Some Further Necessary Amendments to the Uniform Negotiable Instruments Law

Ernst W. Puttkammer
SOME FURTHER NECESSARY AMENDMENTS TO THE UNIFORM NEGOTIABLE INSTRUMENTS LAW*

By ARTHUR H. KENT†

The Uniform Negotiable Instruments Law now appears upon the statute books of all of our states, the District of Columbia, Alaska, and the Philippine Islands. In the great majority of them it has been law for many years. Sufficient time has therefore elapsed to judge from actual experience wherein the statute is defective. One could not fairly deny that its adoption has brought about gratifying uniformity of decision upon a number of important questions where conflict once existed.¹ Yet it is equally true that the act in its present form has fallen far short of realizing the ideal of general uniformity entertained by its draftsmen. No doubt this was due in part to the difficulties inherent in the codification of a body of law so complex and technical as the law of negotiable instruments. But much of the fault must be attributed to the relative haste which characterized its drafting, and to the unfortunate failure to make use of the best knowledge and skill in the field of negotiable instruments law which our country afforded. Such historical recollection profiteth nothing, save as a warning that haste in the adoption of a code of amendments would not be desirable, and that it is essential that any amendments decided upon should, in form and substance, be the product of all the legal intelligence which can be brought to bear.

It is cause for congratulation that the Conference of Commissioners on Uniform State Laws has decided that the time is ripe for the formulation and submission to the legislatures of a code of amendments to the Negotiable Instruments Law. The Special Committee upon the Amendment of the Uniform Acts, functioning under the able leadership of Professor Williston, has submitted to the

*The majority of the amendments hereinafter suggested have been proposed at one time or another by Dean James Barr Ames, Mr. Charles L. McKeehan, Professor Joseph D. Brannan, Professor Zechariah Chafee, Jr., and others. The writer also acknowledges his indebtedness to Professor William E. Britton of the University of Illinois for many suggestions.

†Associate Professor of Law at the University of Chicago.

¹The preface to the fourth edition of Brannan “The Negotiable Instruments Law,” contains a summary of the most valuable contributions made by the act.

[833]
Commissioners for consideration and criticism a draft of twenty-four amendments. It is not within the scope of this article to discuss these amendments directly. A comprehensive analysis and criticism of them appears elsewhere in this issue.² Suffice to say that their general purpose and character seem admirable, that they remedy a number of the more apparent defects in the act, and that, with relatively minor changes and improvements which will doubtless be made, they should be adopted.

The aim of this article is rather to point out that these amendments are too few in number to correct all the serious defects and omissions which critical analysis and judicial construction of the act have revealed, and which are crying for treatment. A cursory examination of the cases annotated in Professor Brannan's valuable work on the Negotiable Instruments Law will show the distressing lack of uniformity in decision which exists under many important sections not affected by the proposed amendments. It is apparent that hope of complete uniformity of construction throughout forty-eight states, however high the degree of textual uniformity may be, is illusory. And that there are, perhaps, limits beyond which it is not wise to go in endeavoring to overcome by textual amendment mistaken and illiberal judicial construction may be admitted. The fact remains that much of the present conflict of decision is due to plain ambiguities in the text of the statute itself, or to the silence of the act upon important questions with which it ought to deal.

It may be argued that the submission of amendments materially in excess of the twenty-four proposed might jeopardize the adoption of any amendments by the legislatures of many states, and that such an eventuality would increase the present lack of uniformity. It is believed that this danger may be easily exaggerated. Why the mere number of amendments submitted should affect the probability of their general adoption is not perceived. If the choice were between a very small number of amendments on the one hand, and a very large number on the other, the choice of the larger number might, perhaps, involve such a danger. But since the the Special Committee on Amendments has found that so large a number of amendments as twenty-four will be required to correct defects in the act which are both obvious and serious, the submission of perhaps double that number, assuming a real need for the larger number, ought not to imperil the success of the project. The relative speed with which the various states accepted the present act,

² Britton "The Proposed Amendments to the Negotiable Instruments Law" ante p. 815.
as compared with other uniform acts, would seem to indicate a general legislative consciousness of the essentiality of uniformity in this field of our mercantile law. And the ease or difficulty of securing favorable action upon any code of amendments would in all likelihood depend rather upon legislative appreciation of the serious need for an overhauling of the statute than upon the mere number of amendments proposed. Indeed, a thorough revision which would obviate any necessity for further legislative tinkering with the act for a generation or more might well be more quickly adopted than a patchwork proposal.

Moreover, it is not apparent wherein the present lack of uniformity would be increased if the proposed code should fail of adoption in a number of states. True, there would not be the same degree of textual uniformity as now exists. But what virtue has a textual uniformity which fails to produce even an approximate uniformity of decision? Such uniformity in text would appear to possess little practical significance or value. Changes which would substitute clarity for ambiguity in the text, or additions which would remove undesirable and troublesome vacua in the text, would inevitably tend, it is believed, toward increased harmony in actual decision.

