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AMENDING OUR NEGOTIABLE INSTRUMENTS LAW

E. C. DICKINSON*

The Revisers of the Code of West Virginia, in their report to the Legislature,¹ have recommended that twenty-seven sections of the present chapter 98-A, dealing with negotiable instruments, be amended. Four of these suggested changes would merely correct clerical errors which appear in the present act and involve no substantial change in the law. Of the remaining twenty-three, a part, apparently, are intended to clarify the law, but others, and perhaps most of them, admittedly change the present statutory rules applicable to bills, notes and checks.

The Negotiable Instruments Law was the first of the uniform commercial acts recommended to the states for adoption by the body now known as the National Conference of Commissioners on Uniform State Laws. Adopted first by Connecticut in 1897, it required twenty-seven years to convince all the states of the desirability of codifying this branch of the law. It has been a part of the law of West Virginia for twenty years. With a few changes here and there, it has now been adopted in the District of Columbia, all the states and territories except Porto Rico, and in the Philippines. Such departures from the original draft as have been made are the result largely of the criticism in 1900, of certain sections of the Negotiable Instruments Law by Professor Ames,² then Dean of the Harvard Law School, which led to the Ames-Brewster controversy and to a very thorough re-examination of its provisions by leading jurists. As a result of this discussion certain of the modifications suggested by Dean Ames, and later formulated as amendments by Professor Brannan,³ have come to be generally regarded as desirable, and two or three states in adopting the Act have made some of these changes. Then, too, the several thousand cases decided under the Act have

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¹ Chapter 46 of the Revisers' Report contains the Negotiable Instrument Law as revised.
³ J. D. Brannan, "Some Necessary Amendments of the Negotiable Instruments Law," 26 HARV. L. REV. 493, 588. Many of these will be found also in Brannan's NEGOTIABLE INSTRUMENTS LAW ANNOTATED, 4th ed., under pertinent sections.
brought to light a number of ambiguities and uncertainties resulting in continued conflict of authority. A few of the states have endeavored to remove these sources of conflict by modifying the offending provisions of the Act.

It must be admitted, therefore, that while the general adoption of the Negotiable Instruments Law has brought about the desired uniformity upon many important questions, it is equally true that it has fallen far short of realizing the ideal of complete uniformity which its draftsmen likely entertained. In the light of what has occurred in other states, it is not surprising that the Revisers of our Code have undertaken to remedy certain defects and omissions in our Negotiable Instruments Law which the experience of twenty years has disclosed. It is plain, however, that with every such modification of the official draft, we are getting further away from that uniformity which the Act was intended to secure, and to that extent defeating the purpose of its adoption. There is serious doubt in the writer’s mind whether the benefit to be derived from any amendment suggested by the Code Commission is great enough, or its need sufficiently urgent, to warrant securing it at such a cost. Fortunately, a way is open by which the most needed of these amendments may be secured and substantial uniformity retained.

In a recent article entitled "Keeping the Uniform State Laws Uniform," Judge Hargest, Chairman of the Executive Committee of the National Conference of Commissioners on Uniform State Laws, makes the following suggestion: "The only proper way to amend uniform statutes is to call the attention of the National Conference of Commissioners on Uniform State Laws to the need of amendment. That Conference, as experience in the past has shown, then considers the question in the same way that it considers an original Act. When satisfied, as the Conference sometimes is, that an amendment is desirable, it prepares such an amendment with care and recommends it for adoption to the several states. An observance of this rule would also go a long way toward keeping the uniform statutes uniform." This thing has occurred, apparently, in the case of the Negotiable Instruments Law. The Commissioners on

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4 76 U. of Pa. L. Rev. 178.
Uniform State Laws have not been unmindful of the criticisms aimed at the original draft, of the ambiguities which have appeared and of the conflicting interpretations put upon its provisions. At the 36th Annual meeting in Denver in 1926 the Conference decided that the time had come for entering upon the study of the need for a comprehensive amendment of the Negotiable Instruments Law. The matter was referred to a special committee upon the Amendment of the Uniform Acts, with Professor Williston as Chairman. At a meeting held last August this committee reported as the basis for further discussion a list of proposed amendments to twenty-four sections of the Act. Criticism of this report has been solicited by the committee and a careful study of the changes suggested is being made by members of the profession best fitted by training and experience to make recommendations. Whether the committee will act finally upon these amendments at its next meeting in July is not known. The defects in the original act will serve, no doubt, as a warning against undue haste. The advisability of further amendments to correct defects and omissions not covered by the committee's proposals has been ably pointed out and will doubtless receive careful consideration at the hands of the committee. It is not too much to expect that, when finally submitted to the states for adoption, the proposed amendments will represent the consensus of opinion of a large body of the country's leading bankers and lawyers on what is advisable in the way of modification.

