ALBERT H. FREEMAN,

Subscribed and sworn to, this
18th day of May, A. D., 1927.

HARVEY W. KEOUGH,
Notary Public of New Jersey.

My Commission expires June 1, 1927.

THE STATE OF NEW JERSEY TO

HENRY HAHN AND HERMAN POTOKER

YOU ARE SUMMONED to answer the annexed complaint of ASHER MAURER in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the said Essex County Circuit Court, at Newark, N. J., within twenty days after the service upon you of this writ and the annexed complaint, the paintiff may proceed in the suit and judgment may be entered against you.

WITNESS, Worrall F. Mountain, Esquire, Judge of aforesaid Court, at Newark, N. J., this 14th day of May, Nineteen hundred and twenty-seven.

JOHN H. SCOTT,
Clerk.

M. S. MAURER,
Attorney.

ESSEX COUNTY CIRCUIT COURT.

ASHER MAURER, *Plaintiff,* —*vs*— HENRY HAHN AND HERMAN POTOKER, *Defendants.*	*Action at Law* *Complaint.*

The plaintiff, Asher Maurer, residing in the City of Newark, Essex County, New Jersey, respectfully shows that:—

1. On November 5, 1926, Morez Potoker borrowed from the said Asher Maurer the sum of $3,000 for a period of six months and gave as security therefor a note dated November 5, 1926 in the sum of $3,000. payable in six months from date thereof at the Merchants & Manufacturers National Bank, Newark, N. J., a true copy of which note is hereto annexed as Schedule A.

2. The said note was endorsed by Herman Potoker and Henry Hahn, defendants herein, to the plaintiff as accommodation endorsers.

3. There was an arrangement that the said Morez Potoker was to pay $500 on the fifth day of every month after November 5, 1926, until May 5, 1927, when the full amount shall have been paid off and to be evidenced by six checks, one for each month, but not one of these checks was ever paid and the full amount of $3,000 is still due and owing.

4. Said note fell due on May 5, 1927, and was presented for payment at the Merchants Trust Company of Newark, New Jersey, formerly the Merchants & Manufacturer National Bank of Newark, N. J., but said note was protested on May 5, 1927 for non-payment because the account had been closed and it appears that the said Morez Potoker had been adjudged a bankrupt heretofore and one Barney Larkey had been appointed trustee. A true copy of the certificate of protest is annexed to the within complaint as Schedule B.

5. Notice of protest of said note was duly mailed to Herman Potoker and Henry Hahn on May 5, 1927, at 6:00 P. M. and in addition notice of the protest was brought to the attention of Henry Hahn personally by Maurice S. Maurer for and in behalf of the plaintiff hereon on the morning of May 6, 1927 at 10:30 A. M. at the office of Henry Hahn, 9 Clinton street, Newark, New Jersey, and the said Henry Hahn admitted receipt of the notice of protest.

6. The said Morez Potoker also gave to the plaintiff herein as a pledge to secure the note a coal certificate for one share of stock in the New Jersey Coal Dealers Association. The certificate was offered by the trustee in bankruptcy for public sale and no bids could be obtained thereon as this certificate is valueless.

7. Said note and the checks are still the property of Asher Maurer, the plaintiff herein as well as the coal certificate which was given as a pledge to secure same and the full amount of $3,000 with legal interest is still due and owing.

WHEREFORE the plaintiff demands as damages from Henry Hahn and Herman Potoker the sum of Three Thousand Dollars ($3,000) with legal interest from November 5, 1926, and costs of suit.

M. S. MAURER,
Attorney of Plaintiff.

SCHEDULE A.

$3,000.

Newark, N. J., November 5, 1926.

SIX MONTHS after date I promise to pay to the order of ASHER MAURER THREE THOUSAND 00/100 DOLLARS at Merchants & Manufacturers National Bank.

Value received with interest at per cent. per annum.

No. Due May 5, 1927.

MOREZ POTOKER.

ENDORSEMENTS: Herman Potoker, Henry Hahn, A. Maurer.

UNITED STATES OF AMERICA
STATE OF NEW JERSEY
ESSEX COUNTY. } ss:

On the 5th day of May in the year of our Lord, one thousand nine hundred and twenty-seven at the request of the Merchants Trust Company of Newark, I, Samuel P. Watson, a Notary Public in and for the State of New Jersey, duly appointed commissioned and sworn, did present the original instrument, hereunto annexed, at Merchants Trust Co., Newark, N. J. to the bookkeeper thereof, and of him demanded payment, who then and there refused to pay the same, saying account closed whereupon and before the hour of 6 P. M. on the said day I deposited in the post office at Newark, N. J. written notices of the dishonor of the said instrument, addressed as follows, with postage thereon prepaid:

Morex Potoker, c/o Herman Potoker, 21 Joyce street, West Orange, N. J.

Henry Hahn, 9 Clinton street, Newark, N. J.

A. Maurer, 21 William Street, Newark, N. J.

And because of the non-payment of the said instrument as aforesaid, I, the said Notary, at the request aforesaid did PROTEST and by these presents do publicly and solemnly PROTEST, as well against the drawer and endorsers of the said instrument as against all others who it doth or may concern, for exchange, re-exchange and all costs charges, damages and interest already incurred and to be hereafter incurred and to be hereafter incurred for want of payment of the said instrument.

Thus done and protested in the City of Newark, County of Essex and State of New Jersey, the day and year first above written.

SAMUEL P. WATSON,
A Notary Public of New Jersey.

ESSEX COUNTY CIRCUIT COURT.

ASHER MAURER, *Plaintiff,* —*vs*— HENRY HAHN AND HERMAN POTOKER, *Defendants.*	*Action at Law.* *Answer of Defendant, Henry Hahn.*

The defendant, HENRY HAHN, answering the complaint herein, says:

1. He denies the allegations contained in paragraph No. 1 of the complaint, except as admitted by the first separate defense.

2. He denies the allegations contained in paragraph No. 2 of the complaint, except as admitted by the second separate defense.

3. He has no information with respect to the truth of the allegations contained in paragraph No. 3 of the complain, and therefore neither affirms nor denies the same, and alleges that if an arrangement was made, as therein set forth, it was between the said plaintiff, and the said Morez Potoker.

4. He denies the allegations contained in paragraph No. 4 of the complaint, execept as set forth in the second separate defense.

5. He admits the allegations contained in paragraph No. 5 of the complaint, but denies that the said notice was due and legal notice of the protest of the alleged note in question.

6. He admits the allegations contained in paragraph No. 6 of the complaint.

7. He denies the allegations contained in paragraph No. 7 of the complaint.

FIRST SEPARATE DEFENSE.

1. On or about November 5th, 1926, this defendant signed a paper which the defendant, Morez Potoker, represented to be a guaranty for coal to be purchased by him in the course of his business as a whosesale coal dealer.

2. After this defendant had signed said paper in the form of a blank note, to be used as a guaranty for payment of coal to be purchased by said Morez Potoker, the said Morez Potoker unlawfully, and without the consent of this defendant, wrote in the writings and figures that appear in the copy annexed to the said complaint and marked "Schedule A."

3. Said unlawful diversion and illegal alteration of said paper signed as aforesaid by this defendant, was with the knowledge of the plaintiff herein, and the said plaintiff is not a holder in due course and for a valuable consideration, but took said note with notice of the fact that the same had been diverted by the said Morez Potoker for a purpose other than the same was authorized, and that it was illegally altered, without the consent of this defendant.

4. Said plaintiff, because of the notice of the said illegal diversion and illegal alteration of the said paper marked "Schedule A," and because of his acquiescence therein, is not legally entitled to recovery on said paper.

SECOND SEPARATE DEFENSE.

1. Said alleged note was payable in installments of five hundred ($500.00) dollars on the fifth day of every month after November 5th, 1926, until May 5th, 1927, when the full aomunt should have been paid off. Said payments were evidenced by six checks, one for each month, as set forth in paragraph No. 3 of the complaint. The first payment was due on December 5th, 1926, but said check was dishonored, and no notice given to this defendant of dishonor, for the non-payment of said installment. The second payment was due on January 5th, 1927, but said check was dishonored, and no notice given to this defendant of dishonor for the non-payment of said installment. The third payment was due on February 5th, 1927, but said check was dishonored, and no notice given to this defendant of dishonor for the non-payment of said installment. The fourth payment was due on March 5th, 1927, but said check was dishonored, and no notice given to this defendant of dishonor for the non-payment of said installment. The fifth payment was due on April 5th, 1927 but said check was dishonored, and no notice given to this defendant of dishonor for the non-payment of said installment. The plaintiff is not entitled to recover for the installments of Five hundred ($500.00) dollars each which fell due on December 5th, 1926, January 5, 1927, February 5th, 1927, March 5th, 1927 and April 5th, 1927, respectively, for failure to give due notice of dishonor of said note to this defendant.

THIRD SEPARATE DEFENSE.

1. The said plaintiff accepted said alleged note from the said Morez Potoker as security for the payment of a usurious loan, in that the said Morez Potoker paid the sum of Twelve hundred ($1,200.00)

dollars as a premium for the making of said loan of Three thousand ($3,000.00) dollars by Asher Maurer, the plaintiff, to him, the said Morez Potoker, and said plaintiff is therefore not a bona fide purchaser for value of said note, and is therefore not entitled to recover, in any event, more than the true principal of said loan, without costs, as provided by an Act of the Legislature of the State of New Jersey entitled "An Act Against Usury," Revision of 1877.