Should the Commissioners on Uniform State Laws, however, deem it necessary for some reason to limit the number of amendments to be submitted to a maximum not materially in excess of the number now, proposed, it would become vitally important that this number include such amendments as are needed to cure those defects and omissions in the act which are most prejudicial in their practical effects. Any defect which introduces elements of peril into common transactions involving negotiable paper ought by all means to be remedied. Evaluating amendments upon this basis we shall find that there are several bad spots in the Negotiable Instruments Law in more urgent need of attention than some of those with which the twenty-four amendments aim to deal.

A number of these bad spots exist in those sections dealing with the formal requisites of negotiability. The sections requiring an instrument to contain an unconditional promise or order to be negotiable are not affected by the proposed amendments. Yet they are badly in need of clarification. Sec. 1, subsec. 2, codifies the general requirement of the law merchant that a negotiable instrument must contain an unconditional order or promise. Sec. 3 then attempts to define what is meant by an unconditional order or promise. This it signally fails to do. In the first place, it states that "an
unqualified order or promise is unconditional, though coupled with, etc." The section cannot constitute, then, a definition of what is meant by "an unconditional order or promise," save upon the assumption that the words "unqualified" and "unconditional" are legally synonymous. If this be true, then the former term is a tautology, and should be stricken from the text. But a still more serious difficulty is that the section then attempts to define "unconditional" in terms of ideas which do not resolve the ambiguity contained in the word. It in effect declares merely that an unqualified order or promise remains unconditional, though coupled with an indication of a particular fund to be debited with its payment, or a statement of the transaction giving rise to the instrument. It assumes an order or promise which is unconditional, save for such coupling. This declaration has some utility, but it surely cannot be said to afford a clear picture of the content of the legal concept, "unconditional order or promise." A very practical and unfortunate consequence of the ambiguity in this section is that the negotiability of conditional sale or chattel notes, a form of paper so widely used in modern mercantile transactions, is left undetermined by the act. Their negotiability in some states may depend upon fine-spun distinction in common law decisions between "transfer of title with mortgage back" and "sale upon a condition." A very practical and unfortunate consequence of the ambiguity in this section is that the negotiability of conditional sale or chattel notes, a form of paper so widely used in modern mercantile transactions, is left undetermined by the act. Their negotiability in some states may depend upon fine-spun distinction in common law decisions between "transfer of title with mortgage back" and "sale upon a condition." An effort to frame a direct and precise definition of the term "unconditional" would surely be desirable.

The time of payment clauses are in even a worse condition, and their revision would be eminently justified upon the basis of practical necessity. In their present form these sections afford but little help in the solution of a whole host of difficult and oft-recurring problems. It is possible to construe sec. 4 as abrogating the whole requirement of certainty of time, as it existed in the law merchant, and to hold that its language, though probably intended merely to codify the anomalous doctrine of the death note cases, has substituted a sole requirement of certainty of obligation. It has been shown that such a change is dangerous and unwise, and that it opens the door to a host of peculiar varieties of paper, unfit for circulation.

FURTHER NECESSARY AMENDMENTS

The Negotiable Instruments Law recognizes that provisions in instruments accelerating maturity do not ipso facto destroy negotiability. But it affords no test for determining what sort of acceleration clauses are permissible. On the one hand, some forms of acceleration paper have been held negotiable which ought not to be. On the other hand, the courts continue to hold, upon purely artificial reasoning, that a clause giving the holder the option to accelerate maturity if he deems himself insecure destroys negotiability. Yet no reason has been suggested for holding such paper to be non-negotiable which cannot be urged with equal or greater force against all forms of optional acceleration. Moreover, such paper subserves a legitimate business purpose, and is attractive from an investment standpoint. It differs in no substantial respect, so far as uncertainty of time is concerned, from demand paper. The ultimate fixed date in effect operates as a limitation upon the time within which demand may control maturity. Since subsec. 3 of sec. 4, as construed, probably applies only to "on or before" paper where the option is in the maker, a specific provision ought to be inserted in sec. 4 making the above form of instrument negotiable.

Most serious of all, however, is the complete failure of the act to deal with the many complications with respect to maturity arising out of the frequent use of installment paper, and paper containing various sorts of acceleration clauses. Many of these forms of paper, which were virtually unknown to the law merchant, had gradually achieved negotiability in the common law decisions, satisfying as they did new but very real commercial needs created by complex modern business operations. Sec. 2 of the act also recognizes that such paper may be negotiable. Yet it is impossible to determine from the language of the statute, in the case of simple installment paper, whether a default upon a single installment lets in equities against the entire obligation or merely against the overdue installment. It is equally uncertain whether a bona fide pur-
chaser of installment paper, taking without notice of a default upon a prior installment or, in the case of acceleration paper, without notice of the happening of the accelerating event, is to be protected, or has only the rights of a purchaser of overdue paper. In the latter case the problem is particularly serious if the acceleration clause be automatic in its operation. But even if the acceleration be optional with the holder, purchase of the paper still involves an element of peril, since there is always the possibility that a prior holder may have exercised the option to accelerate, without making a notation upon the face of the instrument to indicate the fact.