If the desire for uniformity in the law of negotiable instruments is still prevalent, and the writer believes it is, this Amendatory Act should be welcomed by all the states as a means of approaching nearer the ideal of complete uniformity than ever has been possible under the original act, for most of the modifications, as will later appear, do not purport to change the law but only to clarify it so as to secure uniformity of interpretation. In this aim, it would seem, our own state should cooperate. If this Act, when finally submitted to the states, embodies the most important of the changes desired by our Code Commission, it should be seized upon gladly as a means of obtaining the needed

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amendments without destroying the uniformity which now exists.

It has been suggested that a discussion in the pages of the Law Quarterly of the amendments to our negotiable instruments law proposed by the Code Commission might direct attention to the subject and perhaps lead to a consideration of the proposed changes, by the bar of the state, which otherwise they might not receive. Regardless of the action which may be taken on other Chapters of the Code, there may be good and sufficient reason for not altering, especially at this time, a uniform statute such as the Negotiable Instruments Law. Intelligent action cannot be expected without a careful examination of the sections affected. This should include an investigation of the purpose of each change suggested, the need for such change, and the desirability of the modification proposed. Where the purpose of the change is merely to clarify the law, then no serious objection to its adoption would appear. Textual uniformity, while desirable, is of less importance than uniformity of interpretation. On the other hand, amendments which change the law should not be adopted unless it plainly appears that the present rule has worked hardship for which not even the benefit of uniformity can compensate. In considering the amendments, also, the possible inconsistencies which may result from their adoption must not be lost sight of. The writer feels, too, that such a study should be made in the light of the report of the Committee on Amendment of Uniform Acts and will therefore make frequent reference to their proposals and discuss briefly their recommendations at the end of this paper. The amendments suggested by our Code Commission will first be taken up in order.

In Articles 1 and 2, dealing respectively with "Form and Interpretation" and "Consideration," the only change proposed is the omission of the words "of a specified person" from subdivision (d) of Section 1 of Article 1, which reads: "(d) Must be payable to the order of a specified person or to bearer." The words omitted are superfluous and the change wholly immaterial.

In Article 3, relating to negotiation, four changes are proposed. Three of these, in Sections 30, 38 and 45, merely
correct clerical errors and make the sections identical with the uniform act. These corrections should be made at an appropriate time. The fourth change is the omission of Section 40, which reads as follows:

"Where an instrument payable to bearer is indorsed specially, it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement."

The repugnancy of this section to Subsection 5 of Section 9 was pointed out by Dean Ames⁶ and its repeal advocated by Professor Brannan.⁷ Section 9-5 implies that unless the "only or last indorsement is in blank" the instrument ceases to be payable to bearer. Section 40 provides that an instrument payable to bearer may be negotiated by delivery even when specially indorsed. Section 9-5 abrogated the rule of Smith v. Clarke,⁸ while Section 40 re-enacted it and was so understood by the draftsman.⁹ The attempt to reconcile the two sections by treating Section 40 as applying only to instruments payable on their face to bearer has not been entirely satisfactory, and the mercantile understanding has always been that if an instrument payable to bearer is indorsed specially, the indorsement of the special indorsee should be necessary for negotiation whether originally payable to bearer, or payable to order and indorsed in blank. The Committee on Amendment of Uniform Acts also recommends the repeal of Section 40, and to prevent such decisions as that of Parker v. Roberts,¹⁰ would add to Section 9 the following:

"When an instrument payable to bearer is specially or restrictively indorsed it ceases to be payable to bearer and becomes payable according to the terms of the indorsement."

The purpose of the Code Commission would be more surely accomplished by following this course than by merely repealing Section 40.

