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**Negotiable Instruments Law under the Uniform Commercial Code**

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The use of commercial instruments in trade and business dates from antiquity. Wigmore has called attention to the use of a note payable to bearer dating approximately from 2100 B.C. It was not until the 15th and 16th centuries that the use of negotiable instruments became widespread and common. While bills and notes in trade were used before this period, their true importance and common use date from the establishment of the great banking institutions of the continent.

The laws relating to negotiable instruments arise from three sources, the law merchant, the common law and the Negotiable Instruments Law (NIL). The NIL, approved by the Conference of Commissioners on Uniform State Laws in 1896, was the first of the uniform laws promulgated in this country. The NIL was adopted in West Virginia in 1907, and by 1924 had been adopted in every state. Unfortunately, a large number of states modified or changed the language of various sections of the uniform act. West Virginia has varied the language in twenty-two sections. Lack of uniformity resulted not only from legislative change but

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from ambiguities in the NIL itself, and ambiguities resulting from judicial interpretation of the NIL. Some important points were simply not covered by the NIL and this contributed to the fact that the widespread adoption of the NIL did not achieve the goal of certainty and uniformity.

Article 3 of the Uniform Commercial Code would replace the NIL. Comparing the Code with the NIL, one will readily observe that the NIL is not a model of legislative draftsmanship. While the NIL is at points ambiguous and at other points provides no answer, it is none-the-less more verbose than article 3 of the Code. The NIL consists of 198 sections while the Code article on commercial paper contains seventy-nine sections. Eleven sections of the Code cover matters not covered by the NIL. Total wordage of the Code's article 3 is about one-third less than that of the NIL.

Article 3 of the Code is limited in its coverage to negotiable instruments. Unlike the NIL, it does not purport to cover any negotiable instrument other than "commercial paper" such as checks, drafts, certificates of deposit and promissory notes. Excluded from coverage under article 3 are investment securities, bonds, money and documents of title. The NIL does not apply to documents of title which are regulated by other uniform acts.

As an aid in evaluating the Code and what effect its adoption would have upon the present laws of West Virginia every case decided by the Supreme Court of Appeals of West Virginia involving or relating to negotiable instruments from 1908 to 1962 (nearly 200 in number) was read and catalogued. The more significant and leading cases are cited with a digest of the cases or holding of the court. Unfortunately, many cases involving negotiable instruments have been decided by the Supreme Court of Appeals without ever mentioning the NIL. In some cases the court failed to state whether the instrument was negotiable.

A summary of each section of article 3 is intended to furnish the reader with a general idea of the likely effect of each section upon the present law in the event of the adoption of the Code in West Virginia.

Section 3-101. Short Title.

This Article shall be known and may be cited as Uniform Commercial Code—Commercial Paper.
Article 3 is a complete revision of the laws relating to negotiable instruments as presently established under the NIL. The NIL was adopted in West Virginia in 1907 and became effective on January 1, 1908. As business practices changed through the passage of time, commercial paper and its use have likewise changed. Article 3 of the Code is intended to clarify the law of commercial paper and to bring about greater uniformity.

WEST VIRGINIA CASE

The Uniform Negotiable Instruments Act made little alterations in the law of West Virginia as it was understood to be at the time of the passage of the act and in nearly all respects it was only a declaration of the general law merchant. Lewis, Hubbard & Co. v. Morton, 80 W. Va. 92 S.E. 252 (1917).

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Section 3-102. Definitions and Index of Definitions.

(1) In this Article unless the context otherwise requires

(a) “Issue” means the first delivery of an instrument to a holder or a remitter.

(b) An “order” is a direction to pay and must be more than an authorization or request. It must identify the person to pay with reasonable certainty. It may be addressed to one or more such persons jointly or in the alternative but not in succession.

(c) A “promise” is an undertaking to pay and must be more than an acknowledgement of an obligation.

(d) “Secondary party” means a drawer or endorser.

(e) “Instrument” means a negotiable instrument.

(2) Other definitions applying to this Article and the sections in which they appear are: [omitted] . . .

(3) In addition Article 1 contains general definitions and principles of construction and interpretation applicable throughout this Article.
Subsection (1) (a) of the UCC defines the term "issue" and removes the possible paradoxical interpretation that might result from the language of Sections 14, 15, and 191 of the NIL. Section 191 of the NIL reads in part: "Issue' means the first delivery of the instrument, complete in form, to a person who takes it as a holder." Sections 14 and 15 authorize the one in possession of an incompletely completed instrument to complete the instrument, and limits the defense of unauthorized completion to being a defense only against those not having the rights of holders in due course. The question might be raised as to whether an incompletely issued instrument is ever issued in the light of the language of Section 191. Subsection (1)(a) of the Code rectifies this unfortunate language of the NIL. It will also be noted that under the definition of delivery set forth in the NIL refers to delivery of the instrument to a holder, while the UCC does not require the delivery to be a technical holder. In the terms of the UCC, the instrument may be delivered to a remitter, which means that the instrument may be delivered to one who technically does not fulfill the requirements of a holder as defined in Section 191 of the NIL.

Subsections (1)(b) and (c) do not have a counterpart in the NIL. However, the meaning of the terms "order" and "promise" set forth is in accord with that used by the courts. Subsection (1)(b) continues the doctrine that the use of words of politeness may be used in giving an order to the drawee to pay. Subsection (1)(c) makes no change in the present law of most jurisdictions in recognizing that a mere acknowledgement of a debt (as an I. O. U.) is not a negotiable instrument.

Subsection (1)(b) continues the present ruling of section 1 (5) of the NIL in that for negotiability the drawee of a bill of exchange must be named with reasonable certainty, while continuing that part of Section 128 of the NIL which permits an instrument otherwise negotiable to be addressed to joint drawees. Subsection (1)(b) of the UCC changes the law as set forth in Section 128 of the NIL and permits negotiable bills to be drawn upon alternative drawees. This change would permit corporations and large businesses to make dividend checks or checks for rebates drawn upon alternative banks in various parts of the country which would enable the holder to present it to a local drawee bank. Under the UCC presentment to any one of the named alternate drawees followed by dishonor and the necessary proceedings thereafter is all that is required in order to establish the
liability of secondary parties. No holder would be required, nor expected, to make presentment to more than one of the alternate drawees in order to perfect his rights against those secondarily liable.

Section 3-103. Limitations on Scope of Article.

(1) This Article does not apply to money, documents of title or investment securities.

(2) The provisions of this Article are subject to the provisions of the Article on Bank Deposits and Collections (Article 4) and Secured Transactions (Article 9).

It is clear by the language used in this section that the UCC is applicable only to those negotiable instruments defined in Section 3-104 namely: Drafts, checks, certificates of deposit, and notes. Subsection 3-103(1) of the Code excludes money from the coverage of Article 3. Money, while not expressly made negotiable under the NIL, has nevertheless been treated as negotiable primarily because it was so treated at common law. Money must by its very purpose be so treated.

Documents of title and investment securities are excluded from the coverage of this Article. The laws applicable to documents of title are set forth in the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act. Article 7 of the UCC replaces the Uniform Bills of Lading Act and the Uniform Warehouse Receipts Act. In most jurisdictions the courts have construed bonds, interim certificates, and other investment securities as being subject to the NIL. Because of peculiar problems associated with investment paper not common to ordinary commercial paper, the drafters of the code have treated the law relating to such instruments separately in article 8 of the Code. Article 3 is intended to cover short-term notes, checks, drafts, and certificates of deposit. In those instances where an instrument may qualify for treatment under both Article 3 and 8, the law as set forth in article 8 will govern [See, Section 8-102(1) (b)]. By treating the instruments used for different purposes in different Articles of the Code a more precise coverage of the law applicable to each type of instrument is made possible.

Section 3-104. Form of Negotiable Instruments; "Draft"; "Check"; "Certificate of Deposit"; "Note".
(1) Any writing to be a negotiable instrument within this Article must
(a) be signed by the maker or drawer; and
(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and
(c) be payable on demand or at a definite time; and
(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is
(a) a "draft" ("bill of exchange") if it is an order;
(b) a "check" if it is a draft drawn on a bank and payable on demand;
(c) a "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;
(d) a "note" if it is a promise other than a certificate of deposit.

(3) As used in other Articles of this Act, and as the context may require, the terms "draft", "check", "certificate of deposit" and "note" may refer to instruments which are not negotiable within this Article as well as to instruments which are so negotiable.

Section 3–104 makes no basic or drastic changes from the law as set forth in the NIL. It does, however, clarify certain minor troublesome points which were formerly in doubt. The requirements for negotiability remain the same. It is recognized in this section that instruments not meeting the requirements of negotiable instruments under this section, however, may be negotiable under another article. Article 3 applies only to those instruments which meet the requirements of negotiability as set forth in article 3.

WEST VIRGINIA CASES

A certificate of deposit, payable to the order of the depositor, is negotiable and is governed by the law applicable to commercial paper. Bank v. Bryan, 72 W. Va. 29, 78 S.E. 400 (1913).

A certificate of deposit issued by a bank for a certain sum of money, not subject to check and payable to the order of the depositor in current funds
on return of the certificate properly indorsed, is a negotiable instrument. Pomeroy Nat'l Bank v. Huntington Nat'l Bank, 72 W. Va. 534, 79 S.E. 662 (1912)

Coupon bonds and other commercial paper of a similar nature are not only different from ordinary evidences of indebtedness, but rest upon principles which recognize their enforcibility because of their characteristic quality of negotiability by delivery. Coupons themselves may possess qualities of negotiability from hand to hand after detachment from the bond or other evidence of which they are a part. Hamilton v. Public Service Co., 88 W. Va. 573, 107 S.E. 401 (1921).

A certificate of deposit is defined as a written acknowledgment by a bank or a banker's promise to pay to the depositor, to the order of the depositor, or to some other person or to his order. A certificate of deposit in legal effect is a promissory note. As such it is transferrable by indorsement, when negotiable in form, in the same manner and with the same results as other negotiable paper. Maryland Finance Co. v. Peoples Bank, 99 W. Va. 230, 128 S.E. 294 (1925).

Certificates of deposit were often negotiable before the adoption of the NIL. Merchants Bank & Trust Co. v. Peoples Bank, 99 W. Va. 544, 130 S.E. 142 (1925).

Section 3-105. When Promise or Order Unconditional.

(1) A promise or order otherwise unconditional is not made conditional by the fact that the instrument

(a) is subject to implied or constructive conditions; or

(b) states its consideration, whether performed or promised, or the transaction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or "as per" such transaction; or

(c) refers to or states that it arises out of a separate agreement; or

(d) states that it is drawn under a letter of credit; or

(e) states that it is secured, whether by mortgage; reservation of title or otherwise; or

(f) indicates a particular account to be debited or any other fund or source from which reimbursement is expected; or

(g) is limited to payment out of a particular fund or the proceeds of a particular source, if the instrument is issued by a government or governmental agency or unit; or
(h) is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.

(2) A promise or order is not unconditional if the instrument

(a) states that it is subject to or governed by any other agreement; or

(b) states that it is to be paid only out of a particular fund or source except as provided in this section.

The effect of each part of Section 3-105 must be considered separately and for that reason the discussion will follow the outline of this section.

(1)(a) This subsection codifies the already existing rule of the majority of jurisdictions that conditions should not be implied which would result in making an otherwise negotiable instrument nonnegotiable.

(b) The fact that the drawer or maker of an instrument, otherwise negotiable, states that the instrument is payable "as per" the terms of another instrument or agreement does not make the instrument conditional upon the terms of the other instrument, but is treated as a mere statement of the consideration for which the instrument was issued. This is in accord with the holdings under NIL.

(c) The fact that the instrument shows that the consideration for which it was issued was executory does not make the promise or order in the instrument conditional or destroy the negotiable character of the bill or note. Such statement is a mere statement of the consideration for which the instrument was created. This is likewise in accord with the holdings under NIL.

(d) The coverage in this subsection is new. It recognizes that a letter of credit may give added security to an instrument and is a statement of collateral for the instrument.

(e) The purpose of this subsection is to bring the varied holdings of the different jurisdictions into one camp. In some jurisdictions it has been held that a note which showed on its face that it was secured by a conditional sales contract is non-negotiable. Under the language of this subsection the fact that
the instrument was secured by a conditional sales contract, deed of trust or mortgage would not affect its negotiable character.

(f) This subsection codifies the prior view that if the maker had pledge his entire credit or had given an unconditional order to the drawee to pay, he might, without destroying the negotiable character of the instrument, thereon state what account is to be charged or debited, or from what source reimbursement may be had.

(g) This subsection enables various governmental units to issue negotiable instruments payable from a designated source of revenue even though that source be limited. In some instances in the past, bonds issued by governmental agencies have been held to be nonnegotiable because of being payable from a special fund. The entire credit of the state or other agency has not been pledged. This section is in accord with prior West Virginia holdings.

(h) It is important to note that this subsection does not purport to change the law as to the liability of partners, trustees, or others on an instrument. This subsection declares that an instrument made by a partnership, unincorporated association, or trust is unconditional even though liability is limited and payable only from the assets of such association.

(2)(a) This subsection is a mere codification of an already existing rule. An instrument made subject to some other instrument or document is not unconditional because it is necessary to make reference to another source in order to determine to what the promise or order is subject. Such an instrument is therefore nonnegotiable.

(b) See explanation of subsection (1)(g) above for the effect of this subsection which is in accord with the language of the NIL.

WEST VIRGINIA CASES

The recital of the consideration for which an instrument is given does not render it nonnegotiable, neither does it put plaintiff upon notice of defendant's equities, there being nothing to indicate a failure of consideration, either in whole or in part. Dollar Savings & Trust Co. v. Crawford & Ashby, 69 W. Va. 109, 70 S.E. 1089 (1911).

"This note is to fulfill an agreement of a certain date," or "This note is for the fulfillment of a certain agreement," or "This note is to fulfill a contract dated July 7th, 1919" are no more than mere statements of the transaction which gave rise to the instrument, and, being immaterial, the erasure of such a statement does not constitute an alteration of the instrument. Mason v. Shaffer, 82 W. Va. 632, 96 S.E. 1023 (1918).

A promissory note which on its face is ambiguous as to whether the payee shall look to a particular fund for payment, or whether the personal credit
of the maker is primarily liable for payment, may be interpreted and its
true intent and purpose ascertained by resort to the circumstances surrounding
the parties, their situation and relation, and the practical construction given
by them both simultaneously and subsequently thereto. Bordman v. Frick, 95
W. Va. 263, 120 S.E. 833 (1923).

A state warrant was drawn by the state upon a bank payable to a con-
tractor payable out of "appropriation for State Road Commission distribution
road fund." The court found the plaintiff to be a holder in due course without
actually considering whether the warrant was in fact negotiable, which it
would have had to be in order for it to be in the hands of a holder in due
course thereof. This case seems to represent the minority view; however, it
would be in accord with the UCC. Elk Valley Bank v. State Road Comm',
111 W. Va. 527, 162 S.E. 889 (1932).

When a note is payable from a special fund, the note does not carry
the general credit of the maker but only the credit of the particular fund. The
obligation of the maker is not to pay at all events, but only to pay when he
may realize from the fund. This case involved a promise to pay from what
was realized from defendant's mother's estate. Harmer v. Tracey, 115 W. Va.
349, 176 S.E. 238 (1934).

The fact that a note is secured by a deed of trust does not affect the
negotiable character of an instrument. However, as in this case, if a note,
negotiable in form, refers to some other paper and produces uncertainty as
to the amount which will be due on the note at any given time or as to the
time or method of payment, the negotiable character of the note is
destroyed. Fayetteville Building & Loan Assn. v. Crouch, 115 W. Va. 651,
177 S.E. 532 (1934).

The fact that the note showed on its face that it was secured by a con-
ditional sales contract does not destroy the negotiable character of the instru-

Section 3-106. Sum Certain.

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

(a) with stated interest or by stated installments; or

(b) with stated different rates of interest before and after
default or a specified date; or

(c) with a stated discount or addition if paid before or after
the date fixed for payment; or

(d) with exchange or less exchange, whether at a fixed
rate or at the current rate; or

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

(2) Nothing in this section shall validate any term which is
otherwise illegal.
An instrument to be negotiable under the terms of article 3 of the UCC, as under the NIL, must be payable in a sum certain in money. This section specifies what auxiliary provisions may be inserted in the instrument without making the sum payable uncertain and destroying the negotiable character of the instrument.

It should be observed that subsection 3-106(2) does not validate such provisions which are authorized by the first part of the subsection which merely provided that such provisions will not destroy the otherwise negotiable character of the instrument. It is one thing to have authorization for such provision and another to make it enforceable. In Raleigh County Bank v. Potee the Supreme Court of Appeals of West Virginia ruled that an agreement by one party to pay the other’s attorney’s fees in the event the obligation is not paid is invalid, even though the NIL states that such a provision does not make sum payable uncertain nor affect the negotiable character of the instrument. The court stated: “The negotiable instrument law has not altered this policy. Negotiability of paper is one thing, and the policy of the state as to usury and other oppressive practices quite another, the statute deals with the former not the latter.”

Whether the court should allow the creditor the right to recover from a defaulted debtor the costs that the creditor has incurred in collecting a just debt, in instances where the debtor had agreed to reimburse the creditor for such costs, is a matter which might well be considered by the legislature as a matter of state policy. It would seem that if the creditor might find it to his advantage to sue on instruments containing such provisions in another state, assuming proper service of process could be obtained.

Subsection (1)(b) clarifies a previous uncertain situation in providing that an instrument which provides for a different rate of interest after maturity is nevertheless for a sum certain.

Subsection (1)(c) is new, but merely codifies prior case law.

WEST VIRGINIA CASES

A provision in a negotiable note for “five per cent collection fees” and “$10.00 attorney fee in addition to the attorney’s fee taxed or allowed by law” is invalid. Such provision does not destroy the negotiable character of the instrument. The NIL did not alter the policy of the state as to oppressive practices or to the usury laws. Raleigh County Bank v. Potee, 74 W. Va. 511, 82 S.E. 332 (1914).

Stipulations in a negotiable note for payment of a certain percentage of the principal and statutory attorney fee as collection charges are invalid. This

A note provided for interest at the rate of five per cent per annum. Judgment was obtained upon the note and provided for interest but did not specify the rate of interest to be applied to the judgment. The court held that the contract rate must govern until the end; and that instead of using words "with interest thereon," thus leaving room for doubt as to the proper rate, the decree should have been more specific. Appellate court modified the decree to specify the rate at five per cent per annum. Watson-Loy Coal Co. v. Monroe Coal Mining Co., 85 W. Va. 645, 102 S.E. 485 (1920).

An agreement to pay compound interest is valid if made after the interest which is to bear interest has come due and payable. The rule generally followed in this state is that interest should not bear interest. The court held that past due interest coupons themselves bear interest from their maturity date. Hamilton v. Public Service Co., 88 W. Va. 573, 107 S.E. 401 (1921).

It is contrary to the public policy of West Virginia to permit one to collect his attorney fees from the maker or indorser of a note even in the instance where the maker or indorser had promised to pay such fees. The policy of law of this state requires the application of the above mentioned rule not only to promissory notes payable in this state, but also to all notes for which this state affords the forum for collection. Campen Bros. v. Stewart, 106 W. Va. 247, 145 S.E. 381 (1938).

Section 3-107. Money.

(1) An instrument is payable in money if the medium of exchange in which it is payable is money at the time the instrument is made. An instrument payable in "currency" or "current funds" is payable in money.

(2) A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the day of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency.

Section 3-107 clarifies many issues which were uncertain under the language of section 6(5) of the NIL and settles the troublesome question of meaning to be attached to the terms therein used. In considering this section of the UCC attention must also be directed to section 1-201(24) of the UCC, wherein "money" is defined as meaning a medium of exchange authorized or adopted by a domestic or foreign government as part of its currency. It
appears that "money" has a broader meaning than legal tender. Government sanction, whether local or foreign, is what gives the quality of money to any means of exchange. This definition of money would not include all mediums of exchange such as gold dust, skins, corn, or other commodities, but only that which is recognized by the government as an established legal currency. Cases could be cited wherein the courts have held that an instrument payable in "currency" or "current funds" is not payable in money and that such instrument would not be negotiable. This section of the UCC would change the law in these minority jurisdictions to conform with the view of the majority that such instruments are in reality payable in money.

This section would put at rest any question as to whether an instrument payable in a foreign currency is negotiable in this country. The UCC provision specifies that such instruments are negotiable and payable in a sum certain in money. The obligation may be discharged by payment in the specified foreign currency or in dollars at the sight-exchange rate on the due date of the instrument or if the instrument is payable on demand then at the sight rate of exchange on the date of demand. One is permitted to insert in such instruments a provision that payment is to be made in the foreign currency. Such a provision would be recognized and the obligor would not have the right to discharge the obligation in domestic currency.

Section 3-108. Payable on Demand.

Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated.

Section 3-108 does not alter the concept of what is a demand instrument from that expressed in section 7 of the NIL. The last sentence of section 7 of the NIL reads: "Where an instrument is issued, accepted, or indorsed when overdue, it is, as regards the person so issuing, accepting, or indorsing it, payable on demand." Such provision is not included in the UCC. One might reasonably infer from the quoted sentence of section 7 that the rules relating as to qualifying as a holder in due course, holding, presentment, notice of dishonor, and the like must be considered together. By deleting this portion of the NIL the troublesome problem sug-
gested by its terms is no longer an issue. Under the Code there is no longer the argument that one who acquires a time instrument after maturity may be a due course purchaser against a post-maturity indorser. As will be noted in the discussion of section 3-501(4) an indorser after maturity is not entitled to presentment and notice of dishonor or protest. An indorser after maturity is made a guarantor of payment and does not have the true indorser’s liability.

WEST VIRGINIA CASE

In this case, neither the order nor the acceptance was dated, nor was the time of payment specified. The absence of a date or failure to state the time when payable does not render the order invalid. Where no time for payment is specified the instrument is payable on demand according to section 7 of the NIL. Lewis, Hubbard & Co. v. Morton, 80 W. Va. 137, 92 S.E. 253 (1917).

Section 3-109. Definite time.

(1) An instrument is payable at a definite time if by its terms it is payable

(a) on or before a stated date or at a fixed period after a stated date; or
(b) at a fixed period after sight; or
(c) at a definite time subject to any acceleration; or
(d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(2) An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred.

Section 3-109 for the most part is a redraft of section 4 of the NIL. However, some very important changes are made by this section. In order for an instrument, other than a demand instrument, to meet the requirements of negotiability either under the NIL or under the UCC it must be payable at a “definite time.” Then the UCC provides that one must be able to determine the definite time from an examination of the instrument in question. Under
the Code and instrument which is payable a specified number of days after date will be treated as being payable at a time certain only if the instrument bears a date. If the instrument is not dated, the holder is empowered by section 3-115 of the Code to complete the instrument by the insertion of the date, the instrument then satisfies the requirements of law for negotiability.

Subsection (c) clarifies the law on a matter which formerly was subject to contrary holdings in the different jurisdictions. There is authority under the NIL for the proposition that if the holder has the right to accelerate the due date of the instrument upon the happening of some event which is in his exclusive control, the instrument is not payable at a fixed or determinable future time and is nonnegotiable. The fact that the holder had the right to accelerate the due date does not destroy the negotiable character; but the fact that he controlled the event on which he could act renders the due date uncertain. Subsection (c) would allow anyone to have control the acceleration event without destroying the negotiable character of the instrument. The time of payment would be no more uncertain than in the case of an instrument payable on demand.

Subsection 3-304(3) of the UCC provides: “The purchaser has notice that the instrument is overdue if he has reason to know (b) that acceleration of the instrument was made.” Clearly, the acceleration clause may have considerable effect on whether a purchaser of the instrument may qualify as a purchaser before maturity and be a holder in due course.

Section 3-511(1) does not require presentment to be made on the accelerated due date where the holder of the instrument on the accelerated due date was unaware that the accelerating event had occurred. The holder would be required, however, to use due diligence in making presentment after having learned of the acceleration in order to establish the liability of those secondarily liable on the instrument.

Section 3-109(1) has no counterpart in the NIL. That portion of this section which gives to the holder the option to extend the due date does not vest in him any right which he did not otherwise possess. The holder has always been free to extend the time for payment. But that portion of the section which permits the maker or acceptor to postpone the due date, or automatically does so, upon the happening of a specified act or event would of course destroy, the negotiable character of the instrument unless an ul-
timate due date for payment was specified. The due date for payment is certain. Such a clause is an acceleration clause in reverse. In the instance where an ultimate due date is specified such option would have the same effect as if the due date had been specified with an acceleration clause made a part thereof.

Subsection 2 of this section is contra to section 4(3) of the NIL which reads: "An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable: (3) On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain." Under Code an instrument made payable upon such an event is nonnegotiable. The rarity of instruments expressed to be payable upon the happening of an event which is certain to happen does not merit the continuation of the authority for such instruments.

There are two lines of decisions (each claiming "the weight of authority") concerning the effect upon a note of an accelerating clause in a mortgage made concurrently with the note and given to secure it. One line holds that such a clause advances the maturity of the note for all purposes. The other line limits the acceleration to the mortgage foreclosure and holds the maturity of the note is not otherwise affected. West Virginia has adopted the latter position.

WEST VIRGINIA CASE

"Research has disclosed no case applying the first line rule against accommodation indorser, when the note made no reference to the mortgage." Waddell v. McComas, 113 W. Va. 344, 167 S.E. 866 (1933).

Section 3-110. Payable to Order.

(1) An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as "exchange" or the like and names a payee. It may be payable to the order of

(a) the maker or drawer; or
(b) the drawee; or
(c) a payee who is not maker, drawer or drawee; or
(d) two or more payees together or in the alternative; or
(e) an estate, trust or fund, in which case it is payable to the order of the representative of such estate, trust or fund or his successors; or

(f) An office, or an officer by his title as such in which case it is payable to the principal but the incumbent of the office or his successors may act as if he or they were the holder; or

(g) a partnership or unincorporated association, in which case it is payable to the partnership or association and may be indorsed or transferred by any person thereto authorized.

(2) An instrument not payable to order is not made so payable by such words as “payable upon return of this instrument properly indorsed.”

(3) An instrument made payable both to order and to bearer is payable to order unless the bearer words are handwritten or typewritten.

Subsection (1)(a)(b) and (c) are identical with section 8(1), 8(2), and 8(3) of the NIL. Subsection (1)(d) replaces sections 8(4) and 8(5) in clearer language. Section 8(4) of the NIL stated that an instrument might be payable to “two or more payees jointly.” This gave the possible implication that the right of survivorship would exist between the payees when as a matter of fact the creator of the instrument intended the named payees to be mere tenants in common of the instrument. Under the UCC, an instrument may be made payable to two or more persons in the alternative or collectively, which is allowed under the NIL. The requirements to negotiate such an instrument or to give a discharge thereof is specified in section 3-116 of the UCC and will be considered in detail under that section.

Subsection (1)(e) is intended to bring uniformity to the court holdings on the question of whether an instrument payable to an estate is in fact order paper or bearer paper. There is some authority for the proposition that an instrument so payable is bearer paper because the named payee does not purport to be the name of any person. The person drawing such an instrument
likely intended such an instrument to be payable to the personal representative of the estate and thus order paper. Under this section of the UCC, such an instrument would be so treated. Under the UCC, the payee need not be a legal entity so long as the payee can be identified.

Subsection (1)(f) is a rewording of section 8(6) of the NIL. The provision of the NIL in question provides that: “It may be drawn payable to the order of . . . (6) The holder of an office for the time being.” The UCC permits an instrument to be made payable to “an office, or an officer by his title. . . .” This change in language brings the law more nearly in accord with what is thought to be the usual intent of the creator of such an instrument, for it would be reasonably expected that the author did not intend such an instrument to be made payable to the bearer. An examination of section 3-117 and the consideration following should be read together with this section.

Subsection (1)(f) recognizes that for the purpose of negotiation an instrument made payable to the order of a partnership or an unincorporated organization is in reality made payable to the order of the legal entity and any person authorized by the partnership or unincorporated association may transfer title to the instrument. But for this section it is arguable that an instrument made payable to the order of an unincorporated body is payable to bearer as the name of the payee does not purport to be the name of any person.

The first paragraph of subsection (1) makes the word “assigns” a word of negotiability. An instrument made payable to a named person or his assigns is the same as making it payable to the named person or his order.

Subsection (2) rectifies a void in the law which had previously led to conflict in decisions. It was thought by some that an instrument not payable to order which contained a statement “payable upon return of this instrument properly indorsed” was in fact payable to an indorsee and thus construed as being payable to the order of a named person and negotiable. Under this subsection of the UCC, such instrument is nonnegotiable and the effect of the language is to permit the surrender of the instrument in event of payment to serve in lieu of a receipt.

Subsection (3) is intended to remove the ambiguity in instances where an instrument is made payable “to the order of John
Smith or bearer.” Under the Code such an instrument is order paper unless the bearer words are handwritten or typewritten. It appears that this section is intended to be applied only to those situations in which a printed form is used. If the entire instrument is in handwriting or typewriting or at least the bearer words so written the instrument would be considered bearer paper. The language of this subsection may prove troublesome in the future.

WEST VIRGINIA CASES

The negotiability of an instrument is not affected by its being made payable to a trustee. The designation of the payee as attorney is sufficient to put the purchaser on notice that another person has an interested in the fund, and to put him upon inquiry respecting the rights of the payee to sell the note. Dollar Savings & Trust Co. v. Crawford & Ashby, 69 W. Va. 109, 70 S.E. 1089 (1911).

A note payable to the order of the maker is a nullity until indorsed by him and negotiated. A West Virginia case involved a note made payable to Dotson jointly with the maker, the payees not being partners. No presumption of partnership arises from the fact that they are joint payees. The maker indorsed the note and delivered it to his joint payee Dotson. Dotson could have added his indorsement and in due course have passed title to the note to a third party. Summers, the maker and joint payee, did not by his indorsement become liable to Dotson. As between the two, he was not technically an indorser, because one joint payee cannot pass title; it requires joint indorsement to do so, and that was never done. Whatever interest, if any, Dotson has in the note is purely equitable, and no action at law can be maintained upon it. Dotson v. Skaggs, 77 W. Va. 372, 87 S.E. 460 (1915).