KRAEMER & SIEGLER,

Attorneys for Defendant, Henry Hahn.

ESSEX COUNTY CIRCUIT COURT.

ASHER MAURER, *Plaintiff,* —*vs*— HENRY HAHN AND HERMAN POTOKER, *Defendants.*	*Action at Law* *Order.*

Motion having been made by Maurice S. Maurer. attorney of Plaintiff, Asher Maurer, upon due notice to Kraemer and Siegler, attorneys of the defendant, Henry Hahn, to strike out the answer filed in the above matter by the said Henry Hahn on the grounds that the said answer and seperate defenses are sham and frivolous and improper in law and filed for the purpose of delay and for the entry of summary judgment and argument having been had in the matter, and it appearing to the Court that said answer and separate defenses are shown and frivolous and improper, it is, thereupon on this 26th day of July, nineteen hundred and twenty-seven.

ORDERED, that the answer and separate defenses filed by the defendant Henry Hahn be and the same are hereby stricken out and it is further

ORDERED that judgment final in favor of Asher Maurer against the defendant, Henry Hahn, be and the same is hereby entered in the sum of Three thousand dollars ($3,000.00) with protest fees in the sum of Two Dollars and thirty-six cents ($2.36) and legal interest from May 5, 1927, in the sum of thirty-six dollars ($36.) making a total of three thousand thirty-two dollars and thirty-six cents ($3,032.36) together with costs of suit to be taxed.

Let this rule be entered in the minutes of the Court on motion of Maurice S. Maurer, attorney for plaintiff.

WM. A. SMITH,
Judge.

ESSEX COUNTY CIRCUIT COURT.

ASHER MAURER, *Plaintiff,* —*vs*— HENRY HAHN AND HERMAN POTOKER, *Defendants.*	*Action at Law* *Answering Affidavit.*

STATE OF NEW JERSEY
ESSEX COUNTY.

HENRY HAHN, of full age, being duly sworn, according to law, upon his oath, deposes and says:

I am the defendant in the above entitled cause. I have read the affidavit filed in behalf of the plaintiff for a summary judgment herein.

On or about November 1, 1926, Morez Potoker, a man with whom I had been acquainted and on friendly terms with for about twenty years and who was in the coal business, told me he was in a position to buy some coal at reduced rates and to establish and maintain a good line of credit, if I would guarantee the payment of his coal purchases. He promised that out of the sales made by him he would pay off the bills so guaranteed by me and thus make it impossible for me to lose any money by reason of such guarantee.

I agreed to such guarantee and in accordance with said agreement, said Potoker gave me a form of blank note, which note I endorsed in bank to be used expressly as a guarantee of the coal to be purchased

by said Potoker and this is the note that plaintiff sues on, excepting that the said Potoker filled the same in after its endorsement by me.

It was then understood and agreed between Potoker and myself that the note was only to be used for the purpose above stated. I did not authorize said Potoker to discount said note or to fill it in for the purpose of discounting it. The filling in of plaintiff's name and discounting thereof was without my consent and authorization and contrary to the agreement I had made with said Potoker when I endorsed the said note for the express purpose as aforesaid. The said Potoker filled in the blanks of said note, as now appears in the copy annexed to the complaint, all of which was done subsequent to my endorsement of the same for the express use and purpose, as aforesaid.

The arrangement for the payment of said note in six monthly installments of Five hundred ($500.) dollars each was also without my consent and contrary to the terms of the agreement I had made with said Potoker for the endorsement of the said note. I did not authorize the said Potoker to give these checks of Five hundred ($500) Dollars each to be applied to the payment of the said note, as alleged by plaintiff and the same was done without my knowledge. I received no notice of protest or dishonor of any of the six Five hundred ($500.) dollar checks, as given under said agreement on any of the alleged dates, the said checks were supposed to be due.

I admit attending certain conferences, the purpose of which was the attempt to arrive at a settlement, in order to avoid the embarrassment and publicity of litigation; that I retained Kraemer & Siegler, as counsel, to represent me at said conferences,

which were attempts leading to settlement and for no other purpose, which settlements failed to materialize.

HENRY HAHN.

Subscribed and sworn to before
me this 20th day of July, 1927,
at Newark, N. J.

RICHARD HARTSHORNE,

Master in Chancery of New Jersey.

ESSEX COUNTY CIRCUIT COURT.

ASHER MAURER,
Plaintiff,
—*vs*—
HENRY HAHN AND HERMAN POTOKER,
Defendants.

Action at Law.
Notice of Motion.

TO:—Kraemer and Siegler, Attorneys of defendant, Henry Hahn, No. 164 Market street, Newark, N. J.

TAKE NOTICE that on Saturday, July 9, 1927, at 10:00 A. M. (D. S. T.) or as soon thereafter as counsel can be heard, I shall move before the Judge of the above court, at the Court House, Newark, New Jersey, to strike out the answer and seperate defenses of the defendant, Henry Hahn, filed in the above matter and for entry of summary judgment on the following grounds:

1. The said answer is sham and frivolous and is filed for the purpose of delay.
2. The first separate defense is false.
3. The first separate defense does not constitute a legal defense.
4. The second separate defense is sham.
5. The second separate defense does not constitute a legal defense.
6. The third separate defense is sham.
7. The third separate defense does not set up a proper legal defense.

And the plaintiff shall rely on the affidavit hereto annexed.

M. S. MAURER,
Attorney of Plaintiff.

ESSEX COUNTY CIRCUIT COURT.

ASHER MAURER,
Plaintiff,
—*vs*—
HENRY HAHN, ET ALL.,
Defendants.

Action at Law.
Affidavit.

STATE OF NEW JERSEY, COUNTY OF ESSEX. } ss:

Asher Maurer of full age being duly sworn according to law on his oath deposes and says:

"I am the plaintiff in the above entitled matter. On or about the third day of November, 1926, my brother, Herman Maurer, came to me and explained to me that one Morez Potoker needed money and had asked my brother to raise it for him somewhere. My brother further explained to me that he had had dealings with him before on notes which had been endorsed by one Henry Hahn, a lawyer in this city, and a Herman Potoker, son of said Morez Potoker. He told me that the notes have always been honored and that he had never had any trouble. He told me that he was making the request at the suggestion and for Morez Potoker and that he would get me a note endorsed by Henry Hahn and Herman Potoker and also six checks payable every month at $500 and that I would get the $90 interest immediately.

"This was agreeable to me and I gave a check of $3,000 to my brother, Herman Maurer, which check was made payable to Morez Potoker, a true copy of

said check being hereto annexed as Schedule A. This check was out of the funds of New Jersey Lamp Works, Inc., of which I am president, and which is chargeable against my account as a loan.

"I never saw or met Morez Potoker or Henry Hahn or Herman Potoker. All my dealings were through Herman Maurer who represented to me that he represented Morez Potoker. The note which I received from Morez Potoker through Herman Maurer does not say anything about installment payments. And the note itself is not payable in installments as evidence by the copy hereto annexed. The checks which I received are not endorsed by Henry Hahn or Herman Potoker and they are not a party at all to the said checks.

"Some time in December, 1926, I was informed that Morez Potoker went into bankruptcy and I immediately turned over the note to my son, Maurice S. Maurer, for him to attend to same for me.

"The next time that I heard anything pertaining to the said note was the sixth of May, 1927, the day after the note became due. I received a telephone call from my son, Maurice S. Maurer, and he advised me that he was at the office of Henry Hahn and that he had notified Mr. Hahn of the protest of the note and Mr. Hahn offered to pay me $500 in cash and to give me a mortgage on certain property for the balance of $2,500, payable in three years and my son asked me whether this was agreeable to me and I told him that I would accept such settlement. I thereafter learned that he refused to go through with the arrangement and I authorized my son to institute suit.

"Several days thereafter Henry Hahn sent a letter to my son arranging an appointment at the office of Joseph Kraemer on Thursday, May 12, 1927,

at 4:00 P. M. After that appointment my son advised me that an offer had been made to pay my note by a settlement of 70 per cent. which I accepted and told my son to accept but I never heard thereafter and I ordered my son to proceed at once with the suit.

"As state before, I never met any of the parties, had no other dealings with any of the parties, was not informed at all at any time pertaining to relationship between Henry Hahn and Morez Potoker nor of the consideration he may have gotten, if he did, for his endorsement nor did Herman Maurer say anything to me pertaining to same."

A. MAURER.

Sworn and subscribed to before
me this 24th day of June, 1927.

MACLYN S. GOLDMAN,

A Notary Public N. J.

ESSEX COUNTY CIRCUIT COURT.

ASHER MAURER,
Plaintiff,

—vs—

HENRY HAHN, ET AL.,
Defendants.

Action at Law.

Affidavit.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss:

Herman Maurer of full age being duly sworn according to law on his oath deposes and says that:

"On or about the latter part of October, 1926, Morez Potoker came to me at my residence, No. 223 Renner avenue, Newark, New Jersey, and asked me for an additional loan of $3,000. I had given Mr. Potoker several loans of $3,000 prior to that date on notes which were endorsed by his son, Herman Potoker, and by his friend, Henry Hahn. Two of the notes have already been paid off and a third note I still hold and at that time had not yet matured.

"I advised Mr. Potoker that, though I was willing to loan him further amounts, I did not have any money at that time available. He inquired whether I could get any money for him anywhere. I promised Mr. Potoker I would try to get it for him from someone because of the business dealings that I have been having with Mr. Potoker for quite a long time pertaining to the purchase of coal.