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⁶ Supra, n. 2, 249.
⁷ Supra, n. 3, 500.
⁸ 1 Esp. 180, S. C. Peake 225 (1794).
⁹ CRAWFORD, NEGOTIABLE INSTRUMENTS LAW, 3d ed. 65.
¹⁰ 243 Mass. 174, 137 N. E. 295 (1922). The court held in this case that two special indorsements after a blank indorsement might be struck out under Section 48 as not necessary to the holder's title.
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In Article 4, entitled "Rights of the Holder," two changes are proposed. Section 52 is made to read: "A holder in due course is a holder, including a payee, who has taken the instrument," etc. The words "including a payee" are new. At common law the payee might be a holder in due course. Under the Negotiable Instruments Law the decisions are divided.\(^{11}\) The purpose of this amendment is to give the same protection to a payee as to an indorsee if the instrument is taken in due course. This happens when possession of a check is intrusted by the drawer to some one other than the payee and is delivered to the payee without authority but is taken in good faith and for value. The amendment is desirable, but would seemingly necessitate changes in other sections to avoid uncertainty. In Section 16, for instance, it is provided that "As between immediate parties and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing as the case may be." This sentence should be made to read: "As against a party other than a holder in due course, the delivery," etc., since such a drawer and payee as are referred to above would be immediate parties and without this change would not have the rights of a holder in due course which Section 52 as amended would secure to the payee. Section 30 also requires modification for the same reason. The Committee on Amendment of Uniform Acts recommends this change also, but in place of the words "including a payee," makes the section read: "A holder in due course is a payee or other holder who has taken the instrument," etc. The Committee also recommends the modification of Sections 16 and 30 to make them conform to the change in Section 52. Here again it would seem to be preferable to follow the language of the Committee's proposed amendments.

Section 58 has also been changed in accordance with a suggestion of Professor Brannan.\(^{12}\) This section originally provided that "A holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights

\(^{11}\) See cases in BRANNAN'S NEGOTIABLE INSTRUMENTS LAW ANN., 4th ed. pp. 362-360.

\(^{12}\) Supra, n. 3, 602.
of such former holder in respect to all parties prior to the latter." In the case of *Horan v. Mason*, the New York court held that a holder with notice of the fraud, who thereafter transferred the instrument to a holder in due course and later re-acquired it, had the rights of a holder in due course. The purpose of the amendment, as explained in the Revisers' Note, is "to make certain that a holder with notice should not be able to cure a defect in his title by transferring the instrument to a holder in due course and then re-acquiring the instrument." This is done by excluding from the rights of a holder in due course anyone who has "previously been a holder with notice and subject to the defense of such fraud or illegality." No pressing need for this amendment is apparent. The holder with notice in *Horan v. Mason* became "a party to the fraud" when he sold the instrument to a holder in due course and thus cut off the defense of fraud. This is the view taken by other courts. The fact that the Committee on Amendment of Uniform Acts fails to recommend this amendment argues against its necessity. However, since it does not change the law, its adoption would be harmless.

Modification of three sections in Article 5, dealing with liability of parties, is proposed. Two subsections of Section 64 are re-written so as to enable the drawer of an accepted bill, payable to his own order, to hold a person who indorses for the purpose of guaranteeing payment. "This omission," states the Revisers' Note, "was no doubt an oversight on the part of the author of the original statute." This change has been recommended by Dean Ames but is not included in the Report of the Committee on Amendment of Uniform Acts. The fact that in the only cases where the omission has threatened to produce the wrong result the courts have found a way of reaching the correct result, may have influenced the Committee. The amendment as proposed would do no harm except to produce further lack of uniformity.

Section 66, defining the liability of the general indorser

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13 *141 App. Div. 89, 125 N. Y. S. 668 (1910).*
14 *Supra, n. 1, 9.*
15 *Berenson v. Conant, 214 Mass. 127, 101 N. E. 60 (1913); Bank of Meno v. Coulter, 94 Okla. 213, 221 Pac. 495 (1923); Comstock v. Buckley, 141 Wis. 225, 124 N. W. 414 (1910).*
16 *Supra, n. 1, 9.*
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has been altered by the Revisers in several respects. It now reads:

"Liability of General Indorser. Every indorser who indorses without qualification, warrants to all subsequent holders in due course; (1) the matters and things mentioned in subdivisions one, two, and three of the next preceding sections; and (2) that the instrument is at the time of his indorsement valid and subsisting. And, in addition, he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its tenor and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it."