A check may be made payable to an administrator in his fiduciary capacity. United States Fidelity & Guaranty Co. v. Home Bank for Savings, 77 W. Va. 655, 88 S.E. 109 (1916).

Section 3-111. Payable to Bearer.

An instrument is payable to bearer when by its terms it is payable to

(a) bearer or the order of bearer; or

(b) a specified person or bearer; or

(c) “cash” or the order of “cash”, or any other indication which does not purport to designate a specific payee.

Only part of section 9 of the NIL is included in this section of the UCC. This section should not be considered alone but should be considered in connection with sections 3-405 and 3-204 of the UCC. Under the NIL an instrument is considered bearer paper when it is payable “to the order of a fictitious person, and
such fact was known to the person making it so payable." In 1951 the West Virginia Legislature amended this portion of section 9 to read: "The instrument is payable to bearer: When it is payable to the order of a fictitious or nonexisting or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee." The latter language is also found in the negotiable instruments laws in Illinois and Texas. Under the code such an instrument is not bearer paper in the sense that it may be negotiated by delivery alone. As will be subsequently noted under section 3-405, an indorsement by any person in the name of the named payee is effective to negotiate the instrument. While an indorsement is necessary to negotiate such an instrument, but need not be written by any particular party.

Subsection (a) removes any uncertainty in the instances where a printed form containing blank space for the name of the payee to be inserted is used and the word "bearer" is inserted. Under the Code such an instrument is bearer paper and may be negotiated by delivery alone.

WEST VIRGINIA CASE

The facts showed that a corporation loaned money and notes given were made payable to bearer. In determining the proper party plaintiff, the question was not who loaned the money but who holds the notes. In a suit affecting notes payable to bearer, the court stated that the holder of the notes is a necessary party. Carney v. Mortgage Sec. Corp., 107 W. Va. 605, 149 S.E. 837 (1929).

Section 3-112. Terms and Omissions Not Affecting Negotiability.

(1) The negotiability of an instrument is not affected by

(a) the omission of a statement of any consideration or of the place where the instrument is drawn or payable; or

(b) a statement that collateral has been given for the instrument or in case of default on the instrument the collateral may be sold; or

(c) a promise or power to maintain or protect collateral or to give additional collateral; or

(d) a term authorizing a confession of judgment on the instrument if it is not paid when due; or

(e) a term purporting to waive the benefit of any law intended for the advantage or protection of any obligor; or
(f) a term in a draft providing that the payee by indorsing or cashing it acknowledges full satisfaction of an obligation of the drawer; or

(g) a statement in a draft drawn in a set of parts (Section 3-801) to the effect that the order is effective only if no other part has been honored.

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

Subsection 3-112(a) is merely a re-enactment of sections 6(2) and 6(3) of the NIL.

Subsection 3-112(b) is slightly different in language from section 5(1) of the NIL. The UCC would permit the insertion of a provision in the instrument which would authorize the sale of collateral in the event of default in payment of any installment or interest on the obligation. The NIL would only permit a clause to be inserted authorizing the sale of collateral in the event the instrument was not paid at maturity.

Subsection 3-112(c) would permit the insertion of a clause in the instrument whereby the promisor promises to protect the security which has been given for the instrument or to furnish additional security without such a provision being treated as a promise to do an act in addition to the payment of money and for that reason destroying the negotiable character of the instrument.

Subsection 3-112(d) authorized the insertion of a confession of judgment clause in a negotiable instrument. This subsection does not validate such a provision. In some few states the local law permits a confession of judgment before the instrument is due. This provision of the UCC only permits the insertion of an authorization to confess judgment after the instrument has become due. Such a clause is inoperative in West Virginia. It would not destroy the negotiable character of the instrument; on the other hand, it would not be enforced.

Subsection 3-112(e) is in accord with section 5(3) of the NIL. This subsection does not mean that matters which could not formerly be waived because of local law or policy may now
be validly waived, but only that such purported waiver will not destroy the otherwise negotiable character of the instrument.

Subsection 3-112(f) makes no basic change in our laws even though no such provision is found in the NIL.

Subsection 3-112(g) is considered under Section 3-801.

Section 5(4) of the NIL which provides: "... But the negotiable character of an instrument otherwise negotiable is not affected by a provision which ... (4) gives the holder an election to require something to be done in lieu of payment of money ..." does not have a counterpart in article 3 of the UCC. Under this section of the NIL an instrument payable in a sum certain in money and negotiable even if the holder is given an election to demand performance by a means other than the payment of money. The maker or drawee may not be given the election to pay other than by the payment of money. Such election given to the maker or drawer would destroy the negotiable character of the instrument. As this matter is only important in instances involving bonds, it is provided for in article 8 of the UCC.

Section 3-113. Seal.

An instrument otherwise negotiable is within this Article even though it is under a seal.

The purpose of the re-wording of section 6(4) of the NIL is to assure that the same laws applicable to an unsealed instrument will be applied to one under seal. Article 3 is to be applied to sealed and unsealed instruments alike. This section would not change any other laws applicable to sealed instruments, except in instances where there is a conflict with the provisions of this article, in which case the law as specified in this article would control. As to those matters not regulated by the language of this article, such as the possibility of a different statute of limitations or a different form of action upon sealed instruments as compared with unsealed instruments, would continue to be governed by the general law outside of article 3.
Section 3-114. Date, Antedating, Postdating.

(1) The negotiability of an instrument is not affected by the fact that it is undated, antedated or postdated.

(2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

(3) Where the instrument or any signature thereon is dated, the date is presumed to be correct.

Section 12 of the NIL provides: “The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose.” The provision of the UCC, subsection 3-114(1), does not contain the limitation concerning whether the purpose of antedating or postdating a check or note was for a fraudulent purpose. Under the UCC the reason for antedating or postdating a negotiable instrument would be irrelevant. Any fraud relating to the dating of an instrument should not affect the negotiable character of the instrument, but should be only important when used as a defense to the instrument in accord with UCC sections 3-306 and 3-307.

As was observed under UCC section 3-109(1), an instrument payable “sixty days after date” would be nonnegotiable unless the instrument was dated. Without a date it would be an incomplete instrument. The holder might by authority of UCC section 3-115 insert the date and complete the instrument. When, however, the instrument is dated, whether the date that was inserted or whether it was dated, postdated or antedated, the stated date will be considered the due date of the instrument. Thus an antedated instrument would be due before its issue. When an instrument is payable on demand or a specified period after date, the date stated in the instrument controls as to the rights of the parties as to when payment may be properly made and the date from which the statute of limitations would begin to run. The person assetting the instrument was given on a date other than the date specified in the instrument has the burden of so proving.

Section 3-115.—Incomplete Instruments.

(1) When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still
incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.

(2) If the completion is unauthorized the rules as to material alteration apply (Section 3-407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting.

Section 13 of the NIL specified that if an instrument was undated, and a date was necessary to determine the maturity thereof (for example) an instrument payable a fixed period after date), any "holder" might insert the true date of issuance or acceptance and the instrument would be payable accordingly. The insertion of an incorrect date did not avoid the instrument in the hands of a holder in due course. The question has been raised whether the right to insert the date was limited to a "holder." Section 14 of the NIL provides that an instrument wanting in any material particular may be completed by the person in possession thereof. That is, the one in possession has the prima facie authority to fill in any blanks found on the instrument. Improper or unauthorized completion of the instrument is a personal defense under this section and not available against a holder in due course. Section 15 of the NIL in dealing with incompletely instruments specifies that nondelivery of an incompletely instrument is a good defense against a holder in due course. Some courts have held that this rule is applicable only where the person had not been negligent in permitting the incompletely instrument to get into circulation, and that if the party had been negligent in permitting the incompletely instrument to get into circulation he should be estopped, as against a holder in due course, to deny the instrument had been delivered. This section of the UCC reverses the position taken by section 15 of the NIL. Under the UCC, nondelivery of an incompletely instrument is only a personal defense and not available against one who has become a holder in due course after the completion of the instrument.

Section 3-115 of the UCC in incorporating section 13 and 14 of the NIL authorizes the completion of the instrument as to any necessary additions. This would include, for example, the amount, payee, drawee or other matters which might be necessary to the negotiable character of the instrument, and would allow
the insertion of a date when a specified date would be necessary in order to fixe the due date of the instrument, as where an instrument is “payable __________ days after date.” Where no time for payment is intended or specified in the instrument, it would be payable on demand and a date would not be necessary to make it negotiable.

Subsection 3-115(2) places unauthorized completion and material alteration on equal footing even though the instrument had not been delivered by the maker or drawer. An examination of section 3-407 of the UCC, which will be considered in detail later, treats material alteration only as a personal defense only when such alteration is both fraudulent and material. Section 3-115 and 3-407 should be considered together for a complete understanding of the problems of each.

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The maker acknowledge the signature as his, but insisted that he did not know that the note was on the other side, and, further, that he saw no printing or other signature in the space above where he placed his signature. The defendant claimed one Varney came into his place of business soliciting a fund to aid a lady in destitute circumstances; that he responded to the entreaty by donating fifty cents; that he also signed his name at the instance of Varney, on a strip of paper, for the sole purpose of advising the lady of his act of philanthropy. By his admitted negligence in signing his name on the piece of paper, which had the usual form of a note, without making certain that it was not in fact such, he has caused a third party to discount the same on the strength of his signature, and is thereby estopped from setting up the fraud claimed to have been perpetrated upon him, as against a holder in due course. Picklesimer v. Varney, 103 W. Va. 650, 138 S.E. 317 (1927).

Hays signed a blank check, drawn on the defendant and delivered it to White with instructions that she fill it out in the sum of $25.00 and make it payable to Ramsey. White place the check under a top of a cabinet. The check came into the hands of Binegar, a domestic who filled in the check by writing in the blank spaces the date, the name of the payee and the amount of $212.00 payable to Cuffner a fictitious person. In an action by the drawer against the drawee, the court held for the drawer finding that the drawee had been negligent in failing to obtain proper identification from the person receiving payment from the bank. The soundness of this case may well be questioned. Hays v. Lowndes Sav. Bank & Trust, 118 W. Va. 360, 190 S.E. 543 (1937).

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

An instrument payable to the order of two or more persons

(a) if in the alternative is payable to any one of them and may be negotiated, discharged or enforced by any of them who has possession of it;
Section 3-116 of the UCC is in effect a redraft of section 41 of the NIL with modification to show that a clear distinction is intended between an instrument payable to the order of A and B and one made payable to the order of A or B. In the first instance the indorsement of both A and B would be necessary to negotiate the instrument, while in the latter situation the instrument might be negotiated by the indorsement of either A or B followed by delivery. In the first instance, the drawee of a bill of exchange made payable to the order of two or more persons could only discharge its obligation to the drawer by paying to A and B or to their joint order. While the instrument is in the possession of the joint payees an action may only be brought on the instrument by the payees' joint action.

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Where one of the joint payees is also the maker and has indorsed the instrument and delivered it to the other payee, such joint payee who indorsed the instrument to his point payee is not liable to the joint payee. For a fuller treatment of this case see discussion of case under section 3-110. Dotson v. Skaggs, 77 W. Va. 372, 87 S.E. 460 (1915).

Section 3-117. Instruments Payable With Words of Description.

An instrument made payable to a named person with the addition of words describing him

(a) as agent or officer of a specified person is payable to his principal but the agent or officer may act as if he were the holder;

(b) as any other fiduciary for a specified person or purpose is payable to the payee and may be negotiated, discharged or enforced by him;

(c) in any other manner is payable to the payee unconditionally and the additional words are without effect on subsequent parties.

Section 42 of the NIL specifies: "Where an instrument is drawn or indorsed to a person as "Cashier" or other fiscal officer
of a bank or corporation it . . . may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer. Subsections 3-117(a) and (b) not only retain the law as set forth in section 42 of the NIL relating to instruments payable to a "Cashier" or other officer of a "bank" or "corporation" but extends the application of the doctrine to cover situations to instruments which have been made payable to other fiduciaries. Such instruments may be negotiated by either the fiduciary or the beneficiary, and either may give a discharge thereof. However, anyone taking such an instrument from the fiduciary in payment of a personal obligation would be put on notice of the possible breach of the fiduciary's duty and normally would not qualify as a holder in due course of the instrument. For a fuller discussion of this matter, consideration should be given to section 3-304 of the UCC. For example an instrument made payable to the order of "Sam Brown, City Clerk of Morganville, W. Va." could be negotiated by either Sam Brown, the fiduciary, or the city, the beneficiary. The officer is named only for the convenience in enabling him to receive payment or negotiate it to another.

Subsection 3-117(c) is applicable to instances where words of description follow the name of the payee without identifying the principal, such as the use of the address of the payee, or such words as treasurer, president, or administrator. Subsequent persons may buy or deal with such instruments without fear and may disregard the description and will be fully protected as a holder in due course in the absence of independent notice of breach of duty by the payee in passing the instrument.

Section 3-118. Ambiguous Terms and Rules of Construction.
The following rules apply to every instrument:

(a) Where there is doubt whether the instrument is a draft or a note the holder may treat it as either. A draft drawn on the drawer is effective as a note.

(b) Handwritten terms control typewritten and printed terms, and typewritten control printed.

(c) Words control figures except that if the words are ambiguous figures control.

(d) Unless otherwise specified a provision for interest means interest at the judgment rate at the place of
payment from the date of the instrument, or if it is undated from the date of issue.

(e) Unless the instrument otherwise specifies two or more persons who sign as maker, acceptor or drawer or indorser and as part of the same transaction are jointly and severally liable even though the instrument contains such words as "I promise to pay."

(f) Unless otherwise specified consent to extension authorizes a single extension for not longer than the original period. A consent to extension, expressed in the instrument, is binding on secondary parties and accommodation makers. A holder may not exercise his option to extend an instrument over the objection of a maker or acceptor or other party who in accordance with Section 3-604 tenders full payment when the instrument is due.

The effect of each part of section 3-118 must be considered separately and for that reason the discussion will follow the outline of this section.

Subsection (a) permits the holder of a bill on which the drawer and drawee is the same person to hold the one signing either in the capacity of a drawer of a bill of exchange or as maker of a note. This enables the holder to recover from the signer as a primary party, in which case the holder would not be required to show as a condition precedent to his right to recover that he had made proper presentment of the instrument or that he had given due notice of dishonor. The signer would thus not be discharged by the holder's failure to have made due presentment or to have given due notice of dishonor, for neither is required as a condition precedent to the liability of the maker of a note.

Subsection (b) sets forth which of the various types of writing prevails over the others in the event that portions of the instrument have been written by different means such as typewriting, printing or longhand in the event that inconsistency in terms be present. Explanation of the subsection is not required.

Subsection (c) continues the rules as set forth in the NIL that written words govern over figures when they are in conflict.
Subsection (d) continues the former rule that in instances when an instrument calls for interest but no rate is specified, the legal rate will be imposed rather than what might be the going business rate in the community. It is the legal rate of interest in force at the place of payment, rather than the place of execution of the instrument, which fixes the rate of interest to be assessed.

Subsection (e) is intended to apply to the situation wherein two or more persons sign the instrument, in which case they are jointly and severally liable thereon even if the signular pronoun is used in the body of the instrument. This section only operates where both parties signed in the same capacity and as a part of the same transaction such as where all are indorsers, or makers, or drawers as distinguished from successive indorsers.

Subsection (f) is new, having no counterpart in the NIL. It applies to instances where the instrument authorizes an extension of time without the consent of secondary parties in which case there may be only one extension of time granted and the extension time may be for no longer period than the original period of the instrument unless otherwise specified in the instrument. The holder is not permitted to grant an extension of time against the objection of the one obligated if that person has made a full tender of payment at the due date. For the effect of a lawful tender of payment see section 3-604 of the UCC.

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Subsection (b) is in agreement with the West Virginia Supreme Court of Appeals which has said: "... where a contract is partly printed and partly written, and there is a conflict between the printing and the writing, the writing should prevail." Nuzum v. Sheppard, 87 W. Va. 243, 104 S.E. 587 (1920); Peirpont v. Peirpont, 71 W. Va. 431, 76 S.E. 848 (1912).

Section 3-119. Other Writings Affecting Instrument.

(1) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.

(2) A separate agreement does not affect the negotiability of an instrument.
Section 3-119 of the UCC codifies what has already been recognized by case law, that is, as between the immediate parties to a transaction involving a negotiable instrument any defense which the maker, drawer or indorser may have, whether created by law or by another instrument, is available to such maker, indorser, or drawer against the party with whom he dealt. As between immediate parties all instruments executed at the same time and as a part of the same transaction should be read together for determining the rights or liabilities of these parties. Should the instrument find its way into the hands of a holder in due course he is not bound by the agreements found in separate instruments unless he had actual knowledge of the terms thereof. If there is a provision in the instrument in question making it subject to another instrument then such instrument is conditional and non-negotiable and there could not be a holder in due course of such an instrument. In other words, a separate agreement of itself does not affect the negotiable character of a note or bill unless the note or bill is made subject to such other instrument by its terms. One who purchases an instrument with knowledge of such limitations may be a holder in due course, but he takes the instrument subject to the specified limitations.

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The vendor of realty sold and conveyed land to the vendee with a reservation of a vendor's lien and with a proviso for abatement of the amount of the notes given in payment if the quantity of land was less than that agreed upon. No provision for abatement was found in the notes. Each notes stated that it was secured by a vendor's lien. The instrument came into the hands of a holder in due course with no notice of the provision in the deed for abatement. The security instrument and notes were treated as two separate instruments and were not construed together. The court said that the holder in due course of the notes could enforce them against the maker without any abatement, that they were payable in a sum certain. NIL was not mentioned. Shanabarter v. Phares, 36 W. Va. 64, 103 S.E. 349 (1920). For a note secured by a conditional sales contract, see Colvin v. Smith, 94 W. Va. 748, 121 S.E. 88 (1923).

Negotiable notes which stated on their face that they were executed for purchase money for mineral rights which were conveyed by deed with a reservation of a grantor's lien to secure payment of the notes. The deed in question provided that prior liens on the land were to be discharged by the grantor and if he did not so do the grantee could pay off the debts and obtain a release of the liens and credit the notes executed by the purchaser for the land by the amount paid to discharge the prior liens. The notes by their terms were payable in a sum certain in money, the provision in the deed for abatement under certain conditions does not make the sum specified in the notes unconditional or uncertain. The holder in due course may recover against the maker the amount stated in the note without abatement. Morgan v. Farmington Coal & Coke Co., 97 W. Va. 83, 124 S.E. 591 (1924).

A note negotiable in form was written on a single sheet of paper together with a conditional sales contract. Each instrument was signed severally. The
instruments were separated by a line of perforations. The instruments have since been severed. The note did not refer to the contract. The contract mentioned the note. The note was negotiated to the plaintiff. Upon default the goods sold under conditional sales contract were repossessed and the sum realized from the sale applied to the note. The court stated that "when the detachment of a note from a contract changes the legal effect of the note, the detachment constitutes a material alteration, particularly when the note is in the hands of a holder with notice. Conversely, if the detachment had no such effect, the severance is immaterial." When a severed contract and the note have a common holder, and he introduces both in evidence he thereby reunites them in legal effect and the severance becomes of no moment." C.I.T. Corp. v. Petitto, 117 W. Va. 808, 188 S.E. 489 (1936).

The terms of a contemporaneous written instrument executed by the maker and payee of a promissory note, negotiable in form, affecting the source of payment and made known to a purchaser thereof prior to transfer, are binding upon a past due assignee from such purchaser. Lawhead v. Stewart, 123 W. Va. 41, 14 S.E.2d 1 (1941).

Section 3-120. Instruments "Payable Through" Bank.

An instrument which states that it is "payable through" a bank or the like designates that bank as a collecting bank to make presentment but does not of itself authorize the bank to pay the instrument.

Section 3-120 recognizes and authorizes a practice which has not been too common of naming a bank through which payment of an instrument is to be had which bank is other than the drawee bank. The named bank is the channel through which the instrument may properly be sent for presentment for payment to the named drawee. It does not appear that this section makes any change in the present law.

Section 3-121. Instruments Payable at Bank.

Alternative A—

A note or acceptance which states that it is payable at a bank is the equivalent of a draft drawn on the bank payable when it falls due out of any funds of the maker or acceptor in current account or otherwise available for such payment.

Alternative B—

A note or acceptance which states that it is payable at a bank is not of itself an order or authorization to the bank to pay it.
UCC 3-121 as drafted has alternative provisions. Alternative A is in accord with Section 87 of the Uniform Negotiable Instruments Act. Alternative B is in accord with the present provision in the West Virginia version of the Negotiable Instruments Act.

Alternative A has the merit of permitting the holder of a note or accepted bill to present it to the officials of the bank where it is made payable and if the maker of the note or the acceptor of the bill has sufficient funds on deposit to treat the note or acceptance as an order on the bank to pay the instrument from the maker's or acceptor's account.

Basically it makes a promissory note or accepted bill of exchange into a check of the maker or acceptor drawn on the bank where it is made payable.

Alternative B, which is in accord with the present West Virginia law only establishes the place of payment and the place to make presentment of the instrument for payment in order to comply with the requirement of proper presentment and to fix the liability of those secondarily liable on the instrument. If the person liable on the instrument is at the designated place of payment ready, willing and able to pay the bill or note, this is equivalent to a tender of payment on his part whether presentment is or is not made, and would have the legal effect of a tender of payments such as the stopping of the accruing of interest. Alternative B is perhaps more nearly in accord with the general understanding of business men than is alternative A.

Section 3-122. Accrual of Cause of Action.

(1) A cause of action against a maker or an acceptor accrues

   (a) in the case of a time instrument on the day after maturity;

   (b) in the case of a demand instrument upon its date or, if no date is stated, on the date of issue.

(2) A cause of action against the obligor of a demand or time certificate of deposit accrues upon demand, but demand on a time certificate may not be made until on or after the date of maturity.
(3) A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand.

(4) Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment

(a) in the case of a maker of a demand note, from the date of demand;

(b) in all other cases from the date of accrual of the cause of action.

This section is important for two reasons: One, as to when the statute of limitations begins to run; two, as to when interest will start to accrue on a non-interest bearing instrument.

Subsection 3-122(1)(a) provides that the obligor has the entire due date on which to make payment before being in default. The holder of the instrument may not commence his action on the instrument until the day after the due date. The statute of limitations would begin to run from this date and likewise from this date interest would start to accrue at the legal rate.

Subsection 3-122(1)(b) follows the generally accepted position that the holder of a demand instrument may institute an action thereon any time after its date, or, if no date is specified, any time after its issue. A demand is not a condition precedent to the right to sue on a demand instrument. The statute of limitations would start to accrue from its date or date of issue if not dated. The West Virginia version of section 70 of the NIL provides: “The statute of limitations shall not begin to run against the holder of a certificate of deposit or a bank note until after presentment and demand for payment.”

Subsection 3-122(2) is in accord with section 70 of the West Virginia NIL. Whether a time or demand certificate of deposit is involved, the statute of limitations will not begin to accrue until a demand for payment upon the bank has been made.

Subsection 3-122(3) specifies that notice of dishonor given to the drawer of a bill of exchange or an indorser on either a note or bill of exchange is in effect a demand for payment. The holder
of the instrument may institute an action against the drawer or indorser any time after having given a proper notice of dishonor. The statute of limitations would start to run and interest to accrue from the date of the notice of dishonor.

Subsection 3-122(4)(a) and (b) infers that an unpaid demand instrument carries interest from the date of demand for payment unless otherwise specified in the instrument. On a time instrument the obligation would not carry interest, in the absence of agreement, until the date specified for payment. Thereafter it would carry interest at the legal rate.

WEST VIRGINIA CASE

West Virginia judiciary has provided that a statute of limitations enacted after the due date of a note secured by a deed of trust does not operate retroactively to bar the enforcement of the lien created by such deed. Kuhn v. Shreeve, 141 W. Va. 170, 82 S.E.2d 685 (1955).

Section 3-201. Transfer: Right to Indorsement.

(1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

(2) A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.

(3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

Subsection (1) relates and is applicable to all transfers of negotiable instruments, whether the transfer be by the way of negotiation, indorsement and delivery of order paper or mere delivery of bearer paper; or by assignment, the mere delivery of order paper. One cannot qualify as a holder in due course of a
negotiable instrument unless he can first qualify as a holder thereof. With the possible exception of the payee, as expressly recognized in West Virginia by section 52 of the West Virginia version of the NIL, one can only qualify as a holder when he has acquired the instrument by a negotiation as distinguished from an assignment. One who has taken order paper by delivery alone may qualify as an assignee of the instruments, he may not technically qualify as a holder of the instrument, although such party was referred to as a holder in Furbee v. Furbee, 117 W. Va. 722, 188 S.E. 123 (1936). One who is a holder in due course of order paper, as where he took order paper by a special indorsement, may pass the instrument by delivery alone, in which case the recipient would have all the rights of the transferor including the right to collect upon the instrument free of personal defenses so long as he was not a party to any fraud or illegality affecting the instrument. Such assignee from a holder in due course has the rights of his transferor even though he took by an assignment, after maturity, in bad faith and did not give value so long as he was not a participant in the fraud or illegality giving rise to the instrument. This is in accord with section 49 of the NIL.

Subsection (2) is important as it relates to section 3-303 of the UCC. As will be noted in the discussion of section 3-303 of the UCC, one to whom an instrument has been negotiated as security for a debt is deemed to have given value for the instrument to the extent of his security interest, and, assuming the other requirements to qualify him as a holder in due course have been met, such holder is a holder in due course of the instrument to the extent of his lien and a mere holder to the extent of the balance of the instrument. Subsection (2) of section 3-201 enables the transferee, who is holding the instrument as security, to further transfer the instrument. The transferee might qualify as a holder in due course in his own right; if not, he would have the rights of his transferor as a holder in due course to the extent of the transferor's lien.

Subsection (3) is a rewording of section 49 of the NIL. If one has received order paper for value without the indorsement of the transferor, and such indorsement is necessary for negotiation of the instrument, and there is no agreement to the contrary, the transferee is entitled to the unqualified indorsement of the transferor. This right may be enforced by a bill for specific performance. In determining whether the transferee may qualify as a
holder in due course, the court is limited to the consideration of whether the transferee could have qualified as a holder in due course at the time he received the indorsement in question, not at the time of the transfer. Until the transferee receives the indorsement of the transferor there is no presumption that the transferee is the owner of the instrument.

WEST VIRGINIA CASES

Mere possession by a third person of an unindorsed negotiable instrument payable to the order of the payee therein named is not even prima facie evidence of legal title in the holder as such payee. Fink v. Scott, 105 W. Va. 523, 143 S.E. 305 (1928).

"An unsigned indorsement is not sufficient. The name of the transferor cannot be assumed to be physically present simply because of an intention to place it there. Although the transferee may be entitled to complete an indorsement, the execution thereof at a subsequent date will not protect the transferee from equities arising prior to the completion of the indorsement. Rights of a bona fide holder accrue as of the date when the indorsement is made. ... Even though a purchaser for value, a transferee cannot be a holder in due course unless the statutory form of indorsement is used." Community Sav. & Loan Co. v. Eifort, 111 W. Va. 308, 161 S.E. 584 (1931).

"Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein. ..." This section changes the Law Merchant by vesting in the transferee the entire title of the transferor whether legal or equitable, or both. The transferee thus becomes a holder of the note (under the first sentence of section 30), though not a holder in due course; since his title is precisely that of, and consequently subject to all the equities against the transferor." The transferee, having legal title, has the right to maintain a legal action thereon. Furbee v. Furbee, 117 W. Va. 722, 188 S.E. 123 (1936).

Section 3-202. Negotiation.

(1) Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery.

(2) An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed there-to as to become a part thereof.

(3) An indorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less it operates only as a partial assignment.

(4) Words of assignment, condition, waiver, guaranty, limitation or disclaimer of liability and the like accompanying an indorsement do not affect its character as an indorsement.
Subsection (1) is concerned with the minimum requirements for negotiating a negotiable instrument. Section 3-201 of the UCC was concerned with the transfer of a negotiable instrument in a manner which did not result in a negotiation. In order to negotiate order paper it must be indorsed by the proper party, the payee or the special indorsee, followed by delivery. If the instrument is bearer paper, being made payable to bearer or indorsed in blank by the proper party, it may be negotiated by delivery without an indorsement. There is some authority for the proposition that an instrument which by its terms is payable to bearer will remain bearer paper regardless of what type of indorsement might be placed on the instrument, whether the indorsement be special or restrictive. Section 3-204 provides that an instrument indorsed specially is order paper, irrespective of whether it was originally bearer paper or had been previously indorsed in blank. Such instrument being order paper it may only be further negotiated by indorsement of the special indorsee followed by delivery.

Subsection (2) is in accord with section 31 of the NIL, but with clarifying language. The very nature of a negotiable instrument dictates that all indorsements of the instrument be written on the instrument itself. But for this requirement there would be an invitation to dishonest persons to acquire a signature from any source and paste it to the bill or note and to try and to pass the instrument in fraud of the owner of the instrument. This subsection recognizes the right of the holder of a bill or note to use an allonge when there is no longer space on the instrument itself for an indorsement. The allonge must be attached to the instrument before the indorsement is placed thereon.

Subsection (3) is in accord with section 32 of the NIL. An instrument may be negotiated to two persons jointly. A fractional part of an instrument may not be negotiated to one of several transferees. In order for a transfer to constitute a negotiation the entire cause of action must pass by the transfer. A transfer of a fractional part of the obligation or a transfer of fractional parts to different parties is treated as a partial assignment. This subsection does not validate partial assignments or determine what rights such assignee or assignees may have but leaves this matter to the general law of each jurisdiction. One may negotiate the balance due on a note. This is not a partial assignment because the entire cause of action passes to the recipient of the transfer.
Subsection (4) is important in two aspects. It rejects prior decisions in which it has been held that the use of the words "I guarantee payment" indicated an intention of the one so indorsing to be liable as a guarantor and not as an indorser. Secondly, the use of such words or words of waiver, limitation or disclaimer of liability does not prevent the signature from constituting an indorsement which might be necessary in order for the taker to qualify as a holder in due course of the bill or note.