"I then approached my brother, Asher Maurer, at

his place of business, No. 21 William street, Newark, N. J. and explained to him my previous dealing with Mr. Potoker and that I had received as security for loans from him, notes which were endorsed by his son, Herman Potoker, and his friend, Henry Hahn, and which notes had been honored upon presentment and I told him that Mr. Potoker would give him the same kind of a security.

"My brother then told me that he would want the same arrangement, that is, a note similarly endorsed with checks for monthly payments.

"I told my brother that this was agreeable to Morez Potoker whom I was representing and for whom I made the request and my brother then gave me a check for $3,000, a true copy of which is hereto annexed as Schedule A.

"I took this check and turned it over to Morez Potoker at my house, No. 223 Renner avenue, Newark, N. J., and received from him a note dated November 5, 1926 to the order of Asher Maurer for $3,000 an dendorsed by Herman Potoker and Henry Hahn. At that time only Mr. Morez Potoker and myself were present and the note was filled in in my presence by Morez Potoker and I noticed that the endorsements were already on the back of the note. The said note was filled in by said Morez Potoker and made to the order of Asher Maurer payable in six months at the Merchants & Manufacturers National Bank and at the same time he also made out and gave me six checks to the order of Asher Maurer for $500., each check payable one every month. The note, however, did not have any statement in it whatsoever pertaining to any installment payments. A true copy of the said note which he gave me is hereto annexed as Schedule B. I then gave him the

check of $3,000. of Asher Maurer and he gave me the note and checks, a certificate and $90 cash for the interest that is due for the loan.

"At no time have I spoken to or ever seen Mr. Henry Hahn in this transaction or any other transaction that I personally ever had with Morez Potoker. At no time did Morez Potoker ever meet or deal with Asher Maurer in the present transaction because, I, at the request of Morez Potoker, approached my brother, obtained his check and turned same over to Morez Potoker and was the go-between for Morez Potoker in this matter.

"At no time did Morez Potoker advise me what understanding or arrangement there may have been between him and Henry Hahn, except that I knew that his endorsement was an accommodation endorsement so that Mr. Morez Potoker could get credit on that endorsement as had been done previously in dealings with me."

HERMAN MAURER.

Sworn and subscribed to before
me this 24th day of June, 1927.

MACLYN S. GOLDMAN,
A Notary Public N. J.

ESSEX COUNTY CIRCUIT COURT.

ASHER MAURER,
Plaintiff,
—*vs*—
HENRY HAHN, ET AL.,
Defendants.

Action at Law.

Affidavit.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss:

Maurice S. Maurer, of full age being duly sworn according to law on his oath deposes and says that:

"I am the attorney of the plaintiff herein; some time in the latter part of December, 1926, the plaintiff, my father, turned over to me a note, a true copy of which is hereto annexed as Schedule B, which is dated November 5, 1926, to the order of Asher Maurer for $3,000. payable in six months thereafter at the Merchants & Manufacturers National Bank and which note is endorsed by Herman Potoker and Henry Hahn; and my father then advised me that the said Morez Potoker had been adjudged a bankrupt. On or about the sixth day of aJnuary, 1927, Henry Hahn called at my office, 207 Market street, Newark, N. J., at my request pertaining to another extraneous matter which I had to take up with him and at that time I informed him of this note and of the fact that his note would come due on May 5, 1927 and would undoubtedly be protested because of the bankruptcy of Morez Potoker. Mr. Hahn admitted his endorsement and admitted that he had endorsed this note in blank together with other notes and in the same manner as other notes which he had en-

dorsed in blank for the said Morez Potoker and told me that the endorsements were accommodation endorsements without consideration to help Morez Potoker who was an old friend of his and as Henry Hahn expressed it "almost like a father to me." Mr. Hahn requested that I wait a while pertaining to the note due to Asher Maurer.

"On February 8, 1927, Henry Hahn called at my office again pertaining to that other matter and I once more called his attention to the Asher Maurer note and he prayed for further extension of time. On April 20, 1927, two weeks before the Asher Maurer note would mature, I sent a registered letter to Henry Hahn, a true copy of which letter is hereto annexed as Schedule C ,together with a true copy of the return receipt, herein mentioned as Schedule D, in which letter I informed him that the note of Morez Potoker dated November 5, 1926, in the sum of $3,000, to the order of Asher Maurer on the Merchants & Manufacturers National Bank will come due on May 5, 1927, at which time it will undoubtedly be protested for non-payment because the said Morez Potoker is bankrupt and I further advised him that the note was endorsed by him and I was giving him this notice so that he may arrange to settle same BEFORE it is protested for non-payment and I also advised him that I give him this notice so that there will be no question of his having notice of the note or the due date thereof. I received the return receipt but did not hear from Henry Hahn at all.

"The note came due on May 5, 1927, and I presented it to the Merchants & Manufacturers National Bank and asked them to take care of the payment or, in case of non-payment, the protest of the said note and the mailing of the notices of protest and I gave to the bank the addresses of the endorsers, the address of Henry Hahn being 9 Clinton

street, Union Building, Newark, N. J., I called at the Merchants Trust Company, formerly the Merchants & Manufacturers National Bank, on May 6, 1927, at 10:00 A. M. and I received from the bank the original certificate of protest, a true copy of which is hereto annexed as Schedule E, together with the note and was advised that a notice of protest had gone out to every endorser about 6;00 o'clock on May 5, 1927. From the bank, I immediately went to the office of Henry Hahn, at No. 9 Clinton street, Newark, N. J., and, after waiting about a half hour for Mr. Hahn to appear, I personally and orally told Mr. Henry Hahn at his office on that morning, to wit, May 6, 1927 about 10:30 A. M. that the note of Morez Potoker to the order of Asher Maurer for $3,000 which came due on May 5, 1927, had been protested for non-payment and I showed him the original certificate and particularly the clause therein which says that notice had been mailed to the said Henry Hahn and then the said Henry Hahn admitted to me that he had gotten that notice of protest and he looked for it on his desk, found it among his papers and then showed to me the notice which he had that morning received."

"We then discussed the matter and Henry Hahn told me that he did not want to "beat" anybody out of his money and proposed a settlement. I called up my father on the telephone in Henry Hahn's presence and told him of the offer of settlement which was $500 to be paid in cash and $2,500 by a mortgage for three years and my father accepted the offer. Mr. Hahn then requested that I give him until 1:45 P. M. of that day to draw up the papers and an appointment was made for the early afternoon. Some time during the morning, I was notified that the office of Henry Hahn had called up and left a message that Mr. Hahn could not keep the appointment. I called Henry Hahn on the 'phone and spoke to him

and he advised me that he could not go through with the settlement and asked for two or three weeks time "to induce his wife to sign the mortgage." I told him that I could not accept that ridiculous explanation and he would have to make some arrangement shortly. I then received a letter from him dated May 9, 1927, arranging an appointment at the office of Joseph Kraemer on Thursday, May 12, 1927, at 4:00 P. M. Mr. Joseph Kraemer, Mr. Henry Hahn and myself were present at that appointment and Mr. Hahn advised me that there were about $12,000 worth of notes outstanding against him which he had endorsed for Mr. Morez Potoker and for that reason he made an offer of about 70 per cent. to me. I took this up with my father thereafter and my father accepted the offer. I called up the office of Kraemer & Siegler and spoke to Joseph Kraemer advising him that my father would accept the settlement; he then advised me that he will get in touch with Henry Hahn and then let me know, but I never heard from him.

"On May 6th, 1927, I sent to Henry Hahn a registered letter confirming all that had happened on that day and annexed hereto as Schedule F, is the said letter and the registry receipt thereof.

"The said Henry Hahn had due and legal notice of protest of the said note, had admitted to me his endorsement and that there is due to Asher Maurer the sum of $3,000 and the answer filed by the said Henry Hahn in the within matter is entirely sham and frivolous and was filed for purpose of obtaining a delay.

MAURICE S. MAURER.

Sworn and subscribed to before
me this 24th day of June, 1927.

MACLYN S. GOLDMAN,
Notary Public N. J.

ESSEX COUNTY CIRCUIT COURT.

ASHER MAURER,
Plaintiff,
—*vs*—
HENRY HAHN, ET ALL.,
Defendants.

Action at Law.

Affidavit.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss:

Samuel P. Watson of full age being duly sworn according to law on his oath deposes and says:

"On May 5, 1927, at the request of the Merchants Trust Company of Newark, this deponent, a Notary Public of New Jersey, presented the original note of Morez Potoker dated November 5, 1926 in the sum of $3,000. payable in six months at the Merchants & Manufacturers National Bank to the order of Asher Maurer, a true copy of the original instrument being hereto annexed at the Merchants Trust Company of Newark, New Jersey, formerly the Merchants & Manufacturers National Bank of Newark, N. J., to the bookkeeper thereof and demanded payment and he then and there refused to pay same saying that the account had been closed;

"This deponent thereupon, on May 5, 1927, before 6:00 P. M. of that date, deposited in the Post Office at Newark, N. J., written notices of the dishonor of the said instrument addressed as follows with postage prepaid theron:—To Morez Potoker, c/o Herman Potoker, 21 Joyce Street, West Orange, N. J., to Herman Potoker, 21 Joyce street, West Orange, N. J., to Henry Hahn, No. 9 Clinton street, Newark, N. J., to Asher Maurer, 21 William street, Newark, N. J.

"Because of the non-payment of the said note, this deponent, at the request of the Merchants Trust Company, protested, as well as against the drawer and endorsers and against all others whom it may concern, the non-payment of the said note and all costs, charges, and interest already incurred for want of payment of said note, the protest fees thereof amounting to $2,46."