The first change suggested is the insertion of the words "except an accommodation indorser" after the word "indorser" in the first line. Since an accommodation indorser is not a vendor, he should not be liable as a warrantor. This change has been made in Illinois, following the suggestion of Dean Ames. It seems to be desirable. The second change suggested would incorporate the fourth warranty mentioned in Section 65—"That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." This, evidently, is taken from the Illinois Act also. The Revisers give no reason for this change and the writer can discover none. The warranty "that the instrument is at the time of his indorsement valid and subsisting" affords all the protection that the former does, and more. Such a departure from uniformity, for no apparent reason, is not desirable. The third change in this Section is necessary if the first one is made. "He" is changed to "every indorser" so that the remainder of the Section shall apply to an accommodation indorser. Otherwise, the accommodation indorser would incur no liability.

Two changes are suggested also in Section 68. The first has to do with the order of liability of indorsers. The original act reads:

"As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint in-

17 Supra, n. 2, 250.
18 Supra, n. 2, 251-252.
endorsers who indorse are deemed to indorse jointly or severally."

The Revisers insert a provision that accommodation or irregular indorsers, indorsing for the same party, are *prima facie* equally liable. Here they are acting, apparently, on their own initiative. Not even has the Illinois Act made this change, and Dean Ames sees no cause, apparently, for taking exception to the rule as stated. The Revisers' Note points out that the existing rule "has resulted, in a number of cases, in manifest injustice to parties, and, in order to prevent injustice, the courts have been driven to the necessity of setting up an agreement among such indorsers fixing their liability equally as among themselves, when in fact no such agreement existed." 10 True enough, our court has said that "such an agreement need not be express but may be inferred from facts, circumstances and conduct," 20 but can one say properly in such a case that "in fact no such agreement existed"? With the court taking this position, it is difficult to see how injustice is likely to occur. The fact that no other state has made this change and the failure of the Committee on Amendment of Uniform Laws to recommend it, raise a doubt as to its need.

The second change in Section 68 makes all parties jointly bound on a negotiable instrument jointly and severally liable. The present Act makes only joint payees or joint indorsers jointly and severally liable. This follows the Illinois Act. It also conforms to the provisions of Article 8, c. 55 of the Revisers' Report. It is probably desirable aside from the consideration of uniformity.

Several important changes are made in Article 6 relating to presentment for payment. From Section 70 the following provision is omitted: "but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part." Wisconsin has omitted this provision and three other states have added, after the word "maturity," "and has funds there available for that purpose." The Revisers argue 21 that since the result of an unaccepted tender of payment is to dis-

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10 Supra, n. 1, 9.
21 Supra, n. 1, 10.
charge all persons secondarily liable on the instrument, a layman, ignorant of the law, may be subjected under the present rule to losses which, "but for the changes in the law made by the Act of 1907" would not be incurred. The danger here appears to be imaginary. Secondary parties are discharged if presentment is not made. The provision the Revisers would omit merely adds a penalty of loss of interest and costs in case of suit against the primary party to collect the note when he was ready and willing to pay at the specified place. The section as it stands does not appear objectionable and its change would put our law at variance with that of practically all the other states.

A new provision also has been added to this Section, as follows: "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 same purpose is accomplished in a different way by the amendment proposed by the Committee on Amendment of Uniform Acts. Their suggestion is to make the first sentence of Section 70 read as follows: "Presentment for payment is not necessary, except in the case of bank notes and certificates of deposit, in order to charge the person primarily liable on the instrument." The effect of this section, as originally drawn, on certificates of deposit and bank notes was evidently overlooked. The change is clearly advisable. It would seem preferable to adopt the latter form and thus avoid further departure from uniformity. It would seem, also, that the same business custom with reference to which this change is made, would require a qualification of Section 53, such as proposed in the Amendatory Act, making that Section read: "Where an instrument payable on demand, other than a bank note or a certificate of deposit, is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course."

To Section 72 the Revisers would add a sentence designating to whom presentment shall be made on behalf of a corporation. This would seem to be unnecessary, as no difficulty, apparently, has arisen under the present Act.