WEST VIRGINIA CASES

A partner has apparent authority to indorse negotiable paper payable to the order of the partnership. Bank of Greenville v. S. T. Lowry Co., 81 W. Va. 578, 94 S.E. 985 (1918).

A note was made payable to the order of Lyda & Ridiger and on the back indorsed "Lyda & Ridinger, by C. F. Lyda" and below "C. F. Lyda." The court said: "... the endorsement of the payee is necessary to the plaintiff's title in this case. The whole endorsement hinges on the authority of C. F. Lyda. It may be said that there is a presumption of partnership by the use of the two names joined by the character '&.' Of course any member of a trading firm has implied authority to transfer paper payable to the firm's order by indorsement in the firm's name." Fink v. Scott, 105 W. Va. 523, 143 S.E. 305 (1928).


Section 3-203. Wrong or Misspelled Name.

Where an instrument is made payable to a person under a misspelled name or one other than his own he may indorse in that name or his own or both; but signature in both names may be required by a person paying or giving value for the instrument.

The language used in Section 3-203 is superior to and more realistic than that used in section 43 of the NIL in dealing with the same basic problem. The UCC recognizes that the name of the payee may be misspelled. In this event the payee may negotiate the instrument by indorsing either by using the correct spelling of his name or by the spelling as used in designating him the payee. The one required to pay the instrument may refuse payment unless the indorsement be made in both fashions on the instrument. It is desirable to have the indorser indorse with the same spelling as by which he was designated in the instrument followed by his name correctly spelled. This facil-
itates identification of the party in the event that it is necessary to find the indorser to give notice of dishonor or to institute an action against the indorser.

Section 3-204. Special Indorsement; Blank Indorsement.

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

(2) An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed.

(3) The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

Initially the West Virginia version of the NIL contained section 40 of the uniform act, but this was subsequently repealed. While section 40 was not a model of legislative draftsmanship, its repeal left a void in our law. Subsection (2) is an obvious improvement in terminology over that used in section 40 of the NIL, and is even more desirable because of the repeal of section 40 by the West Virginia Legislature. The effect of subsection (2) is that a special indorsement controls whether the instrument is to be order or bearer paper irrespective of whether the instrument had been originally made payable to the order of a designated party or to bearer or had been previously indorsed in blank. To further negotiate an instrument which has been specially indorsed it is necessary for the special indorser to indorse the instrument and then for the instrument to be delivered. The instrument indorsed specially may become bearer paper by the use of a blank indorsement by the special indorsee.

Subsection (3) is a redraft of section 35 of the NIL. This subsection permits the holder of an instrument bearing a blank indorsement to convert the blank indorsement into a special indorsement by writing over the blank indorsement words sufficient to transfer the blank indorsement into a special indorsement. In
this case the instrument would then be order paper and the indorsement of the named special indorsee would be necessary to further negotiate the instrument. This subsection leaves unanswered the question of the liability of one who changed the blank indorsement into a special indorsement and delivered the instrument to the person named as indorsee. Is he to be held liable as to one who has negotiated the instrument by delivery alone or is he to be held as an indorser? As the transferor's name does not appear on the instrument, he would not likely be held liable as an indorser unless the court should hold that he has adopted the name used in the blank indorsement as his own and made it his indorsement by adoption.

WEST VIRGINIA CASES

An instrument having been indorsed in blank by the payee may thereafter be negotiated by delivery, even without further indorsement, because it then became a bearer paper which could thereafter be negotiated by delivery alone in the absence of subsequent special or restrictive indorsement. Farmers Nat'l Bank v. Howard, 71 W. Va. 57, 76 S.E. 122 (1912).


A note was indorsed: "For value received the undersigned hereby sells, assigns, transfers and set over unto Earl Swartzwelder all the right, title and interest of the First National Bank of Webster Springs, W. Va., and of the undersigned, as its receiver, in an to the within note without recourse or warranty of any kind or character whatsoever. J. S. Odland, Receiver First National Bank of Webster Springs, W. Va." The instrument is a special and qualified indorsement and does not impair the negotiable character of the note. A note negotiable in its inception continues to be negotiable until restrictively indorsed or discharged. Odland v. Hamrick, 127 W. Va. 206, 32 S.E.2d 629 (1944).

Section 3-205. Restrictive Indorsements.

An indorsement is restrictive which either

(a) is conditional; or

(b) purports to prohibit further transfer of the instrument; or

(c) includes the words "for collection", "for deposit", "pay any bank", or like terms signifying a purpose of deposit or collection; or

(d) otherwise states that it is for the benefit or use of the indorser or of another person.
Except for his liability as a warrantor, an indorser's liability on a negotiable instrument is conditional in the sense that his liability as an indorser depends upon the instrument having been duly presented for payment or acceptance or both, dishonored and due notice of dishonor having been given the indorser. Section 39 of the NIL authorized conditional indorsement, as, for example, "Pay John Doe, when he delivers me a 1962 Ford, Peter Smith." Conditional indorsement is not to be confused with the indorser's conditional liability. Under the language of subsection (a) of section 3-205 of the UCC what was formerly a conditional indorsement is defined as a restrictive indorsement, the effect of which is set forth in section 3-206 of the UCC.

Those types of indorsements which were called restrictive indorsements under section 39 of the NIL are likewise treated as restrictive indorsements under the definition of restrictive indorsements set forth in subsections (b), (c) and (d). Section 3-206 of the UCC should be considered together with this section for an understanding of the use of and effect of a restrictive indorsement.

WEST VIRGINIA CASES

Two West Virginia cases are relevant to the discussion of this section. In the first, the purchaser of a note indorsed it "for collection" to the Bank of Sutton and received from the bank its cashier's check for $1,240.00 (in full of the note). It was contended that negotiability of the note became suspended when it was indorsed restrictively ("for collection") and that it became nonnegotiable (in a technical sense) when not paid at maturity. The court said "Both contentions may be admitted without giving the defendants any color of vantage. The law does not forbid the purchase of nonnegotiable paper—it simply subjects the purchaser to any defense in favor of the payee or a prior holder." The court further said: "Despite the initial relation of the Bank as agent of Wise & Co., it is recognized that the bank had the right to convert that relationship into one of ownership by satisfying Wise & Co. . . . If, notwithstanding a restrictive indorsement, advances are actually made to the depositor, the title passes." Bank of Sutton v. Skidmore, 113 W. Va. 25, 167 S.E. 144 (1932).

Secondly, an instrument negotiable in origin continues to be negotiable until it has been restrictively indorsed or discharged by payment or otherwise. The indorsement "for collection" is a restrictive indorsement. That indorsement bars any further negotiation of the note. Maryland Trust Co. v. Gregory, 129 W. Va. 35, 38 S.E.2d 359 (1946).

Section 3-206. Effect of Restrictive Indorsement.

(1) No restrictive indorsement prevents further transfer or negotiation of the instrument.

(2) An intermediary bank, or a payor bank which is not the depositary bank, is neither given notice nor otherwise affected by
a restrictive indorsedment of any person except the bank's immediate transferor or the person presenting for payment.

(3) Except for an intermediary bank, any transferee under an indorsedment which is conditional or includes the words "for collection", "for deposit", "pay any bank", or like terms (subparagraphs (a) and (c) of Section 3-205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsedment and to the extent that he does so he becomes a holder for value. In addition such transferee is a holder in due course if he otherwise complies with the requirements of section 3-302 on what constitutes a holder in due course.

(4) The first taker under an indorsedment for the benefit of the indorser or another person (subparagraph (d) of Section 3-205) must pay or apply any value given by him for or on the security of the instrument consistently with the indorsedment and to the extent that he does so he becomes a holder for value. In addition such taker is a holder in due course if he otherwise complies with the requirements of section 3-302 on what constitutes a holder in due course. A later holder for value is neither given notice nor otherwise affected by such restrictive indorsedment unless he has knowledge that a fiduciary or other person has negotiated the instrument in any transaction for his own benefit or otherwise in breach of duty (subsection (2) of Section 3-304).

Subsection (1) is a complete reversal of the law as set forth in section 47 of the NIL. Under the UCC a restrictive indorsedment does not destroy the negotiable character of the instrument. Section 47 of the NIL reads: "an instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed. . . ." The difference is apparent. It should be noticed that Section 3-205(a) treats a so-called conditional indorsedment as restrictive indorsedment, such indorsedment would fall within the coverage of this section of the Code.

Under the NIL it is generally thought that a restrictive indorsee could not qualify as a holder in due course of the instrument because of his limited interest in the instrument. Under the Code the restrictive indorsee is not as a matter of law prohibited from qualifying as a holder in due course. The restrictive indorsedment does not of itself give notice to subsequent indorsees of any claim or defense of the restrictive indorser.
Subsection (2) permits an intermediary bank or the payor bank which is not the depositary bank to disregard the restriction in the indorsement except the restrictive indorsement of the one from whom they acquired the instrument. This subsection does not alter the rights of the restrictive indorser as against parties not in the bank collection process or against the first bank in the collection process, such rights are controlled by subsections (3) and (4) of Section 3-603.

A conditional indorsement is treated like an indorsement for collection or deposit under subsection (3). Any transferee under such an indorsement, except the immediate bank, becomes a holder in due course to the extent that he acts consistently with the indorsement in paying or applying any value given him for or on security of the instrument. This subsection sets forth the legal relationship that exists between the restrictive indorser and the indorsee where deposited for collection is contemplated and indicated by the restriction in the indorsement. Under the express terms of this section an intermediary bank would not become a holder in due course of the instrument.

Subsection (4) applies to instances where a restriction in the restrictive indorsement is for the benefit of the indorsee or a third party and not one for collection. An example would be "Pay A, for the use of B, C." A may negotiate the instrument further. The party taking the instrument from A may assume that A is not breaching his trust in passing the instrument. The party taking the instrument from A may qualify as a holder in due course, unless he had actual knowledge that A breached his trust in negotiating the instrument, as where he passes it in payment of his personal obligation and that fact is known by the recipient of the instrument. A latter holder for value is not charged with notice or affected by the restrictive indorsement unless he had actual knowledge that the instrument had been negotiated in violation of the trust. The party taking an instrument from the restrictive indorser under the restrictive indorsement is, of course, bound by the terms of the indorsement, but may be a holder in due course to the extent that he has parted with value for the instrument.

WEST VIRGINIA CASE

An indorsement "for collection" is restrictive. If the indorser receives payment from the indorsee, such indorsee becomes the owner of the instrument and the restriction is no longer of effect. Bank of Sutton v. Skidmore, 113 W. Va. 25, 176 S.E. 144 (1932); Maryland Trust Co. v. Gregory, 129 W. Va. 35, 33 S.E.2d 35 (1946).
Section 3-207. Negotiation Effective Although It May Be Rescinded.

(1) Negotiation is effective to transfer the instrument although the negotiation is

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

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

(c) part of an illegal transaction; or

(d) made in breach of duty.

(2) Except as against a subsequent holder in due course such negotiation is in an appropriate case subject to rescission, the declaration of a constructive trust or any other remedy permitted by law.

Subsection (1)(a) is an enlargement and clarification of section 22 of the NIL. Section 22 of the NIL deals only with the instances in which a negotiable instrument is negotiated by an infant or a corporation without capacity.

Subsection (1)(a) establishes that a negotiation by any incompetent is in fact a negotiation and passes title to the instrument whether or not the one passing the instrument had capacity to contract.

Subsection (1) permits one who has obtained an instrument by fraud, duress, illegal means, breach of duty, or mistake of any kind to qualify as a holder of the instrument. Until the instrument has been recovered from the wrongdoer by rescission or replevin or otherwise, he must be considered to be the holder of the instrument. A thief could not qualify as a holder in due course, but could by making delivery of bearer paper pass the instrument to one who could qualify as a holder in due course. This section does not impose liability upon one who has negotiated the instrument under the instances mentioned above. He may assert any of the defenses for his benefit enumerated in sections 3-305, 3-306, and 3-307.

Subsection (2) means that the rights and remedies found under the general laws are not abridged unless the instrument gets into the hands of a holder in due course. One who qualifies
as a holder in due course is free from claims to the instrument by any other party. There can be no rescission nor replevin against a holder in due course of the instrument by one who has given up the instrument because of fraud having been practiced upon him, under duress, by mistake, or in breach of duty.

Section 3-208. Reacquisition.

Where an instrument is returned to or reacquired by a prior party he may cancel any indorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course and if his indorsement has been cancelled is discharged as against subsequent holders in due course as well.

This section does not appear to change the law as set forth in the various sections of the NIL. Section 50 of the NIL refers to instances “where an instrument is negotiated back to a prior party. . . .” Section 3-208 of the UCC uses the phrase “is returned or reacquired by a prior party. . . .” It is clear under the wording of the code that one may reacquire an instrument even though he does not regain the instrument by the way of a negotiation. As under the terms of the NIL, the reacquirer does not have the right to recover against intermediate parties to whom he would be liable by virtue of having initially passed the instrument. A reacquirer is permitted to cancel any indorsement which is not necessary to his title and to reissue or further negotiate the instrument. This is also permitted under section 48 of the NIL. Intermediate indorsers are liable to subsequent holders in due course unless the subsequent holder in due course had knowledge at the time he qualified as a holder in due course that their indorsement had been cancelled. For the effect of a discharge attention is called to section 3-602 of the UCC which corresponds in general to section 121 of the NIL.

Section 3-301. Rights of a Holder.

The holder of an instrument whether or not he is the owner may transfer or negotiate it and, except as otherwise provided in
Section 3-603 on payment or satisfaction, discharge it or enforce payment in his own name.

Section 51 of the NIL states that payment to the holder of a negotiable instrument discharges the instrument. Under the UCC payment is a discharge of the instrument under the terms of section 3-603. In instances where there are adverse claimants to the instrument, the one who, by terms of the instrument, is to pay may satisfy his obligation by paying the holder unless the adverse claimant, prior to such payment, either supplies indemnity to the one who is seeking to discharge his obligation or is enjoined from making payment by a competent court having jurisdiction of all of the parties. Under the terms of section 1-201 of the UCC, a thief may qualify as holder of a negotiable instrument. Payment to the thief in bad faith would not act as a discharge of the instrument under section 3-603 of the UCC.

Under the Code every holder, whether he is the owner or not, may transfer or negotiate the instrument. A restrictive indorsee may further negotiate the instrument in accord with Section 3-206 of the UCC.

This section of the Code in authorizing the holder to sue on the instrument in his own name, whether he is the owner or not, would prevail over a general real party in interest statute so far as his right to institute a action based on a negotiable instrument.

WEST VIRGINIA CASES

While the facts are not clear in the opinion, and no statement is made as to whether the instrument in question was negotiable or nonnegotiable, it does appear that the instrument was negotiable and the action was brought in the name of administrator of the holder. An administrator is not a bona fide purchaser from the deceased. The court held that failure of consideration was a good defense against one not a holder in due course. Belcher v. Dickinson, 70 W. Va. 750, 75 S.E. 78 (1912).

"In an action upon a negotiable note it is essential that the declaration show that the plaintiff has title, and, therefore, a right to maintain his action. Bank v. Hysell, 22 W. Va. 142." Farmers Nat'l Bank v. Howard, 71 W. Va. 57, 76 S.E. 122 (1912).

An action upon a negotiable instrument was brought by the payee. The court said that as long as the instrument remained in the hands of the payee the payee is the proper party plaintiff and the defense of failure of consideration may be successfully asserted. First Nat'l Bank v. Freeman, 83 W. Va. 477, 98 S.E. 558 (1919).

Fraud is never presumed, where alleged it must be clearly proven. Whether in law or in equity the alleged fraud must be clearly and distinctly proven before relief will be granted. Colvin v. Smith, 94 W. Va. 748, 121 S.E. 88 (1923).
Absence of or failure of consideration is a good defense as against any person not a holder in due course. "It is well established principle of law, pertaining to bills of exchange and promissory notes, that in all cases in which the consideration is open to inquiry, parol evidence is admissible to show the want, failure or illegality of consideraiton." Federal Sav. & Trust Co. v. Davis, 104 W. Va. 235 (1927).

An assignee for collection of an instrument may sue in a given jurisdiction if the assignor could prosecute an action therein; otherwise not. Since a foreign personal representative may not maintain a suit in this state, such fiduciary's assignee for collection of a note may not maintain an action on the instrument in this state. Curl v. Ingram, 121 W. Va. 763, 6 S.E.2d 453 (1940).

A photostatic copy of a negotiable note does not prove its ownership, its non-payment, nor even its existence. Photostatic copy of a note was held not to be competent evidence of a right to recover on the note. Roane County Bank v. Phillips, 124 W. Va. 720, 22 S.E.2d 291 (1942).

Section 3-302. Holder in Due Course.

(1) A holder in due course is a holder who takes the instrument

(a) for value; and

(b) in good faith; and

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

(2) A payee may be a holder in due course.

(3) A holder does not become a holder in due course of an instrument:

(a) by purchase of it at judicial sale or by taking it under legal process; or

(b) by acquiring it in taking over an estate; or

(c) by purchasing it as part of a bulk transaction not in regular course of business of the transferor.

(4) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased.
chases an instrument not knowing that it is overdue, as where the instrument contains an acceleration clause and the accelerating event had occurred, or that the instrument had been previously dishonored, the purchaser is nevertheless deemed to have purchased the instrument before maturity and in good faith and may qualify as a holder in due course.

Subsection (2) determines with finality that a payee may qualify as a holder in due course. Section 52(4) of the NIL in defining a holder in due course states: "That at the time it was negotiated to him. . . ." The payee not taking the instrument by negotiation has been questioned in some courts whether the payee could in fact be a holder in due course. The law as set forth in subsection (2) would be in accord with the present West Virginia law.

Subsection (3) is a codification of existing law. Purchasers at judicial sales have generally not been treated as bona fide purchasers for value. Purchasers at judicial sales acquire the rights of their predecessor in title. If the prior owner in succession of title was a holder in due course then the purchaser at the judicial sale would acquire the rights of a holder in due course in accord with Section 3-201 of the UCC. However, he would not in his own right qualify as a holder in due course.

Subsection (3)(c) is important in that it denies to the purchaser in bulk of commercial paper the right to qualify as a holder in due course. Where there is a reorganization of a partnership and the successor partnership acquires the commercial paper of the old partnership, the new partnership may not qualify as a holder in due course. In instances where one bank purchases the commercial paper of a bank which is ceasing business, such purchasing bank would not qualify as a holder in due course. Such purchases are not in the regular course of business.

Subsection (4) permits a pledgee of negotiable paper to qualify as a holder in due course to the extent of his interest therein. Defenses available against the pledgor will be available against the pledgee to the extent that the pledgee does not qualify as a holder in due course. Personal defenses would be good to the extent of whatever equity the pledgor has in the pledged instrument assuming that the pledgor was not himself a holder in due course of the instrument. This subsection does not change the law as found in section 27 of the NIL. Any recovery by the pledgee
over and above the sum necessary to satisfy his claim is held by
the pledgee for the benefit of the pledgor.

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Where there is no consideration for the negotiation, and the plaintiff
is not a purchaser of the note for value he cannot qualify as a holder in
444 (1909).

The fact that the note was assigned without recourse casts no suspicion
upon plaintiff's title. "If the purchaser knows at the time of his purchase
that the consideration for which the note was given has failed, if he is informed
that the validity of the consideration is a question yet to be tested, or if
he knows or has legal constructive notice that the consideration is illegal,
he cannot be considered a bona fide holder." Dollar Sav. & Trust Co. v.
Crawford & Ashby, 69 W. Va. 109, 70 S. E. 1089 (1911).

The certificate of deposit having gotten into the hands of a holder in
due course, the fact that it had been issued as a result of fraud may not
be successfully asserted as a defense against the holder in due course. Benedum
v. Citizens Bank, 72 W. Va. 124, 78 S.E. 656 (1913).

Section 3-303. Taking for Value.

A holder takes the instrument for value

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

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

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

Section 3-303 defines what constitutes value. For one to qual-
ify as a holder in due course it is necessary that he has parted
with value for the instrument.

Section 3-408 relates to consideration. These sections should
not be confused. Lack of failure of consideration is important in
that such lack or failure of consideration may be successfully
asserted as a defense against one who does not have the rights
of a holder in due course. One may be a holder in due course,
having given value for the instrument, even though there was
no initial consideration for the instrument.
Subsection (a) removes any conflict which heretofore existed between the language of sections 25 and 54 of the NIL. The first sentence of section 25 states: "Value is any consideration sufficient to support a simple contract." While section 54 provides: Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him." A promise to pay value would support a simple contract, it is submitted that under the language of section 25 a promise to pay value in the future would be value and entitle the holder-promisor to qualify as a holder in due course. However, section 54 being more specific on the issue clearly states that a promise to pay value in the future is not value and the holder-promisor is not a holder in due course. However, if the promise to pay value is negotiable in form, such promisor is deemed to have given value for the instrument. Subsection (a) removes the ambiguity created by the language used in sections 25 and 54 of the NIL and simply states that value has only been given when the agreed consideration has been paid.

Subsection (a) is also important in recognizing that one who has acquired a lien upon a negotiable instrument, other than by legal process, is deemed to have given value for the instrument to the extent of the lien and may be a holder in due course to that extent.

The doctrine that a bank which discounts a negotiable instrument for a depositor and merely gives credit to the depositor's account has not given value for the instrument until the depositor has actually withdrawn such credit from his account is retained in the Code.

Subsection (b) is a redraft of the last sentence of section 25 of the NIL which reads: "An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." Under NIL and the UCC, past consideration is value. When an instrument is taken in payment of an antecedent debt or obligation, or accepted as security for a debt already created and irrespective of whether the debt for which it was given or pledged as security be the debt or obligation of the recipient or some other person such recipient is a holder for value of the instrument.
Subsection (c) does not have a counterpart in the NIL but is in accord with prior case law. An executory promise to pay value is not value unless the executory promise be evidenced by a negotiable instrument. The giving of a negotiable instrument in exchange for another negotiable instrument is value within the meaning of this subsection. In such instance each party has given value for the other's instrument.

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When there was no consideration for the negotiation, the transferee is not a purchaser for value and cannot qualify as a holder in due course. Buckeye Saw Mfg. Co. v. Rutherford, 65 W. Va. 395, 64 S. E. 444 (1909).

A son, in recognition of past services rendered by his mother to him, years after the services were rendered, gave his note for $2,000 to his mother. The law does not raise or imply a promise to pay for services or maintenance or education of a son by a parent on which an action can be based. The court in quoting Daniel on *Negotiable Instruments*, section 182 said: "A moral obligation, though coupled with an express promise, will not constitute a valuable consideration, and it is only where there is a precedent duty which would create a sufficient legal or equitable right if there had been an express promise at the time, or where there is a precedent consideration, that an express promise will create or revive a cause of action." Held, no recovery. Gooch v. Gooch, 70 W. Va. 38, 73 S.E. 56 (1910).

It is neither necessary to aver or prove that valuable consideration had been received by the defendant. The note prima facie imports valuable consideration. First Nat'l Bank v. Freeman, 89 W. Va. 344, 109 S.E. 729 (1921).

If a bank discounts a negotiable note for the payee and places the proceeds thereof to the credit of the payee's account in the bank, in an action brought by the bank on the note against the maker, the bank is deemed prima facie a holder for value. In an action by the bank against the maker where the proceeds had been credited to the transferor's account, the burden of showing that the proceeds had not been paid out or drawn upon is upon the defendant. Merchants & Mechanics Sav. Bank v. Haddix, 97 W. Va. 536, 125 S.E. 362 (1924).

One to whom a negotiable instrument is negotiated as collateral to secure a valid debt, without more is a holder for value. Wyoming County Bank v. Nichols, 101 W. Va., 553, 133 S.E. 129 (1926).

The mere transfer by a purchasing bank of proceeds of a note to the transferor's account is not paying value, and will not in itself make the bank a holder for value. Elk Valley Bank v. State Road Comm', 111 W. Va. 527, 162 S. E. 889 (1932); Bank of Sutton v. Skidmore, 113 W. Va. 25, 167 S.E. 144 (1932).

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**Section 3-304. Notice to Purchaser.**

(1) The purchaser has notice of a claim or defense if

(a) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; or
(b) the purchaser has notice that the obligation of any party is voidable in whole or in part, or that all parties have been discharged.

(2) The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty.

(3) The purchaser has notice that an instrument is overdue if he has reason to know

(a) that any part of the principal amount is overdue or that there is an uncured default in payment of another instrument of the same series; or

(b) that acceleration of the instrument has been made; or

(c) that he is taking a demand instrument after demand has been made or more than a reasonable length of time after its issue. A reasonable time for a check drawn and payable within the states and territories of the United States and the District of Columbia is presumed to be thirty days.

(4) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim

(a) that the instrument is antedated or postdated;

(b) that it was issued on negotiated in return for an executory promise or accompanied by a separate agreement, unless the purchaser has notice that a defense or claim has arisen from the terms thereof;

(c) that any party has signed for accommodation;

(d) that an incomplete instrument has been completed, unless the purchaser has notice of any improper completion;

(e) that any person negotiating the instrument is or was a fiduciary;

(f) that there has been default in payment of interest on the instrument or in payment of any other instrument, except one of the same series.
(5) The filing or recording of a document does not of itself constitute notice within the provisions of this Article to a person who would otherwise be a holder in due course.

(6) To be effective notice must be received at such time and in such manner as to give a reasonable opportunity to act on it.

Subsection (1)(a) is a redraft of section 52(1) of the NIL. Under the language of UCC one may be a good faith purchaser of an instrument, and qualify as a holder in due course, which contains blanks which relate to unnecessary particulars, and/or may contain minor erasures. The UCC, unlike the NIL, makes no requirement that the instrument be complete and regular upon its face in order for the holder to qualify as a holder in due course. It is only when the incompleteness or irregularity is of such a nature to excite suspicion that the purchaser is under a duty to make an investigation to determine the past history of the instrument. Under the so called "equity rule," which is retained in the Code, if one fails to qualify as a holder in due course for any reason, the door then opens to prior parties to assert any defense which they might have to the instrument whether the defense relates to the reason the holder did not qualify as a holder in due course or not.

Under subsection (1)(b) one who purchases an instrument knowing that the transaction for which it was given was "voidable in whole or in part" is barred from being a holder in due course. He could not be a good faith purchaser. The term "voidable" should not be confused with "set-off or counterclaims." The fact that the purchaser may know of the existence of a set-off or counterclaim on the part of a previous party might have asserted against another does not bar him from being a good faith purchaser.

If one had knowledge that all prior parties to the instrument had been discharged, he could not by purchasing the instrument qualify as a good faith purchaser, and would not be a holder in due course. But notice that some party had been discharged is not notice to the purchaser of infirmities in the obligations of those parties to the instrument who had not been discharged. One who takes an instrument with knowledge that an indorser had been discharged takes the instrument subject to the discharge
of the indorser, (section 3-602) but this does not prevent him from qualifying as a holder in due course of the instrument, in respect to his rights against other parties who had not been discharged.

Subsection (2) is in accord with section 6 of the Uniform Fiduciaries Act. One who merely gives a fiduciary value for the instrument with knowledge of the fiduciary relationship may be a good faith purchaser and a holder in due course. However, if the purchaser had knowledge that the fiduciary passed the paper, which he held in a fiduciary capacity, in payment of his personal obligation, the purchaser is not in a position to assert that he was a good faith purchaser of the instrument and therefore is not a holder in due course of the instrument.

Subsection (3) brings light to a previously cloudy area. If the party taking the instrument had reason to know that an installment or other part of the principal amount was overdue, he does not qualify as a good faith purchaser and is thus not a holder in due course. A comparison with subsection (4)(f) will show that knowledge of default in the payment of interest or in payment of any other instrument, except one of the same series, does not give the purchaser notice of a defense or claim which might be asserted against the instrument, in this instance the recipient would not be a bad faith purchaser of the instrument and could qualify as a holder in due course.

By subsection (3)(b) and (c) one who takes an instrument which contained an acceleration clause, whether automatic or optional, may qualify as a holder in due course if at the time he took the instrument he was unaware that the due date had been accelerated. The fact that one takes an instrument which has been previously dishonored will not bar him from being a holder in due course if he were unaware of the previous dishonor. Subsection (c) continues the “reasonable time after issue” doctrine of section 53 of the NIL in specifying in what period of time one may acquire a demand instrument and be deemed to have purchased it before maturity. Subsection (c) provides that a reasonable time, as used above, for a check drawn and payable in the States is presumed to be 30 days. One purchasing a check within 30 days of issue would, under this subsection, have the benefit of the presumption that the purchase was made before the expiration of a reasonable time after its issuance.
Subsection (4)(a) rejects the doctrine of those cases which have held that an instrument which has been antedated or post-dated is not "regular" on its face. One may clearly qualify as a holder in due course of an instrument which has either been antedated or postdated.

Subsection (4)(b) should be considered together with sections 3-105 and 3-119 of the UCC. The fact that the one receiving an instrument knows that the instrument was given in payment of an executory promise or in payment of a separate agreement does not bar the taker from qualifying as a holder in due course, unless the taker had knowledge that the other party had defaulted in his promise or agreement.

Subsection (4)(d) retains the provision of the NIL (section 14) which empowers the holder of an instrument containing blanks to fill in these blanks. One who purchases the instrument after the blanks have been filled is entitled to qualify as a holder in due course, unless he had knowledge that the blanks had been improperly filled.

Subsection (5) is a most welcome subsection. Under this subsection it is clear that one who purchases a negotiable instrument is not to be charged with "constructive notice" of public records or what information they contain so as to prevent one who has purchased a negotiable instrument from being a good faith purchaser. A purchaser of negotiable paper should not be held responsible for an examination of public records to determine if any defense or equity may be asserted against a negotiable instrument. Such requirement would too greatly impede the transfer of commercial paper.