SAMUEL P. WATSON.

Sworn and subscribed to before
me this 23rd day of June, 1927.

MACLYN S. GOLDMAN,

A Notary Public N. J.

SCHEDULE A.

Newark, N. J., Nov. 3, 1926.

No. 4662.

Pay to the order of MORRIS POTOKER....$3,000.00
Three Thousand no/100.....dollars
To the West Side Trust Company, Newark, N. J.

NEW JERSEY LAMP WORKS, INC.

A. MAURER,
President.

Endorsed: Morris Potoker.

SCHEDULE B.

$3,000.

Newark, N. J., November 5, 1926.

SIX MONTHS after date I promise to pay to the order of ASHER MAURER, THREE THOUSAND 00/100 DOLLARS at Merchants & Manufacturers National Bank.

Value received with interest at per cent. per annum.
No. Due, May 5, 1927.

MOREZ POTOKER.

ENDORSEMENTS: Herman Potoker, Henry Hahn, A. Maurer.

SCHEDULE C.

April 20, 1927.

Mr. Henry Hahn,
9 Clinton Street,
Newark, N. J.

Dear Sir:

Take notice that a note made by Morez Potoker dated November 5, 1926, in the sum of $3,000 to the order of Asher Maurer on the Merchants & Manufacturers National Bank will come due on May 5, 1925, at which time it will undoubtedly be protested for non-payment because the said Morez Potoker is bankrupt. This note was endorsed by you and I give you this notice so that you may arrange to settle same before it is protested for non-payment. I give you this notice so that there will be no question of your having notice of this note or the due date thereof.

Very truly yours,

MAURICE S. MAURER.

MSM:TK.
REGISTERED MAIL.

SCHEDULE D.

RETURN RECEIPT.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this card.

HENRY HAHN,
(Signature or name of addressee.)

ELLIS A HAHN,
(Signature of addressee's agent.)

Date of Delivery 4-22-1927.
Registered Article No. 190850.

SCHEDULE E.

UNITED STATES OF AMERICA,
STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss:

On the 5th day of May in the year of our Lord, one thousand nine hundred and twenty-seven at the request of the Merchants Trust Company of Newark, I, Samuel P. Watson, a Notary Public in and for the State of New Jersey, duly appointed commissioned and sworn, did present the original instrument, hereunto annexed, at Merchants Trust Co., Newark, N. J., to the bookkeeper thereof, and of him demanded payment, who then and there refused to pay the same, saying account closed whereupon and before the hour of 6 P. M. on the said day I deposited in the post office at Newark, N. J., written notices of the dishonor of the said instrument, address as follows, with postage thereon prepaid:

Morez Potoker, c/o Herman Potoker, 21 Joyce street, West Orange, N. J.

Herman Potoker, 21 Joyce street, West Orange, N. J.

Henry Hahn, 9 Clinton street, Newark, N. J.

A. Maurer, 21 William street, Newark, N. J.

And because of the non-payment of the said instrument as aforesaid, I the said Notary, at the request aforesaid, did PROTEST and by these present do publicly and solemnly PROTEST as well against the drawer and endorsers of the said instrument as against all others whom it doth or may concern for exchange, re-exchange and all costs charges, damages and interest already incurred and to be

hereafter incurred and to be hereafter incurred for want of payment of the said instrument.

Thus done and protested in the City of Newark, County of Essex and State of New Jersey, the day and year first above written.

SAMUEL P. WATSON,
A Notary Public of New Jersey.

SCHEDULE F.

May 6, 1927.

Mr. Henry Hahn,
9 Clinton St.,
Newark, N. J.
Dear Sir:

On Thursday, May 5, 1927, the note of Morez Potoker to Asher Maurer for $3,000 dated November 5, 1926, was due and was protested by the Merchants Trust Company for non-payment and notice of protest was mailed to you that day.

On Friday, May 6, 1927, at 10:30 A. M. I called at your office and showed you the certified of protest and the note and you then admitted to me that you had received the notice of protest and showed me the notice of protest which you had received in that matter that morning. We then discussed a settlement and it was arranged that you give a mortgage to Asher Maurer for a period of three years, to pay same which mortgage was to be for $2,500 and the balance of $500 shall be paid in cash. Thereafterafter, on that day, you advised me over the 'phone that you could not go through with that settlement and asked for two or three weeks' time "to induce your wife to sign a mortgage" as you stated.

This letter is to confirm the message which I gave you over the 'phone to the effect that I could not wait because of your failure to live up to your agreement and I am therefore, instituting suit at once against you.

Very truly yours,

M. S. MAURER.

MSM:TK.
REGISTERED .

COPY OF REGISTRY RECEIPT.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

HENRY HAHN,

(Signature or name of addressee.)

F. SCHORR,

(Signature of addresse's name.)

Date of Delivery: May 7, 1927.

Registered Article No. 1200998.

ESSEX COUNTY CIRCUIT COURT.

43172-54

ASHER MAURER, *Plaintiff,* —*vs*— HENRY HAHN AND HERMAN POTOKER, *Defendants.*	*Action at Law.* *On Order Striking Out Answer Judgment entered July 28, 1927.* Damage ....$3,032.36 Costs ..... 64.53 Total $3,096.89

Maurice S. Maurer, Attorney of Plaintiff.

Judgment on Order Striking Out Answer in the above entitled Action was rendered on the twenty-eighth day of July A. D., nineteen hundred and twenty-seven in favor of the plaintiff, Asher Maurer, and against the defendant, Henry Hahn for the sum of thirty hundred thirty-two dollars and thirty-six cents ($3,032.36) damages and sixty-four dollars and fifty-three cents costs of suit.

Judgment entered and signed July 28, 1927.

WILLIAM S. GUMMERE,
Judge.

JOHN H. SCOTT,
Clerk.

Book 103, page 153.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ASHER MAURER, *Plaintiff-Appellant,* *vs.* HENRY HAHN, *Defendant-Respondent.*	*On Appeal from Supreme Court.*

BRIEF FOR PLAINTIFF-APPELLANT.

Facts.

In the latter part of October, 1926, Morez Potoker applied to Herman Maurer for a loan of $3,000 to be secured by his promissory note endorsed by Herman Potoker and Henry Hahn. Herman Maurer had previously discounted three similar notes for Potoker, all endorsed the same way and which had been paid at maturity. On this occasion Herman Maurer did not have available funds to discount such a note and so informed Potoker who, thereupon, asked Herman Maurer to try to get such a note discounted for him. Herman Maurer at the request of Morez Potoker, and as his agent for that purpose (Case, p. 28, ll. 30 to 40, and p. 29, ll. 15 to 20) applied to his brother Asher Maurer, the plaintiff-appellant, to discount such a note and having assured his brother that he had done it before for Potoker and that the notes had been honored upon presentment (Case, top p. 29), the plaintiff agreed to discount the note, but made the condition that he wanted the same arrangement as Herman Maurer had; that is, checks for monthly payments before the note became due. Upon being assured by Herman Maurer, the agent of Morez Potoker, that the arrangement was agreeable to

Potoker (Case p. 29, ll. 15 to 20), he gave Herman Maurer a check for $3,000 to the order of Morez Potoker and received in return the promissory note which is the subject matter of this action and which is Schedule A of the complaint filed in this action and is printed on page 14 of the case, together with $90 in cash for the discount, and six $500 checks payable monthly. The note contains no reference to the checks and none of them were paid.

It appears from the affidavit of Herman Maurer (Case, p. 28), that the promissory note in question had been endorsed in blank by Henry Hahn and Herman Potoker and that when he advised Morez Potoker that he had succeeded in getting his brother to discount the note, Morez Potoker then filled out the note in the form in which it was delivered to the plaintiff and made the plaintiff the payee and himself the maker. This was not known to the plaintiff and was not at any time communicated to him by Herman Maurer, the agent of Morez Potoker, nor by anyone else. The plaintiff never came in personal contact with either Morez Potoker, or any of the endorsers, but accepted the note complete in form, and regular on its face, in exchange for his $3,000 check when the note was delivered to him by Herman Maurer, the agent of Morez Potoker.

Less than two months after the note in question had been negotiated to the plaintiff and Potoker had received the proceeds of same, Morez Potoker was adjudicated a bankrupt and thereafter negotiations were begun on behalf of the plaintiff to collect the indebtedness represented by said note from Henry Hahn, the only defendant who defended this action and who is the respondent here. The negotiations having failed the note was duly protested and notice of

protest sent to the respondent Henry Hahn, as well as to the other endorser. The fact that the note was properly protested when due and that notice of protest was sent to and received by Henry Hahn in due time, in compliance with all legal requirements is not in question.

After the note had been protested negotiations were again had with Henry Hahn, looking towards a settlement, but failed. Then the plaintiff brought this action against Henry Hahn and Herman Potoker, the endorsers on said note. Herman Potoker did not defend. Henry Hahn filed an answer (Case, p. 16) denying the allegations of the complaint and pleading that he has no information, except that he admits the protest of the note, and that he received the notice of protest, and that a coal certificate which had been given to the plaintiff as collateral security was valueless, and with his answer sets up three defenses:

1. That he signed the note in question in blank to be used as a guaranty for payment of coal to be purchased by Morez Potoker, and that by filling in the note to another payee and getting it discounted, Morez Potoker violated the authority given by him as to the manner in which the note should be filled out and dealt with.