In Section 73, dealing with place of presentment for payment, the Revisers have proposed a change which is ex-
ceedingly objectionable. The section now provides:

"Presentment for payment is made at the proper place
1. Where a place of payment is specified in the instrument and it is there presented;
2. Where no place of payment is specified, but the address of the person to make payment is given in the instrument and it is there presented;
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual place of business or residence of the person to make payment;
4. In any other case if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence."

The Revisers would leave (1) as it is and for (2), (3), and (4) substitute the following: "Where no place of payment is specified, when presented at the usual place of business or residence of the holder. A person having an instrument in his possession for collection is a holder within the purview of this section."

Presentment for payment is one of the steps necessary to fix the liability of drawers and indorsers, but is not necessary in order to charge persons primarily liable on the instrument. It has always, by common understanding, meant an exhibition of the instrument by the holder to the maker or acceptor, accompanied by a demand for payment, in accordance with the rules laid down in Sections 72 and 73, which merely codify the common law. The drawer and indorsers could demand due diligence from the holder, and due diligence included hunting up the party primarily liable and seeking payment from him before looking to the parties secondarily liable for payment. By the change suggested, the holder would be relieved entirely of this obligation. If no place of payment is specified, the holder, by having the instrument in his possession at his usual place of business or residence at maturity, is entitled not only to hold the primary party, but upon giving notice of nonpayment to parties secondarily liable, to hold them as well.22 To prevent this result the maker or acceptor must locate the paper in

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22 Section 6 of Article 6 of the Revisers' Report, corresponding to Section 76, c. 98-a of the present Code, provides: "When no place of payment is specified in the instrument, the presence of the same for delivery to the person entitled to it upon payment, on the day for presentment, at the usual place of business or residence of the holder, if the person entitled to presentment be not there found, shall be deemed a sufficient presentment."
the hands of the holder and make payment there. If he fails to do so, the paper is dishonored. If able and willing to pay, but unable to locate the holder of the instrument, presumably the same result would follow. This certainly effects a radical change in the conditions under which a drawer and indorser agree to pay. While purporting to affect only the place of presentment, it in fact abolishes the requirement of presentment in case of all instruments which do not specify a place of payment. If this is the purpose of the Revisers, they should abolish it expressly, and not, under pretense of retaining the requirement, completely nullify it.

The reasons assigned for this change in the long Revisers' Note\(^23\) accompanying this section would lend support to much that is written and believed regarding our State. They tell us that the "Act of 1907 is reasonably suitable in centers of population but is wholly unsuited to the wide, unsettled spaces and points of difficult access in West Virginia," and that Section 73 is "unsuited to the conditions under which business is transacted in West Virginia." They argue further that "the present law places upon the layman holding a negotiable instrument * * * the difficult and onerous task of locating the person to make payment and transmitting the instrument to the place of business or residence of such person." The change they propose "makes presentment for payment simple and inexpensive and any objections to this provision are outweighed by its advantages."

Just how conditions under which business is transacted in West Virginia differ from those in many other States is not explained, nor can we properly claim a monopoly on "wide, unsettled spaces and points of difficult access." Surely a requirement which has been a part of the common law for a century or more, is the law in all of our States and has been a part of our own law for twenty years,\(^24\) must not have proved to be unduly onerous or burdensome. The fact that the holders of commercial paper seldom acquire it without ascertaining the residence and financial responsibility of its signers; that the requirement can be waived if

\(^{23}\) Supra, n. 1, 10-11.

\(^{24}\) Prior to the adoption of the Negotiable Instruments Law in West Virginia, only instruments payable at a bank were negotiable.
the parties see fit; and that by Section 82 presentment is
dispensed with where, after the exercise of reasonable
diligence it can not be made, all go to show that the diffi-
culty of finding the primary party is largely imaginary. The
modification proposed is a radical departure from long es-
established custom, would put our law at variance with that
of all other states, and would lead to numerous complica-
tions in case of bills drawn and indorsed in other States and
payable here, and those drawn here and payable else-
where. The writer is unable to see the advantages in the
change which outweigh these objections.

If the suggested amendment to Section 73 should be
adopted, it would necessitate the modification of Sections
75, 76, 77 and 78 as proposed by the Revisers. As the
changes are for the purpose of making these sections con-
form to Section 73, the objections urged to its adoption
apply equally to them.