Subsection (6) provides that notice of a defense or equity received by a person will not prevent that party from being a holder in due course of an instrument purchased after receipt of such notice unless it was received in time to be acted upon. For example, notice to one officer of a bank would not prevent the bank from qualifying as a holder in due course in instances where the instrument is purchased by the bank through another bank employee before the officers of the bank had an opportunity to advise the other bank employees of receipt of such notice. This is a reasonable and sound rule.
Where the purchaser knows at the time of his purchase that the consideration for which the note was given had failed, or if he is informed that the validity of the consideration is a question yet to be tested, or if he has knowledge the consideration was illegal, he cannot be considered a good faith purchaser, and thus not a holder in due course. Dollar Sav. & Trust Co. v. Crawford, 69 W. Va. 109, 70 S.E. 1089 (1911).

Admitting that the purchaser of the notes was suspicious of the notes, mere suspicion is not enough; the purchaser is, nevertheless, to be considered a bona fide holder, in the absence of actual or constructive knowledge of any defect in the notes. Bank v. Bryan, 72 W. Va. 29, 78 S.E. 400 (1913).

Knowledge of a bank employee, acquired in a capacity other than as representative of the bank, when such employee is an officer of the bank, his knowledge will not be imputed to his employer to prevent the bank from qualifying as a good faith purchaser. Rusmussell v. White Oak Stave Co., 80 W. Va. 400, 82 S.E. 672 (1917).

The existence of a personal relationship between the cashier of one bank and the president of another, to which it sends commercial paper, regular on its face, in the usual course of business, is not proof of such notice of infirmity in the paper to receiving bank or its president, as the cashier of the sending bank may have had. Hartley v. Ault Woodenware Co., 82 W. Va. 780, 97 S.E. 137 (1918).

Where the cashier of the discounting bank personally accepted a payment from the maker of a note for discounting it at the bank, without the knowledge of the other officers of the bank, his lack of good faith cannot be imputed to the bank, since the fraudulent act was not within his apparent authority and the bank derived no benefit from it. National Bank v. Alter, 92 W. Va. 313, 114 S.E. 745 (1922).

"Mere knowledge of facts sufficient to create suspicion, without actual knowledge, will not deprive one of the rights of a purchaser in due course, but if the facts, circumstances and conditions attending the purchase are so cogent and obvious that to remain passive amounts to bad faith on his part and show bad faith on the part of the seller, the purchased will be deprived of the statute of holder in due course." Facts which are calculated only to arouse suspicion will not suffice to deprive one of the status of good faith purchaser. Merchants Bank & Trust Co. v. Peoples Bank, 99 W. Va. 544, 130 S.E. 142 (1925).

"A purchaser in good faith should be one who has purchased with due regard to the rights of the maker, and not one who, relying on paying value for the note and purchasing before maturity without knowledge of any defense, is indifferent as to whether the same was honestly obtained from the maker. Where the evidence tends to show such indifference the question of good faith is for the jury." Merchants & Miners Bank v. Gaujot, 102 W. Va. 643, 138 S.E. 199 (1926).

A bank discounting commercial paper for the benefit of one or more of its officers is not chargeable with notice of an infirmity in the instrument known to the employee. Ficklesimer v. Hall, 103 W. Va. 646, 138 S.E. 370 (1927).

"While our court has frequently recognized and applied the principle that a corporation is not ordinarily chargeable with the information of an officer, which it was to his interest to conceal from the corporation, it has recognized an exception in certain cases wherein the principal acts through a single official. This exception is based on the theory that, since the corporation claims the benefit of the agent's act, it thereby subjects itself to the consequences of his knowledge." Ficklesimer v. Varney, 103 W. Va. 650, 138 S.E. 317 (1927).
C, acting as a broker, received from A and B their joint note in the sum of $1,600. C was to discount the note and pay over to A and B $1,500, keeping the $100. difference for his trouble. C borrowed $1,500 from a bank on his personal note and pledged A and B's note as security for the loan, but did not pay anything over to A and B. As there was no evidence that the bank knew or had reason to believe that C intended to embezzle or misappropriate the funds the bank qualified as a holder in due course. First Nat'l Bank v. Croy, 108 W. Va. 342, 150 S.E. 904 (1929).

The law affords to every holder of a negotiable instrument the presumption that he is a holder in due course, if there are circumstances which raise a strong suspicion of fraud in the negotiation of the instrument, the presumption in favor of the holder is withdrawn. Baker v. Cole, 109 W. Va. 89, 153 S.E. 109 (1930).

For summary of cases dealing with dishonest employee and effect upon the good faith of the employer who becomes the owner of the instrument see: Kelley v. Kittrell, 110 W. Va. 189, 157 S.E. 165 (1931).

In order to constitute notice of infirmity in the instrument or of defect in title thereto, the taker must either have actual knowledge, or knowledge of such facts, as would make the taking of the instrument an act in bad faith. Commercial Credit Co. v. Barnett, 116 W. Va. 132, 178 S.E. 816 (1935).

The bank acquired a note with notice of the conditions which were a part of the understanding out of which it grew, and sold it to Lawhead, the plaintiff, who purchased after its due date, took it subject to same infirmities, terms and defenses that bound the bank. Lawhead v. Stewart, 123 W. Va. 41, 14 S.E.2d 1 (1941).

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

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

1. all claims to it on the part of any person; and

2. all defenses of any party to the instrument with whom the holder has not dealt except

   (a) infancy, to the extent that it is a defense to a simple contract; and

   (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and

   (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms; and

   (d) discharge in insolvency proceedings; and

   (e) any other discharge of which the holder has notice when he takes the instrument.
Defenses which may be successfully asserted to actions on negotiable instruments fall into two classes, personal defenses which may be successfully used against one who does not qualify as a holder in due course or does not trace his title through a prior holder in due course, and real defenses which are available against all parties whether holders, holders in due course, or holders with the rights of a holder in due course.

Subsection (1) retains the rule of the NIL that one who qualifies as a holder in due course has superior title to the instrument, both in law and equity, to any prior party who may have owned the instrument and from whom it may have been stolen or obtained by fraud. No prior party may rescind or avoid the transfer of the instrument as against a holder in due course.

Subsection (2)(a) incorporates into the Code prior case law. Infancy is recognized as a real defense to the same extent that it would be a defense to an ordinary contract. The UCC does not endeavor to define under what circumstances an infant may avoid his contractual liability. In some jurisdictions an infant who has misrepresented his age for the purpose of inducing the making of the contract is estopped to assert his infancy. In other jurisdictions an infant cannot escape liability on his contracts unless he returns the consideration which he received. These latter two illustrations are mentioned to show how local law may differ in respect to the right of an infant to avoid liability on a contract.

Subsection (2)(b) leaves to the general law of the various jurisdictions to determine the effect of lack of capacity to contract, duress, illegality, ultra vires, insanity and coverture. If local law renders such contracts null and void the party under the above mention disability would have a successful defense to a negotiable instrument even as against a holder in due course. If contracts entered into by such parties are only voidable generally the right to avoid liability on such instruments is not available against a holder in due course.

Subsection (2)(c) is applicable to instances where one, who as the result of misrepresentation of another, had been induced to sign an instrument without knowledge or reasonable opportunity to learn of the character of the instrument, such party is permitted to assert this matter as a defense against a holder in due course.
Subsection (2)(d) is new. Under this subsection a discharge in any insolvency proceeding or bankruptcy may not be successfully asserted as a defense against a holder in due course.

Subsection (2)(e) is also new. When considering this subsection together with section 3-304 it will be apparent that notice of discharge of any person or persons to an instrument, but on which others remain liable, does not prevent a purchaser with such knowledge from qualifying as a holder in due course as to that person or persons who had not been discharged of liability. For example, if an indorsement is stricken, such indorser is discharged of liability on the instrument. One purchasing such an instrument with knowledge of this fact may, nevertheless, qualify as a holder in due course so far as the maker, drawer, or other indorsers on the instrument are concerned.

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Evidence of failure of consideration is not admissible as against a holder in due course. Finance Co. v. Schroder, 74 W. Va. 67, 51 S.E. 552 (1914).

An instrument given in payment of a gambling transaction is void in the hands of a holder in due course. Twentieth Street Bank v. Jacobs, 74 W. Va. 525, 82 S.E. 320 (1914). This case no longer represents the law of West Virginia. Chapter 55, Article 9, Section 1 of the West Virginia Code (Michie 1961) provides that a holder in due course may recover upon an instrument given in a gambling transaction.

If an unlawful promise or agreement constitutes any part of the consideration for the promise or agreement of the wrongdoer, or his sureties, the contract is wholly void and will not be enforced by the courts. This case involved litigation between the original parties to the instrument. No holder in due course was involved. Board of Education v. Angel, 75 W. Va. 747, 86 S.E. 747 (1915).

Payment is only a personal defense and not available as a defense against a holder in due course. Manchester v. Parsons, 75 W. Va. 793, 86 S.E. 885 (1915).

Failure of consideration is not a defense against a holder in due course. Shanabarger v. Phares, 86 W. Va. 64, 103 S.E. 349 (1920).

Conditional delivery of an instrument may be shown between the immediate parties and those with like rights, but not as against a holder in due course or holder with the rights of a holder in due course. Securities & Inv. Corp. v. Heron, 88 W. Va. 552, 107 S.E. 179 (1921).


Improper or unauthorized transfer of negotiable paper is a personal defense and not available against a holder in due course. First Nat'l Bank v. Croy, 108 W. Va. 342, 150 S.E. 904 (1929).

“A plea that a negotiable note signed by a party was procured by deception and fraud in representing it to be a paper of different character is not good against a holder for value acquired in due course of business before maturity unless the plea avers notice to the holder of such fraud and deception before he acquired the note.” Bank v. Pancake, 109 W. Va. 400, 155 S.E. 117 (1930).

Usury is a real defense good against a holder in due course to the extent of the usury, that is, to that portion over and above the rate which might lawfully be charged. Artrip v. Peters, 114 W. Va. 819, 174 S.E. 524 (1934).

Parol evidence may be shown to establish absence of consideration. Absence of consideration is defense against one not a holder in due course. Failure of consideration is a defense pro tamo against a holder but not against a holder in due course. Attorney's National Clearing House v. Greever, 121 W. Va. 601, 5 S.E.2d 621 (1939).

The signature of the drawer carries with it the statutory engagement as if it were written on the check. Therefore the statute of limitations applicable to written contracts, namely 10 years, applies to the right to sue the drawer on a check. If the statute of limitations has run it is a real defense and available for use against a holder in due course. Select Kentucky Distillers, Inc. v. Foloway, 124 W. Va. 72, 19 S.E.2d 94 (1942).


A contract by statute declared void, because in part usurious, is as to such usury a nullity, and, although negotiable in form, no currency in the market and no innocence or ignorance on the part of the holder can impart validity to it. Eskridge v. Thomas, 79 W. Va. 322, 91 S.E. 7 (1916).

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

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

(a) all valid claims to it on the part of any person; and
(b) all defenses of any party which would be available in an action on a simple contract; and
(c) the defenses of want or failure of consideration, non-performance of any condition precedent, non-delivery, or delivery for a special purpose (Section 3-408); and
(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.
Subsection 3-306 is applicable in those instances where the holder of the instrument is unable to qualify as a holder in due course or to trace his title through a prior holder in due course. This section applies to a holder who, for example, became the owner of the instrument after maturity, and/or in bad faith, and/or without paying value therefor, and/or by the way of an assignment.

Under subsection (a) one who qualifies only as a holder of the instrument is subject to the defense of lack of title, that is, title to the instrument is in another person, and all liens, equities or other claims which may be asserted by other persons. It would seem that one who has the right to rescind a transfer because of fraud would be entitled to reclaim the instrument or the proceeds thereof from a mere holder.

Subsection (b) is in accord with the first sentence of section 58 of the NIL.

Subsection (c) retains those portions of sections 16 and 28 of the NIL which permits the defenses of failure or lack of consideration, nondelivery or conditional delivery to be successfully asserted against a mere holder of a negotiable instrument. Such defenses may not be used against a holder in due course or a holder with the rights of a holder in due course. The fourth sentence of section 16 of the NIL provides: "And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved." While under section 3-307 of the UCC the defendant simply has the burden of proving nondelivery, conditional delivery, or delivery for a special purpose when he wishes to assert one of those matters as a defense. The presumption set forth in section 16 of the NIL is not present in the UCC.

Subsection (d) is a redraft of parts of sections 22 and 59 of the NIL. The only duty of the person obligated to pay a negotiable instrument is to pay the holder thereof the sum specified in the instrument. Claims which others may have against the holder are no concern of the one who is to make payment of the instrument. If the plaintiff is unable to prove ownership of the instrument on which he is suing, such as in the case of a thief, the defendant may defend on the ground of lack of title in the plaintiff. If the plaintiff has a voidable title, the obligor/de-
fendant cannot assert this matter as a defense nor may he assert the rights of another to avoid this or a prior transfer. The courts in the past have generally not permitted a plea of jus tertii (the right of the party who has no defense of his own to avail himself of the defense of some third party who is not before the court). The language of UCC appears to be in accord with the holding of the prior cases in denying the use of jus tertii. If the third party who has a defense is a party to the litigation or is made a party thereto, then such defenses as he may have may be pledged. In considering the full effect of this section consideration should also be given to section 3-803 of the UCC.

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By dicta the West Virginia Court has indicated that the defense of set-off is available against one other than a holder in due course. Bank of Grafton v. Danser, 70 W. Va. 529, 74 S.E. 628 (1912).

Failure of consideration is a good defense against one other than a holder in due course. Belcher v. Dickinson, 70 W. Va. 750, 75 S.E. 78 (1912).

The maker of a negotiable instrument is entitled to the benefit of all of the equities existing between him and the original holder, and to make all of the defenses which he might have made were the suit brought by the original holder when the action is brought against him by one not a holder in due course. Securities & Inv. Corp. v. Heron, 88 W. Va. 552, 107 S.E. 179 (1921).

"... One who acquires negotiable paper after maturity takes it, in the absence of statutory modification, subject to all equities and defenses arising out of the paper itself and attaching to it, or out of the transaction with reference to which the paper was made, or of any agreement between the original parties with relation to the instrument." Clemmer v. Bowlby, 109 W. Va. 105, 153 S.E. 311 (1930).

By inference the West Virginia Supreme Court of Appeals has said that if an instrument is procured by deception and fraud in that it was represented to be a paper of different character that it really was is available as a defense against mere holder. Bank v. Pancake, 109 W. Va. 400, 155 S.E. 117 (1930).

Where the consideration for an instrument is open to inquiry, parol evidence may be admitted to establish absence of, or failure of, consideration. Absence of consideration is available as a defense against one not a holder in due course, failure of consideration is a pro tanto defense, whether the failure is ascertained and liquidated or not, against one other than a holder in due course. Attorney's Nat'l Clearing House v. Greever, 121 W. Va. 601, 5 S.E.2d 621.

An assignee for collection of an instrument may sue in a given jurisdiction if the assignor could have prosecuted an action therein; otherwise not. Since a foreign personal representative may not maintain an action in this state, such fiduciary's assignee for collection of a note may not maintain a suit in this state. Curl v. Ingram, 121 W. Va. 763, 8 S.E.2d 483 (1940).

Want of consideration embraces transactions where no consideration was intended to pass. Failure of consideration means that something presumably of value moving from the obligee to the obligor was intended but did not pass Rauschenbach v. Estate of McDaniel, 122 W. Va. 632, 11 S.E.2d 852.
One who accepts a note as collateral security after its maturity date cannot qualify as a holder in due course. Where fraud is present, the one who would profit by the fraud may not successfully plead such even against one who does not qualify as a holder in due course. Jones v. Evans, 123 W. Va. 394, 15 S.E.2d 166 (1941).

Section 3-307. Burden of Establishing Signatures, Defenses and Due Course.

(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue

(a) the burden of establishing it is on the party claiming under the signature; but

(b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

(3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

In order for forgery to be considered as a defense, the forgery must be specially pleaded. The reason for requiring forgery to be specially pleaded is to give notice to the one bringing an action of this rather uncommon defense which he is normally not prepared to litigate in the absence of such notice. Whether the plea of forgery must be under oath depends upon the general law of the jurisdiction. After a plea of forgery the person asserting a cause of action on the instrument has the burden of proving the genuineness of the signature. The Plaintiff is aided in his proof by subsection (1)(b) in that the signatures on the instrument are presumed to be valid, except where the action is to enforce the obligation of a purported signer who is dead or incompetent.

Subsection (2) is in accord with the NIL in that a holder is entitled to recover on the instrument unless the defendant estab-
lishes a good defense. The burden of proving a defense to the action upon a negotiable instrument is on the party asserting such defense.

Under subsection (3) the plaintiff has the burden of proving that he is a holder in due course, or has the rights of a holder in due course, after the defendant has a defense to the instrument. If the defense proven is a real defense it would then be immaterial whether the plaintiff is or is not a holder in due course, for such defense would be available against holders or holders in due course.

Section 3-401. Signature.

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

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

Subsection (1) is applicable to instances where an agent signs his own name to a negotiable instrument without disclosing the identity of his principal. An undisclosed principal cannot be held liable on a negotiable instrument as his name does not appear thereon. The undisclosed principal may be held liable on the underlying debt or obligation.

By authority of sections 134 and 135 of the NIL, a drawee may be held as an acceptor on a bill without having signed his acceptance under the rules relating to virtual acceptance and collateral acceptance. Under the NIL, except in the instances of a virtual acceptance or collateral acceptance, no person is liable on a negotiable instrument whose signature did not appear on the instrument. The doctrine of virtual or collateral acceptances have been abrogated by the UCC.

There is no requirement under the NIL or the UCC that one’s signature appear at the end of, or at the bottom of, the instrument. The signature may be in the body of the instrument. One who signs an instrument in a trade name, assume name, or in another’s name is liable as a signer in the capacity in which
he placed the signature upon the instrument. Parol evidence may be admitted to identify the signer and he is, for the purpose of liability, deemed to have adopted the name used as his own. This is not to say that such party would not be criminally liable for the unauthorized use of author's name.

**WEST VIRGINIA CASE**

An undisclosed principal for whom a negotiable note was given, who has accepted and holds the benefits of the transaction, is liable on the common counts on the underlying obligation. "... where the undisclosed principal has taken the benefits of the transaction by which the negotiable notes came into existence, even if there is nothing on the face of the notes to indicate that the maker was acting for another, and retains the benefits, which, in good conscience, he should not retain at the expense of the third party, the person holding the notes need not rely on them for recovery, but may reject them, and recover from the principal, afterwards discovered, on the original consideration for which the notes were given..." Harvey v. Dyer, 108 W. Va. 85, 150 S.E. 235 (1929).

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**Section 3-402. Signature in Ambiguous Capacity.**

Unless the instrument clearly indicates that a signature is made in some other capacity it is an indorsement.

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Section 3-402 is a consolidation of sections 17(6) and 63 of the NIL. In determining the capacity in which one placed his signature upon an instrument any ambiguity is to be resolved in favor of treating the signer as an indorser. Where it is clearly shown that the one who has placed his signature upon an instrument intended to be bound thereon in a capacity other than that of an indorser, he is liable in such capacity. For example, one who placed his signature upon an instrument in the following manner: "John Doe, Witness" would not be liable on the instrument in any capacity. If one places his signature in the lower right hand corner of an instrument, the court may take judicial notice that that is the place where the maker or drawer normally signs. The court will hold the signer as maker or drawer instead of as an indorser.

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**Section 3-403. Signature by Authorized Representative.**

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

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

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

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

This section is of more than ordinary importance for from it one may determine who is personally liable on an instrument executed by an agent, trustee or other representative. Assuming that the person executing the instrument has been empowered by his principal with authority to act for the principal, it then becomes important to consider the form in which the signature is affixed to the instrument. The authorization to the agent to represent another need be conferred in no particular form and may be oral. For the purpose of illustration we will assume that in each of the following six illustrations "Michael Maker" is the principal and has authorized "Artie Agent" to sign a negotiable instrument in his behalf in the indicated form: (1) "Michael Maker, by Artie Agent," (2) "Michael Maker," (3) "Artie Agent," (4) "Artie Agent, agent," (5) "Michael Maker Company, Artie Agent," and (6) "Michael Maker, Artie Agent." The question is raised as to who is liable on the instrument in each of the above signatures.

The first example is of the proper form for the agent to sign an instrument in order to bind his principal and to escape personal liability on the instrument.

In the second illustration, where the agent merely signed his principal's name, the agent would not be personally liable on the
instrument. Assuming that the agent had authority to represent the principal. Under the NIL there is some question as to whether one signing another’s name without authority would be personally liable on the instrument, or would be liable for breach of warranty of authority to represent the purported maker. If the one signing did not have the authority to sign another’s name, under the Code such signature would be an unauthorized signature and governed by section 3-404.

The agent signing, as in the third example, is personally liable on the instrument and may not use parol evidence to escape liability thereon. This is clear from the terms of subsection (2)(a). The principal is not liable on the instrument as his signature does not appear thereon. The principal may be liable on the underlying debt or in quasi contract. If the agent is called upon to pay the instrument, he may recover over against his principal.

Subsection (2)(b) governs the liability of the parties as where the agent signed as in the fourth example. The fourth example differs from the third in that the agent has shown on the instrument that he is representing another, but without identifying that person. The cases decided under the NIL are in conflict as to whether parol evidence may be admitted to exonerate the agent of personal liability or to impose liability upon the unidentified principal. Perhaps the majority view is that the agent so signing is alone personally liable on the instrument. The Code provision is not in accord with the majority view and would allow parol evidence, as between the immediate parties, to remove the ambiguity as to who was intended to be bound by the signature. Such evidence would not be admitted against a holder in due course.

In the fifth example, the abbreviation for company follows the principal’s name. Subsection (3) by its terms would treat this as a signature by the agent in a representative capacity, thus the agent would not be personally liable.

In the sixth illustration, the name of the principal is followed by the name of the agent without any indication that he intended to sign in a representative capacity. In this instance the agency relationship may not be shown as against a holder in due course. Both parties would be liable as co-makers of the instrument. As between the immediate parties, the true relationship may be shown by competent evidence where there was an understanding be-
tween the parties that the credit was in fact extended to the principal rather than to the agent or to the agent and principal.

It would be well to observe at this point that if the one purposing to act in a representative capacity lacked authority to represent the purported principal, the purported principal would not be liable either on the instrument or on the obligation for which it was given. Under the majority view one purporting to act as an agent, but without authority, is personally liable on the instrument irrespective of what form he used in signing the instrument. The West Virginia Supreme Court of Appeals by dicta indicated that in West Virginia, such purported agent would not be personally liable on the instrument even where he is unauthorized to act for the other party. The person purporting to act in a representative capacity without authority is liable for breach of warranty of authority.

WEST VIRGINIA CASES

A partner in a trading partnership has implied authority to execute commercial paper of the firm. In the absence of an estoppel, the firm is bound by the act of a partner who acts in the apparent scope of authority, notwithstanding the improper use of the firm name. Bank of Greenville v. S. T. Lowry & Co., 81 W. Va. 578, 94 S.E. 985 (1918).

Note signed "Winnie M. Jacobs, Exec. of George M. Jacobs, Deceased." Irrespective of what might have been the rule at common law under section 20 of the NIL, Winnie M. Jacobs is not personally liable on the note. "The question of her authority as executrix to execute a note in renewal of one executed by her husband during his lifetime is the determining point of the case. If she possessed such authority, the statute declares that she is not liable thereon personally." National Bank v. Jacobs, 85 W. Va. 653, 102 S.E. 491 (1920).

In the body of the note the signers described themselves: "We, the trustees of the Ellenboro M. E. Church." There were seven signatures at the bottom of the note without any qualification as to the capacity in which the signers placed their names thereon. The court said: "No reason appears for using the descriptive phrase except to show the representative capacity of the makers." Under section 20 of the NIL the signers were held not to be personally liable on the note. First Nat'l Bank v. Delancey, 109 W. Va. 136, 153 S.E. 808 (1930).

Section 3-404. Unauthorized Signatures.

(1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it; but it operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value.
(2) Any unauthorized signature may be ratified for all purposes of this Article. Such ratification does not of itself affect any rights of the person ratifying against the actual signor.

Included under the heading of unauthorized signatures are forgeries; signatures by one not an agent, but purporting to be by an agent; and signatures by an agent who exceeds his actual and apparent authority in signing an instrument in the principal's behalf.

Subsection (1) is in accord with prior holdings in recognizing that an unauthorized signature is wholly inoperative as against the person whose name is improperly signed, but is effective to create liability upon the unauthorized signor of the instrument and to transfer any rights that the unauthorized signor might have in the instrument.

In some jurisdictions the party acting without authority in signing or indorsing an instrument is personally liable thereon as if he had signed his own name to the bill or note. In other jurisdictions he is held liable on the theory of breach of warranty of authority to represent. In the latter jurisdictions three distinct problems result from the use of the warranty theory. First, the question is raised as to whether the liability of the warrantor extends to any person other than the immediate party with whom he dealt, or whether the liability of such warrantor runs with the instrument to any subsequent owner of the instrument. Secondly, in the event of breach of warranty, what is to be the measure of damages? Is it the face amount of the instrument, or is it to be only the amount of damages which the plaintiff can show he suffered as the result of the breach of warranty? This becomes important in instances where the purported principal is insolvent or judgment proof. In this event the holder would not have been damaged to the face amount of the instrument by the breach of warranty of the purported agent. The West Virginia Supreme Court of Appeals has indicated by the way of dicta that one who without authority nevertheless purports to act for another is only to be held liable on the basis of breach of warranty. This section of the UCC is contrary to the dicta of the West Virginia court. Under the UCC the purported agent would only be liable on the instrument to those who in good faith pays the instrument or takes it for value. Under the general theory of
warranties the unauthorized signer would not be liable for breach of warranty to one who took the instrument with knowledge that the one signing the instrument lacked authority to bind the purported principal, for without reliance there can be no breach of warranty.

Subsection (2) resolves the question of whether a forgery may be ratified. Under this subsection an unauthorized signature may be ratified for all purposes pertinent to this Article. The ratification would not have the effect of relieving the forger of any criminal liability because of the forgery. Only the State has the power to condone a crime. Ratification does not have the effect of relieving the unauthorized signer of liability on the instrument, nor any other liability to the person whose name he forged.

The theory that one may be estopped to deny the authority of the one purporting to act for him is recognized and continued under this section of the UCC. That is in instances where an appointment of one as an agent has been terminated without proper notices, or where the agent acts outside of actual authority but within his apparent authority. The purported principal may be estopped to question the authority of the one acting to represent him.

WEST VIRGINIA CASES

Where a bill alleges that a person made a promissory note, and an answer, verified by affidavit, denies that such person made the note, the plaintiff must prove the signature and execution of the note. Horner v. Amick, 64 W. Va. 172, 61 S. E. 40 (1908).

A person who signs the name of another to a contract, as the agent of such person, without authority to do so, is not personally liable on the contract as promissor or covenanter, but is liable in an action of assumpsit, upon the implied warranty of his authority, or, in trespass on the case, for fraud and deceit. Haupt v. Vint, 68 W. Va. 657, 70 S.E. 702 (1911).

In an action on a promissory note, in which forgery is relied upon as a defense, it is not error for the trial court to refuse to strike out a plea of non est factum, denying the handwriting of the signature and verified by affidavit. First Nat'1 Bank v. Barker, 75 W. Va. 244, 88 S.E. 898 (1914).

The president of a corporation has no inherent power to negotiate loans or enter into contracts binding the corporation. As to it, his acts in these particulars are not binding, unless authorized by some resolution, or ratified expressly by the corporate entity represented by him, or by a course of dealing or conduct on his part with the knowledge or consent, or by its taking the benefits of such contract, or inducing the belief on the part of those so dealing with it through the intervention of its officer that it had empowered him to act for and in its behalf. Williams v. S. M. Smith Ins. Agency, 75 W. Va. 494, 84 S.E. 235 (1915).

"The law does not sustain the view that one dealing with a corporation through its officers must under all circumstances go to its by-laws as the exclusive evidence of their authority. On the contrary, the corporation is
estopped to deny acts of an officer done and performed by permission of its board of directors evidenced by its knowledge of his acts, acquiescence therein, and silence." National Bank v. Lemkulil Co. 97 W. Va. 284, 125 S. E. 241 (1924).

A forged instrument is not merely voidable, but absolutely void, and there can be no ratification of a forgery that will make the instrument valid. Merchants Bank & Trust Co. v. Peoples Bank, 99 W. Va. 544 130 S.E. 142 (1925).

Section 3-405. Impostors; Signature in Name of Payee.

(1) An indorsement by any person in the name of a named payee is effective if

(a) an impostor by use of the mails or otherwise has induced the maker or drawer to issue the instrument to him or his confederate in the name of the payee; or

(b) a person signing as or on behalf of a maker or drawer intends the payee to have no interest in the instrument; or

(c) an agent or employee of the maker or drawer has supplied him with the name of the payee intending the latter to have no such interest.

(2) Nothing in this section shall affect the criminal or civil liability of the person so indorsing.

Section 9(3) of the NIL provides: "The instrument is payable to bearer: (3) When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable." In 1951 the West Virginia Legislature amended the corresponding section of the West Virginia NIL, section 9(c), to read: "The instrument is payable to bearer: . . . (c) When it is payable to the order of a fictitious or nonexisting or living person not intended to have any interest in it, and such fact was known to the person making it so payable, or known to his employee or other agent who supplies the name of such payee." Under the UCC instruments which would have formerly been bearer paper under prior quoted sections are no longer considered bearer paper and may not be negotiated by delivery alone, but may be negotiated by delivery with the indorsement of any person in the name used for the payee. It will be observed that the phrase "fictitious or nonexisting person" as used in the NIL
is not present in the UCC. Under the UCC, an instrument payable to the order of an impostor or to the order of a nonexisting person is not bearer paper. However, any person, even a thief or second impostor, can indorse the name used for the name of the payee and negotiate the instrument. This is not to infer that such person will not have criminal liability resulting from his unlawful act.

