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Negotiable Instruments Law Its History and Its Practical Operation

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THE NEGOTIABLE INSTRUMENTS LAW: ITS HISTORY AND ITS PRACTICAL OPERATION

July, 1 1878, several leading lawyers in different states, public spirited men, issued a call for a meeting, to form an American Bar Association. Pursuant to this call seventy-five prominent members of the bar and others, interested in the proposal met at Saratoga Springs, New York, August 21, 1878, and the American Bar Association came into being.

The first object of the Association, as stated in the call for this meeting, was "to assimilate the laws of the different states," and the first article of the Constitution as then adopted and as it still stands, is as follows:—

"Its object shall be to advance the science of jurisprudence, promote the administration of justice and *uniformity of legislation throughout the Union*, uphold the honor of the profession of the law and encourage cordial intercourse among the members of the American Bar."

The first report of any committee to this Association was that of the Committee on Jurisprudence and Law Reform, made in 1879 at the second annual meeting[1] in which they recommended co-operation among the several Local Councils of the Association and this Committee, to secure uniformity on various subjects referred to them.

In 1882[2] this Committee reported on various subjects referred to them, with forms for statutes to bring about uniformity in legislation in the different states.

In 1883[3] the same Committee made a further verbal report.

In 1886[4] this Committee made a report on uniformity of proceedings in settlement of estates of decedents leaving property in different states.

In 1887[5] this Committee submitted a report on Uniformity of pleading and practice in the Courts of the United States. At this meeting[6] the Committee on Commercial Law submitted a report upon the need for a national bankruptcy act and for national legislation to regulate commercial transactions between citizens of different states. Their fourth conclusion was as follows:—

"That in the exercise of the same power" (over interstate commercial transactions) "Congress should enact a statute defining the law relating to

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[1] See p. 207 of the Reports for that year.

[2] P. 309. [3] P. 38. [4] P. 294. [5] P. 327. [6] P. 332.

bills of exchange and other commercial paper, so far as the same is involved in interstate commerce."[1]

The Act proposed is given in full in the Reports of the American Bar Association for 1887.[2] It merits study as the precursor of the Negotiable Instruments Law. It was prepared by a member of the Committee of the American Bankers' Association and was introduced into Congress by the late Judge Poland. The preliminary statement would make an appropriate and admirable preliminary statement to stand at the head of our Negotiable Instruments Law that should be passed in Congress as a national Act in the exercise of its power over inter-state commerce. It is as follows:—

"Part 1. Preliminary.

Section 1. That to provide for the general welfare of the United States, and to carry into excution more fully than heretofore the power to regulate commerce among the several states, and to promote the security and efficiency of the national banks in their commercial transactions, all bills of exchange, promissory notes, checks on banks or bankers, and other negotiable instruments purporting to have been made in one of the United States, or a Territory thereof, or the District of Columbia, and payable in any other State, Territory, or country, are hereby declared to be means and instruments of commerce among the several states, and all such bills, notes, checks, and instruments made or dated on or after the date of the approval of this act shall be governed exclusively by the provisions thereof; and all laws or parts of laws of the several states in any wise inconsistent with the provisions of this act are hereby suspended."

At the annual meeting in 1888 a suggestive paper was read by the late John Randolph Tucker, of Virginia, on Congressional Power over Inter-State Commerce.[3] At p. 273 he asks "How far the power of Congress extends to the regulation of those important instruments of commerce which pass under the general name of commercial paper?" and answers:—

"They, when made between parties in different states, are closely related to inter-state commerce. They are parts of commercial intercourse, as much so as contracts and communications by telegraph. Indeed, they are more so, for they are means whereby moneys are withdrawn from one state to another. They are *media* of exchange; and if exchange or traffic in products constitutes commerce, as is undoubted, are not bills drawn or notes given between citizens of different states in payment of goods sold by one to the other, as much a part of inter-state commerce as is the sale of goods?"

And he stated that when he was a member of Congress and of the Judiciary Committee of the House, the subject of a system of international and inter-state commerce law, uniform throughout the country, was before that Committee.

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[1] P. 352. [2] Pp. 362 to 395. [3] "Reports" for that year, p. 247.