It is elementary that negotiable paper, like the money for which it serves as a substitute, should carry its full character upon its face. Its free circulation must be greatly impeded if a prospective purchaser cannot safely buy the paper without making extensive inquiry regarding facts de hors the instrument. Unless such a purchaser may rely upon the face of the instrument to indicate the fact of prior default or acceleration, such paper violates this axiom of negotiability. It is apparent in the present state of the law that he cannot safely rely upon the face of the paper itself. He is likely to find himself in the legal position of a purchaser of overdue paper. One of two consequences must follow—either the free circulation of such paper will be hampered, thereby preventing full satisfaction of those business needs which demanded that the paper be given the attribute of negotiability, or that circulation will tend to create numerous traps for the unwary. These dangers and difficulties can be reduced to a minimum by an appropriate amendment declaring that "the ultimate time of payment is the maturity of the instrument for all purposes with respect to persons who have not received notice that the fact which was to accelerate payment has occurred," or, in the case of installment paper, with respect to persons having no notice that there has been any default upon a prior installment or installments. With such a provision, a default or acceleration would no longer render paper overdue as a matter of law, but would operate merely as a dishonor of the instrument accelerating maturity against all save subsequent holders in due course. An analogy for such a principle may be found in the doctrine of the leading case of Dunn v. O'Keefe, holding that a refusal by the drawee to accept a bill upon presentment before


maturity is a dishonor accelerating maturity of the bill, save as against subsequent holders in due course.

Neither the changes proposed by Professor Williston and his committee nor the amendments above suggested will remove entirely the need for an independent uniform negotiable securities act. While the amendments to the title and to sec. 1 of the act will avoid the unfortunate consequences resulting from the application of its provisions to interim certificates, there are forms of corporate securities already in use or certain to be devised to meet changing corporate needs, but calling for the payment of money, which will not satisfy the formal requisites of negotiability contained in the act, and yet which are or may be commonly dealt with as negotiable. The bonds involved in the recent case of *King Cattle Company v. Joseph* afford a striking example of this sort. The British Bills of Exchange Act avoided this difficulty by limiting its provisions to bills of exchange, cheques, and promissory notes, leaving to the courts the power to determine the negotiability of other forms of paper as they should arise. The Negotiable Instruments Law as amended, while an improvement, will still leave the negotiability of all instruments calling for the payment of money in a legislative straight-jacket.

Attention should be directed to the advisability and practicability of amending the act so as to clarify to some extent the legal status of non-negotiable commercial paper. An instrument which complies with all the formal requisites of negotiability, save that it lacks words of negotiability, ought not to be relegated in law to the position of a simple contract. Many common law decisions indicate, indeed, that there are some important differences.

15. (1924) 158 Minn. 481, 198 N. W. 798, 199 N. W. 437.

16. The cases have generally held that the act has no effect upon non-negotiable paper, doubtless rightly so, in view of the title of the law. But it may be noted that, while the word "negotiable" is always used in the act in defining a promissory note, the definitions of a bill of exchange do not use this word, but are broad enough in their language to include non-negotiable bills. See secs. 126, 184, 191. And it is held in New York that non-negotiable instruments no longer import a consideration, the Negotiable Instruments Law being held to repeal a former statute importing consideration. *Deyo v. Thompson* (1900) 53 App. Div. 9, 65 N. Y. Supp. 459; *Rahill v. Rahill* (1921) 188 N. Y. Supp. 780. See a note in 9 Corn. Law Quar. 182, criticizing these cases adversely upon the sound ground that consideration might have been presumed in such instruments under the law merchant, the Negotiable Instruments Law making no pretense to affect the rules of the law merchant so far as they applied to non-negotiable instruments.

17. The chief difference established by many cases is that a presumption of consideration exists in the case of non-negotiable instruments, they being regarded as mercantile instruments. As to non-negotiable bills of exchange, there is no conflict; as to non-negotiable promissory notes, some decisions have denied the existence of such a presumption at least where the words
Professor Goodrich has shown what a twilight zone the law of non-negotiable commercial paper is.\textsuperscript{16}

Sec. 8, subsec. 6, dealing with the effect of making an instrument payable to the holder of an office for the time being, might be improved. The provision as it stands settles the conflict upon the negotiability of such paper, but the term "holder of an office for the time being" is open to conflicting interpretations.\textsuperscript{19}

Sec. 12 leaves the legal status of postdated instruments in a very uncertain condition. It merely provides that such an instrument is not invalid, if it be not issued for an illegal or fraudulent purpose. Since the act by its title purports to deal only with negotiable instruments, and since a postdated instrument is payable at a determinable future time, and ordinarily satisfies the other formal requisites, it would seem fairly clear that such an instrument is negotiable. Nevertheless, some courts have been in doubt upon this question. Whether a postdated instrument is a promissory note, a check, a demand bill of exchange, or a bill payable at a future date, are questions which the act leaves unsettled, and upon which the decisions have been in doubt.\textsuperscript{20} There are serious objections to each of these views. Perhaps we have here a negotiable contract sui generis. It should be possible to clarify this situation by amendment.