Subsection (1)(a) abolishes the distinction that has sometimes been made between face-to-face impostors and impostors by mail by providing that the dominant intent of the one making the instrument is to deal with the name rather than with the person. The effect of the provision of the UCC is to place the loss resulting from any dealing or dealings with an impostor upon the maker or drawer of the instrument rather than upon the drawee, irrespective of whether the impostor dealt with the maker or drawer through the mail or face-to-face. The term "impostor" is limited to impersonation, and does not apply to instances where one represents himself to be the authorized agent of the payee. If the person making the instrument deals with one as an agent, but is sufficiently careful to make the instrument payable to the order of the principal, he should have the protection of the law and such an instrument may only be negotiated by the indorsement of the named principal followed by the delivery. The drawee is respecting the order of the drawer when the drawee pays the sum called for to the named principal or to his order and only in that case may the drawee properly debit the account of the drawer.

Subsection (1)(b) is in accord with sections 9(3) of the NIL and 9(c) of the West Virginia NIL. The issue is, did the person signing on behalf of the maker or drawer intend for the payee to have any interest in the instrument? If the answer is in the affirmative, then the instrument is order paper and the indorsement of the payee would be necessary to negotiate the instrument. If the answer is in the negative, under both the NIL and the West Virginia NIL, the instrument is bearer paper and may be negotiated by delivery alone. Under the UCC if the answer is in the negative, such an instrument would not be bearer paper, but the indorsement of any person in the name of the payee followed by delivery is sufficient to negotiation of the instrument.

Subsection (1)(c) is unlike section 9(3) of the Uniform Negotiable Instrument Act it approaches the position of 9(c) of the
West Virginia version of the Act. Under the West Virginia version of §9(3), §9(c) of the West Virginia NIL, where the one furnishing the name of the payee did not intend for the named payee to have any interest in the instrument, the instrument is bearer paper. Under subsection (c) of the UCC the instrument would technically not be bearer paper but may be indorsed by any person in the name of the payee and delivered. This would constitute a negotiation under the UCC.

When reading subsections 1(b) and (c) together, the conclusion must be reached that if either the one signing or the one supplying the name of the payee did not intend for the payee to have any interest in the instrument, the instrument may be negotiated by the indorsement by any person in the name of the payee followed by delivery.

WEST VIRGINIA CASE

A bank owes a duty to its depositor. "It has the opportunity to demand proper identification, and if it fails to take advantage of such opportunity, and through carelessness, mistake, or bad judgment, fails to take the necessary precaution with respect to identification, it cannot claim to be a holder in due course." Hays v. Lowndes Sav. Bank & Trust, 118 W. Va. 360, 190 S.E. 543 (1937).

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

Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

This section adopts as a statutory rule the holding of the 1827 English case of young v. Grote, 4 Bing. 253, wherein it was held that the drawer who was so negligent in drawing an instrument as to facilitate its material alteration is liable to the drawee who, unaware of the alteration, in good faith pays the instrument after the alteration.

This section confers upon holders in due course and payors, who may not necessarily be drawees, the right to recover upon
the instrument or to debit the account of the drawer where there has been an alteration of the instrument and the negligence of the drawer "substantially" contributed to the alteration. The concept that the drawer is not to be held responsible for his negligence to subsequent parties on the basis that at the time he drew the instrument there was no contract between them and no duty owed is rejected by this section.

The UCC does not purport to define negligence but leaves the determination of negligence open to the court or jury upon the facts of each case. It would seem that if the maker were to leave blank the space in which the sum payable is to be inserted and permits the instrument to get into circulation, the subsequent improper completion of the instrument is a result of his own negligence and he should be liable on the instrument to a holder in due course. It is generally held that the fact that an instrument was written on non-sensitized paper or written in pencil does not constitute negligence on the part of the maker or drawer of the bill or note.

Under this section of the Code, the negligence of the maker or drawer which contributed to an alteration is liable on the instrument in its altered form to a holder in due course. Such maker or drawer is estopped as against a holder in due course to assert the issue of alteration. As the plaintiff bases his case on breach of contract rather than tort the plaintiff is entitled to recover the sum specified in the instrument rather than damages which he might show he suffered because of the negligence of the maker or drawer.

A bank or other drawee who pays a check or bill which clearly shows on its face to have been altered is not entitled to the protection of this section of the Code. To be a good faith purchaser the bank or drawee would be expected to have complied with the ordinary business customs and practices in dealing with an obviously altered instrument.

The same rules are followed in instances where one's negligence contributes to a forgery or other unauthorized signature as defined in section 1-201 of the UCC. For example, if one regularly uses a check-writing machine containing the authorized facsimile of his signature and permits the instrument to be left in a public area without supervision or unlocked so that some one passing by might use the machine and affix a signature to a bill
or note, the negligence of the maker or drawer would bar his assertion of forgery as against a holder in due course.

In summary, it may be said that under section 3-407 a holder in due course of an altered instrument may recover thereon according to its original tenor irrespective of any negligence on the part of the maker or drawer contributing to the alteration. While under authority of section 3-406 a holder in due course may recover on the instrument according to the altered amount in instances where the maker or drawer was negligent and his negligence substantially contributed to the alteration.

WEST VIRGINIA CASE

Unauthorized completion of a negotiable instrument is not a defense against one who purchased such instrument after its completion and qualifies as a holder in due course. Rusmissell v. White Oak Stave Co., 80 W. Va. 400, 92 S.E. 672 (1917).

Section 3-407. Alteration.

(1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in

(a) the number or relations of the parties; or

(b) an incomplete instrument, by completing it otherwise than as authorized; or

(c) the writing as signed, by adding to it or by removing any part of it.

(2) As against any person other than a subsequent holder in due course

(a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;

(b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.

(3) A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an
incomplete instrument has been completed, he may enforce it as completed.

Under section 124 of the NIL material alteration of a negotiable instrument is a personal defense to the instrument and may successfully be pleaded against anyone not having the rights of a holder in due course. Where the altered instrument has reached the hands of subsequent holder in due course, the defense of material alteration may be used as a defense against such party only to the extent of the alteration. That is, under the NIL a holder in due course of a materially altered instrument may recover on the instrument in accordance with its original tenor.

Under subsection (2)(a) of section 3-407 of the UCC an alteration of an instrument does not result in the discharge of anyone unless the alteration be fraudulent, material and made by the holder, in which event the defense of alteration may be successfully asserted against one not having the rights of a holder in due course. It would appear that under this subsection of the Code a reduction of the interest rate on an instrument or decreasing the sum payable would not be a fraudulent alteration. However, in those states where the penalty for usury is the loss of all interest, an alteration which reduces the interest rate might be shown to be for a fraudulent purpose. In which case the defense of alteration could be successfully pleaded against a mere holder of the instrument.

Subsection (1)(b) should be considered together with section 3-115 of the UCC. Where an instrument containing blanks has been delivered, the blanks may be filled in accordance with the authority given, and if so done the instrument is as valid as if it had been completed at the time of delivery. If the blanks are not filled in accord with the authority given the improper completion is treated as a materially altered and the laws relating to material alteration are applicable. Where because of the unfilled blanks the instrument had no original tenor a holder of the instrument is entitled to recover on the instrument in accordance with the authority which the drawer or maker has in fact conferred regarding how the blanks should be filled. One who takes the instrument after blanks have been filled and who qualifies as a holder in due course is entitled to recover on the instrument in accordance with the terms of the instrument at the time he became a holder in due course thereof.
Subsection (3) is applicable only when the instrument has found its way into the hands of a holder in due course. If the maker or drawer had been negligent in enabling the alteration to be made, a holder in due course is entitled to recover on the instrument in the altered form, section 3-406 of the UCC. Section 4-401 is applicable in determining the rights of a bank to debit the drawer's account on an instrument which had been altered after its execution.

Considerating section 3-408 together with section 3-115 of the Code, the conclusion is reached that non-delivery of an incompleted instrument may not be successfully asserted as a defense against holders in due course. This is in contradiction to the holdings under section 15 of the NIL which in effect provides that non-delivery of an incompleted instrument is a defense against even holders in due course. There is some authority to the effect that if the maker or drawer had been negligent in permitting the incompleted instrument to get into circulation then the maker or drawer would be estopped to assert the defense of non-delivery of an incompleted instrument against subsequent holders in due course.

WEST VIRGINIA CASES

A material alteration does not render a note void as to all parties. The note is good and valid as to any party who himself made, authorized or assented to, the alteration, and, if the plaintiff could have proved that the defendant had made the alteration, or authorized it to be made, or assented to it, the plaintiff could have recovered. Harper v. Clear Fork Coal & Land Co., 80 W. Va. 246, 92 S.E. 565 (1917).

An instrument contained a statement of the transaction which gave rise to the instrument. This statement was erased. Court held that this was not a material alteration of the instrument. Mason v. Shaffer, 82 W. Va. 632, 96 S.E. 1023 (1918).

The Uniform Negotiable Instruments Law, expressly changes the rule of the law merchant in that when an instrument has been materially altered, by allowing a holder in due course, not a party to the alteration, to enforce payment thereof according to the original tenor of the instrument. Picklesimer v. Chafin, 104 W. Va. 106, 139 S.E. 475 (1920).

Section 3-408. Consideration.

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

All though the Code, as under the NIL, the terms value and consideration have distinct meanings. Consideration refers to what the obligor received for his promise or obligation. Want or failure of consideration may successfully be asserted against one not having the rights of a holder in due course. The second sentence of this section is important in that it recognizes that a pledgee of a negotiable instrument who has taken the instrument as collateral security for another debt may be a holder in due course of the instrument. Such pledgee is deemed to have given value for the instrument. Some of the older cases have held that unless there was an extension of time given or some concession by the creditor the new obligation failed for want of consideration. This concept is not recognized under the Code. It is recognized by this section that an obligation given for more or less than the liquidated obligation does not fail because of the common law rule that a liquidated smaller amount cannot be used to discharge a larger liquidated amount. Under section 24 of the NIL a presumption of consideration for the instrument existed. No such presumption is created by the UCC. The Code merely places the burden upon the defendant of establishing any defense which he might wish to assert including the personal defense of failure of consideration.

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A note cannot have effect as a mere gift, it being nothing more than a promise to given money, signifying intention to give, but not amounting to, or evidencing, execution of such intent. Defense of failure of consideration good against a mere holder. Bade v. Feay, 63 W. Va. 168, 61 S.E. 348 (1907).

If the thing for which the note was given failed, this could be shown by the way of defense in whole or in part, as the case happens to be. In most jurisdictions the note is regarded as having had no effect beyond that of postponing the right of action on the original contract, until the expiration of the period of credit stipulated in the note. The note was not payment in advance for the property. A note is not in this state regarded as absolute payment of the debt for which it is given unless there is an express stipulation to that effect. Acme Food Co. v. Older, 64 W. Va. 255, 66 S.E. 235 (1908).

A deed of trust was executed to secure a nonnegotiable instrument. As there was not consideration for the note, the deed of trust secured nothing. If the notes represent nothing, it would be inequitable to allow an enforce-

One who purchases a note with knowledge of breach of warranty of quality of merchandise for which the note was given is not a good faith purchaser and is subject to the defense of failure of consideration. Buckeye Saw Mfg. Co. v. Rutherford, 65 W. Va. 395, 64 S.E. 444 (1909).

The note in question given by a son to mother. In an action upon the note, the maker asserted the defense of lack of consideration. The mother had paid out money for the education of deceased son without any contract or understanding that he would repay her, and she did not expect any repayment. Years afterwards, in consideration of money which she had so paid, he voluntarily gave her this note. "We have several times decided in effect that where a son claims for service rendered the father cannot recover, unless he proves an express contract on the fact clearly shown an expectation or intention on the part of the father to pay for the service. The law does not raise or imply a promise to pay for services or maintenance or education of a son by a parent on which an action can be based." An instrument was not in the hands of a holder in due course, the defense of lack of consideration was allowed. Gooch v. Gooch, 70 W. Va. 38, 78 S. E. 56 (1910).

One may recover the face amount of the negotiable instrument even though he purchased the instrument at a discount. Wiley v. Martin, 73 W. Va. 228, 80 S.E. 879 (1913).

In an action upon a negotiable instrument, the defense of failure or partial failure of consideration is not allowed against a holder in due course. Finance Co. v. Schroeder, 74 W. Va. 67, 51 S.E. 552 (1914).

Where gambling furnished the consideration for a note, even a holder in due course is barred from recovery on the instrument. Twentieth Street Bank v. Jacobs, 74 W. Va. 525, 82 S.E. 320 (1914). By a later enacted statute, a negotiable instrument for which the consideration was a gambling transaction is valid as against a holder in due course. By statute gambling is no longer a defense against a holder in due course.

"It is well settled law that, though criminal proceedings have been begun and be pending against the wrongdoer for the crime, one whose money or property has been embezzled, or fraudulently procured, may contract with such wrongdoer for repayment or satisfaction of the loss, and take security therefor, without invalidating such contract, unless there be included therein and as part consideration therefor some promise or agreement, express or implied, that such prosecution shall be suppressed, stifled or stayed." Board of Education v. Angel, 75 W. Va. 747, 86 S.E. 747 (1915).

As long as a note remains in the hands of the payee who brings an action thereon, want of consideration may be shown as a defense to such action. It is not necessary to aver or prove that valuable consideration had been received by the defendant. The note prima facie imported a valuable consideration. First Nat'l Bank v. Freeman, 89 W. Va. 344, 109 S.E. 726 (1921).

The defendant denies the existence of such consideration, claims that the settlement and subsequent execution of the notes was done under misapprehension of fact as to whether or not he was liable on the original note, whereas he later learned that there was affirmative evidence that the notice of protest had not been sent to or received by him in any way; and, therefore, there was not consideration for the settlement and execution of the negotiable instrument upon which this suit was brought. Held, the compromise afforded sufficient consideration for the note sued on. Gaddis v. Chilton, 101 W. Va. 28, 131 S.E. 719 (1926).

The defendant contends that the note sued on was never a binding obligation, that such note was given by him at the same time other notes were
given by other stockholders to the corporation as a means of concealing what was in fact a dividend then declared and paid by the plaintiff to its stockholders; that his stock subscription account was credited with payment in full; and that defendant's decedent did not receive value from the said corporation for the note so executed. This contention, if sustained by the proof, would defeat recovery. This defense may be given in evidence under general issue and need not be specially pleaded. Coal Co. v. Hawley, 102 W. Va. 205, 135 S.E. 7 (1926).

Absence or failure of consideration is a defense against any person not a holder in due course. The plaintiff acquiring the note after maturity did not qualify as a holder in due course. The defendant is therefore entitled to make the defense of absence of consideration against the plaintiff. "It is well established principle of the law, pertaining to bills of exchange and promissory notes, that in all cases in which the consideration is open to inquiry, parol evidence is admissible to show the want, failure or illegality of consideration." Federal Sav. & Trust Co. v. Davis, 104 W. Va. 235, 139 S.E. 703 (1927).

"Services rendered and benefits conferred, under circumstances rendering lack of expectation to be compensated therefor highly probable, impose no obligation to make such compensation, in the absence of proof of an antecedent or contemporaneous promise thereof, under which the services were rendered or the benefits conferred." Williams v. Moss, 114 W. Va. 488, 172 S.E. 529 (1933).

As between the maker and payee, the consideration or the lack of consideration for the giving of the instrument may be shown by parol testimony. Shannon v. Lampton, 115 W. Va. 765, 177 S.E. 776 (1934).

A note or bond, executed by bank directors or stockholders, to make good an impairment of a bank's assets, so that the bank may continue in business, is based on valid consideration. Tyler v. Reynolds, 120 W. Va. 601, 197 S.E. 735 (1938).

In an action on a contract a defense of failure or partial failure of consideration must be grounded on a special plea which fairly puts the plaintiff on notice of that defense. Absence of failure of consideration is a defense against one not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount of otherwise. Attorney's Nat'l Clearing House v. Greever, 121 W. Va. 601, 5 S.E.2d 601 (1939).

It was averred that there was no consideration for the note and no quantum meruit was involved. So, the controversy must be appraised solely in respect of the note, and that means, of course, either allowance or disallowance thereof in toto. Want of consideration embraces transactions where no consideration was intended to pass. Failure of consideration means something presumably of value moving from the obligee to the obligor was intended but did not materialize. Valid consideration supporting a note need not be of balanced value with the instrument. Rauchenbach v. McDaniel, 122 W. Va. 632, 11 S.E.2d 852 (1940).

The extension of credit to a third person is sufficient consideration to support the enforceability of a promissory note. Jollifee v. First Nat'l Bank, 128 W. Va. 273, 27 S.E.2d 710 (1943).

A promissory note transferred by a maker to a payee as a gift is not enforceable by the payee against the maker. Peters v. Altizer, 127 W. Va. 92, 31 S.E.2d 555 (1944).


Where there was an obligation to pay for services rendered the value of which the maker of the note placed on the services rendered by the

Section 3-409. Draft Not an Assignment.

(1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.

(2) Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance.

Section 3-409 is a consolidation of sections 127 of the NIL, which relates to bills of exchange in general, and section 189 of the NIL which relates specifically to checks. Under the NIL neither a bill of exchange nor a check in itself constitutes an assignment of the drawer's funds. A drawee is neither liable on a check nor a bill of exchange prior to his in the absence of an acceptance of the instrument. It appears that both under the NIL and the UCC an assignment pro tanto of one's funds or claim may be made. Before an instrument will constitute an assignment pro tanto of funds the intent to make an assignment must be clearly shown.

The phrase is section 189 of the NIL: "and the bank is not liable to the holder, unless and until it accepts or certifies the check," is an unfortunate choice of words and is not found in the UCC. It is clear that the drawee is not liable on a bill or check until he has accepted it, but the NIL fails to recognize that the drawee might have other liable than that of an acceptor. Under section 4-302 the drawee bank may be held liable for late return of a check, for if the drawee bank does not settle promptly for the check or return it the bank may be liable to the holder of the item.

Subsection (2) is new. The purpose of subsection (2) is to make it clear that any liability which the drawee may have apart from his liability upon the instruments remains unaltered. For example, the drawee might be held liable for fraud in representing that he had accepted the instrument, when in fact he had not, or for breach of his obligation under a letter of credit.
Section 3-410. Definition and Operation of Acceptance.

(1) Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery or notification.

(2) A draft may be accepted although it has not been signed by the drawer or is otherwise incomplete or is overdue or has been dishonored.

(3) Where the draft is payable at a fixed period after sight and the acceptor fails to date his acceptance the holder may complete it by supplying a date in good faith.

Section 3-410 does not retain the doctrine of virtual and collateral acceptances of sections 134 and 135 of the NIL. Sections 134 and 135 of the NIL are contrary to section 17 of the English Bills of Exchange Act, in that they authorize "virtual" and "collateral" acceptances. A virtual acceptance of a bill is a written promise to accept a draft drawn or to be drawn, while a "collateral acceptance" is an acceptance by another instrument. While the general rule is that no person can be held liable upon a negotiable instrument whose signature does not appear thereon, it is recognized by sections 134 and 135 of the NIL that a drawee can become bound on a bill or check by virtual acceptance or collateral acceptance. The use of virtual acceptances and collateral acceptances might have been desirable at a time when communications between distant points was slow and difficult but their use is no longer needed nor desirable. As the reason for the use of both virtual acceptances and collateral acceptances has failed their usage is not authorized by the UCC. The elimination of recognition of virtual acceptance and collateral acceptances does not mean that the drawee cannot be held liable on his contract to accept or in tort for the destruction of or wrongful retention of a bill as regulated by sections 3-409 and 3-419 of the UCC. In these instances the liability of the defendant is not as an acceptor of the bill or check but upon the contract to accept or in tort for conversion of the bill.

It is interesting to note that under the UCC the signature alone of the drawee upon a bill of exchange constitutes an acceptance, the acceptor being primarily liable on the instrument.
without the use of such words as "accepted," "certified," or "good." If the drawee by appropriate word indicates that he is dishonoring the instrument, his signature on the instrument will not be deemed an acceptance on his part.

The last sentence of subsection (1) is a deviation from the ordinary rules of contract law in that the drawee's acceptance becomes effective when the drawee notifies the holder or gives notice of his acceptance in accordance with the holder's direction. The general rule of contract law is that one has no liability on an instrument prior to the delivery of the instrument is not applied to the acceptor of a bill of exchange. On this point the Code is in accord with section 191 of the NIL.

Under subsection (3) an undated draft which is by its terms payable a designated number of days after date is an incomplete instrument. The acceptor of such a draft may complete the instrument by inserting a date, and if he does not the holder may complete the acceptance according to the terms of the draft by supplying the due date. The holder is permitted to insert any date so long as he does so in good faith.

Section 3-411. Certification of a Check.

(1) Certification of a check is acceptance. Where a holder procures certification the drawer and all prior indorsers are discharged.

(2) Unless otherwise agreed a bank has no obligation to certify a check.

(3) A bank may certify a check before returning it for lack of proper indorsement. If it does so the drawer is discharged.

Subsection (1) is in accord with section 188 of the NIL in providing that if a check is certified at the request of party holding the check, all prior parties thereon are released of liability. One who indorses a check after the drawee bank has certified the instrument incurs the liability of an indorser. Where the drawer requests the bank to certify his check, the drawer's liability on the check is not affected by the certification.

Subsection (2) has no counterpart in the NIL but is in accord with prior decisions. In the absence of contract a bank is under
no duty to certify a check. The refusal of a bank to certify a check is not a dishonor of the instrument. Where a bank had agreed to certify a check, the bank may be liable for breach of its contract to certify the check, in which case the bank's liability is for breach of contract to certify, not upon the check. Under the UCC there can be no acceptance before the drawer places his signature upon the instrument (Section 3-409(1)).

Subsection (3) is new. By this subsection a bank is given authority to certify a check for the purpose of protecting the drawer from contingent liability while returning the instrument to obtain the proper indorsement of a prior party.

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A certification of a check by the drawee bank is equivalent to an acceptance. Since by certification a bank becomes primarily liable on the check, presentment for payment is not necessary to charge the bank. As presentment is not necessary to charge the bank the statute of limitations operates from the date of the certification. The West Virginia version of section 70 of the NIL reads: "The statute of limitations shall not begin to run against the holder of a certificate of deposit or a bank note until after presentment and demand for payment." The failure of the legislature to include certified checks in the exceptions to section 70 must be taken as conclusive of the legislative will that the statute of limitations should run against the holder of a certified check in favor of the bank from the date of certification. Weaver v. Harrell, 115 W. Va. 409, 176, S.E. 608 (1934).

Section 3-412. Acceptance Varying Draft.

(1) Where the drawee's proffered acceptance in any manner varies the draft as presented the holder may refuse the acceptance and treat the draft as dishonored in which case the drawee is entitled to have his acceptance cancelled.

(2) The terms of the draft are not varied by an acceptance to pay at any particular bank or place in the continental United States, unless the acceptance states that the draft is to be paid only at such bank or place.

(3) Where the holder assents to an acceptance varying the terms of the draft each drawer and indorser who does not affirmatively assent is discharged.

Section 3-412 incorporates into one section all of those portions of the NIL which relate to qualified and conditional acceptances. Under the NIL and the UCC the holder of a bill who
presented it to the drawee for acceptance is entitled to an unqualified acceptance from the drawee, that is an acceptance by the drawee in accord with the terms of the instrument as drawn. If the holder is refused an unqualified acceptance he may treat the bill as dishonored and proceed to perfect his rights against those parties secondarily liable on the instrument by the way of giving due notice of the dishonor. If the holder of the instrument takes a qualified acceptance of the instrument from the drawee, the drawer and all indorsers who did not consent to the holders taking of the qualified acceptance are discharged of liability on the bill. Under this section of the UCC, unlike section 142 of the NIL, the assent of the drawer and indorsers to the taking by the holder of a qualified acceptance must be affirmatively expressed. The mere failure on the part of the drawer or indorsers to object is not, under the Code, to be taken as their assent to the holder’s act in accepting a qualified acceptance.

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"Defendants were not notified of the conditional acceptance of the order, nor of its nonpayment, until this action was instituted in the justice’s court more than seven years after acceptance. . . . The acceptance being qualified the drawers were entitled to reasonable notice thereof, and there is no pretense that they were ever notified, nor that they ever either expressly or impliedly authorized such acceptance, or thereafter assented to it. They knew nothing of it, and, after the lapse of a reasonable time after the bill was issued, were justified in assuming it had been paid. . . . The relation of acceptor and drawer is that of principal and surety, or of maker and indorser of a negotiable note. After acceptance the drawer is not primarily liable, and the drawee, or holder, of such paper is bound to exercise reasonable diligence to collect from the acceptor, on pain of losing his remedy against the drawer.” Lewis, Hubbard & Co. v. Morton, 80 W. Va. 137, 92 S.E. 252 (1917).

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

(1) The maker or acceptor engages that he will pay the instrument according to its tenor at the time of his engagement or as completed pursuant to Section 3-115 on incomplete instruments.

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

(3) By making, drawing or accepting the party admits as against all subsequent parties including the drawee the existence of the payee and his then capacity to indorse.
Subsection (1) is concerned with the extent of the acceptors liability upon a bill which had been altered after its execution and prior to the acceptance. By authority of this subsection the one who accepts a bill which had previously been altered is liable on his acceptance according to the extent of the tenor of the instrument at the time of the acceptance and his liability is not limited to the original tenor of the instrument. The acceptor is protected in part by section 3-417 of the UCC by the warranty made to him by certain parties that the instrument had not previously been materially altered.

In considering the effect of this subsection, consideration should also be given to the following sections of the UCC: 3-115, 3-406, 3-407, 3-412, and 3-418.

From the language of this section it is clear that the acceptor of a bill and the maker of a note are primarily liable thereon. Proper presentment, dishonor and notice of dishonor are not conditions precedent to the liability of one primarily liable, but are necessary to fix the liability of drawers and indorsers.

Subsection (2) merely provides that the drawer's liability on a bill of exchange is secondary. Drawers and indorsers do not obligate themselves to pay the instrument in every event as does a maker of a note. The drawer and indorsers liability on an instrument is conditional. The drawer agrees only to be liable upon the instrument in the event it is dishonored and necessary notice of dishonor or protest is given him. Subsection (2) provides that a drawer may even disclaim this liability by drawing the instrument without recourse. This subsection is in accord with section 61 of the NIL.

Subsection (3) is likewise in accord with section 61 of the NIL. Under this subsection the party making, drawing or accepting the instrument admits the existence of the payee and his then capacity to indorse the instrument. Under the UCC this admission not only benefits subsequent holders of the instrument but also benefits the drawee. There is a definite question under the NIL as to whether the admissions by the drawer extended to and were for the benefit of the drawee. The UCC clarifies this point.

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A drawer who makes payment on a bill containing the forged signature of the drawer to a bonafide holder cannot recover the money so paid from the person to whom payment was made. Bank of Williamson v. McDowell County Bank, 66 W. Va. 545, 66 S.E. 605 (1909).
A qualified acceptor is liable according to the terms of his qualified acceptance. Lewis, Hubbard & Co. v. Morton, 80 W. Va. 137, 92 S.E. 252 (1917).

A holder of a check cannot recover from the drawer until it has been presented for payment and notice of non-payment given the drawer. Schumback v. Williams, 95 W. Va. 291, 120 S.E. 660 (1923).

The instrument in question being nonnegotiable the assignor thereof warrants its validity, his right to assign, that it is subsisting unpaid debt, and the solvency of the debtor. While suit may be brought against the maker at any time after maturity and within the period of limitations, a right of action does not arise against the assignor until legal recourse has been exhausted against the maker, or he has become insolvent, or from some other cause it is made to appear that a suit against him would be unavailing. Stewart v. Tams, 108 W. Va. 536, 155 S.E. 660 (1930).

While it is the general rule that all the makers of a joint note should be made parties to an action on the note it does not require the joiner of one who is without the jurisdiction of the court. Jones v. Boyles, 109 W. Va. 366, 154 S.E. 877 (1930).

Drawer of a check may institute an action against the drawee who has improperly debited the drawer's account. Hays v. Lowndes Sav. Bank & Trust, 118 W. Va. 360, 190 S.E. 543 (1937).

One Kelly, as principal, executed a note for $200 with Wolfe and Fisher as sureties. All three signed on the face of the note. Several renewal notes had been given from time to time. The last renewal note contained on it the signatures of Kelley and Wolfe. In the absence of express agreement, the giving of a renewal note is not satisfaction of the original. In a suit in equity for contribution, Fisher was required to make contribution to the sum paid by Wolfe. Wolfe v. Kelley, 119 W. Va. 428, 194 S. E. 77 (1937).

Section 3-414. Contract of Indorser; Order of Liability.

(1) Unless the indorsement otherwise specifies (as by such words as "without recourse") every indorser engages that upon dishonor and any necessary notice of dishonor and protest he will pay the instrument according to its tenor at the time of his indorsement to the holder or to any subsequent indorser who takes it up, even though the indorser who takes it up was not obligated to do so.

(2) Unless they otherwise agree indorsers are liable to one another in the order in which they indorse, which is presumed to be the order in which their signatures appear on the instrument.

Under subsection (1) the liability of an indorser extends to any holder of the instrument, whether or not he be a holder for value, and to any indorser who takes up the instrument whether or not he was obligated to do so. One indorsing an instrument may disclaim indorser's liability on the instrument by preceding his indorsement with words of disclaimer such as "without recourse." This results in what is called a qualified indorsement.
In addition to the secondary liability imposed by this subsection upon an indorser is his liability as a warrantor. The liability of a warrantor is upon every person who transfers a negotiable instrument as provided by section 3-417 of the UCC. The warranties of one transferring negotiable paper are set forth in section 3-417 of the Code. For the total liability of an indorser see both sections 3-414 and 3-417.

The indorsers liability under subsection (1) is limited to an determined by the amount specified by the terms of the instrument at the time of his indorsement. If a person indorses an instrument after it had been altered his liability is in accord with the altered sum.

Subsection (2) clarifies the order of liability of indorsers. This subsection creates two presumptions: One, that the indorsers are liable to one another in the order in which they in fact indorsed the instrument. Two, that the indorsers did in fact indorse the instrument in the order in which their names appear upon the instrument. Parol evidence is admissable under the Code, as under the NIL, to prove that the indorsers intended, as between themselves, to incur liability in a different order than that in which their names actually appear on the instrument.