2. That the note was payable in installments (which is not a fact), and that as each check became due he was not notified of its dishonor, and

3. That the plaintiff took the note as security for the payment of a usurious loan.

The plaintiff served notice of a motion to strike out said answer and special defenses on the ground that the answer is sham and frivolous;

the first defense false and does not constitute a legal defense; the second defense sham and does not constitute a legal defense; and the third defense sham and does not constitute a legal defense. With the notice were served the affidavits of Asher Maurer, Herman Maurer, Maurice S. Maurer and Samuel P. Watson, appearing on pages 25 to 36 of the case.

In reply to these affidavits Henry Hahn submitted only his own affidavit (Case, p. 21) in which he admits that he endorsed the note in question in blank, but says that it was to be used as a guaranty of the coal to be purchased by Potoker; and denies knowledge of the arrangement for the installment payments by the $500 checks and sets up no notice of protest of the checks.

After argument on this motion, the learned Circuit Court Judge ordered the answer and defenses struck out, and summary judgment entered against the defendant for the amount of the note with interest.

From this judgment the defendant Hahn appealed to the Supreme Court. The Supreme Court ordered the judgment reversed and the case remanded on the grounds that the plaintiff-appellant was not a holder in due course, holding that a note is not negotiated to its payee; and in its finding of fact holding that Herman Maurer was the agent of Asher Maurer.

Plaintiff claims that the judgment of the Supreme Court was erroneous both as to the law and as to the facts, and has brought this appeal.

There are three questions involved in the consideration of this appeal:

1. Is the plaintiff who is the payee of the note in question a holder in due course?

2. Is the defendant's liability as endorser of the note in question discharged by the fact that the maker without the knowledge of the defendant endorser issued six post-dated checks, each in the sum of $500, and payable one each month in advance of the due date, as a means of paying the indebtedness secured by the note in installments, without any reference to such an arrangement appearing on the note?

3. Is Herman Maurer the agent of the plaintiff, or of Morez Potoker, in the transaction in question?

These questions will be dealt with in this brief in the order stated.

ARGUMENT.

I.

The plaintiff-appellant is a holder in due course of the note sued upon.

The question as to whether the payee of a promissory note is a holder in due course under the provisions of the Uniform Negotiable Instrument Law, which has been passed by all of the states, and was adopted in this State in 1902 (Compiled Statutes of New Jersey, p. 3734) is not open in this State since the decision by this Court in *Penbrook Trust Company* v. *Wiegand & Co.*, 100 N. J. L. 353, which decision agrees with the great weight of authority. The facts in this case were that Wiegand & Co., manufacturing jewelers of Irvington, New Jersey, being in need of cash, made two promissory notes, one dated September 21st, 1922, in the sum of $2,000 payable four months after date at the Irvington National Bank with the name of the payee in blank, and the other one for the same amount in the same way,

but dated September 23rd, 1922; and delivered these notes to a finance company which was authorized to fill in the name of the payee upon receiving cash or other notes, which Wiegand & Co. would be able to use as cash for said notes. Wiegand & Co. never received any consideration for the notes, and when they demanded the return of the notes did not get them; but the name of the Paxtang Shoe Manufacturing Co. was afterwards filled in on the face of the notes as payee; and the notes delivered to the Paxtang Shoe Manufacturing Co., in exchange for its own notes. After maturity and dishonor, the Penbrook Trust Company became the owner of these notes by transfer from the Paxtang Shoe Manufacturing Co., the payee.

The question that came before this Court for decision was whether or not the Paxtang Shoe Manufacturing Company, although it was the payee in the notes sued upon, was a holder in due course, and the Penbrook Trust Company could therefore recover on the notes on the strength of that legal position of the payee notwithstanding that the makers never received any consideration. This Court, in a very carefully written opinion by Justice Katzenbach, says on page 359:

> "The position of the appellant is also untenable in assuming, first, that the defendant could set up as against the Paxtang Company the defenses of misappropriation of the notes and lack of consideration had the notes not been discounted by the Penbrook Company, and in assuming, in the second place, that if they came into the possession of the Penbrook Company after maturity, with notice of their misappropriation and the failure of the maker to receive any consideration therefor, that this necessarily made the notes subject to the defenses set up in the answer

> of the defendant. *As has been stated, the Paxtang Company paid value for the notes. It took them without notice of the circumstances surrounding their issue or lack of consideration to the maker. The Paxtang Company was a holder in due course.* The Paxtang Company was secondarily liable upon the notes after their protest. If the Paxtang Company paid the amount due on the notes to the Penbrook Trust Company the Paxtang Company had all its former rights, and could renegotiate the notes so as to give to its transferee or transferees all the rights which it had against the maker."

A comparison of the facts in the instant case with the facts in the case just cited shows:

(a) In the instant case defendant Hahn endorsed the note in blank for the purpose of having it filled in for the use by Morez Potoker, the maker, as security for the payment of coal which he would purchase. In the cited case, Wiegand & Co. made out the notes leaving the name of the payee in blank to have the finance company secure cash or other notes in exchange for their notes and fill in as the payee the name of the party from whom the consideration was received.

(b) In the instant case Potoker filled out the blank spaces in the note endorsed in blank by the defendant Hahn, making it a promissory note in the sum of $3,000 payable in six months to the order of the plaintiff-appellant. In the cited case the finance company filled in the name of the Paxtang Shoe Manufacturing Company as payee, took notes of the Paxtang Shoe Manufacturing Company in exchange and kept the notes.

(c) In the instant case the note was entirely completed on its face and regular in form before the plaintiff received it or saw it, and he had no knowledge of the fact that the endorsement of the

defendant Henry Hahn had been placed on the note before it was made out. In the cited case the Paxtang Company received the notes with their name appearing as payee without any knowledge that the notes had not been completely filled in by the maker before delivery to them.

(d) In the instant case the plaintiff-appellant paid the full consideration for the note sued upon, while in the cited case, although the Paxtang Company never paid the notes that it gave in exchange for the notes of Wiegand & Company, the fact that it had given notes in exchange was held by this Court to be sufficient consideration. It is therefore apparent that the decision in *Penbrook Trust Company* v. *Wiegand & Co.* (*supra*) is dispositive of the instant case, and that the Supreme Court erred in holding that the plaintiff-appellant was not a holder in due course. The Supreme Court in its opinion written by Justice Parker (Case, pp. 2 to 7), does not cite or refer to the case of *Penbrook Trust Company* v. *Wiegand & Co.,* and evidently neither counsel called that decision to the attention of the Supreme Court.

The *Penbrook Trust Company* v. *Wiegand & Co.* decision in this Court is amply supported not only by the provisions of the statute itself, which in Section 191 (Compiled Statutes, p. 3756) provides:

> " 'Holder' means the payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof."

and in Section 59 (Compiled Statutes, p. 3741):

> "Every holder is deemed *prima facie* to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course, but the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title,"

and in Section 52 (Compiled Statutes, p. 3741):

> "A holder in due course is a holder who has taken the instrument under the following conditions:
>
> "I. That it is complete and regular upon its face;
>
> "II. That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;
>
> "III. That he took it in good faith and for value;
>
> "IV. 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."

and by Section 14 (Compiled Statutes, p. 3736):

> "Where the instrument is wanting in any material particular, the person in possession thereof has a *prima facie* authority to complete it by filling up the blanks therein; and a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a *prima facie* authority to fill it up as such for any amount; in order, however, that any such instrument when completed, may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time; but if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accord-

ance with the authority given and within a reasonable time."

but also by the great weight of authority.

In *Howard National Bank* v. *Wilson, et al.,* 120 Atl. 889, 96 Vt. 438, the Vermont Supreme Court goes thoroughly into the question involved in this case and reviews and compares the authorities up to the date of its decision, 1923, and reaches the following conclusions:

(a) Under Uniform Negotiable Instruments Act, Section 52, defining holder in due course as one not having notice of infirmity or defect of title, at the time the instrument was negotiated, the "payee" may be a holder in due course. As "negotiated" means concluded by bargain or agreement, a note may be negotiated to payee; especially in view of Section 30.

(b) That the weight of authority agrees with that conclusion.

The facts in the Vermont case cited (*supra*) are very similar to the facts in the instant case and the decision is with the plaintiff.

In *Ex Parte Goldberg & Lewis,* 67 So. 839 (1914), the Alabama Supreme Court decided:

> "What we do decide is that the payee of a completed negotiable note to whom it is given for value, without notice, and in the ordinary way of business, by one of several makers, to whom it has been entrusted by another maker for that purpose,—albeit by fraud, or upon condition, as in this case,—is, as to the obligation of such other party, a bona fide holder in due course of trade, and is, as for such fraud or breach of authority between the obligors, entitled to enforce the obligation."

This conclusion is stated by the Court in its opinion after reviewing the authorities and quoting at length the provisions of the Negotiable Instruments Act above quoted.

In *Liberty Trust Company* v. *Tilton,* 217 Mass. 462, the Massachusetts Supreme Judicial Court (court of last resort) in an opinion by Chief Justice Rugg rendered in 1914 discusses the minority decisions which hold the other way and holds—

> "The payee named in a promissory note who purchases it complete in form for value before maturity, in good faith and without notice of any infirmity in title or otherwise, is a person to whom it has been negotiated as holder in due course, notwithstanding it was signed in blank by the party to be charged, whose instructions as to the filling of blanks and the delivery have not been followed by the one to whom it was entrusted by him in its incomplete state."