The act's whole treatment of real and personal defenses is inadequate and ambiguous and in need of redrafting. In this connection two different terms are used, "infirmity in the instrument" and "defect in the title." Sec. 55 defines the latter term, but not the former. Do they mean the same thing? Does notice of the one necessarily imply notice of the other? If so, the former term is tautologous and should be dropped. If not, both terms ought to be defined. In sec. 57 it is provided that a holder in due course takes free from defenses. But no attempt is made to limit the term "defenses," save for the provision in sec. 58 that a holder not in due course takes "subject to the same defenses as if it (the instrument) were non-negotiable," the implication being that a holder in due course will possess immunity from some or all of the defenses which might be asserted against a bona fide purchaser of

\textsuperscript{16} For value received" or language of similar import does not appear on the face of the instrument. See Goodrich "Non-negotiable Bills and Notes" (1920) 5 Iowa Law Bul. 65, 70.

\textsuperscript{17} Goodrich ibid.; (1923) U. of Pa. Law Rev. 365, note.

\textsuperscript{18} Brannan op. cit. supra, note 1, 77, setting forth three possible interpretations.

\textsuperscript{20} Brannan supra, note 1, 107.
non-negotiable paper. But what are those defenses? Since the
act says nothing about the legal nature of non-negotiable paper,
resort must be had to common law decisions dealing with such
paper to answer this question. Again, does the term "non-negoti-
able" refer to "non-negotiable commercial paper" or to "common
law choses in action?" It may make a difference, as, for instance,
regarding the presumption of consideration.

The act does not deal specifically, as it should, with defenses
based upon want of intention to contract, such as the cases of
fraud in the inception. Sec. 55 speaks of fraud, without express
qualification, merely as a defect in the title. Under sec. 56 a defect
in the title seems to be available only against one not a holder in
due course. It is only by ignoring the act or by a strained con-
struction of its language that some courts have been able to hold
that fraud in the execution and other forms of "never contracted"
continue to be real defenses as they were at common law.

Little light is thrown by the act upon the rights of a bona fide
purchaser of overdue paper. Unless he derives his title through
a holder in due course, he cannot qualify as such a holder under
sec. 52. We have seen that one not a holder in due course takes
the instrument subject to the same defenses as if it were non-negoti-
able, whatever that may mean, by virtue of sec. 58. Does it mean
that he takes the instrument subject merely to such equities of
defense as the maker or other prior parties may have against their
contractual liability, or does it mean also that he may be deprived
of his title by prior parties or third persons having equitable claims
to ownership of the instrument? The latter construction would
be in accord with the rule adopted by the English courts and in
some American states. Yet it was not so long ago that the English
judges were not agreed that the maturity of an instrument had
any effect whatever upon the rights of a purchaser, save as a cir-
cumstance bearing upon the issue of good faith. This is still
the rule in several continental legal systems. It is difficult to main-
tain that maturity relegated a negotiable instrument to the status
of a common law chose in action. Legal title to the instrument
as a property interest may still be transferred by indorsement or,
if the instrument be payable to bearer, by delivery. Negotiable
instruments have for centuries been regarded as mercantile specialties.

22. Alcock v. Smith (1892) 1 Ch. 238, 253. In this case the court of
appeal found that under Norwegian and Swedish law an overdue bill is
treated no differently than a current bill with respect to equities. For some
purposes at least, the same rule seems to exist in France and Germany.
The law today treats them for many purposes as tangible chattels. And overdue paper does not cease to circulate by any means, judging from the frequency with which cases involving its transfer arise. For these reasons, the legal effect of transfer of overdue paper to a bona fide purchaser upon equitable claims to ownership ought to be determined by analogy to the principles of the law of sales rather than the principles governing assignment of common law choses in action.\(^3\)

It seems an unwarranted anomaly to place a bona fide purchaser for value of overdue negotiable paper in a worse position, as regards equities of title, than a bona fide purchaser of a chattel, or in a position inferior to that enjoyed with respect to latent equities in some jurisdictions by a bona fide assignee of a common law chose in action.\(^4\) Nor does such a doctrine, as seems to be tacitly assumed, work a hardship only upon bona fide purchasers after maturity. Its baneful effects may likewise prejudice the rights of a holder in due course who for some reason cannot secure prompt payment of an instrument at maturity.\(^5\) It is submitted that the act should be amended to settle this point upon the principle laid down by the United States circuit court of appeals, in *Wolf v. American Trust & Savings Bank*.\(^6\)

---

\(^23\) Williston "Is the Right of an Assignee of a Chose in Action Legal or Equitable?" (1917) 30 Harv. Law Rev. 97, 103.