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An agreement for a joint indorsement need not be formal, but may be inferred from facts and circumstances. Contribution may be had by one joint accommodation indorser against another joint accommodation indorser. Plumley v. First Nat'l Bank, 76 W. Va. 635, 87 S.E. 94. See Morris, Accommodation Parties to Negotiable Instruments, 61 W. Va. L. Rev. 83 (1958).

A negotiable instrument made payable to the order of several persons, not partners, can only be transferred by a joint indorsement of all of them; but when it is made to two or more persons as partners, it may be transferred by the indorsement of any one of them. Dotson v. Swaggs, 77 W. Va. 372, 87 S.E. 460 (1915).

One who places his name upon a negotiable instrument other than as maker, drawer or acceptor is deemed to be an indorser, unless by appropriate words he indicates an intention to be bound in some other capacity. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied. The facts of this case showed a waiver after maturity. Thompson v. Curry, 79 W. Va. 771, 91 S.E. 801 (1917).

An indorsement in blank is made by simply writing one's name across the back unqualified by any writing in connection therewith. One who indorses an instrument is denied the right to prove that there was a contemporaneous parol understanding or agreement between the indorser and indorsee that the indorser's liability was to be different from that which the contract of indorsement imports. An indorser may show that, as between him and the party with whom he dealt, or one charged with knowledge of their transaction, that it was delivered upon conditions, and those conditions have
not been performed, hence no liability upon him, or that it was procured from him by fraud, or that the holder procured it from him without consideration. An indorser may plead such conditional delivery as a defense as well as a failure of consideration. Cole v. George, 86 W. Va. 346, 103 S.E. 201 (1920).

Where one of several joint indorsers, contrary to the legal effect of his indorsement, asserts that his contract with his co-indorsers was that he was to be bound differently from the legal import of his indorsement, as set forth under section 68 of the NIL, the burden is upon him to establish such fact by the preponderance of the evidence, without which he should not prevail. McKnown v. Silver, 99 W. Va. 78, 128 S.E. 134 (1925).

A note was made payable to "Lyda & Ridinger" and on the back thereof are the indorsements "Lyda & Ridinger, by C. F. Lyda" and below "C. F. Lyda." It may be said that there is a presumption of partnership by the use of two names joined by the character "&." Any member of a trading firm has implied authority to transfer paper payable to the firm's order by an indorsement in the firm's name. In this case there was nothing in the pleadings or on the face of the paper to indicate that C. F. Lyda was a member of the firm or that C. F. Lyda was the "Lyda" mentioned as payee. If there is not a partnership both payees must indorse in order to negotiate the paper. Plaintiff was denied right to recover on the instrument. Fink v. Scott, 105 W. Va. 523, 143 S.E. 305 (1928).

A person who transfers, without recourse, for valuable consideration, a promissory note, whether due or not, impliedly warrants, among other things, that he has done nothing and will do nothing to prevent the assignee from collecting it. Hoge v. Ward, 109 W. Va. 515, 155 S.E. 644 (1930).

"A contract of indorsement, when made, is neither a primary nor an absolute one. It is secondary and conditional. It is but an agreement for future liability upon and after the happening of certain contingencies." Ohio Valley Builders Supply Co. v. First Nat'l Bank, 110 W. Va. 320, 158 S.E. 181 (1931).

Where a person signs his name, in blank, on the back of a nonnegotiable note before delivery, he may be held as maker or guarantor, at the election of the holder, in the absence of special agreement. The fact that the indorser is sued jointly with the makers is sufficient to show that the holder elected to treat the indorser as maker. Fayetteville Building & Loan Assm. v. Crouch, 115 W. Va. 651, 177 S.E. 639 (1934).

The breach of a mandatory warranty of indorsement is a breach of a written contract and is governed by the 10 year statute of limitations of a written contract. Houston v. Lawhead, 116 W. Va. 652, 182 S.E. 780 (1935).

The obligation of an indorser and a maker is different. They may be sued together under Code, 5-8-7. Their obligation is not joint so that a judgment in favor of one could be pleaded in bar of a judgment against the other. Charleston Nat'l Bank v. Hulme, 117 W. Va. 790, 188 S.E. 225 (1938).

An accommodation indorser of negotiable paper is relieved of liability unless at maturity the instrument is presented for payment and dishonored, and notice of dishonor given to the indorser. The indorser's right to require proper presentment and notice of dishonor as a condition precedent to the indorser's liability may be waived. Any statement or action on the part of the indorser which indicates conclusively that he knows the date of payment and that it will not be paid, and he intends to continue as security, is sufficient to import an implied waiver. Insolvency of the maker does not dispense with the requirement of presentment and notice of dishonor. If the indorser's conduct renders it impossible for the maker to pay the note, an implied waiver of presentment and notice of dishonor occurs. Rinsehart v. Lucas, 118 W. Va. 466, 180 S.E. 772 (1937).

The indorser who pays and takes a note and thereafter prosecutes a chancery cause to obtain a money decree against his accommodation do-indors-
er for his pro rata shares of the paid obligation, such suit will in equity be regarded as being upon the note itself. The statute of limitations applying to written instruments is applicable. Cost v. MacGregory, 124 W. Va. 204, 19 S.E. 2579 (1942).


Section 3-415. Contract of Accommodation Party.

(1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

(2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.

(3) As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

(4) An indorsement which shows that it is not in the chain of title is notice of its accommodation character.

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

Where one places his indorsement on a negotiable instrument as a surety for another, the question is present whether his liability is to be governed by the laws of suretyship or negotiable instruments. One who lends his name to a negotiable instrument of another, whether by the way of a co-maker or indorser, is in fact a surety for the principal obligor. It is a general rule of suretyship law that a binding extension of time granted to the principal debtor releases the gratuitous surety unless he has assented to the extension of time or unless the creditor expressly reserved his rights against the surety. Under the NIL a binding extension of time granted to the principal debtor by the holder of the instrument releases those parties secondarily liable on the instrument. Such an extension of time does not release those primarily liable. In the event we have an accommodation co-maker of a negotiable
instrument and the holder grants to the principal obligor a binding extension of time should the rules of suretyship or of negotiable instruments be applied to determine the effect of the extension upon the liability of the accommodation co-maker? An accommodating party is a surety whether he placed his name on the instrument as a co-maker or indorser. In the past the courts of most states have held that the rules relating to negotiable instruments take priority over the rules relating to suretyship where one is a surety on a negotiable instrument. Under this view an accommodation co-maker of a negotiable instrument, who is a surety, would not be relieved of liability because of a binding extension of time had been granted to the principal obligor. Under subsection (3) of the UCC a co-maker/surety may assert as a defense against one not a holder in due course or a holder in due course with knowledge that the defendant was an accommodation party those defenses which he might have as a defense to a simple contract. An accommodation indorser as any other indorser is only liable after due presentment, dishonor and proper notice of dishonor. Subsection (4) charges a purchaser of an instrument with an indorsement which is not in the chain of title of notice of the accommodation character of such indorsement.

Subsection (5) retains the rule that an accommodation party cannot be held liable by the party that he accommodated. It also recognizes the right of an accommodating party to maintain a bill for exonereation, contribution, reimbursement and subrogation in addition to any other rights which may be conferred upon him by statute.

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Before the adoption of the NIL one who placed his name upon a negotiable instrument as an accommodation indorser before delivery could be held as a maker. Kidd v. Beckley, 64 W. Va. 80, 60 S.E. 1089 (1908).

Where a note is made payable to an agent who indorses the instrument and passes it to his principal such agent is an accommodation indorser for his principal. Buckeye Saw Mfr. Co. v. Rutherford, 65 W. Va. 395, 64 S.E. 444 (1909).

Accommodation indorsers are prima facie liable to one another in the inverse order of their endorsements in the absence of agreement to be liable jointly or in some other order. Flumley v. First Nat'l Bank, 76 W. Va. 635, 87 S.E. 94 (1915).

The party for whose benefit accommodation paper has been made acquires no rights against the accommodation party who may set up the defense of want of consideration. First National Bank of West Union v. Freeman, 83 W. Va. 477, 98 S.E. 558 (1919).
As between accommodation makers of a note, the presumption is that they are co-sureties, and as such liable to contribution to one of their number who discharges the obligation. Huffman v. Manely, 85 W. Va. 503, 98 S.E. 613 (1919).

W. P. Co. signed a note on its face and defendants W and N on the back thereof before the note was delivered by all the parties to D, the plaintiff. Plaintiff alleged that all being interested in the matter for which the note was given, they were all liable on the note as makers; that even as indorsers their relationship to the transaction would not entitle them to notice of protest. Plaintiff wanted to show that the note was for W's and N's accommodation and that they were liable in a primary capacity since the note was for their accommodation. Court said plaintiff should have been permitted to show this, citing sections 80 and 115 of the NIL. Dankmer v. Wheeling Printing Co., 103 W. Va. 40, 136 S.E. 690 (1927).

Section 192 of the NIL defines one primarily liable as: "... the person who, by the terms of the instrument, is absolutely required to pay the same." Section 29 of the NIL states that an accommodation party is liable on the instrument to a holder for value, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party. The court stated: "... the obligation of the accommodation party is absolute to pay the holder on the basis of what is written on the paper." The relation of the co-makers to each other is of no consequence to the holder. The court held that an extension of time granted to the principal debtor did not have the effect of releasing an accommodation co-maker of a negotiable instrument. The NIL takes priority over rules of suretyship as to the liability of one signing a negotiable instrument. Marshall County Bank v. Fonner, 113 W. Va. 451, 168 S.E. 375 (1933).

An accommodation indorser of a negotiable note is relieved of liability unless at maturity of the note it is properly presented for payment, dishonored and proper notice of dishonor given to the indorser. Rinehart v. Lucas, 118 W. Va. 466, 180 S.E. 772 (1937).

An accommodation indorser of negotiable promissory note who has paid the note or judgment rendered thereon may proceed against the party accommodated for the sum paid. Hunter v. Monroe County Lumber Co., 123 W. Va. 479, 18 S.E.2d 618 (1941).

An accommodation indorser who has paid the note has the right of compensation therefor. The letters "Sec." appearing after his name which the plaintiff understood to mean "Security." The question was presented as to whether the rules of suretyship are applicable to the case or whether it is governed by the NIL. The court said: "... in the case of Marshall County Bank v. Fonner... may be distinguished from the case at bar. In that case there was no qualification to the signatures of the alleged accommodation makers, and from the statement of facts it appears at the time the note was delivered to plaintiff, he knew that the accommodation parties were accommodation makers, which precludes any idea that they were gratuitous sureties. We disapprove of such parts of that opinion as would indicate that the law of suretyship where the relation of principal and surety is shown under proper evidence does not apply to a negotiable instrument. We are of the opinion that the defendant is a gratuitous surety within the meaning of the general law of surety, as it existed prior to the enactment of Chapter 98A, Code, 1923, and not an accommodation party, as defined by Code, 1931, 49-2-6, and, as such, on the question whether a discharge either in toto or pro tanto was effective, the general law of suretyship should be applied in appraising his rights and liabilities." As there has been a modification of the contract the surety was released. Keblegard Co. v. Maxwell, 127 W. Va. 630, 34 S.E.2d 116 (1945).

Section 3-416. Contract of Guarantor.

(1) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.

(2) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

(3) Words of guaranty which do not otherwise specify guarantee payment.

(4) No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others.

(5) When words of guaranty are used presentment, notice of dishonor and protest are not necessary to charge the user.

(6) Any guaranty written on the instrument is enforceable notwithstanding any statute of frauds.

Section 3-416 sets forth the liability of a guarantor upon a negotiable instrument.

Subsection (1) sets forth the law applicable to a "guarantor of payment." An indorser who "guarantees payment" waives the right to have the instrument properly presented, dishonored, and proper notice of dishonor as conditions precedent to liability on his part. He is by law in effect a co-maker of the instrument and liable as such. Words of guaranty in an indorsement do not affect the character of an indorsement as an aid to negotiating an instrument, it is still an indorsement for the purpose of passing title. (Section 3-202(4)).

Subsection (2) is concerned with "guaranty of collection." A guarantor of collectibility waives the requirement of proper pre-
sentiment, dishonor and proper notice of dishonor as conditions precedent to his liability. One who indorses in such terms is only liable after the claim against the maker or acceptor has been reduced to judgment and execution thereon returned unsatisfied, or it is shown that the maker or acceptor is insolvent and it would be useless to proceed against him. Such an indorsement is effective for passing title to the instrument under Section 3-202(4).

Subsection (6) is only of importance in those states wherein the statute of frauds requires a statement of the consideration to be incorporated into any agreement to answer for the debt, default or miscarriage of another in order to be valid. Under this subsection such an agreement to answer for the debtor default of another present on a negotiable instrument would be enforceable even though the statement of the consideration for the guaranty was not made.

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The instrument contained the blank indorsement of the defendant. The defendant asserted that he was not liable because at the time he indorsed the notes to the plaintiff it was agreed between him and the plaintiffs that he should not be liable thereon, and should not be sued thereon until the estate of the maker had been exhausted. The court held that he could not show that he intended to be merely a guarantor for payment of the notes as this would violate the established rule denying the right of party to an instrument to vary terms or conditions thereof by parol evidence. Cole v. George, 86 W. Va. 346, 103 S.E. 201 (1920).

Section 3-417. Warranties on Presentment and Transfer.

(1) Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that

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

(b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith

(i) to a maker with respect to the maker's own signature; or

(ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or
(iii) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer’s signature was unauthorized; and

(c) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith

(i) to the maker of a note; or

(ii) to the drawer of a draft whether or not the drawer is also the drawee; or

(iii) to the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance provided “payable as originally drawn” or equivalent terms; or

(iv) to the acceptor of a draft with respect to an alteration made after the acceptance.

(2) Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that

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

(b) all signatures are genuine or authorized; and

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

(d) no defense of any party is good against him; and

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

(3) By transferring “without recourse” the transferor limits the obligation stated in subsection (2) (d) to a warranty that he has no knowledge of such a defense.

(4) A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this section, but if he makes such disclosure warrants only his good faith and authority
The liability of one who transfers an instrument, receives payment or receives an acceptance of a bill is expressly defined by the way of warranties. The liability of an indorser other than for breach of warranty is set forth in section 3-414. All remedies available for breach of warranty, such as the right to maintain an action for damages or suit for rescission, are available against one who has breached a warranty under this section.

Subsection (1) is new. It impresses the liability of a warrantor upon a person who receives payment, or acceptance or who is a prior transferor of the instrument. The warranties extending to and for the benefit of the party paying or accepting the instrument.

Subsection (1)(a) retains the doctrine set forth in the case of Canal Bank v. Bank of Albany, 1 Hill 287 (N. Y. 1841) to the effect that one who pays an instrument bearing a forged indorsement has a cause of action against the party who received payment to regain the sum paid. A forged indorsement is inoperative to pass title to a negotiable instrument. Where the indorsement which is forged is one which is necessary in order to negotiate the instrument no title would pass by such forged indorsement. One who receives the proceeds of an instrument but does not have title to the instrument is not entitled to retain the proceeds received for the instrument. The remedy used by the drawee in the Canal Bank case to recover back the payment made was assumpsit for money had and received. The defendant was the party to whom the bank had made payment. Under the general rules relating to assumpsit, it would seem that the remedy of assumpsit for money had and received would not be available against one who indorsed subsequently to the forged indorsement and with whom the bank had not dealt, such party would have no funds belonging to the drawee bank. There are two schools of thought as to whether a drawee has the right to maintain an action against an indorser for breach of warranty under section 65 or 66 of the NIL. The majority view appears to be that the warranties of an indorser under sections 65 or 66 do not extend to the drawee. The drawee who pays on a bill of exchange does not qualify as a holder as defined by section 191 of the NIL. The right of the drawee to recover the sum paid from the party with whom he dealt is limited to instances in which the drawee had paid in good faith. Under subsection (1)(a) the drawee who paid the instrument in good faith may proceed by the way of an action for
breach of warranty to recover the sum paid where an indorsement on the instrument has been forged. The drawee is not limited to recovery only from the party with whom the drawee had dealt, but may recover from a prior transferor of the instrument.

Subsection (1)(b) is applicable only to the instance in which the drawer's signature had been forged. Subsection (1)(a), as discussed above, relates to the effect of a forged indorsement on a negotiable instrument. Subsection (1)(b) retains the doctrine of the case of Price v. Neal, 3 Burr. 1354 (1762), in which it was held that the drawee on paying or accepting a bill admits the genuineness of the drawer's signature which it cannot subsequently deny as against a good faith holder for value.

The reason the courts allow the drawee, who had paid an instrument on which an indorsement had been forged, to recover the sum improperly paid and in not allowing the drawee to recover back the sum paid where the drawer's signature had been forged is that the drawee is charged with the duty of recognizing the genuineness of the signature of its depositor, but is not charged with the obligation to recognize the signature of an indorser. The drawee is more likely to have a specimen of the signature of those authorized to draw bills than is the drawee to have a specimen of every conceivable indorser. For this and other reasons the drawee is not charged with the responsibility of recognizing a forged indorsement.

Under subsection (1)(b) the party receiving the acceptance, payment or who has made a prior transfer of the instrument warrants to the drawee that he has no knowledge that the signature of the drawer is forged. The warranty under this subsection refers to knowledge not to fact. Thus if the party who receives payment or a prior party who transfers the instrument had no knowledge that the drawer's signature was forged such party has not breached this warranty to the drawee and the drawee as against such party cannot repudiate its payment and recover back the sum paid.

A holder in due course of an instrument does not make such warranties to the maker whose own signature has been forged, to the drawer with respect to the drawer's signature whether the drawee and drawer are the same person or not, not to the acceptor if the holder in due course acquired the instrument after it had been accepted, or obtained the acceptance without knowledge that the drawer's signature was in fact forged.
Subsection (1)(c) settles the issue as to whether a drawee who has paid an instrument which had been previously altered (i.e. amount raised) is entitled to recover back the sum paid in excess of the original tenor of the instrument when the alteration occurred subsequent to the drawee’s acceptance. The drawee is not permitted to recover back the sum paid over the amount of the original tenor of the bill even though the acceptance provided “payable as originally drawn.” The party receiving the acceptance or payment or a prior transferor of the instrument does warrant to the drawee that the instrument had not been materially altered. But, when the alteration is made after the acceptance or certification the drawee is charged with the responsibility of recognizing any alteration which took place subsequent to his acceptance or certification. A holder in due course acting in good faith does not warrant against a material alteration to the maker of a note or to the drawer of a bill.

Subsection (2) provides that any transferor of negotiable paper for consideration, whether by delivery alone or indorsement and delivery, warrants that he has good title to the instrument or is authorized to obtain payment or acceptance; that all signatures are genuine or authorized; that the instrument has not been materially altered; that no defense of any party is good against him; that he has no knowledge of any insolvency proceedings instituted with respect to the maker, acceptor, or drawer of an unaccepted instrument. If the transfer is by way of indorsement and delivery the warranties referred to above extend to all subsequent holder who takes the instrument in good faith. This is true whether the indorsement be general or qualified. If the transfer is by delivery alone, the transferor’s liability extends only to his transferee.

Subsection (2)(d) creates a cause of action for the holder of an instrument against one who transfers an instrument while it was subject to a defense in the hands of the transferor even where such defense may not be asserted successfully against the transferee. For example if the transferor would have been subject to a personal defense before he transferred the instrument, he is liable for breach of warranty to the transferee even though the transferee is a holder in due course and takes the instrument free of the assertion of a personal defenses. This is for the protection of the transferee as he did not expect to be put to the burden of collecting against an asserted defense, personal or real nor to be put
to the burden of proving himself to be a holder in due course. Subsection (3) limits the warranty of the qualified indorser to one that "he had no knowledge of such defense." The warranty of the qualified indorser would follow the instrument into the hands of anyone who acquired the instrument in good faith.

It is to be noted that the warranties of one who transfers an instrument do not coincide with indorser's liability under section 3-414 of the UCC. One who indorses without recourse is not liable as an indorser but is liable for breach of warranty. The amount which the plaintiff may recover depends in part on whether the indorser is to be held on his liability as an indorser or for breach of a warranty. The indorser in effect says that he will be liable for the face amount of the instrument in the event the instrument is properly presented, dishonor, and proper notice of dishonor given him. The holder suing an indorser for breach of warranty may recover only the amount of damages which he can show that he has suffered as a result of the breach of warranty. If the only prior party to the instrument is insolvent, the transferee has hardly been damaged to the extent of the sum specified in the body of the instrument for such sum could not have been collected from the prior party had there been no warranty breached.

Subsection (2) is in one respect a departure from the interpretation generally placed upon sections 63, 64 and 66 of the NIL. Under section 66 of the NIL an accommodation indorser is liable, as any other indorser, for breach of warranty. Under subsection (2) one is only liable for breach of warranty when he has received consideration for his transfer. As an accommodation indorser is not a transferor and normally does not receive consideration for indorsing the instrument such accommodation indorser is not liable for breach of warranty under the UCC. An accommodation indorser is liable on his contract of indorsement, but not for breach of warranty. His liability depends upon the instrument having been properly presented, dishonored and the holder having given him proper notice of dishonor.

It is thought that the warranties specified in Subsection (2) are warranties created by contract, the indorsement being an abridged form of the full contract. If this view be sound then an indorser may lawfully qualify his liability by negating any of the warranties specified under this section. If, on the other hand,
the court should find that these warranties are imposed by law upon the transferor of the instrument he would not be permitted relieve himself of the liability imposed by statute.

Section 3-418. Finality of Payment or Acceptance.

Except for recovery of bank payments as provided in the Article on Bank Deposits and Collections (Article 4) and except for liability for breach of warranty on presentment under the preceding section, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

Section 62 of the NIL provides "The acceptor by accepting the instrument . . . admits: (1) The existence of the drawer, the genuineness of his signature. . . ." Section 62 of the NIL is basically a codification of the doctrine of the case of Price v Neal discussed under section 3-417. In view of section 62 of the NIL, the drawee who accepted the instrument on which the drawer's signature had been forged is estopped to raise subsequently the issue of the forgery of the drawer's signature and is liable on the instrument as an acceptor to a good faith holder for value of the instrument. If payment by the drawee of a bill be an acceptance within the language of section 62 of the NIL, and the courts have so held, the drawer who pays an instrument on which the drawer's signature has been forged cannot recover the sum paid except from the forger, donee, or bad faith purchaser of the instrument.

Under section 3-418 the drawee who accepts a bill of exchange or pays a bill of exchange is liable on his acceptance, or if he makes payment of a bill of exchange, such payment is final. Under section 3-417(1)(b) any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith. The drawee who accepts or makes payment of a bill on which the drawer's signature has been forged may proceed by the way of an action for breach of warranty against one who with knowledge of the forgery transferred the instrument, received the acceptance, or received payment. Payment or acceptance is final as to any holder in due course.
Section 3-419. Conversion of Instrument; Innocent Representative.

(1) An instrument is converted when
(a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or
(b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or
(c) it is paid on a forged instrument.

(2) In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument.

(3) Subject to the provisions of this Act concerning restrictive indorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

(4) An intermediary bank or payor bank which is not a depositary bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (Sections 3-205 and 3-206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor.

Under section 137 of the NIL the drawee who destroys or refuses to return a bill presented for acceptance is deemed to have accepted the bill, while under the West Virginia modification of this section the drawee is treated as a converter of the bill. Under the West Virginia NIL the converter is liable for the amount of the bill.

Section 3-419 is more nearly in accord with the West Virginia version. Subsection (1)(a) applies to instances wherein the drawee to whom a bill has been presented for acceptance refuses to return it on demand. Subsection (1)(b) is applicable to the situation where the drawee to whom a bill has been presented for payment refuses to either pay or return the bill. Under either
subsection (1)(a) or (1)(b) the drawee who has wrongfully refused to return the bill, or under subsection (1)(b) has refused to pay or return it, is treated not as an acceptor of the bill but as converter thereof.

Subsection (1)(c) is new. It adopts the view that the drawee who pays an instrument on a forged indorsement is not to be treated by the true owner of the bill as an acceptor thereof, but the owner may treat such drawee as a converter of the instrument. The drawee having exercised control over the instrument inconsistent with the rights of the true owner is guilty of conversion.

Subsection (2) adopts the rule, which has generally been applied to cases involving conversion of negotiable instruments, that the instrument is presumed to be worth its face value, and that should be the sum which the owner is entitled to recover from the drawee who has converted the instrument.

Subsection (3) has no counterpart in the NIL. This subsection adopts the rule of case law that one who deals in good faith with commercial paper as an agent or representative, such as a broker or collecting bank is not liable to the true owner of the negotiable instrument for conversion. But such party may be compelled to return the instrument to the true owner or to turn over to him any of the proceeds of the instrument which might still be in his possession. For the full import of this subsection, an examination of sections 3-205 and 3-206 should be made.

Subsection (4) grants certain protections to intermediary banks and payor banks which are not the depository banks in instances where an instrument had been restrictively indorsed.

Section 3-501. When Presentment, Notice of Dishonor, and Protest Necessary or Permissible.

(1) Unless excused (Section 3-511) presentment is necessary to charge secondary parties as follows:

(a) presentment for acceptance is necessary to charge the drawer and indorsers of a draft where the draft so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its date of payment depends upon such presentment. The holder may
at his option present for acceptance any other draft payable at a stated date;

(b) presentment for payment is necessary to charge any indorser;

(c) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, presentment for payment is necessary, but failure to make presentment discharges such drawer, acceptor or maker only as stated in Section 3-502(1) (b).

(2) Unless excused (Section 3-511)

(a) notice of any dishonor is necessary to charge any indorser;

(b) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, notice of any dishonor is necessary, but failure to give such notice discharges such drawer, acceptor or maker only as stated in Section 3-502(1) (b).

(3) Unless excused (Section 3-511) protest of any dishonor is necessary to charge the drawer and indorsers of any draft which on its face appears to be drawn or payable outside of the states and territories of the United States and the District of Columbia. The holder may at his option make protest of any dishonor of any other instrument and in the case of a foreign draft may on insolvency of the acceptor before maturity make protest for better security.

(4) notwithstanding any provision of this section, neither presentment nor notice of dishonor nor protest is necessary to charge an indorser who has indorsed an instrument after maturity.

Section 3-501 of the UCC relates to conditions precedent to the liability of drawers and indorsers. This liability is in addition to that of an indorsee for breach of warranty. Section 3-511 of the UCC specifies the instances in which the requirement of proper presentment and notice of dishonor may be waived or excused and for that reason should be considered together with Section 3-501 of the UCC.

Subsection (1)(a) is a redraft of sections 143, 144, and 145 of the NIL. The last sentence of this subsection authorizes the
holder of a time bill of exchange to properly present it for acceptance any time after its execution. The holder of a time draft has the right to learn immediately whether the drawee is willing to be bound by the terms of the draft. The drawee who accepts such a bill becomes primarily liable thereon according to its terms. If the drawee refuses to accept the bill such refusal constitutes a dishonor of the instrument. The holder must then give due notice of dishonor to fix the liability of the drawer and indorsers. The holder of a demand instrument does not have the right to expect an acceptance by the drawee of such an instrument but only payment. Being a demand instrument, the holder can determine at any time whether the drawee is willing to honor it simply by demanding payment. If the drawee refuses payment of the instrument, the drawee has dishonored the instrument, and the holder then may look to the drawer or indorsers for payment after having given them due notice of dishonor.

Subsections (1)(a) and (1)(b) retains the rule of section 70 of the NIL which makes it necessary for the holder to prove that he made a proper presentment of a bill for payment, and it was dishonored and due notice of dishonor was given the indorser in order to fix the liability of the indorser, other than for breach of warranty. Proper presentment, dishonor, and notice of dishonor to the drawer must be shown in order to establish the liability of a drawer of a bill of exchange, unless such requirements have been waived by the drawer. Section 186 of the NIL which relates solely to the liability of the drawer of a check provides: “A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.” In addition the West Virginia version of section 186 of the NIL adds: “Failure of the holder to give the drawer due notice of dishonor will discharge him from liability thereon only to the extent of the loss caused by the delay.”

Subsection (1)(c) of the UCC extends the rule of section 186 of the NIL to any drawer, or acceptor of a draft or a maker of a note which is by its terms payable at a bank. That is such drawer, acceptor or maker will only be released to the amount of damages that they can show resulted from the failure of the holder of the instrument to have made proper presentment of the bill for payment. Under this subsection where a note is by its terms payable
at a bank proper presentment of the note is necessary in order to fix the liability of a maker of a note.

Subsection (2) retains the rule that proper notice of dishonor is a condition precedent to the liability of indorsers, other than for breach of warranty, and drawers unless such is excused under section 3-511. As to the drawer, acceptor of a draft payable at a bank or the maker of a note payable at a bank the failure of the holder to have given due notice of dishonor only releases such party to the amount of damages which he can show resulted to him because he did not receive prompt notice of dishonor.

Subsection (3) changes the requirement of the necessity of protesting a foreign bill of exchange. Section 152 of the NIL reads in part: "Where a foreign bill appearing on its fact to be such is dishonored by nonacceptance, it must be duly protested for nonacceptance. . . ." Under subsection (3) of the UCC a protest need only be made where the bill is drawn in one state and payable in another country. The requirement of a protest of a bill drawn in one country and payable in another is retained because of the effect of foreign law which cannot be controlled by the unilateral act of this country or of one of the several states.

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To hold an indorser of negotiable paper liable as such, the instrument must be presented for payment, at the place of payment, when due, and due notice given to the indorser of such presentment and of its dishonor by non-payment. Rusmssel v. White Oak Stave Co., 80 W. Va. 400, 92 S.E. 672 (1917).

An indorser's liability is conditional, and depends on the due and proper presentment of the note at the time and place of payment, and notice to him of dishonor thereof, or waiver of notice. Hastings v. Grump, 89 W. Va. 111, 108 S.E. 600 (1921).