From Section 80 the Revisers would omit everything after
the word "accommodation." The section now reads: "Pre-
sentment for payment is not required in order to charge an
indorser where the instrument was made or accepted for
his accommodation and he has no reason to expect that the
instrument will be paid if presented." This change follows
the precedent of Illinois. The amendment is unobjection-
able in itself. It is doubtful, however, whether it is of
sufficient importance to justify a departure from uniform-
ity.

A complete change in the law as laid down in Section
87 would be accomplished by the amendment proposed to
that section. It now reads: "Where the instrument is made
payable at a bank it is equivalent to an order to the bank
to pay the same for the account of the principal debtor
thereon." By inserting the word "not" before "equivalent,"
the meaning of the section is reversed. No reason for this
change is advanced in the Revisers' Note beyond the fol-
lowing statement:25 "Without directions, either general or
specific from the depositor so to do, a bank should not apply
his funds to the payment of a note because payable at such
bank." The opinion thus expressed may be sound, but
opinion alone seems scarcely sufficient to justify an impor-

25 Supra, n. 1, 12.
tant change in the statutory law of a state. It is true, as the Note states, that four States have omitted this section entirely and two others have changed it as the Revisers suggest. While this lends support to their opinion, the fact that, in spite of this diversity of view, no such change is suggested by the Amendatory Act indicates that no general dissatisfaction is in evidence. It would seem much the wiser policy to stay with the majority of the States unless general adoption of this amendment can be secured through the National Conference of Commissioners on Uniform State Laws.

The only change suggested in Article 7 is the insertion in Section 113 of the words "or other person entitled to give notice," which would make the section read: "Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, or the person entitled to give notice, and not imputable to his default, misconduct or negligence." This probably improves the section, but since no harm, likely, would result from leaving it as it stands, it seems better to do so for the sake of uniformity.

Sections 119 and 120 have proved to be among the most troublesome in the Negotiable Instruments Law, and there is general agreement that they should be re-written. The Revisers have adopted the form proposed by Professor Brannan\textsuperscript{28} for amending Section 119. It is as follows:

"How Instrument Discharged. A negotiable instrument is discharged:
(a) By payment in due course by or on behalf of the person primarily liable;
(b) By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
(c) By the intentional cancellation thereof by the holder;
(d) When the person primarily liable becomes the holder of the instrument at or after maturity in his own right."

The principal change is the omission of subsection (4) of the present section, which reads: "By any other act which will discharge a simple contract for the payment of mon-

\textsuperscript{28} Supra, n. 3, 593-596.
ey." This is an obvious error. Payment or accord and satisfaction before maturity certainly cannot discharge a negotiable note. The words "persons primarily liable" in subsections 1 and 5 are used in lieu of "principal debtor" in order to eliminate questions of suretyship. These proposed changes are desirable. The Amendatory Act makes the same changes with the substitution of the words "rightful owner" for "holder" in subsection 3. The wisdom of this departure from the language of Professor Brannan has been questioned and the term "holder" may be restored before final acceptance of the report.

Section 120 has also been re-written by the Revisers in accordance with the suggestion of Professor Brannan, as follows:27

"When a Party Discharged." A party to a negotiable instrument is discharged:

(a) By any 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 rules governing the discharge of a surety or party secondarily liable because of such secondary liability."

The proposed amendment enlarges the scope of the section, making it apply to "a party to a negotiable instrument" instead of a party secondarily liable. Three subsections of the present act are omitted. They provide for the discharge of indorsers upon specific doctrines of the law of suretyship, and the courts have been unable to agree as to whether the section was exclusive and superseded all former recognized doctrines of suretyship. The proposed section makes this clear and is a decided improvement. Subsection (d) is not included in Professor Brannan's form and perhaps is unnecessary, as all the troublesome clauses are omitted, but it does no harm. The amendment to this section proposed in the Amendatory Act differs in several respects. Subsection (3) reads: "By a valid tender of payment in due course made either by a prior party or by a subsequent party for whose accommodation the party signed the instrument"; and there is added to the section:

27 Ibid.
"As between immediate parties any defense is effectual which would be a defense to a simple contract for the payment of money." The purpose of the amendment is the same, however, and one would likely serve as well as the other.