\(^24\) Cf. the cases of *Holmes v. Gardner* (1893) 50 Ohio St. 167, where a bona fide partial assignee of a mortgage interest created in fraud of creditors was held to take free of the equities of such creditors, and *Kernohan v. Durham* (1891) 48 Ohio St. 1, 26 N. E. 982, where a bona fide purchaser of an overdue negotiable note was held to take subject to a latent equitable claim to ownership of the note.

\(^25\) The assumption that ease and rapidity of circulation before maturity has no relation to the circulability of commercial paper, after maturity is believed to be economically unsound. See Chafee "Rights in Overdue Paper" (1918) 31 Harv. Law Rev. 1104, 1147. The possibility of default at maturity by reason of the insolvency of the party or parties liable or because of temporary financial stringency is always present. If maturity operates as a red flag, charging purchasers after maturity with constructive notice of all sorts of secret claims to title, difficult or impossible to discover by the most extensive inquiry, the holder at maturity will probably encounter much greater difficulty in finding a buyer for the paper and getting his money out of it. He may be forced to bring suit, with all the cost and delay, which that may involve, though for perfectly legitimate business reasons he may be reluctant to do so. If only equities of defense come in, a prospective purchaser may ordinarily protect himself against them without great inconvenience, by inquiry of prior parties. Even if the holder at maturity be a holder in due course, and so able to convey a perfect title after maturity, a purchaser would still be taking the risk that his transferor is, in fact a holder in due course.

The assurance of payment at maturity or of a ready market in the event of temporary default which the view here favored would tend to afford should increase the attractiveness of commercial paper, as an investment, and so enhance its circulatability from its inception.

\(^26\) (1914) 214 Fed. 761, 132 C. C. A. 410.
"An endorsement of a negotiable instrument to a named endorsee has two aspects. In one, it is a contingent contract of debt as complete and definite as if the terms thereof were written out in full above the endorser's signature; and in the other, it is a conveyance to the endorsee of the legal title to the instrument considered as a species of property—as perfect a conveyance as is the ordinary bill of sale of the ordinary chattel. Concerning the endorser's liability on his contingent contract of debt, the maturity of the instrument may or may not be important. As to the validity of the endorser's conveyance of the legal title, the maturity of the instrument is inconsequential. . . . The principle applies, which is common to the law of all kinds of property, that the innocent purchaser of the legal title is protected against secret equities respecting the title."

The writer is not convinced that acceptance of this view necessarily involves assent to the further proposition that a bona fide purchaser of overdue paper from a thief or a finder ought to obtain a good title.\textsuperscript{27}

But whether the above view or the English "red flag" doctrine\textsuperscript{28} be accepted as sound, the question is of too great practical importance to be passed over untouched. The act should be amended to establish some clear and definite rule, and settle the present conflict in the authorities.

The act contains very little with reference to negligence as a source of rights and liabilities upon commercial paper, though statistics of insurance companies show that criminal intervention is responsible for annual losses upon negotiable paper aggregating scores of millions of dollars, and there can be no doubt that such intervention is in many cases facilitated or even invited by the slovenly and unbusinesslike manner in which the paper is drawn. A little observation of checks should convince anyone that this is so. At present the loss is thrown upon this party or that accord-

\textsuperscript{27} See Chafee op. cit. supra, note 25, 1112, for an able argument for protecting the purchaser where he buys bearer paper from a thief or a finder. This argument is based upon the proposition that a thief or finder has title to such paper, being one of the class to whom the promise runs, i.e., a bearer. The victim loses his legal title and is left with an equitable right to reclaim the instrument, which equitable right, like an equity arising in favor of a defrauded vendor, is cut off if the instrument be transferred to a bona fide purchaser. This conclusion follows logically from the premises, but many will dispute the soundness of the premises. These for the most part will insist that a thief or a finder of negotiable paper payable to bearer never has title, but until its maturity possesses a power of vesting a good title in a holder in due course. This extraordinary power is created by operation of law to satisfy imperative business needs for the free and safe circulation of such paper as a substitute for money and a basis for credit. After the maturity of an instrument, this need is no longer so urgent as to demand the continued existence of the power.

\textsuperscript{28} In re European Bank (1870) L. R. 5 Ch. App. 358, is the leading case for this doctrine.
ing to the view taken by the courts of the jurisdiction where the case arises as to whether any duty of care rests upon him who put the instrument into circulation and, if so, the scope of such duty. That the drawer of a check does owe certain duties to his bank not to permit signed incomplete checks to get into circulation, and not to issue checks containing blanks which facilitate alteration, is fairly well settled both in England and this country.29