Where a note was made for the accommodation of an indorser, he steps into the shoes of the ostensible maker and is not entitled to due presentment and notice of dishonor. One whose real relation to the maker is that of primary debtor is not entitled to notice of dishonor under section 115 of the NIL. Dankmer v. Wheeling Printing Co., 103 W. Va. 40, 136 S.E. 690 (1927).

When an indorser of a promissory negotiable note payable on demand expressly waives "presentment, protest and notice of dishonor," on the face of the note, it is not necessary for the holder to present the note in order to preserve the liability of the indorser. Morrison v. Frantz, 103 W. Va. 409, 176 S.E. 608 (1934).

The obligation of an indorser of a negotiable note "is not primary and absolute like that of the maker, but is secondary and conditional." The indorser undertakes to pay only if he is duly informed of the failure of the maker to pay, upon maturity if it be an instrument running for a definite time, or within a reasonable time if the instrument is payable on demand. Arnold v. Potomac Improvement Co., 118 W. Va. 425, 190 S.E. 685 (1937).

A check given by a resident of the state to another resident of the same

Section 3-502. Unexcused Delay; Discharge.

(1) Where without excuse any necessary presentment or notice of dishonor is delayed beyond the time when it is due

(a) any indorser is discharged; and

(b) any drawer or the acceptor of a draft payable at a bank or the maker of a note payable at a bank who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer, acceptor or maker is not otherwise discharged.

(2) Where without excuse a necessary protest is delayed beyond the time when it is due any drawer or indorser is discharged.

Under subsection (1)(a) of the UCC and under section 66 of the NIL, the failure on the part of the holder of a negotiable instrument to make due presentment of the instrument for payment and to give the necessary notice of dishonor, where such failure was not legally excused released the drawer and indorsers of liability. The failure of the holder to make proper presentment of an instrument does not affect the liability of an indorser for breach of warranty.

Subsection (1)(b) relates only to instruments payable at a bank. Drafts and promissory notes payable at a bank or special place are referred to as “domiciled instruments.”

The drawer or the acceptor of a draft payable at a bank, or the maker of a note payable at a bank, in the event the drawee or payor bank becomes insolvent after the due date of the instrument, is relieved of liability to the extent of any funds maintained with the drawee or payor bank by making a written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer, acceptor, or maker
is not otherwise discharged. This subsection gives to the maker of a note, acceptor of a bill or the drawer of a draft which is payable at a bank the same protection that section 186 of the NIL extends to the drawer of a check. Any loss resulting from the failure of the holder to make proper presentment of an instrument payable at a bank resulting from the insolvency of the bank subsequent to the due date is placed on the holder of the instrument.

If the one who is to make payment of such an instrument is ready, willing, and able to pay the instrument at the specified place on the due date of the instrument, such willingness on his part is equivalent to a tender of payment. In drafting an instrument it is a desirable practice to specify a specific place for payment as this will encourage the holder of the instrument to present it for payment at the place specified on its due date. If the one who is to make payment is ready, willing, and able to pay the instrument at the specified place on the due date, interest will not thereafter accrue on the indebtedness whether the holder does or does not make presentment. Interest does not accrue on an indebtedness after a valid tender of payment.

Subsection (2) releases the drawer of liability upon any instrument which must be protested where the delay in properly protesting the instrument is not otherwise excused.

Section 3-503. Time of Presentment.

(1) Unless a different time is expressed in the instrument the time for any presentment is determined as follows:

(a) where an instrument is payable at or a fixed period after a stated date any presentment for acceptance must be made on or before the date it is payable;

(b) where an instrument is payable after sight it must either be presented for acceptance or negotiated within a reasonable time after date or issue whichever is later;

(c) where an instrument shows the date on which it is payable presentment for payment is due on that date;

(d) where an instrument is accelerated presentment for payment is due within a reasonable time after the acceleration;
(e) with respect to the liability of any secondary party
presentment for acceptance or payment of any other
instrument is due within a reasonable time after such
party becomes liable thereon.

(2) A reasonable time for presentment is determined by the
nature of the instrument, any usage of banking or trade and the facts
of the particular case. In the case of an uncertified check which is
drawn and payable within the United States and which is not a draft
drawn by a bank the following are presumed to be reasonable
periods within which to present for payment or to initiate bank col-
lection:

(a) with respect to the liability of the drawer, thirty days
after date or issue whichever is later; and

(b) with respect to the liability of an indorser, seven days
after his indorsement.

(3) Where any presentment is due on a day which is not a
full business day for either the person making presentment or the
party to pay or accept, presentment is due on the next following
day which is a full business day for both parties.

(4) Presentment to be sufficient must be made at a reasonable
hour, and if at a bank during its banking day.

Section 3-503 of the UCC is a consolidation of all the sections
of the NIL relating to the time for making presentment of a bill.

Under this section of the Code any demand for payment no
matter where or in what form the demand is made constitutes
presentment within the meaning of the Code. The technical re-
quirements for proper presentment as set forth in the NIL are not
found in the Code.

Subsection (1)(a) provides that the holder may not properly
present a bill for acceptance after the maturity of the instrument.
The basic reason that a holder requests an acceptance of a bill is
to ascertain whether the drawee is willing to accept liability upon
the instrument prior to its due date. There is no such reason
present in case of a past due instrument.

Subsection (1)(b) modifies the concept of section 144 of the
NIL. That is when an instrument is payable after sight it must
either be presented for acceptance or negotiated within a reasonable time after its date or a reasonable time after its issue, where the date of the instrument and the date of issue are different whichever is later.

Subsection (1)(c) continues the rule that an instrument payable on a definite date must be presented for payment on that date in order to constitute proper presentment for payment.

Subsection (1)(d) is new and novel. The majority of the cases decided under the NIL have held that the holder of an instrument which contains an acceleration clause is not charged with the responsibility of making presentment on an accelerated due date. In determining whether the instrument was presented on the due day, the holder need only be concerned with the specified due date of the instrument. Normally the holder need not be concerned with a different due date which resulted from the happening of the accelerating event. However, if the due date is automatically accelerated by the happening of an event and the holder had knowledge of the happening of the event, then the accelerated due date would govern and be the date on which presentment for payment should be made. This subsection, when considered with section 3-602, appears to mean that secondary parties are discharged of liability in case the holder of an instrument which contains an acceleration clause does not present the instrument for payment within a reasonable time after the acceleration, assuming that the holder has notice of the fact that the accelerating event had occurred. The burden of ascertaining whether the due date has been accelerated should not be cast upon one holding the instrument. But, once he has notice that the due date has been accelerated, the holder must act accordingly to preserve his rights against secondary parties.

Subsection (1)(e) regulates the time in which a holder may properly present a demand instrument for payment in order to perfect his rights against secondary parties. Section 71 of the NIL provides: “Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in the case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.” Under this section of the NIL, the indorsers on a note were all discharged at
the same time irrespective of when they indorsed the note. The reasonable time for making presentment of a demand instrument in order to hold any indorser was measured from the date of issue of the note, not from the time the indorsement was placed on the instrument. Indorsers on demand bills of exchange, and drawers on bills of exchange other than checks were liable if the holder of the bill presented it for payment within a reasonable time after the last negotiation. Thus under the NIL indorser’s liability on a demand bill of exchange could be kept alive almost indefinitely if enough transfers of the instrument took place. For a fuller discussion of this matter see: Morris, *The Importance of Promptly Presenting Checks for Payment*, 61 W. Va. L. Rev. 191 (1959). Under subsection (1)(e) indorsers on demand bills and notes are treated alike. Under the Code in order to hold an indorser on his indorser’s liability, on either a demand bill or note, presentment for payment must be made within a reasonable time after the one who is sought to be held liable indorsed the instrument. Under this subsection some indorsers might be liable on the instrument while others would not because of the expiration of a reasonable time after the particular indorsement was placed on the instrument.

Subsection (2) establishes the ground rules for determining what is a reasonable time in which the holder of demand or sight instrument may make a proper presentment of the instrument for payment. It is recognized that what is a reasonable time in one geographical area or under one set of circumstances may not be a reasonable time in another area or under a different set of facts. The purpose of this subsection is to provide a yardstick for measuring what is presumably a reasonable time when dealing with instruments drawn and made payable within the United States and which are not drafts drawn by a bank or certified checks. In respect to the drawer of a demand bill presentment for payment if made within thirty days of its date or its issue whichever is later is presumed to be within a reasonable time. With respect to the indorser’s liability, presentment within seven days after the indorsement is presumed to have been made within a reasonable time.

Subsection (3) recognizes that many business and financial institutions are closed on Saturdays and holidays. In instances where the due date of the instrument is a day which is not a full business day of either the party who is to make presentment or who is to pay or accept presentment is proper if made on the next
full business day of both parties. It would appear that the statute means the next regular full business day and that one party could not postpone the date for making presentment by prolonged closing of his business.

Subsection (4) requires presentment, if the presentment is to be sufficient, to be made at a reasonable hour and in case of banks to be made during the hours which the bank is regularly open for business.

Section 3-504. How Presentment Made.

(1) Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder.

(2) Present may be made

(a) by mail, in which event the time of presentment is determined by the time of receipt of the mail; or

(b) through a clearing house; or

(c) at the place of acceptance or payment specified in the instrument or if there be none at the place of business or residence of the party to accept or pay. If neither the party to accept or pay nor anyone authorized to act for him is present or accessible at such place presentment is excused.

(3) It may be made

(a) to any one of two or more makers, acceptors, drawees or other payors; or

(b) to any person who has authority to make or refuse the acceptance or payment.

(4) A draft accepted or a note made payable at a bank in the continental United States must be presented at such bank.

(5) In the cases described in Section 4-210 presentment may be made in the manner and with the result stated in that section.

The definition of presentment in subsection (1) is the same used at common law and under the NIL.
The provisions of subsection (2) are slightly different than those found in the corresponding sections of the NIL. Subsection (2)(a) permits the holder to make a presentment through the mail, in which case presentment is deemed to have been made at the time of receipt of the mail, not at the time the instrument was mailed. Under subsection (2)(b) proper presentment may be made through a clearing house. In such case presentment is not completed when the instrument reaches the clearing house, but when it is actually presented to the one who is to pay. For the proper manner and procedure for making presentment by a collecting bank, consideration should also be given to section 4-210 of the UCC. Section 3-504 does not specify any particular requirements as to the form or manner of presentment in order for the presentment to be deemed a proper presentment. There is no requirement under the Code that the instrument be exhibited to the party from whom payment is demanded. Under the provisions of the Code presentment may be made at any place, no matter where or how, but it is also recognized that normally presentment will be made at the business place of the one who is to pay or at the place specified in the instrument. Subsection (4) makes one exception to the rule that presentment can be made at any place in specifying that a draft accepted or a note made payable at a bank in the continental United States must be presented at such bank. Attention is called to section 3-505 of the UCC which allows one to whom an instrument has been presented at an odd place or at an odd time a reasonable opportunity to honor the instrument. This right is conferred by subsection (1)(c) of section 3-505 which reads: "The party to whom the presentment is made may without dishonor require that the instrument be produced for acceptance or payment at the place specified in it, or if there be none at any place reasonable in the circumstances."

Subsection (3) changes the law as recognized under the NIL. Instruments which contain the names of two or more makers, acceptors, drawees or other payors need only be presented to one of such parties, even though they are not partners. The holder of such an instrument is saved the inconvenience of making presentment to two or more persons in order to fix the liability of those with secondary liability on the instrument. Under section 78 of the NIL presentment must be made to all such joint parties in order to fix the liability of those with secondary liability.
Section 3-505. Rights of Party to Whom Presentment Is Made.

(1) The party to whom presentment is made may without dishonor require

(a) exhibition of the instrument; and

(b) reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and

(c) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and

(d) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.

(2) Failure to comply with any such requirement invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance.

In order for one to make a proper presentment of an instrument for payment under Section 74 of the NIL the party making the presentment must exhibit the instrument to the person from whom payment is demanded. Section 3-505 dispenses with this formality and substitutes the right to require the exhibition of the instrument, to reasonable identification and if presentment is made for another to evidence his authority. Subsection (1)(c) which was considered in the discussion of section 3-504 entitles the one to whom presentment is made to require the holder to produce the instrument for acceptance or payment at the place specified in the instrument, if there be no place specified at a place reasonable in the circumstances. Subsection (1)(d) recognizes the right of the one who makes a partial payment of a negotiable instrument to have that fact noted upon the instrument. The notation of partial payment would prevent one from becoming a holder in due course for the face amount of the instrument. A purchaser may qualify as a holder in due course to the extent of the balance shown to be unpaid. In the event of full payment the party paying the instrument is entitled to have that fact noted upon the instrument and to have it surrendered to him.
Subsection (2) is inserted for the benefit and protection of the one making presentment of the instrument. The failure of such party to have complied with the requirements of subsection (1) invalidates the presentment, however, the holder then has a reasonable time to comply and if the holder thereafter complies with the requirements for proper presentment, the time for the acceptance or payments dates from the time of the compliance.

Section 3-506. Time Allowed for Acceptance or Payment.

(1) Acceptance may be deferred without dishonor until the close of the next business day following presentment. The holder may also in a good faith effort to obtain acceptance and without either dishonor of the instrument or discharge of secondary parties allow postponement of acceptance for an additional business day.

(2) Except as a longer time is allowed in the case of documentary drafts drawn under a letter of credit, and unless an earlier time is agreed to by the party to pay, payment of an instrument may be deferred without dishonor pending reasonable examination to determine whether it is properly payable, but payment must be made in any event before the close of business on the day of presentment.

Section 136 of the NIL provides: "The drawee is allowed twenty-four hours after presentment, in which to decide whether or not he will accept the bill, but the acceptance if given dates as of the date of presentment."

Subsection (1) of section 3-506 of the UCC provides that an "acceptance may be deferred without dishonor until the close of the next business day following presentment." This subsection also empowers the holder to extend the time for an acceptance without either a dishonor of the instrument or discharge of secondary parties for one additional business day.

Subsection (2) is concerned with presentment for payment as distinguished from presentment for acceptance. Under this subsection the one to whom an instrument is presented for payment is given until the close of the next business day after the presentment in which to investigate to determine whether payment of the instrument may properly be made.
Section 3-507. Dishonor; Holder’s Right of Recourse; Term Allowing Re-Presentment.

(1) An instrument is dishonored when

(a) a necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time or in case of bank collections the instrument is seasonably returned by the midnight deadline (Section 4-301); or

(b) presentment is excused and the instrument is not duly accepted or paid.

(2) Subject to any necessary notice of dishonor and protest, the holder has upon dishonor an immediate right of recourse against the drawers and indorsers.

(3) Return of an instrument for lack of proper indorsement is not dishonor.

(4) A term in a draft or an indorsement thereof allowing a stated time for re-presentment in the event of any dishonor of the draft by nonacceptance if a time draft or by nonpayment if a sight draft gives the holder as against any secondary party bound by the term an option to waive the dishonor without affecting the liability of the secondary party and he may present again up to the end of the stated time.

Section 3-507 sets forth the conditions precedent which must be performed in order to fix the liability of secondary parties to a negotiable instrument. Unless there has been proper presentment of the instrument for acceptance and/or payment, and the acceptance or payment has been refused, and notice of that fact given the holder has failed to perform the conditions precedent to establishing liability of secondary parties. An instrument is dishonored, within the meaning as set forth in section 3-507, when after presentment, acceptance, or payment is refused or cannot be obtained within the prescribed time or in case of bank collections the instrument is seasonably returned by the midnight deadline as set forth in section 4-301.

Under the authority of subsection (2), the holder of an instrument which has been dishonored may proceed immediately to collect from the drawers or indorsers assuming proper notice of
dishonor had been given to such secondary parties. This is of particular importance where a drawee of a time bill of exchange refused to accept the instrument which was presented for acceptance before the maturity of the bill. The instrument having been dishonored, the holder need not wait until maturity of the bill before proceeding against the secondary parties.

Subsection (3) while new is a codification of the general banking and commercial understanding.

Section 3-508. Notice of Dishonor.

(1) Notice of dishonor may be given to any person who may be liable on the instrument by or on behalf of the holder or any party who has himself received notice, or any other party who can be compelled to pay the instrument. In addition an agent or bank in whose hands the instrument is dishonored may give notice to his principal or customer or to another agent or bank from which the instrument was received.

(2) Any necessary notice must be given by a bank before its midnight deadline and by any other person before midnight of the third business day after dishonor or receipt of notice of dishonor.

(3) Notice may be given in any reasonable manner. It may be oral or written and in any terms which identify the instrument and state that it has been dishonored. A misdescription which does not mislead the party notified does not vitiate the notice. Sending the instrument bearing a stamp, ticket or writing stating that acceptance or payment has been refused or sending a notice of debit with respect to the instrument is sufficient.

(4) Written notice is given when sent although it is not received.

(5) Notice to one partner is notice to each although the firm has been dissolved.

(6) When any party is in insolvency proceedings instituted after the issue of the instrument notice may be given either to the party or to the representative of his estate.

(7) When any party is dead or incompetent notice may be sent to his last known address or given to his personal representative.
(8) Notice operates for the benefit of all parties who have rights on the instrument against the party notified.

Section 3-508 follows generally the provisions of the NIL relating to requirement of giving due notice of dishonor as a condition precedent to the liability of secondary parties to an instrument. By authority of subsection (1) the notice of dishonor may be given by any party who may be compelled to pay the instrument to any other party who is secondarily liable on the instrument. An indorser may give notice of dishonor to prior or subsequent indorsers as well as to the drawer. To illustrate, suppose Daniel Drawer made and delivered a check payable to the order of Peter Payee. Peter Payee indorsed the check in blank and delivered it to Alpha Indorsee who in turn indorsed and delivered it to Beta Indorsee. After due presentment and dishonor Beta Indorsee gives notice of dishonor to Peter Payee. Having received proper notice of dishonor Peter Payee is now legally obligated to pay the instrument. Under this subsection of the Code, Peter is authorized to give a notice of dishonor to Alpha Indorsee which would fix Alpha Indorsee’s liability to parties subsequent to Alpha Indorsee. Beta Indorsee may now elect to pursue his remedy either against Peter Payee or Alpha Indorsee. This subsection enlarges the number of persons who may properly give a notice of dishonor.

Subsection (2) lengthens the period in which one may properly give a notice of dishonor. Under sections 103 and 104 of the NIL, the one day rules is applied. Section 103 provides that if the one giving and the one receiving the notice of dishonor live in the same place the notice, to be effective, must be given before the close of the next business day after the dishonor or receipt of notice of dishonor from another. Section 104 of the NIL provides that where the person giving and the person to receive the notice reside in different places the notice if sent by mail must be deposited in the postoffice in time to go by mail the day following the dishonor. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of the mail, if it had been deposited in the postoffice before the close of the next business day after dishonor. The drafters of the UCC recognized that the time allowed by the NIL for giving notice of dishonor is too short. Subsection (2) allows one three
business days after dishonor or receipt of notice of dishonor in which to give the required notice. This subsection makes an exception to the above mentioned rule relating to the time in which a bank may give a proper notice of dishonor. The time in which a bank may give notice is limited to the midnight deadline rules as defined in Section 4-104(1)(h). That is a bank's notice of dishonor, to be proper, must be given before midnight of the next banking day following the banking day on which it received the instrument or notice that it has been dishonored.

Subsection (3) is in accord with sections 95 and 96 of the NIL.

Subsection (4) is in accord with section 105 of the NIL.

Subsection (5) is in accord with section 99 of the NIL with the clarification that notice to any partner is notice to all as to liability on instruments indorsed by the partnership or a bill drawn by a partnership. Such notice is sufficient even though the partnership was dissolved after drawing or indorsing the instrument.

Subsection (6) permits notice to be given either to the insolvent secondary party or to the party representing his estate.

Subsection (7) changes the rule as set forth in section 98 of the NIL. Section 98 of the NIL provides that in the event of the death of one who is entitled to receive notice of dishonor, the notice of dishonor to be proper must be given to his personal representative or if there is no personal representative, the notice had to be sent to the last residence or place of business of the deceased. Under this subsection of the Code, it is sufficient in any case that the notice be sent to the last known address of the deceased party whether a personal representative had or had not been appointed. The holder may, if he so desires, give the notice of dishonor to the personal representative of the deceased.

Subsection (8) clarifies and continues the rules as set forth under sections 92 and 93 of the NIL.

WEST VIRGINIA CASES

Proof that the notice of dishonor was properly addressed and stamped was deposited in the post office at the place of dishonor, in time to go by mail on the day following the dishonor, establishes due notice. Farmers Na'l Bank v. Howard, 71 W. Va. 57, 76 S.E. 122 (1912).

The note having been properly presented, dishonored and notice of mailing it is immaterial whether the indorser received the notice or not. The Board of Education v. Angel, 75 W. Va. 747, 84 S.E. 747 (1915).
Notes being dishonored were duly protested for nonpayment and due notice thereof given to the indorser, his liability has become fixed. Cole v. George, 86 W. Va. 346, 103 S.E. 201 (1920).

"The certificate of the notary of the protest of negotiable paper constitutes prima facie evidence of all the facts stated therein, and if they show presentment and demand of payment at the time and place and within the proper hours of the day of payment, and refusal of payment, and notice thereof mailed on the same day after the dishonor of the paper, in sealed envelope properly addressed to the drawer or indorser thereof, directed to the place of residence of such drawer or indorser, such facts constitute in law due protest of the paper, sufficient to bind such drawer or indorser for payment thereof." Thorn v. Alter, 92 W. Va. 290, 114 S.E. 741 (1922).

Section 3-509. Protest; Noting for Protest.

(1) A protest is a certificate of dishonor made under the hand and seal of a United States consul or vice consul or a notary public or other person authorized to certify dishonor by the law of the place where dishonor occurs. It may be made upon information satisfactory to such person.

(2) The protest must identify the instrument and certify either that due presentment has been made or the reason why it is excused and that the instrument has been dishonored by nonacceptance or nonpayment.

(3) The protest may also certify that notice of dishonor has been given to all parties or to specified parties.

(4) Subject to subsection (5) any necessary protest is due by the time that notice of dishonor is due.

(5) If, before protest is due, an instrument has been noted for protest by the officer to make protest, the protest may be made at any time thereafter as of the date of the noting.

Under the discussion of section 3-501 it was noted that it is only necessary to protest a bill which on its face appears to be drawn or payable outside of the states and territories of the United States and the District of Columbia.

Section 154 of the NIL provides that protest may be made by a notary public or by any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses. Subsection (1) of section 3-501 adds to those who may protest an instrument vice consuls and other persons authorized.
to certify dishonor by the law of the place where it was dishonored. The UCC, unlike the NIL, does not authorize a protest by a respect-
able resident in the presence of two credible witnesses. A protest
under the code may be made upon information satisfactory to such
person, which does away with the occasionally stated rule that the
person making the protest must certify as to his own knowledge of
the matters mentioned in the protest.

WEST VIRGINIA CASES

The West Virginia Supreme Court of Appeals held that a protest is
sufficient under sections 95 and 96 of the NIL which identified the note and
stated that payment of it was refused by the bank, at which it was payable,
on a certain day named, because there were no funds with which to pay it.
Davis Nat'l Bank v. Knight, 88 W. Va. 319, 103 S.E. 482 (1920).

"Under our uniform negotiable instrument law, chapter 98A Code 1918,
it is no longer necessary, in order to hold the endorser, that the instrument
be formally protested except in the case of a foreign bill of exchange. If the
instrument has been duly dishonored by presentment, nonacceptance or
nonpayment, and notice thereof to the drawer or endorser, as the case may
be, there need be no formal certificate of protest. But if the holder would
preserve the prima facie evidence of the facts necessary to charge drawer
or endorser, he may have the instrument formally protested by the notary.
So it is provided in section 118 of said chapter 89A." Thorn v. Alter, 92 W. Va.
290, 114 S.E. 741 (1922).

Section 3-510. Evidence of Dishonor and Notice of Dishonor.

The following are admissible as evidence and create a presump-
tion of dishonor and of any notice of dishonor therein shown:

(a) a document regular in form as provided in the preced-
ing section which purports to be a protest;

(b) the purported stamp or writing of the drawee, payor
bank or presenting bank on the instrument or accom-
panying it stating that acceptance or payment has been
refused for reasons consistent with dishonor;

(c) any book or record of the drawee, payor bank, or any
collecting bank kept in the usual course of business
which shows dishonor, even though there is no evidence
of who made the entry.

Under subsection (a) a document regular in form and meet-
ing the requirements of a protest as defined in section 3-509 is
admissible in evidence and creates a presumption of dishonor and
of any notice therein shown. This section relieves the holder of the burden of proving that a protest regular in form is authentic or that the person making it was qualified. Like any presumption evidence may be admitted to rebut and disprove the presumption.

Subsection (b) authorizes as a rule of law a practice which has for years been commercially accepted. The drawee’s statement that payment is refused with reasons consistent with dishonor (i.e. Not sufficient funds, No account, or Payment stopped) stamped on the returned item is full proof of dishonor of the bill. Such evidence is therefore made admissible and creates a presumption of the dishonor of the instrument.

Subsection (c) permits the entry of books and records of the drawee, payor bank, or any collecting bank which have been kept in the usual course of business which shows a dishonor to be admitted into evidence and from which a presumption of dishonor and notice of dishonor has taken place. This is allowed even though there is no evidence as who made the actual entry or entries in question.

Section 3-511. Waived or Excused Presentment, Protest or Notice of Dishonor or Delay Therein.

(1) Delay in presentment, protest or notice of dishonor is excused when the party is without notice that it is due or when the delay is caused by circumstances beyond his control and he exercises reasonable diligence after the cause of the delay ceases to operate.

(2) Presentment or notice or protest as the case may be is entirely excused when

(a) the party to be charged has waived it expressly or by implication either before or after it is due; or

(b) such party has himself dishonored the instrument or has countermanded payment or otherwise has no reason to expect or right to require that the instrument be accepted or paid; or

(c) by reasonable diligence the presentment or protest cannot be made or the notice given.

(3) Presentment is also entirely excused when

(a) the maker, acceptor or drawee of any instrument except
a documentary draft is dead or in insolvency proceedings instituted after the issue of the instrument; or

(b) acceptance or payment is refused but not for want of proper presentment.

(4) Where a draft has been dishonored by nonacceptance a later presentment for payment and any notice of dishonor and protest for non payment are excused unless in the meantime the instrument has been accepted.

(5) A waiver of protest is also a waiver of presentment and of notice of dishonor even though protest is not required.

(6) Where a waiver of presentment or notice of protest is embodied in the instrument itself it is binding upon all parties; but where it is written above the signature of an indorser it binds him only.

In order for the plaintiff to recover from secondary parties, the plaintiff must show that the instrument had been properly presented, dishonored, and notice of dishonor given to such secondary parties. This section of the Code recognizes, as does the NIL, that in certain instances presentment and notice of dishonor is excused. This section makes no radical departure from the corresponding sections of the NIL.

Included in subsection (1) are matters governed by portions of sections 81, 113, 147, and 149 of the NIL. Under this subsection delay in presentment, protesting, and giving notice of dishonor may be excuse in instances such as where the holder of a bill is unaware that the instrument had been previously dishonored, or where there is an acceleration clause and the holder is unaware that the acceleration event had occurred. It would seem that the holder would only be required to act with diligence upon discovering the prior history of the instrument.

Subsection (2) enumerates three instances in which presentment, notice or protest is excused. Under certain conditions the drawer and indorsers may be held liable upon an instrument irrespective of whether there has been proper presentment or notice or proper notice or protest of the instrument. If a secondary party has waived the requirement of presentment, dishonor or protest either before or after the due date of the
instrument such party is estopped to deny liability because there had not been a proper presentment of the instrument, or that, proper notice of dishonor or protest had not been given. This waiver may be either oral or in writing and may either be express or implied. It will be noted that subsection (5) codifies the commonly accepted rule that included in a waiver of protest is a waiver of presentment and waiver of notice of dishonor in instances where a protest would not be required.

Subsection (2)(b) provides that if one has no right to believe that an instrument will be accepted or paid he has no right to insist as a condition precedent to his liability be performed, that is the instrument be properly presented for acceptance or payment, or that he be given notice of dishonor. For example, if one has ordered payment of a check stopped, he is hardly in a position to assert that he is not liable on the instrument because the holder had not presented it for payment or had not given him notice of dishonor.

Subsection (2)(c) excuses presentment and notice of dishonor in instances where these conditions cannot be performed. The law does not require the unreasonable or impossible. The holder is only required to exercise reasonable diligence in endeavoring to make presentment and to give notice of dishonor. This subsection coincides with parts of sections 82(1), 112, and 159 of the NIL.

Parts of subsection (3) are new. Where it is shown that the one who is expected to make payment, that is the maker, acceptor or drawee, has died or insolvency proceedings have been instituted against such party, the chances of such party making payment are so remote that payment by such party can hardly be expected. Under these circumstances the holder, for his protection, is given the right to proceed directly and immediately against any prior party to the instrument. In which case the latter party may file his claim against the estate of the insolvent as conditions and law dictates.

Subsection (3)(b) dispenses with the necessity of the holder doing an apparently useless act. For example, suppose the drawee or maker has emphatically stated that he would not accept or pay the instrument, even though the holder has not presented the instrument for acceptance or payment, the holder need not make
a presentment to such party for payment or acceptance before proceeding against prior secondary parties to the instrument.

Subsection (4) is similar to provisions of section 116 and 151 of the NIL. Where proper notice of dishonor, by nonacceptance, has been given, the recipient of the notice of dishonor is not entitled to another notice of dishonor in the event the instrument is subsequently presented for payment and is again dishonored, unless the bill has been accepted subsequent to the first presentment for acceptance. Upon dishonor of a bill by nonacceptance, the holder acquires the right to proceed immediately against those secondarily liable, assuming that proper notice of dishonor has been given to such party. The holder need not wait until maturity of the instrument before proceeding against those secondarily liable where the drawee has refused to accept the bill.

Subsection (6) is a redraft of section 110 of the NIL and simply means that a waiver in an instrument of presentment and notice of dishonor constitutes a waiver of these requirements by all persons who become parties to the instrument. However, a waiver written above an indorsement acts only as a waiver by that indorser and does not act as a waiver on the part of these who may indorse the instrument subsequently.