This decision has been followed and approved to date not only in Massachusetts, but in the majority of the states where the same question has arisen as illustrated in *McLaughlin* v. *Paine Furniture Co.,* 245 Mass. 377, 139 N. E. 542 (1923) and *American National Bank* v. *Kerley,* 109 Ore. 155. In this case the Oregon Supreme Court repudiating its previous decision in *Bank of Gresham* v. *Walch,* 76 Ore. 272 (1915) which had followed the minority view which this decision calls the Iowa rule, says, after reviewing the authorities on both sides of the question:

> "An analysis of the reasons upon which the Massachusetts rule is based could be nothing more than a repetition of what has been many times said by jurists and writers who have followed that rule, and we therefore content ourselves with stating that we agree with the reasoning employed in *Liberty Trust Company* v. *Tilton* and approve the Massachusetts rule."

In Illinois the case of *Drumm Construction Co.* v. *Forbes,* 305 Ill. 303, 137 N. E. 225 (1922), holds to the same effect.

Tennessee is in accord with the majority rule in *Snyder* v. *McEwen,* 148 Tenn. 423, 256 S. W. 434 (1923). Pennsylvania in *Johnston* v. *Knipe,* 260 Pa. 504, 105 Atl. 705, also follows this rule. In this case, Justice Walling, speaking for the Supreme Court of Pennsylvania (1918), quotes with approval as the law the same paragraph from the decision in *Liberty Trust Company* v. *Tilton,* 217 Mass. 462, as quoted above in this brief.

The New York decisions as illustrated in

Brown v. *Rowan,* 154 N. Y. Suppl. 1098 (1915);

Empire Trust Co. v. *Manhattan Co.,* 162 N. Y. Suppl. 629 (affirmed without opinion, 166 N. Y. Suppl. 1093, (1917);

Bergstrom v. *Ritz Carlton Restaurant & Hotel Co.,* 171 App. Div. 776, 157 N. Y. Suppl. 959 (1916),

all follow the Massachusetts rule above quoted and approve and reason from the Massachusetts rule.

Minnesota follows the same rule in *State Bank* v. *Missia,* 144 Minn. 410, 175 N. W. 614.

Montana follows the majority rule in *Merchants National Bank* v. *Smith,* 59 Mont. 280, 196 Pac. 523 (1921).

Nebraska also follows the same rule in *Farmers State Bank* v. *Lydick,* 200 N. W. 50 (1924).

There are five jurisdictions which hold that a payee cannot be a holder in due course. These jurisdictions follow the decision in the case of *Vander Ploeg* v. *Van Zuuk,* 135 Iowa 350, 112 N. W. 807, which decision in turn is based upon the English decision in *Herdman* v. *Wheeler,* 1 K. B. 361 (1902), and a misapprehension of what was held in Massachusetts in the case of *Boston Steel & Iron Company* v. *Steuer,* 183 Mass. 140, 66 N. E. 646 (1903).

The case of *Herdman v. Wheeler* has been criticized and doubted in *Lloyd's Bank* v. *Cooke,* 1 K. B. 794 (1907), where two of the judges expressed grave doubts as to the correctness of the decision, and the third judge rejects the doctrine of the *Herdman-Wheeler* case and decides the facts on the basis of a payee being a holder in due course.

The case of *Jones* v. *Waring & Gillow,* 2 K. B. 612 (1925), again doubts the doctrine of the case of *Herdman* v. *Wheeler.*

The case of *Vander Ploeg* v. *Van Zuuk* (*supra*) relies upon the case of *Boston Steel & Iron Company* v. *Steuer* (*supra*) as authority for its holding, but the Massachusetts Supreme Judicial Court, in *Liberty Trust Company* v. *Tilton* (*supra*), interprets that case as holding the other way. Thus leaving Iowa for its contrary view, resting upon the questioned and doubted English case and its misapprehension of the older Massachusetts decision. The other states, namely, Kentucky in *Southern National Life Realty Corp.* v. *Peoples Bank,* 178 Ky. 80, 198 S. W. 543 (1917); Missouri in *St. Charles Savings Bank* v. *Edwards,* 243 Mo. 553, 147 S. W. 978 (1912); Oklahoma in *Bond* v. *Krugg,* 242 Pac. 559 (1925), and South Dakota in *Tripp State Bank* v. *Jerke,* 188 N. W. 314 (1922), all follow and base their decisions on the Iowa decision of *Vander Ploeg* v. *Van Zuuk* (*supra*).

A review of the authorities thus demonstrates that not only is the clear weight of authority in accordance with the decision of this Court in *Penbrook* v. *Wiegand* (*supra*), but that the five states that take the opposite view have a very meagre foundation to rest upon.

The Supreme Court in deciding the instant case overlooked the *Penbrook* v. *Wiegand* case (*supra*) as heretofore indicated and cited *Asbury Park Electric Supply Co.* v. *Megill,* 102 N. J. L. 496, in support of its holding that a payee is not a holder in due course. While the opinion in that case was written by the same justice who wrote the opinion in the instant case in the Supreme Court, plaintiff respectfully calls attention to the fact that in the case of *Asbury Park Electric Supply Co.* v. *Megill,* though Justice Parker at the top of page 499 says:

> "and a bill of exchange cannot be said to be 'negotiated' to a drawer signing it and payee named therein any more than a note or check is 'negotiated' to its 'payee,'"

It is purely dicta with reference to the payee of a note and is not at all necessary to the decision in that case. For that is a case where the plaintiff was told before accepting the bill of exchange which he saw in an incomplete state, that the defendant had only authorized the person entrusted with it to fill it out for $60 and himself insisted that it be filled in for $209.16. The plaintiff was therefore not a party without notice, but a party with actual notice not only of the defective and incomplete trade acceptance, but also of the fact that it was being filled in contrary to the authority of the acceptor. While this decision containing the dicta above quoted was rendered a year and about seven months later than the *Penbrook Trust Company* case (*supra*), it is not

cited or mentioned in this case either, and the probabilities are that if the *Penbrook Trust Company* case had been called to the attention of the Court, though the decision in the Asbury Park case would not have been different, the opinion probably would not have contained the dicta above quoted and upon which it relied in its decision of the instant case.

The plaintff therefore respectfully submits that the plaintiff having received the note in question complete and regular on its face with no knowledge whatsoever of any defect in title or infirmity in the note, and having paid the full value and consideration before maturity, is by virtue of the Uniform Negotiable Instruments Act, and the decision of this Court and by the great weight of authority a holder in due course, and that therefore the Supreme Court erred in reversing the judgment of the Circuit Court in favor of the plaintiff.

II.

An oral agreement made between the maker and the payee of a note providing for accelerating the payment of the note by means of monthly checks given by the maker to the payee without the knowledge of an endorser and to which agreement the endorser is not a party and no reference to such agreement appearing on the face of the note does not control the time of maturity fixed by the note.

The authorities supporting this point are:

8 C. J., section 327, pages 196 and 197;

Aldrick v. *Peckham,* 74 N. J. L. 711, 68 Atl. 345.

In this case this Court held that the maker could not set up as a defense in an action by the

accommodation endorser who had paid the note, the failure of consideration brought about by the fact that the payee had failed to comply with the terms of a written contract made simultaneously with the note and part of the same transaction, because the endorser was not a party to it, and had no knowledge of the terms of the contract. In the instant case the facts are the exact reverse, because the plaintiff did receive the checks which were not paid, but the defendant Hahn had no knowledge of that arrangement, was not a party to the checks, when the checks were dishonored the note upon which he was an endorser was not then due, and he therefore cannot defend on the theory that he did not receive notice of protest of an instrument to which he was not a party on which he was not liable and of the existence of which he had not knowledge, but the legal principle there stated, controls this situation.

III.

The Supreme Court erred in determining as a fact that Herman Maurer was the agent of Asher Maurer.

The only evidence in the case is that set forth in the affidavits submitted in support of the motion to strike out the answer and defenses and to enter summary judgment for the plaintiff, and in the answering affidavit submitted by the defendant Hahn.

On the part of the defendant Hahn, there is not a word of evidence introduced nor a single statement in his affidavit, which appear on pages 21 to 23 of the case, in any way intimating that Herman Maurer acted for Asher Maurer, nor that Asher Maurer had any knowledge whatsoever of the incomplete state of the note before delivery to him, or of the private arrangement between the defendant Hahn and Potoker as to how the note was to be used, or what it was to be used for.

On the other hand the affidavit of Asher Maurer on page 26, lines 6 to 10, states as follows:

> "I never saw or met Morez Potoker or Henry Hahn or Herman Potoker. All my dealings were through Herman Maurer, who represented to me that he represented Morez Potoker."

and in the affidavit of Herman Maurer, on page 29 of the case, lines 15 to 20:

> "I told my brother that this was agreeable to Morez Potoker, *whom I was representing and for whom I made the request* and my brother then gave me a check for $3,000,"

and also in the same affidavit on page 30, lines 9 to 15:

> "At no time did Morez Potoker ever meet or deal with Asher Maurer in the present transaction because I, *at the request of Morez Potoker,* approached my brother, obtaining his check, and turning same over to Morez Potoker and *was the go-between for Morez Potoker in this matter.*"

This being the only evidence on the question involved in the case, and not being questioned in any way by the defendant and not inherently improbable in itself, the Supreme Court erred in reversing the finding of the Circuit Court and in holding that Herman Maurer was the agent of Asher Maurer. There is absolutely nothing upon which the finding of the Supreme Court can rest, and it was led into this error by a misstatement appearing on page 9 of the brief filed on behalf

of the defendant Hahn on his appeal to the Supreme Court, in which it is stated:

> "By the affidavit of Herman Maurer who acted as the agent for the plaintiff-appellee (Asher Maurer before the Supreme Court) in the purchase of this note."