But whether this duty sounds in tort or arises out of contract implied from the peculiar relation of the parties and business usage is not easy to determine. The majority of the cases have held that the maker or drawer of an instrument owes no such duties of care to subsequent bona fide purchasers,30 though some cases have broken away from this inflexible doctrine.31 The question is one deserving of careful study, and its proper solution requires a nice balancing of opposing social interests and conflicting considerations. In view of the peculiar functions of negotiable paper and the conditions attending its circulation, it is quite arguable that it is unwise to leave the existence and delimitation of the duties of care resting upon parties to negotiable instruments to the general law of negligence in tort. In this connection, it may be noted that sec. 16 of the Negotiable Instruments Law imposes an absolute liability upon the maker or drawer where a completed instrument has without his fault or consent come into the hands of a holder in due course, whereas sec. 15 apparently confers an absolute immunity upon the maker or drawer where an incomplete instrument signed by him has gotten into circulation without his consent, no


31. Allen Grocery Co. v. Bank of Buchanan County (1916) 192 Mo. App. 476, 182 S. W. 777 (incomplete paper); Yocum v. Smith (1872) 63 Ill. 321, 14 Amer. Rep. 320 (blanks facilitating alteration); Garrard v. Hadden (1870) 67 Pa. 82, 5 Amer. Rep. 412 (blanks facilitating alteration); Second Natl. Bank of Vincennes v. Campbell (1915) 4 Ohio App. 158 (careless use of protectograph). The last cited case is criticized adversely in a note in 28 Harv. Law Rev. 624. This criticism, however, is based upon the assumption that the careless use of the protectograph did not facilitate the alteration or contribute to the success of the fraud. Such an assumption is open to challenge. It is quite likely that it may have actually invited the alteration.
matter how careless he may have been. Sec. 15 contains no saving estoppel provision, unlike sec. 23 dealing with the rights of the holder of a forged instrument. Even if it did, an estoppel by negligence would necessarily presuppose the existence of a duty of care to subsequent bona fide holders, and on this question we have seen that the act is silent. The radical distinction established by secs. 15 and 16 between want of delivery as a defense where the instrument is incomplete and where it is complete seems of doubtful justification.

A more general criticism may be made that the sections having some relation to real and personal defenses are so numerous and so scattered through the act that, not being cross-referenced, they are likely to confuse anyone having occasion to refer to them, unless he has previously had the opportunity to make a careful study of the content and structure of the act.

Sec. 62 might well be amended to codify in express terms the doctrine of Price v. Neal,32 in cases where the drawee pays a forged instrument without prior acceptance, although the courts have generally succeeded, in one way or another, in holding that this aspect of the doctrine is still law under the act. This section certainly should be amended to clarify the doubt now existing whether, in its present form, it extends that doctrine to acceptance or payment of altered, as well as forged paper.33 Whether such an extension is desirable is a controversial question, with weighty arguments on both sides.34 But the law on so important a question ought not to be left in a state of uncertainty.

Sec. 64 ought to be amended, as Dean Ames suggested in his criticism of the Negotiable Instruments Law, so that an indorser for the accommodation of the acceptor may be held liable to a drawer-paye. This undoubted defect in the section was the occasion and probable cause for the unfortunate decision of the Court of Appeals of New York construing sec. 64 as raising only re-

32. (1762) 3 Burr. 1354.
33. See the well-known case of National City Bank of Chicago v. National Bank of the Republic of Chicago (1921) 300 Ill. 103, 132 N. E. 832, in which an acceptor of a draft which had been altered as to the payee was denied recovery of payment made to a subsequent holder in due course. There is some doubt whether the same result would be reached in a case of payment of altered paper without acceptance, or in a case where there had been no negotiation of the paper after acceptance.
34. This difference in view is seen in the notes upon the above Illinois case appearing in a number of well-known law reviews. Strongly approving the result reached and favoring an extension of the reasoning of the court, see (1922) 31 Yale Law Jour. 522. Criticizing the decision adversely, see (1922) 22 Col. Law Rev. 260; (1922) 16 Illinois Law Review 615; (1922) 6 Minn. Law Rev. 405. Cf. (1922) 35 Harv. Law Rev. 749.
buttable presumptions of intention rather than as defining as a
matter of law the nature of an irregular indorser's contract. Such
decisions throw the law at this point back into much of the be-
wildering confusion that existed before the act, and which it was
the purpose of this section to avoid.

Sec. 65, dealing with the warranties of qualified indorsers and
transferors by delivery, and sec. 66, dealing with the warranties
of general indorsers, are susceptible of material improvement, both
in form and substance. No reason is seen why the warranty of
a general indorser should run only to subsequent holders in due
course, while a qualified indorser is made in terms to warrant to
all subsequent purchasers. In cases falling within sec. 65 liability
depends upon scienter in some cases, and not in others; under sec.
66 scienter is never material. Logically, liability should be inde-
pendent of scienter in all cases, since the transferor is held as a
vendor. The language of the sections is too general—for instance,
the warranty that "the instrument is in all respects what it purports
to be." It would be much better if the warranties were made to
run against specific defenses created or defined by other sections
of the act referred to by section number. Under sec. 66 as it stands,
an accommodation indorser not in the chain of title is still liable
as a warrantor. This is illogical, and perhaps unjust, since such
an indorser is not a vendor. Practically, however, this feature of
sec. 66 has the merit of strengthening the negotiability of the paper.