The modification of Section 124 is apparently to restore the common law as it existed prior to the Negotiable Instruments Law. Taken literally, the existing statute avoids the instrument though the alteration was made without fraudulent intent and though it was made by third persons. The Revisers insert after the word "altered" the following words: "By the holder or by some one acting with the authority or consent of the holder." This change would restore the American doctrine of spoliation which, it is generally agreed, Section 124 abrogates. It does not, however, restore the law as to innocent alterations. The form recommended in the Amendatory Act accomplishes both purposes by providing: "Where a negotiable instrument is fraudulently and materially altered by the rightful owner without the assent of all parties liable thereon, it is avoided, etc." A holder who has innocently altered an instrument should have the right to restore it to its original condition and to recover thereon. The amendment proposed by Professor Williston's Committee therefore seems preferable.

Two changes are proposed in Article 10 dealing with "Acceptance." By Section 134, when an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person to whom it is shown and who, on the faith thereof, receives the bill for value. In the following section, dealing with an unconditional promise in writing to accept a bill, sight of the paper is not required. No good reason is apparent why sight should be required in the one case and not in the other. The Revisers propose to omit the words "to whom it is shown and" from Section 134. The Illinois and South Dakota Acts do the same. It has not been thought of enough importance to be included in the Amendatory Act.

Section 137 is also changed in several respects in accordance with the suggestion of Professor Brannan.28 "Within twenty-four hours" is changed to "after the expiration of

28 Ibid.
twenty-four hours," and "within such other period" is changed to "or such longer period," to make the section consistent with Section 136. The important alteration is that in place of providing that a drawee who destroys a bill or refuses to return it should be deemed to have accepted it, it is provided that the holder will be deemed to have converted the same and shall be liable in damages for the amount of the bill. These changes are advisable. Professor Brannan has made it clear that uniformity cannot be hoped for under the present section. Several States have refused to adopt it. The Committee in drafting the Amendatory Act has likewise adopted Professor Brannan's substitute.

Section 186, due to an inadvertance, apparently, changed the settled law regarding the discharge of a drawer of a check to whom notice or dishonor is not given. Section 186, as it stands, deals only with presentment. So far as notice of dishonor is concerned, it seems to be governed by the general provision in Section 89, which provides that drawers and indorsers are discharged by failure to give them notice of dishonor. In short, failure to present merely discharges the drawer to the extent of his loss, while failure to give notice of dishonor when presentment is made discharges him altogether. This is not a desirable result. While Illinois is the only State which has changed the section thus far, the Amendment is approved by Professor Brannan and is included in the Amendatory Act. The Revisers have added to Section 186 the following sentence: "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." The form suggested in the Amendatory Act is perhaps better. It is as follows: "A check must be presented in payment within a reasonable time after its issue, and notice of dishonor must be given to the drawer, as provided for in the case of bills of exchange, or the drawer will be discharged to the extent of the loss caused by the delay." This does not conflict in any way with Section 89 because of the opening words of the latter: "Except as herein otherwise provided." The

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20 Supra, n. 3, 599.
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special provisions governing checks are placed together under Title III, Article 1.

The last change suggested is the insertion of the words "law and equity including" in Section 196, so that it will read: "In any case not provided for in this chapter, the rules of law and equity including the law merchant shall govern." As the law merchant is not today a separate branch of the law, the form suggested is preferable. Several States have made this change. It is of no great consequence, but can do no harm.

If this analysis of the proposed changes in our Negotiable Instruments Law is at all accurate, it should be reasonably clear that certain of the changes suggested are inherently objectionable; that others are perhaps good enough in themselves but not at all necessary; and that the badly needed and desirable ones, with possibly one or two exceptions, will in all likelihood be recommended to the States for general adoption by the National Conference of Commissioners on Uniform State Laws. It would seem, then, that action on this chapter might well be deferred until the recommendations of that body are put into final form and submitted to the States. If it then appears that further alteration is necessary to make the Act consistent with other sections of the Code, such change could be made at that time. It is not at all likely that the legislature will refuse to adopt the uniform amendments when proposed. Aside from the natural desire to keep in line with the other States, the merit of the amendments will commend them. A brief reference to those embodied in the Committee's report31 to which reference has not already been made, will indicate their scope and purpose.