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The court cited section 109 of the NIL and stated: "Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the commission to give due notice, and the waiver may be express or implied." The facts showed a waiver after maturity. Thompson v. Curry, 79 W. Va. 771, 91 S.E. 801 (1917).

The question was raised as to whether one only or all of the indorsers who successively write their names on the back of a negotiable instrument below a printed waiver of protest and notice of dishonor are bound thereby. The court said: "Its plain intention we think, is that where there are several indorsers the waiver binds those who sign under it, and not those who do not so sign; but if all of them do place their signatures under it, with or without knowledge that it is printed or stamped thereon at that time, it will render unnecessary presentment for payment and notice of dishonor. Central Nat'l Bank v. Scioteville Milling Co., 79 W. Va. 782, 91 S.E. 808 (1917).

There is authority to sustain the view that a mere offer of renewal on the part of the endorser, although refused, amounts to a waiver, on the ground that the act of the endorser implies knowledge that the note will not be paid at maturity. Martin v. Walker, 93 W. Va. 736, 117 S.E. 879 (1923).

The requirement of presentment and notice of dishonor may be impliedly waived. "Generally, any statement or action on the indorser's part which indicates conclusively that he knows the date of payment and that it will not be paid, and that he intends to continue as surety, is sufficient to import an implied waiver. Rinehart v. Lucas, 118 W. Va. 466, 180 S.E. 772 (1937).
Section 3-601. Discharge of Parties.

(1) The extent of the discharge of any party from liability on an instrument is governed by the sections on

(a) payment or satisfaction (Section 3-603); or
(b) tender of payment (Section 3-604); or
(c) cancellation or renunciation (Section 3-605); or
(d) impairment of right of recourse or of collateral (Section 3-606); or
(e) reacquisition of the instrument by a prior party (Section 3-208); or
(f) fraudulent and material alteration (Section 3-407); or
(g) certification of a check (Section 3-411); or
(h) acceptance varying a draft (Section 3-412); or
(i) unexcused delay in presentment or notice of dishonor or protest (Section 3-502).

(2) Any party is also discharged from his liability on an instrument to another party by any other act or agreement with such party which would discharge his simple contract for the payment of money.

(3) The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument

(a) reacquires the instrument in his own right; or
(b) is discharged under any provision of this Article, except as otherwise provided with respect to discharge for impairment of recourse or of collateral (Section 3-606).

Section 3-601 relates to the discharge of persons when the instrument is not in the hands of a holder in due course. Section 3-602 provides that “No discharge of any person provided by this article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument.” Section 3-601 is considerably different from the provisions of section 120 of the NIL which deals with discharge. For a full understanding of
the effect of section 3-601 of the code a comparison should be made with section 120 of the NIL.

The conditions which will result in the discharge of a party to a negotiable instrument are set forth in several sections of the UCC. Subsection (1) of section 3-601 is an index to the various sections in this article which relate to discharge. There may be a discharge by other reasons than those set forth in subsection (1) because of laws not found in this article such as bankruptcy of a party.

It will be helpful to note that under subsections (2) and (3) reference is made to the discharge of persons. No references are made to the discharge of the instrument. Some persons to the instrument may be discharged while others remain liable. Section 119 of the NIL which provides for the discharge of the instrument under certain conditions.

Subsection (2) is generally in accord with section 119(4) of the NIL in providing that a person is discharged from liability by any act or agreement which would have discharged him of liability on a simple contract.

Subsection (3) provides that the instrument is discharged when it gets into the hands of one who no right to proceed against any other party to the instrument.

The discharge of any person to the instrument also discharged those who would have had a right of recouse against the discharged party, except where the release was accompanied with a reservation of rights against such parties, or where the discharge resulted from the holder's failure to give due notice of dishonor.

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Section 119 of the NIL provides: "A negotiable instrument is discharged (1) by payment in due course by or on behalf of the principal debtor." In view of this section it would seem plain that it meant that the particular method prescribed for the accomplishment of that result should exclude a discharge by any other or different method." "If all other and different methods of discharge are excluded by section 119, then this question turns on whether Ross paid the money to Mrs. Hardman on behalf of Neely, (i.e., with the purpose of discharging Neely's liability); if so, the note was discharged, if not, the note was purchased. The presumption is against payment as a discharge, and in favor of the payment as a purchase. . . . Federal Land Bank v. Neely, 110 W. Va. 433, 158 S.E. 659 (1931).

"Code, 46-8-2, specifies when a party to a negotiable instrument is discharged: (a) By an act which discharges the instrument; (b) By the intentional cancellation of his signature by the holder; (c) By a valid tender of
payment made by a prior party; (d) This section does not include the discharge of a surety or party secondarily liable because of such secondary liability.” Koblegard Co. v. Maxwell, 127 W. Va. 630, 34 S.E.2d 116 (1945).

Section 3-602. Effect of Discharge Against Holder in Due Course.

No discharge of any party provided by this Article is effective against a subsequent holder in due course unless he has notice thereof when he takes the instrument.

Section 3-602 clearly states that one may not plead his discharge as against a holder in due course who became such without knowledge of the defendant’s discharge. This section only relates to such discharges as are set forth in this article of the Code. It has no application where the discharge results from some law outside of article 3, such as a discharge in bankruptcy.

One may qualify as a holder in due course even when he purchased the instrument with knowledge that some party or parties had been discharged of liability on the instrument. The purchaser could qualify as a holder in due course as to those parties who had not been discharged or of whom he had no knowledge of their discharge. One who purchases an instrument and qualifies as a holder in due course is subject to the defense of discharge by a party who had been discharged if the holder in due course knew of the discharge at the time he acquired the rights of a holder in due course.

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The notes had been negotiated to a holder in due course after payment. Such payment cannot be successfully asserted as against a holder in due course. Morgan v. Farmington Coal & Coke Co., 97 W. Va. 83, 124 S.E. 591 (1924).

Section 3-603. Payment or Satisfaction.

(1) The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant
and the holder are parties. This subsection does not, however, result in the discharge of the liability

(a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft or who (unless having the rights of a holder in due course) holds through one who so acquired it; or

(b) of a party (other than an intermediary bank or a payor bank which is not a depositary bank) who pays or satisfies the holder of an instrument which has been restrictively indorsed in a manner not consistent with the terms of such restrictive indorsement.

(2) Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee (Section 3-201).

Section 88 of the NIL provides: “Payment is made in due course when it is made at or after maturity of the instrument to a holder thereof in good faith and without notice that his title is defective.” The language of this section of the NIL does not furnish one with an answer to the following problem: If at maturity the obligor had notice of a claim by some third party to the instrument, would payment of the instrument to the holder be a payment in good faith? If he does not wish to pay sum of the instrument to the holder, may he plead as an excuse that title is claimed by some other person? It would seem that the answer to both question would be in the negative. In most states one is denied the right to plead jus tertia unless the third party is a party to the litigation. If the holder cannot pay in good faith and cannot assert and plead jus tertial the obligor placed in an untineable position.

Section 3-603 of the UCC fills the void resulting from the unfortunate language of section 88 of the NIL. Under section 3-604(1) of the Code the “payment in due course” concept is deleted. Under the Code any one who with the consent of the holder makes payment of the instrument, even though it is made with the knowledge of a claim of a third party, will result in the discharge of the one making payment of liability unless the third party claimant provides adequate indemnity to the one seeking to
discharge an obligation or an injunction is granted prohibiting payment is granted by a court having all the parties before it.

Payment does not act as a discharge to one who pays the instrument in bad faith as when he knows the recipient obtained the instrument by theft.

The discharge by payment not only discharges the payor but also discharges those who might have right of recourse against him under section 3-606. Payment by the payor who happens to be a reacquirer of the instrument has the effect of discharging any intervening parties as set forth in section 3-208. The discharge by payment by one who has no right of recourse on the instrument discharges all parties to the instrument (see section 3-601).

This section also adopts as a general proposition that the payor need not obey a stop payment order received from an indorser of the instrument. This principal is qualified by subsections (1)(a) and (b) respecting persons who acquired an instrument by theft or through a restrictive indorsement.

WEST VIRGINIA CASES

Payment to a prior holder does not discharge a negotiable instrument in the hands of a subsequent holder in due course. Wyoming County Bank v. Nichols, 101 W. Va. 553, 133 S.E. 129 (1926).

In the absence of express agreement, the giving of a renewal note is not satisfaction of the original. Wolfe v. Kelley, 119 W. Va. 428, 194 S.E. 77 (1937).

Where payment is relied on as a defense the burden of establishing that payment was made rests upon the one asserting it. Morrison v. Judy, 123 W. Va. 200, 13 S.E.2d 751 (1941).

"We think it has always been the law that the payment of a negotiable instrument, at or after maturity, by the makers thereof, or any of them, extinguishes the note, and nothing in the negotiable instruments law weakens that proposition . . . . When one who is primarily bound for payment of a notes takes it up, it is a payment—an extinguishment—of the note, no matter what his intention may have been." Perkins v. Hall, 123 W. Va. 707, 17 S.E.2d 707 (1941).

Where a new obligation is taken in consideration of a prior one, it does not operate as payment, or satisfaction of the old obligation, unless such was the agreement or intention of the creditor. Kuhn v. Shreeve, 141 W. Va. 170, 89 S.E.2d 685 (1955).

Section 3-604. Tender of Payment.

(1) Any party making tender of full payment to a holder when or after it is due is discharged to the extent of all subsequent liability for interest, costs and attorney's fees.
(2) The holder’s refusal of such tender wholly discharges any party who has a right of recourse against the party making the tender.

(3) Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due, it is equivalent to tender.

Subsection (1) of section 3-604 is new although it codifies generally the recognized effect of a valid tender of payment. Under this subsection a tender of payment made on the due date or thereafter stops the accruing of interest and relieves the one making the tender of any obligation for court costs or attorney’s fees. A valid tender of payment does not discharge the indebtedness.

Subsection (2) is in accord with section 120(4) of the NII. Under subsection (2) all parties to whom the one making the valid tender of payment is liable are discharged of liability by his tender of payment. This is the same as a tender by the principal obligor which has the effect of releasing a surety of his liability.

Subsection (3) is a rewrite of a portion of section 70 of the NII. If it is shown that the acceptor or maker was ready and willing to pay the instrument at every place of payment specified in the instrument on the due date such ability and willingness is equivalent to a tender of payment.

Section 3-605. Cancellation and Renunciation.

(1) The holder of an instrument may even without consideration discharge any party

(a) in any manner apparent on the face of the instrument or the indorsement, as by intentionally cancelling the instrument or the party’s signature by destruction or mutilation, or by striking out the party’s signature; or

(b) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.

(2) Neither cancellation nor renunciation without surrender of the instrument affects the title thereto.
Initially it should be observed that discharge as used in the Code is a personal defense (3-601) and not available against a holder in due course without notice of the discharge at the time of purchase (3-602). Under the Code consideration is not necessary to validate a cancellation or renunciation of an instrument.

Subsection (1)(a) lists the exclusive means whereby a cancellation will result in the discharge of a party to a negotiable instrument. The cancellation must be apparent on the instrument or the indorsement. This may be evidenced by destruction or mutilation of the instrument or by striking out the party's signature. Cancellation is a personal defense under subsection (c) of section 3-601.

Subsection (1)(b) corresponds to section 122 of the NIL. Under this subsection a renunciation without consideration is valid if in writing, signed and delivered or if the instrument is physically delivered to the one being discharged. Renunciation is a personal defense and not available against a holder in due course (3-601(c)).

Subsection (2) is new. It is made clear by this subsection that one does not lose his title to an instrument by cancellation or renunciation unless he surrenders the instrument.

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Where the indorser, or guarantor, of a negotiable promissory note has released the maker from liability therein so far as he (the indorser or guarantor) is concerned, he cannot complain that verdict and judgment is not rendered against the maker in a suit by a purchaser of the note in due course against both the maker and indorser, or guarantor. Midland Inv. Co. v. Nelson, 107 W. Va. 220, 148 S.E. 9 (1929).

Section 3-606. Impairment of Recourse or of Collateral.

(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to
the knowledge of the holder a right of recourse or
agrees to suspend the right to enforce against such
person the instrument or collateral or otherwise dis-
charges such person, except that failure or delay in
effecting any required presentment, protests or notice
of dishonor with respect to any such person does not
discharge any party as to whom presentment, protest
or notice of dishonor is effective or unnecessary; or
(b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with a right of recourse the holder preserves

(a) all his rights against such party as of the time when the instrument was originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) all rights of such party to recourse against others.

In instances where a party to a negotiable instrument is a surety for another certain rules of suretyship law become important. Three such rules which may have importance are: (1) A discharge of the principal debtor releases the surety. (2) A binding extension of time granted to the principal debtor releases the surety. (3) The surrender of collateral to the principal debtor releases the surety either entirely or pro tanto to the value of the collateral released.

Section 120 of the Uniform Negotiable Instruments Law provides: "A person secondarily liable on the instrument is discharged: . . . (6) By an agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved." The West Virginia version of section 120 does not contain this language. However, the West Virginia counterpart of section 120 reads: "This section does not include the rules governing the discharge of a surety or party secondarily liable because of such secondary liability." The question has risen under the uniform section 120 as to whether the term "secondary party" is used to identify one by virtue of the position of his name upon the instrument, such as an indorser, or whether it means one who is in fact a surety for another though the suretyship relation does not appear on the face of the instrument. Subsection (1)(a) of the UCC clarifies this troublesome problem by stating that the holder discharges "any party" to the instrument to the extent that without such party's consent the holder without express reservation of
rights releases or agrees not to sue any person against whom the party "has to the knowledge of the holder a right of recourse." Under the UCC if holder of the instrument has knowledge that one signed an instrument as an accommodation co-maker (surety) the rules of suretyship become applicable and govern the effect of an extension of time granted to the principal obligor. If the holder is unaware of the suretyship relation the law relating to negotiable instruments controls over the rules of suretyship. If the holder when extending the due date of the instrument or in releasing a party should reserve his rights against such other parties to the instrument, the courts are prone to treat such extension of time as a covenant not to sue the principal obligor and the sureties would not be released. Impairment of recourse or of collateral is a personal defense and may not be used against a holder in due course of the instrument. See Section 3-601(3)(b).

Subsection (1)(b) is a restatement of the law of suretyship and has been generally recognized as being available to accommodation parties or indorsers. See also section 9-207 of the UCC.

Subsection (2) merely sets forth the effect of an express reservation of rights against a party with the right of recourse which the holder is preserving.

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Section 192 of the NIL defines one primarily liable as: "... the person who, by terms of the instrument, is absolutely required to pay the same." Section 29 of the NIL states that an accommodation party is liable on the instrument to a holder for value, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party. The court stated: "... the obligation of the accommodation party is absolute to pay the holder on the basis of what is written on the paper." The relation of the co-makers to each other is of no consequence to the holder. The court held that an extension of time granted to the principal debtor did not have the effect of releasing an accommodation co-maker of a negotiable instrument. The NIL takes priority over rules of suretyship as to the liability of one signing a negotiable instrument. Marshall County Bank v. Fonner, 113 W. Va. 451, 168 S.E. 375 (1933).

An accommodation indorser who has paid the note has the right of compensation therefor. The letters "Sec." appearing after his name which the plaintiff understood to mean "Security". The question was presented as to whether the rules of suretyship are applicable to the case or whether it is governed solely by the NIL. The court said: "The case of Marshall County Bank v. Fonner ... may be distinguished from the case at bar. In that case there was no qualification to the signatures of the alleged accommodation makers, and from the statement of facts it appears at the time the note was delivered to plaintiff, he knew that the accommodation parties were accommodation makers, which precludes any idea that they were gratuitous sureties. We disapprove of such parts of that opinion as would indicate that the law of suretyship where the relation of principal and surety is shown under proper evidence does not apply to a negotiable instrument. We are of the opinion
that the defendant is a gratuitous surety within the meaning of the general law or surety, as it existed prior to the enactment of Chapter 98A, Code, 1923, and not an accommodation party, as defined by Code, 1931, 46-2-6, and, as such, on the question whether a discharge either in toto or pro tanto was effective, the general law of suretyship should be applied in appraising his rights and liabilities.” As there had been a modification of the contract the surety was released. Keblegard Company v. Maxwell, 127 W. Va. 630, 34 S.E.2d 116 (1945).

Section 3-701. Letter of Advice of International Sight Draft.

(1) A “letter of advice” is a drawer’s communication to the drawee that a described draft has been drawn.

(2) Unless otherwise agreed when a bank receives from another bank a letter of advice of an international sight draft the drawee bank may immediately debit the drawer’s account and stop the running of interest pro tanto. Such a debit and any resulting credit to any account covering outstanding drafts leaves in the drawer full power to stop payment or otherwise dispose of the amount and creates no trust or interest in favor of the holder.

(3) Unless otherwise agreed and except where a draft is drawn under a credit issued by the drawer, the drawee of an international sight draft owes the drawer no duty to pay an unadvised draft but if it does so and the draft is genuine, may appropriately debit the drawer’s account.

The subject covered in this section is limited to letters of advice of international sight drafts. This section merely clarifies the law as to certain previously established practices associated with international banking. As the number of cases dealing with such instruments have been few in number and because of the extremely technical nature of such instruments a detailed consideration of this section is not merited.

Section 3-801. Drafts in a Set.

(1) Where a draft is drawn in a set of parts, each of which is numbered and expressed to be an order only if no other part has been honored, the whole of the parts constitutes one draft but a taker of any part may become a holder in due course of the draft.

(2) Any person who negotiates, indorses or accepts a single part of a draft drawn in a set thereby becomes liable to any holder
in due course of that part as if it were the whole set, but as between different holders in due course to whom different parts have been negotiated the holder whose title first accrues has all rights to the draft and its proceeds.

(3) As against the drawee the first presented part of a draft drawn in a set is the part entitled to payment, or if a time draft to acceptance and payment. Acceptance of any subsequently presented part renders the drawee liable thereon under subsection (2). With respect both to a holder and to the drawer payment of a subsequently presented part of a draft payable at sight has the same effect as payment of a check notwithstanding an effective stop order (Section 4-407).

(4) Except as otherwise provided in this section, where any part of a draft in a set is discharged by payment or otherwise the whole draft is discharged.

The practice of issuing bills in sets dates back perhaps to the early 1600's. At that time there was considerable risk in sending bills great distance. To overcome the risk of loss the drawer would make his bills in sets of three or four. Each one of the set would identify that it was one of a set and was numbered. The tender of any one was in effect the tender of all. With the development of a more certain transportation system and a better postal system the use of bills in sets has become obsolete and rarely used. The NIL recognized the particular and peculiar problems associated with the use of bills in set and codified the common law in sections 178-183.

Subsection (1) defines drafts in a set of parts as: (1) each of which is numbered and expressed to be an order only if no other part has been honored. (2) The whole of the parts constitutes one draft. (3) It is possible for each part to be negotiated separately into the hands of a holder in due course.

Subsection (2) while not recognizing the right of one to negotiate separate parts to different parties, does recognize that the holder of the parts does have the power to do so. One who indorses and passes one of the drafts in set is liable thereon as if it were the whole of the set. That is, he will have the liability of an indorser on each one that he indorses. It may thus be seen
that if there is four bills to a set, that each one may find its way into the hands of a holder in due course. The indorser would be liable on each. But as between different holders of the multiple parts, the first to acquire title has the right to the draft and to its proceeds.

Subsection (3) provides that as against the drawee the first presented part, irrespective of number, is entitled to payment, if it be a time draft to acceptance and payment. If the drawee should accept more than one of the set, such acceptor is liable on both acceptances under subsection (2).

A discharge of any one of the set, where the discharge is payment or otherwise, discharges the whole draft. Again it is to be observed that discharge is only a personal defense and may not be successfully asserted against a holder in due course. Thus a discharge of draft number one of a set may not be asserted as a defense against the holder of draft number four if draft number four is in the hands of a holder in due course.

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

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

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

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

(2) The taking in good faith of a check which is not postdated does not of itself so extend the time on the original obligation as to discharge a surety.
The purpose of section 3-802 is to set forth the rights which one who has taken a negotiable instrument has apart from his remedies on the instrument.

Subsection (1) of section 3-411 provides that if the holder obtains the certification of a check which he holds all prior parties to the instrument, such as the drawer and indorsers, are discharged of liability on the instrument. Subsection (1)(a) of section 3-802 provides that if the parties are released of liability on the instrument they are likewise released of liability on the underlying debt. A holder of a check which has been certified at his request thereafter has only a cause of action against the certifying bank. If the bank is the drawer, maker or acceptor the holder of the instrument has no right against the underlying obligor. If the instrument is not for the amount of the underlying obligation, the discharge is pro tanto. It is within the competency of the parties to agree otherwise.

It has often been said that a check is a conditional payment of the obligation for which it is given. Under subsection (1)(b) of section 3-802, the original obligation is suspended pro tanto until the instrument is due or if payable on demand until it is presented. If the instrument is dishonored an action may be maintained either upon the instrument or on the underlying debt or obligation. The discharge of the obligor on the instrument also discharges him of liability on the underlying debt. As the right to proceed against the party on the underlying debt pending maturity of the instrument or demand in case of a demand instrument is suspended it would necessarily follow that the operation of the statute of limitations on the underlying debt is also suspended.

Subsection (2) clearly states that the receipt of a check does not have the effect of releasing or discharging a surety on the underlying obligation. If the check is taken as a means of immediate payment; the thirty day period for presentment as specified in section 3-503 does not constitute an extension of time so as to give the surety a defense to his obligation on the underlying debt.

Section 3-803. Notice to Third Party.

Where a defendant is sued for breach of an obligation for which a third person is answerable over under this Article he may give the third person written notice of the litigation, and the person notified
may then give similar notice to any other person who is answerable over to him under this Article. If the notice states that the person notified may come in and defend and that if the person notified does not do so he will in any action against him by the person giving the notice be bound by any determination of fact common to the two litigations, then unless after seasonable receipt of the notice the person notified does come in and defend he is so bound.

The purpose of this section is to express the rights of one who is being sued over against another party to the instrument. Under this section the defendant by giving notice to a person who is in turn liable to him to have determined in this litigation the amount to which such third party would be liable to the defendant in the event that defendant is required to pay the plaintiff. This section does not displace any rights relating to interpleader, impleading or joinder of parties but is supplemental to these remedies. Upon actual receipt by the third party of written notice of litigation, and if the notice states that the third party may come in and defend, and he fails to do so the third party is bound by any determination of fact common to the two litigations. The third party has the right so far as to those persons who would be liable over to him in the event he has to pay the instrument.

Section 3-804. Lost, Destroyed or Stolen Instruments.

The owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on the instrument.

This section authorizes one who has lost a negotiable instrument or from whom it has been stolen or where the instrument has been destroyed to bring an action upon the instrument in his own name. Such a party plaintiff could not be considered a holder of the instrument since he is not in possession of the bill or note. As he is not a holder, he is not entitled to any of the presumptions applicable to a holder such as set forth in section 3-307. He would
have the burden of proving the terms of the instrument, the signatures and his ownership thereof.

For the protection of the defendant against a verdict resulting from false testimony or from having to subsequently again pay the instrument to a holder in due course, the court may require the plaintiff to furnish indemnity for the protection of the defendant. There may be instances in which the evidence points so clearly to the destruction of the instrument as were the plaintiff's house or place of business has burned with all his effects, that the court may not require the plaintiff to post an indemnity bond for the protection of the defendant.

Section 3-805. Instruments Not Payable to Order or to Bearer.

This Article applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this Article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument.

This section makes the laws applicable to negotiable instruments also applicable to certain nonnegotiable instruments. An instrument which is nonnegotiable because it contains a conditional order or promise to pay would clearly not be within the scope of this Article, but would be a simple contract and governed by the laws applicable to contracts. This section makes the entire Article applicable to instruments which are nonnegotiable because they do not contain words of negotiability (order or bearer) except that one cannot be a holder in due course of such an instrument. A check made payable to John Doe instead of being made payable to the order of John Doe is nonnegotiable. One could not be a holder in due course of such a check. However, in commerce and business circles such an instrument is treated as a check and passes in commerce as a check. Those who handle it treat it differently than they would an ordinary contract. While it has been held that the NIL does not apply to such nonnegotiable checks that they were governed by the law merchant. Such instruments may be passed by indorsement without words of assignment. Indorsers of such nonnegotiable instruments have greater liability than an assignor and are impressed with the liability of an indorser.
Such indorser is entitled to presentment, notice of dishonor, or protest. The rules applicable to filling of blanks on a negotiable instrument are equally applicable to such instruments. Such instruments are treated as negotiable so far as their form will permit.

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Conditional delivery of a negotiable instrument is not a defense against a holder in due course. The instrument having been entrusted to one for one purpose was used for another does not entitle the maker to a defense against a holder in due course. Rusmissen v. White Oak Stave Co., 80 W. Va. 400, 92 S.E. 672 (1917).

Mere knowledge of facts sufficient to create suspicion, without actual knowledge, will not prevent the purchaser from being a holder in due course. If the facts and conditions attending the purchase are so cogent and obvious that to remain passive amounts to bad faith the purchaser will not qualify as a holder in due course. Marion Nat'l Bank v. Harden, 83 W. Va. 119, 97 S.E. 600 (1918).

The cashier of the purchasing bank perpetrated a fraud upon the indorser of the note discounted at the bank. The bank was without knowledge of the conduct of its agent. Notice to the agent was not notice to the principal because of the agent's misconduct, nor is the bank estopped to raise this issue because of having placed the agent in the position of trust and empowered him to deal with others. National Bank v. Alter, 92 W. Va. 313, 114 S.E. 745 (1922).

Every holder of a negotiable instrument is deemed prima facie to be a holder in due course, that is, he took it before it was overdue, without notice that it had been previously dishonored, for value and in good faith. In an action by the bank against the maker, where the proceeds have been credited to the transferor's account, the burden of showing that the proceeds have not been paid out or drawn upon is upon the defendant; and in the absence of such showing the bank will be deemed a holder in due course. Maryland Fin. Corp. v. Peoples Bank, 99 W. Va. 230, 128 S.E. 294 (1925).

Payment is only a personal defense and cannot be successfully asserted against a holder in due course. An instrument indorsed and delivered as collateral entitles the transferee to quality as a holder in due course if acquired before maturity, in good faith, and without notice of equities and without more becomes a holder for value. Wyoming County Bank v. Nichols, 101 W. Va. 533, 133 S.E. 129 (1926).

The question of good faith or bad faith is one for the jury and not the court. One who takes a negotiable instrument has notice of infirmity in the instrument if he has actual knowledge of the infirmity or knowledge of such facts that his action in taking the instrument amounts to bad faith. Merchants & Miners Bank v. Gaujot, 102 W. Va. 643, 136 S.E. 199 (1926).

A bank discounting commercial paper for the benefit of one or more of its officers is not chargeable with notice of an infirmity in the instrument known to him. Picklesimer v. Hall, 103 W. Va. 646, 138 S.E. 370 (1927).

The defendant was permitted to plead that his signature had been obtained to a note under the imposition that it was a release of insurance. In this litigation between the immediate parties to the instrument, the court said: "Looking into the evidence we find that the real defense sought to be set up under the plea is an alleged fraud. In this, that the defendant's signature was obtained to a note under the imposition that it was a release of insurance. So, if a man be imposed upon, and signs one paper while he believes he is signing another, he cannot be said to have assented, and may show this on a plea of no est factum." Canady v. Chestonia, 108 W.Va. 254, 145 S.E. 390 (1928).
When it is shown that the title of any prior party in the chain of title was defective, the holder has the burden of proving that he is a holder in due course or acquired his title through a holder in due course. At this junction there is a shifting of the burden of proof from the defendant to the plaintiff in that the plaintiff no longer has the presumption that he is a holder in due course but must now prove it. Baker v. Cole, 109 W. Va. 89, 153 S.E. 109 (1930).

One who acquires negotiable paper after maturity, not being a holder in due course, takes it subject to all equities and defenses arising out of the reference to which the paper was made, or any agreement between the original parties with relation to the instrument. Clemmer v. Bowlby, 109 W. Va. 105, 153 S.E. 311 (1930).

Where an indorsement is placed on an instrument at a date subsequent to its purchase, the rights of the transferee, whether a holder or holder in due course, will be determined according to the existing facts at the date of indorsement. Even though a purchaser for value, a transferee cannot be a holder in due course unless the statutory form of indorsement is used. Community Savings & Loan Co. v. Effort, 11 W. Va. 308, 161 S.E. 594 (1931).

A plea denying the validity of a negotiable note itself will put a holder on proof, but a denial of the holder's title will not. The mere crediting by a bank to a depositor's account of the proceeds of a note will not constitute the bank a holder for value, thus not a holder in due course. At the time the credit is withdrawn by the depositor from his account the bank may then qualify as a holder in due course. Bank of Sutton v. Skidmore, 113 W. Va. 25, 176 S.E. 144 (1932).

In an unsatisfactory opinion, the court held that the defendant had the burden of proving that the plaintiff did not acquire the instrument in good faith, for value, and without notice. Marshall County Bank v. Citizens Mut. Trust Co., 114 W. Va. 791, 174 S.E. 556 (1934).

Plaintiff contended that whether the notes had in fact been negotiated within a reasonable time is a jury question. The court said: "Where the facts are doubtful or disputed, the question of reasonable time is a mixed question of law and fact. But when the facts are clear and undisputed, the question is one of law for the court. . . ." Weaver v. Harrell, 115 W. Va. 409, 176 S.E. 505 (1934).

When it is shown that the title of any person who negotiated the instrument was defective, the holder must then prove himself a holder in due course, or that he acquired it from a holder in due course. Commercial Credit Co. v. Barnett, 116 W. Va. 132, 178 S.E. 816 (1935).

Usury is a defense even against a holder in due course. However, there is considerable support in the United States for the rule that the defense of usury will not prevail as against a holder in due course.


The sale of negotiable paper after it has been indorsed with a restrictive indorsement is a waiver of the restriction and entitles the purchaser to qualify as a holder in due course. Maryland Trust Co. v. Gregory, 139 W. Va. 35, 38 S.E.2d 399 (1946).