Sec. 87 in its present form is also unsatisfactory. This sec-
tion provides that "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." What is the meaning
and purpose of this ambiguous language? It is sometimes said
that the section makes such an instrument the equivalent of a check.
But it is obvious that a promissory note payable at a bank at a
future date cannot be the legal equivalent of a check. It might
be regarded as equivalent to an ordinary bill of exchange, if the
purpose of sec. 87 is to define the contractual nature of the in-
strument. And a demand note payable at a bank might be treated
as a check, though that would deprive the instrument in large
measure of its usefulness as a circulating medium, due to the ne-
necessity of prompt presentment. This result seems of doubtful

35. Haddock, Blanchard & Co. v. Haddock (1908) 192 N. Y. 499, 85 N.
v. Bickel (1911) 143 Ky. 754, 137 S. W. 790.
36. Little v. Peoples Bank (1922) 209 Ala. 620, 96 So. 763; Shepherd v.
Mortgage Security Corporation (1924) 139 Va. 274, 123 S. E. 553.
desirability. The wise course, it is believed, would be to redraft
the section to provide that, where an instrument is made payable
at a bank, such bank shall be deemed to have authority to pay it
upon presentment for the account of the principal debtor thereon,
where sufficient funds are deposited in the bank for that purpose,
this authority being limited in the case of time paper to the date
of maturity. Sec. 87 has already given rise to some trouble in
the cases. That it has not given general satisfaction in its present
form, is indicated by the fact that a number of states have omitted
it entirely from their acts, or have repealed it, or so amended it
as to modify more or less radically its apparent effect.

The position of demand paper under the act remains ambiguous
in several respects. With sec. 29 amended as proposed, so as to
make negotiation of accommodation paper after maturity by the
accommodated party without the consent of the accommodation party
a breach of faith, doubt would exist as to when accommodation
demand paper is to be deemed mature so that its negotiation would
be a breach of faith. This ambiguity will doubtless be removed
before the amendment is finally approved. But a similar ambiguity
exists at present with reference to the maturity of demand paper
for purposes of payment. Demand paper is not mature so as to
let in equities for a reasonable time after its issue. But for the
purpose of the running of the statute of limitations it is mature
from the date of its issue. It is not clear whether payment of a
demand instrument before a reasonable time after its date of issue
has elapsed, and without a cancellation or surrender of the instru-
ment, would constitute a real or a personal defense, though con-
siderations of practical convenience would favor the latter view.
Sec. 119, subsec. 1, enacts that payment in due course by or on be-
half of the principal debtor (by or on behalf of the party primarily
liable under proposed amendment to this section) shall operate to
discharge the instrument. Discharge is clearly a real defense.
Sec. 88 defines payment in due course as payment at or after the
maturity of the instrument. Sec. 53 does not help, since it merely
assures to a bona fide purchaser of demand paper within a reason-
able time after issue the rights of a holder in due course. But
payment at or after maturity operates as a discharge, creating a real
defense available even as against a holder in due course. In the
case of time paper, payment before maturity, it is true, is only

711, 176 S. W. 1038, 2 A. L. R. 1377, and Baldwin's Bank of Penn Yan v.
38. See Brannan supra, note 1, 668.
a personal defense, but such a payment is really not a performance according to the terms of the contract. It would be difficult to argue that payment of demand paper any time after its issue is not performance according to the terms of the contract, when a right of action for the recovery of such payment accrues the moment that the paper is delivered. It is possible, then, as things stand, for the courts to hold that payment of demand paper at any time operates to discharge the instrument. No cases squarely involving the point have arisen. A minor amendment to sec. 88 would eliminate this possible danger.

The remaining ambiguity involving demand paper arises out of the combined effect of secs. 70, 87, and 120, subsec. 4, of the act. Suppose a demand note is made payable at a bank. By sec. 87 this is equivalent to an order upon the bank. Sec. 70 provides that ability and willingness to pay the instrument at maturity at such special place is equivalent to a tender. And sec. 120, subsec. 4, operates to relieve indorsers from liability where a valid tender of payment has been made by a prior party. Let us suppose, in the case put, that funds sufficient to pay the note are deposited in the bank and remain there for a considerable period after the note is issued. It has been pointed out that, if sec. 70 applies to such demand paper at all, strange and absurd results may follow. There are cogent reasons for construing sec. 70 as not applicable to the liability of indorsers upon demand notes at all. Since sec. 70 is modified in other respects by sec. 15 of the proposed amendments, it would be easy to resolve any possible doubt by adding to the proposed amendment a provision that the section shall have no application to the liability of indorsers of demand notes.

Despite the language of sec. 193, courts of high authority continue to speak as though changes in business usage and banking practices can have no effect upon the common law rules determining a reasonable time for presentment of a check. No discussion is necessary to show that very serious consequences may follow if modern banking methods for the collection of checks, viz., the clearing house in the case of local checks and the correspondent bank in the case of out-of-town checks, are ignored in deciding what is a reasonable time for presentment under the act. This modern banking machinery, which is made use of by millions of people

39. Ibid. 636.
40. See (1924) 24 Col. Law Rev. 73, for exhaustive note on point.
every day as a matter of course, is organized upon considerations of cost economy as well as speed in collection, and very generally tends to increase the time required for presentment from one day to several days beyond that allowed by the common law rules.