The first Amendment is to the title of the Law, which would become: "A General Act Relating to Negotiable Instruments for the Payment of Money"; and the first section would read: "An instrument for the payment of money to be negotiable, etc." The purpose is "to narrow the operation of the Negotiable Instruments Law to promises to pay money, leaving other promises to the operation of the com-

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31 For a careful analysis and criticism of this report see Britton, "The Proposed Amendments to the Negotiable Instruments Law," 22 Ill. L. Rev. 815.
mon law as it may be qualified by custom and by statute."32 It is pointed out33 that as the law now stands, it denies negotiability to interim receipts and other receipts for securities, and would seem to prevent negotiability of bills of lading and warehouse receipts if enacted subsequently to the Acts governing those instruments.

Section 5 would be amended so as to read: "An instrument is not negotiable which contains an order or promise to do any act in addition to the payment of money, unless such additional act is apparently intended to render more secure and certain the payment of the sum of money to which the order or promise relates." The object of this is to "preserve the negotiability of elaborate forms of notes and corporate bonds which frequently contain additional promises."34

An amendment to Subsection 5 of Section 6 is "to settle a conflict in the cases as to the meaning of "current money," some cases holding that it can mean only legal tender. Section 23 would be made to read: "When the signature of a person is forged or made without authority, it is inoperative to render him liable or to transfer his rights under the instrument unless he is precluded from setting up the forgery or want of authority." This change avoids the too broad effect of the words "wholly inoperative" in the present act. Professor Williston points out35 that a forgery is not necessarily wholly inoperative. It may render a person who commits the forgery liable as an indorser or effect a transfer of the instrument in case of impersonation."

To Section 29 would be added the following: "But negotiation after maturity by the accommodated party without the assent of the accommodation party is a breach of faith." This would settle a conflict in the cases which will likely continue unless some such amendment is adopted.

Section 37, relating to the effect of a restrictive indorsement, has not been satisfactory. The Committee points out36 that "under clause 2 of Section 37 of the Act, as it stands, which confers upon the indorsee the right . . . . to

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33 Ibid., 9.
34 Ibid., 10.
36 Ibid., 11.
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bring any action thereon that the indorser could bring," an indorser even though for value could not be sued by an indorsee in trust for a third person. The Amended section would read:

"A restrictive indorsement confers upon the indorsee the right:
(1) To receive payment of the instrument;
(2) To bring any action thereon that the indorser could bring; or except in the case of a restrictive endorsement specified in subsection 2 of Section 36, any action against the indorser or any prior party that an unrestrictive indorsee would be entitled to bring.
(3) To transfer the instrument where the form of the indorsement authorized him so to do.

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement, specified in Subsection 1 of Section 36 and as against the principal or cestui que trust only the title of the first indorsee under the restrictive indorsement specified respectively in Subsections 2 and 3 of Section 35."

An amendment to Section 47 would prevent the result that a restrictive indorsement of any other character than that in Subsection 1 of Section 36 makes an instrument non-negotiable.

Section 71 inadvertently changed the law. By its terms, presentment for payment in case of a bill of exchange will be sufficient if made within a reasonable time after the last negotiation of the bill. This permits negotiation for an indefinite period without discharging secondary parties. The amendment proposed is as follows:

"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 the indorsement in order to charge the indorser, and in case of a bill of exchange presentment for payment must be made within a reasonable time after its issue in order to charge the drawer."

Section 85, which the Revisers have "retained in the original form, with the hope that at some future time an effort will be made to reconcile the various changes which have been made by the different states," is restated as follows in the Amendatory Act:

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[Supra, n. 1, 12.]
“Every negotiable instrument is payable at the time fixed therein without grace, except that when the day of maturity falls upon Saturday, Sunday, or a holiday, the instrument is payable on the next succeeding business day which is not a Saturday. Instruments payable on demand may at the option of the holder be presented for payment before twelve o’clock noon on Saturday when that entire day is not a holiday.”

Whether this will prove acceptable as a substitute for the various provisions enacted by the different states remains to be seen.

The last amendment proposed would, under Section 60, give the same opportunity for protesting a lost or destroyed note which now is allowed in the case of a bill.