Plaintiff therefore respectfully submits that the judgment of the Supreme Court should be reversed, and the judgment of the Circuit Court in favor of the plaintiff and against the defendant Hahn affirmed with costs.

Respectfully submitted,

PHILIP J. SCHOTLAND,
Attorney and of Counsel with
Plaintiff-Appellant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ASHER MAURER, *Plaintiff-Appellant,* ***vs.*** HENRY HAHN, *Defendant-Respondent.*	*On Appeal from Supreme Court.*

MEMORANDUM FOR THE DEFENDANT-RESPONDENT.

Facts.

The facts are accurately stated in the opinion of Mr. Justice Parker for the Supreme Court (p. 2, State of Case). The Supreme Court decided that the plaintiff-appellant was not a holder in due course as defined by the Negotiable Instrument Act, and therefore, on the facts presented on the application for the summary judgment the defendant-respondent was not liable on the note in question, because it had not been filled in strictly in accordance with the authority that he had given Potoker, the alleged maker, to use the blank note for a guarantee of payment for coal to be purchased by the said Potoker. Summary judgment of the Essex County Circuit Court in favor of the plaintiff-appellant and against the defendant-respondent was accordingly reversed. It is from that judgment that the plaintiff-appellant has appealed to this court.

ARGUMENT.

Point I.

The appellant argues that the Supreme Court erred in holding that the plaintiff-appellant was

not a holder in due course, and relies upon the case of *Penbrook Trust Company* v. *Wiegand & Co.,* 100 N. J. L. 353; 127 Atl. 404, decided by this court. He construes the opinion of Mr. Justice Katzenbach as establishing the proposition that a payee of a negotiable instrument may be a holder in due course. The facts in that case, however, show that Wiegand & Co. made two notes, for two thousand ($2,000) dollars each, dated September 21, 1922, and September 23, 1922, with the payee's name left blank, and delivered them to the White Finance Company. The notes came into the hands of the Paxtang Shoe Manufacturing Co., who had obtained them from the Mutual Finance Company of Philadelphia, in exchange for their notes of like amounts. These notes were acquired by the Penbrook Trust Company by purchase from the Paxtang Shoe Manufacturing Co. on October 7, 1922, before the due date of the one, and on October 13, 1922, before the due date of the second, and when they were so acquired they were "filled out, complete and regular on their face, and were purchased by the Paxtang Company, so far as the evidence discloses, in good faith, and without any notice of any irregularity or failure of consideration."

On these facts Penbrook Trust Company *v.* Wiegand & Co., has no application to the present case, because not only did the plaintiff, the Penbrook Trust Company, but its immediate predecessor in title, the Paxtang Company, acquire the notes completely filled out before the due dates. They were endorsees, and not payees of the notes in question, and come under the definition of a holder in due course, Section 52 of the Negotiable Instrument Act, C. S. 3741.

It is significant that the case of *Asbury Park Electric Supply Co.* v. *Megill,* 131 Atl. 181,

mentioned by Mr. Justice Parker in his opinion, was decided in the Supreme Court on May 12, 1926, after the decision in *Penbrook Trust Company* v. *Wiegand & Co.* In that case the Supreme Court held that a payee cannot be a holder in due course, under the Negotiable Instrument Act, and certainly the Supreme Court was not overruling the Court of Errors and Appeals.

Cases are mentioned in the plaintiff-appellant's brief where courts of other jurisdiction have held that a payee may be a holder in due course. It is true that there are two opposing theories as to that proposition. One line of authorities, including New Jersey, holds that the payee in whose hands an instrument has its inception, as an obligation, cannot be a holder in due course under the Negotiable Instrument Act. The leading authorities for that rule are: *Vander Ploeg* v. *Van Zuuk,* 135 Iowa, 350; 112 N. W. 807; 13 L. R. A. (N. S.) 490; *Southern Nat. Life Realty Corp.* v. *People's Bank,* 178 Ky. 80; 198 S. W. 543; *St. Charles Savings Bank* v. *Edwards,* 243 Mo. 553; 147 S. W. 978; *Bank of Gresham* v. *Walch,* 76 Or. 272; 147 Pac. 534; *Lewis* v. *Clay,* 67 L. J. Q. B. N. S. (Eng.) 361; *Herdman* v. *Wheeler,* 1 K. B. (Eng.) 361.

Another line of cases, including the case of *Howard National Bank* v. *Wilson, et al.,* 120 Atl. 889; 96 Vt. 438; *Ex Parte Goldberg & Lewis,* 191 Ala. 356; 67 So. 839, L. R. A. 1915 F 1157; *Liberty Trust Company* v. *Tilton,* 217 Mass. 462; L. R. A. 1915 B 144, 105 N. E. 605, and other cases mentioned in appellant's brief hold that a payee may be a holder in due course.

The entire subject is exhaustively treated in the annotations to the case of *Merchants National Bank* v. *Smith,* 59 Mont. 280; 196 Pac. 523,

as reported in 15 A. L. R. page 431, the annotations commencing on page 437. A logical construction of the Negotiable Instrument Act supports the conclusion reached by our Supreme Court, that the payee in whose hands the instrument has its inception, cannot be a holder in due course under the act. Section 52 of the Negotiable Instrument Act, C. S. 3741, contains the codified definition of a holder in due course. Two of the essentials are therein set forth as follows:

> 1. That it is complete and regular on its face.
> 4. 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.

The term "negotiated" as here used is defined in Section 30 of the Negotiable Instrument Act, C. S. 3738, "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee, the holder thereof; if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the endorsement of the holder, completed by delivery." Therefore, if one takes a note that is not complete and regular upon its face, he does not come within the first requirement of section 52, defining a holder in due course. Further, if he takes a note made "to order" with the payee's name left blank, and fills in his own name as payee, then he does not acquire the note by negotiation as defined by Section 30 of the Negotiable Instrument Act, and does not come within the fourth requirement of Section 52 of the Negotiable Instrument Act.

Throughout the act a holder in due course is construed as one to whom a completed instrument has been negotiated by one in whose hands

it was already an obligation. The cases that hold that a payee may be a holder in due course disregard the pertinent definition of the Negotiable Instrument Act, and rely upon the theory that such was the Common Law rule, and that the Negotiable Instrument Act was not intended to reverse it, and restrict the Common Law rights of a payee.

Thus, in *ex parte Goldberg & Lewis, supra,* the Court says:

> "It is clear that, if subdivision 4 of Section 5007 (of the Alabama Commercial Code, which corresponds with Section 52 of our Negotiable Instrument Act) does not by necessary implication exclude a payee in every case from the status of 'holder in due course,' there is nothing else in the Code which even suggests that result.
>
> And even if we could not construe subdivision 4 as above indicated, we think it would still be perfectly consonant with reason and with the general language and purpose of the law, to hold that the definition of a 'holder in due course,' as expressed in the entire section (5007) was framed with regard only to the usual and ordinary case of negotiatees; and that the occasionally exceptional status of a payee as such is simply a *casus omissus,* contemplated and provided for by Section 5143, 'In any case not provided for in this chapter, the rules of the law merchant shall govern.' "

Thus that Court holds that even if they were obliged to construe Section 5007 of their Commercial Code, which corresponds to Section 52 of the Negotiable Instrument Act, as excluding payees from the class of "holder in due course," they would still hold, notwithstanding, that a payee could be a holder in due course on the ground that it was a *"casus omissus"* and governed by the rules of the Common Law Mer-

chant. That Court further held that "it might be conceded that 'negotiate' as used throughout the Act means always only the transfer from one holder to another, after the instrument has been issued" but that that does not affect their judgment.

In *Liberty Trust Company* v. *Tilton,* 217 Mass. 462, L. R. A. 1915 B 144, 105 N. E. 605. The facts are as follows: One Perley G. Tilton signed a note to the order of the plaintiff and presented it complete in every respect except its amount, which was blank, to the defendant, Frank B. Tilton, who, for the accommodation of Perley G. Tilton, signed it in blank on the back upon the express representation and agreement by Perley G. Tilton that the defendant's signature should not be operative nor the instrument be delivered unless and until one Leonard Grant also should sign on the back, and that then it should be filled out for two hundred ($200.00) dollars, and no more. Leonard Grant did not sign the instrument, the amount of four hundred ($400.00) dollars was filled in, and the instrument, without the knowledge or authority of the defendant, and in violation of the agreement between him and Perley G. Tilton, was delivered complete in form to the plaintiff, the payee, who took it for value in good faith and without knowledge of the agreement between the maker and the defendant. The question was whether the defendant was liable to the plaintiff. The Supreme Judicial Court of Massachusets held that the point had not until then been decided in Massachusetts, and found in favor of the plaintiff. But it is important to note that in that case the decision was based on the definition of the word "negotiation" and not upon the requirements of what is our Section 52 of the Negotiable Instrument Act. There the

Court particularly held "that the note was delivered complete in form to the plaintiff, the payee, who took it for value in good faith and without notice of the agreement between the maker and the defendant."