It is conceded that a reasonable construction of sec. 193 would obviate all these difficulties. In view, however, of the tremendous number of possible transactions affected, it is submitted that it would be wise to make the matter clear beyond all doubt by inserting in the act a provision that presentment of an instrument in accordance with usual and established banking practices shall be deemed a presentment within a reasonable time.

The foregoing suggestions deal with what seem to the writer to be the most serious defects in the act, in addition to those sought to be cured by the proposed twenty-four amendments. This is not intended to imply that there are not other flaws which it would be desirable to remedy if a thorough revision is to be made. For instance, different sections of the act use two distinct methods for referring to facts declared to be legally inoperative. In some sections it is declared that proof of certain facts is dispensed with; in others that the existence of certain facts will be "conclusively presumed." Such a method of statement is not conducive to clarity in thinking. The agency sections have fallen far short of quieting the conflict in the cases falling within their scope. If further clarification of these sections be possible, it should be attempted. But it must be recognized that the trouble at this point arises chiefly from the inveterate adherence by some courts to all their old artificial reasoning based upon the dogma of descriptio personae or unduly technical and sometimes specious applications of the parol evidence rule. These sections, interpreted in a reasonable and common sense manner, would assure proper results in most cases. It may well be questioned whether any change in the text short of a specific treatment of each of the numerous types of possible situations would suffice to overcome this ingrained habit of judicial construction. Moreover, there are some encouraging signs in the more


"To hold that the time between the issue of a check upon a distant bank and its presentation for payment by this method (i.e., by forwarding in regular course through correspondent banks) is unreasonable and serves to discharge the endorser, would not only tend to create disastrous confusion in this most important branch of business, but to disregard a statute (i.e., sec. 193, Negotiable Instruments Law) which makes the usage in such business one of the standards by which the reasonableness of the time of presentation for payment is to be determined."
recent cases of a tendency to construe and apply these sections in a fairer and more rational way.\textsuperscript{43}

Sec. 25 defines "value" in terms of "consideration." But there is no definition of "consideration" in the act. The section might be clarified on the point whether an antecedent debt not only constitutes value, but a good consideration to support an instrument received merely in conditional payment of or as collateral security for such pre-existing obligation. Secs. 24 and 28 have failed to quiet the conflict on the ultimate burden of proof, where the defense of want of consideration is raised, despite the fact that sec. 28 makes want of consideration matter of defense, to be treated on the same footing as failure of consideration. Sec. 59 has likewise failed to settle the conflict on the ultimate burden of proof where the issue is whether a holder is a holder in due course.\textsuperscript{44} This latter section might be dropped from the act without great loss.

Sec. 31 relative to the use of an allonge is broader in its language than is necessary to accomplish its probable purpose. Sec. 38, dealing with qualified indorsements needs amendment to settle the conflict upon the legal effect of words of assignment or guaranty of payment indorsed upon the back of a negotiable instrument. The status of the reacquirer remains highly uncertain under secs. 58 and 121. There is no apparent reason why an accommodation party or an innocent donee reacquiring an instrument from a subsequent holder in due course should be prejudiced by his previous connection with the instrument.\textsuperscript{45} There is no basis in reason or convenience for the variations now existing under secs. 134 and 135 in the rights of parties with respect to the two types of collateral acceptances.

Reasonable minds no doubt may differ as to the relative importance of the amendments herein suggested, and disagree as to the desirability or practicability of some of them. Also, the act may be in need of revision at many points not mentioned here. It is of vital importance that every defect in the act which seems of any importance shall be called to the attention of those upon whom rests the responsibility of framing amendments for submission to the legislatures. It is just as essential that every amendment proposed shall be subjected to searching and widespread criticism, both as to form and substance, before its final approval.

\textsuperscript{43} Brannan supra, note 1, 164.
\textsuperscript{44} Cf. Gebby v. Carillo (1918) 25 N. M. 120, 177 Pac. 894, and Downs v. Horton (1921) 287 Mo. 414, 230 S. W. 103.
\textsuperscript{45} Chafee "The Reacquisition of a Negotiable Instrument by a Prior Party" (1921) 21 Col. Law Rev. 38.
FURTHER NECESSARY AMENDMENTS

Only in this way can the mistakes of the past be avoided. There is no reason to doubt that the Special Committee upon the Amendment of the Uniform Acts will welcome such cooperation. It is hoped that those who have had occasion in varying capacities to study the Uniform Negotiable Instruments Law and have observed its flaws and inadequacies will seize the opportunity now presented to play some part in securing an adequate revision of it, and in bringing about thereby in larger measure that uniformity of decision which the framers of the original act so earnestly hoped for and expected.