Here also the Court held that a note may be negotiated to its payee on the ground that Section 47 of their Negotiable Instrument Code, which corresponds to Section 30 of our own Act, should be construed in the following way:

> "The remaining sentence of Section 43, viz, 'if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the endorsement of the holder completed by delivery' was not intended to include *all* the ways in which an instrument might be negotiated, nor to restrict the comprehensive terms of the preceding sentence. Plainly under these two sections, a negotiable instrument, payable to a named payee, is negotiated when the physical possession of it is handed, for value, to the person named as payee. One effect of the last sentence of Section 47 is to describe the method by which the person who first became the holder may pass a title. It does not comprehend *all* the ways by which an instrument may be negotiated."

But even so, that case is not an authority for the proposition that a payee may acquire an unfilled note, and be considered a holder in due course. For the Court particularly emphasizes the fact that it "was delivered complete in form to the plaintiff, the payee."

These two cases afford an example of the line of reasoning that is followed in the other cases where a payee is deemed a holder in due course.

The Courts, which like New Jersey, hold that a payee is not a holder in due course, follow the authority of *Vander Ploeg* v. *Van Zuuk*, 131

Iowa 350, 13 L. R. A. (N. S.) 490. In that case the facts were that a note of two thousand ($2,000.) dollars, naming the plaintiff as payee, and the two defendants as joint makers, with one Pothoven, was signed by the two defendants before it was fully completed, being at that time a mere blank printed form, and that the two defendants signed their names, at the request of Pothoven, who was a partner of one of them, on the representation that he would use it to raise one hundred fifty ($150.00) dollars; that Pothoven in fact, being indebted to the plaintiff in the sum of two thousand ($2,000.00) dollars, inserted the plaintiff's name, and the amount of Two thousand ($2,000.00) dollars, and delivered it to the plaintiff. It appears in the evidence that the date was filled in by one W. G. Vander Ploeg, who frequently transacted business for the plaintiff, his father, and who knew of the filling of the name of the payee and the amount by Pothoven before the note was delivered to the plaintiff; but the final delivery was made directly by Pothoven to plaintiff, and there was a conflict in the evidence as to whether the son had any authority to act for the plaintiff in this particular transaction. The facts are recited in full because they are so similar to the case at Bar.

The Iowa Supreme Court held that Vander Ploeg, the plaintiff, was not a holder in due course, basing their opinion on the definition of Section 52, which is also our Section 52 of the Negotiable Instrument Act, defining a holder in due course, and in doing so justify that position as follows:

> "But we must take the Negotiable Instruments Act as it is written, and, while the general purpose was to preserve the existing law so far as it was uniform, yet in many respects in which there was a conflict or

> doubt under the authorities the language of the statute lays down rules which are not to be ignored simply because in some respects a change in the law is effected. With reference to the language which we have been considering in this very case, taken substantially from Section 20 of the English bill of exchange act, the court says, in *Herman v. Wheeler,* 1 K. B. 361, 'We have been very reluctant to come to the conclusion that the judgment in favor of the defendant in this case was right, because it appears dangerous even to cast any doubt upon a payee's right to recover when he has taken a bill or note complete and regular on the face of it, honestly, and for value; but, after carefully considering the matter, we have come to the conclusion that we should be unfairly straining the words if we did not hold that "negotiated" in its proviso at the end of the 20th section, meant transferred by one holder to another.' "

The Court concluded its opinion with the statement:

> "We see no escape from the conclusion that, under the statute, plaintiff, being not a holder in due course, but the person to whom the note was made payable, and to whom it was delivered as an effective instrument, took it subject to the defense that Pothoven had no authority to fill in Two thousand ($2,000.00) Dollars as the amount of the note and deliver it to plaintiff."

It is unnecessary to continue the analysis of the cases in the line of authority following Vander Ploeg *v.* Van Zuuk, to the effect that a payee may not be a holder in due course, because even were we to concede, for the sake of argument, that a payee may be a holder in due course, it would not avail this plaintiff, because in every case where the courts have held that a payee may be a holder in due course, the instrument

was complete on its face at the time when the defendant acquired it.

Thus, in *Howard National Bank* v. *Wilson,* 120 Atl. 889, the Supreme Court of Vermont HELD, that:

> "A payee may be a holder in due course" but predicates that status upon the fact that he has taken commercial paper *complete, on its face,* honestly and for value. And goes on to say, "No question is made but that the note was complete and regular on its face, that the plaintiff became the holder before the note was overdue, and that the note was taken for value."

And in *Ex Parte Goldberg & Lewis,* also relied upon by the plaintiff-appellant, and where the Court held that a payee may be a holder in due course, the Court goes on to say:

> "What we do decide is that the payee of a *completed negotiable note,* to whom it is given for value without notice, and in the ordinary way of business, by one of several makers to whom it has been entrusted by another maker for that purpose—albeit by fraud—or upon condition as in this case, is as to the obligation of such other party a bona fide holder in due course of trade."

Here again the instrument was complete on its face, when acquired by the payee.

And in *Liberty Trust Company* v. *Tilton, supra,* also relied upon by the plaintiff-appellant, and holding that a payee may be a holder in due course, Chief Justice Rugg, writing the opinion, says:

> "The conclusion follows that the payee named in a promissory note, *who purchases it complete in form* for value, before maturity, in good faith and without notice, of any infirmity in the title or otherwise, is a person to whom it has been negotiated as a holder in due course."

But in this case when the plaintiff acquired the alleged note, it consisted of nothing but a blank form, with two endorsements, including the defendant-respondent's endorsement on the back. This appears by the affidavit of the plaintiff-appellant's brother, Herman Maurer, on page 28 of the State of Case. On page 29 he describes how he acquired the note. He states how his brother gave him a check for Three Thousand ($3,000.00) Dollars, dated November 3rd, 1926, and then:

> "I took this check and turned it over to Morez Potoker at my house, No. 223 Renner Avenue, Newark, N. J. and received from him a note dated November 5th, 1926, to the order of Asher Maurer for Three thousand ($3,000.00) and endorsed by Herman Potoker and Henry Hahn. At that time only Mr. Morez Potoker and myself were present and the note was filled in in my presence by Morez Potoker and I noticed that the endorsements were already on the back of the note. The said note was filled in by said Morez Potoker and made to the order of Asher Maurer payable in six months at the Merchants & Manufacturers National Bank."

The plaintiff-appellant did not acquire an instrument complete and regular on its face, and so on no theory can possibly be said to be a holder in due course.

When the defendant-respondent endorsed the note, he endorsed it merely for the purpose of permitting the maker, Morez Potoker, to use the same for the purchase of coal as a guarantee for the payment of the coal so to be purchased. Under Section 14 of the Negotiable Instrument Act, C. S. 3736, in order to hold the defendant liable on such a paper, it must be filled in strictly in accordance with the authority given, and

within a reasonable time, unless and if after completion it is negotiated to a holder in due course, in which event he may enforce it, as if it had been filled in strictly in accordance with the authority given. The plaintiff-appellant not being a holder in due course, the defendant is not liable on his signature, and the judgment of the Supreme Court is correct, and should be affirmed.

Point II.

In the plaintiff-appellant's brief, under point three, he argues that Herman Maurer was not the agent of Asher Maurer, the plaintiff-appellant, in the negotiations for the purchase of the alleged note, but was the agent of Morez Potoker, and that the Supreme Court erred in finding, as a fact, that he was the agent of Asher Maurer, plaintiff-appellant. A complete answer to that proposition is that if there is any question of fact involved in this case necessary to a proper determination, then the Circuit Court was without jurisdiction to enter judgment summarily, and the case should have been sent to a jury. But the plaintiff-appellant is wrong in his conclusion. By the affidavit of Herman Maurer (page 28, State of Case), it appears that sometime in the latter part of October he was importuned by Morez Potoker, for a loan of Three Thousand ($3,000.00) Dollars. That he personally could not make the loan and then approached his brother, Asher Maurer, and recommended the loan to him, who agreed to take the same, and gave him a check of Three Thousand ($3,000.00) Dollars, with instructions "my brother then told me that he would want the same arrangements, that is, a note similarly endorsed, with checks for monthly payments." He

then took the check and turned it over to Morez Potoker, and received from him a note dated November 5th. Attention is directed to the fact that although the check is dated November 3rd, the note is dated November 5th, two days later, indicating that the terms of the loan were closed after Herman Maurer had received the check for Three Thousand ($3,000) Dollars, with instructions to make the loan upon the same terms as he theretofore had obtained. The check was then turned over to Morez Potoker, the maker, and the note was filled in right then and there, made payable to the order of Asher Maurer, at six months, in the Merchants & Manufacturers National Bank, and six checks, to the order of Asher Maurer, for Five hundred ($500.00) Dollars each, payable one each month, for the period of the loan, delivered to Herman Maurer.

The parties who closed the loan were Morez Potoker, the borrower, looking after his own interests, and Herman Maurer, looking after the interests of his brother, Asher Maurer, the plaintiff-appellant. He carried his brother's check for Three thousand ($3,000.00) Dollars, and his purpose and function was to obtain, in exchange for the Three thousand ($3,000.00) Dollar check, a note of Morez Potoker, endorsed by Henry Hahn and Herman Potoker, and six checks of Five hundred ($500.00) Dollars each. His brother, the plaintiff-appellant, had entrusted him with the check for Three thousand ($3,000.00) Dollars on condition that he should exchange the same for these securities, and he was there representing his brother, and not Morez Potoker, the maker, who was there taking care of his own interests. He was the agent of Asher Maurer, the plaintiff-appellant. No other inference is possible from his affidavit.

We respectfully submit that the judgment of the Supreme Court should be affirmed.

KRAEMER, SIEGLER & SIEGLER,
Attorneys for and of Counsel with
Defendant-Respondent.

INDEX.