Upon motion of Rufus King, of Ohio, so much of this paper as referred to national legislation relating to commercial paper as an instrument of commerce was referred to the Committee on Commercial Law.[1]

At the annual meeting in 1889[2] W. A. Collier, of Tennessee, stated that at a recent meeting of the Bar Association of Tennessee the president had made some wise suggestions in reference to uniformity of laws in his address: and this address had been referred to a committee which had reported thereon, and in obedience to their request he now submitted the following resolution:—

"Recognizing the desirability of uniformity in laws of the several states, especially those relating to marriage and divorce, descent and distribution of property, acknowledgment of deeds, execution and probate of wills therefore be it

Resolved, That the President of this Association appoint a Committee, consisting of one from each state, who shall meet in convention at a time and place to be fixed by the President and compare and consider the laws of the different states relating to these subjects, and prepare and report to this Association such recommendations and measures as will bring about the desired result."

The resolution was adopted, the President appointed the Committee, and the list, consisting of forty-two members, may be found at p. 96. It has been appointed annually ever since then, the number of its members increasing as other states have had representatives added, and at the annual meeting in 1903 it was constituted one of the Standing Committees, the constitution being changed to bring this about.

This Committee (on Uniform State Laws) made its first report the following year.[3]

They reported that the State of New York had passed an act authorizing the Governor, by and with the consent of the Senate, to appoint three commissioners for the Promotion of Uniformity of Legislation in the United States,

"to examine the subjects of marriage and divorce, insolvency, the form of notarial certificates, and other subjects; to ascertain the best means to effect an assimilation and uniformity in the laws of the States, and especially to consider whether it would be wise and practicable for the State of New York to invite the other States of the Union to send representatives to a convention to draft uniform laws to be submitted for the approval and adoption of the several states, and to devise and recommend such other course of action as shall best accomplish the purpose of this Act."

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[1] P. 44.

[2] P. 50.

[3] Reports for 1890, p. 336.

The Committee recommended the passage by each state and by the Congress of the United States for the District of Columbia and the Territories, of an act similar to the above, inserting further, as proper subjects requiring uniformity of legislation, "descent and distribution of property, acknowledgment of deeds, execution and probate of wills."

They recommended also that the Secretary be instructed to cause the report and accompanying resolutions to be printed and to send copies to the members of the General Council, the Vice-President and to the members of this Committee in each of the States and Territories and District of Columbia, with the request that they unite in preparing, presenting and securing the passage of a similar bill in their respective states and territories. The report and resolutions were adopted, Mr. Louis H. Pike, of Ohio, stating that the same subject had been considered by the Ohio State Bar Association and by the National Bar Association; and that some of the recommendations of the latter in regard to it had been adopted by some of the state legislatures and some action had been taken upon it.

This committee on Uniform State Laws made its second report in 1891,[1] stating that as it had been found impossible for the members to meet in convention, a circular had been issued by the chairman and sent to each member requesting answers to inquiries as to what steps had been taken looking to the formation of a Commission on Uniformity of Laws in the recipient's state; and in what respect greater uniformity in legislation is deemed desirable and practicable, etc.

Answers were received from most of the states, from judges of the highest courts, and from lawyers who had made a study of inter-state law. Commissions had been appointed on Uniformity of Legislation in New York, Pennsylvania, Massachusetts, Michigan, New Jersey, and Delaware. The Committee found a substantial agreement of opinion that the desired uniformity could be best secured by legislative action in the states, a conclusion that has been verified by the results of subsequent experience.

"There was a substantial agreement in the view that the most urgent and immediate need of uniformity or unification was in the matters affecting directly the business common to and co-extensive with the whole country, such as the enforcement of contracts, the validity, negotiability and construction of commercial paper and the formalities of all legal instruments and the

[1] Reports for 1891, p. 365.

proofs of their authenticity. It was apprehended that sudden, radical and fundamental changes in the laws of Divorce, Descent and Distribution, however desirable, would meet with the greatest difficulty, and in most states changes would be more likely to be adopted, if at all, after the general advantages of uniformity in commercial matters had been demonstrated by experience."[1]

The Committee on Uniform State Laws has reported from year to year to the American Bar Association the appointment by state after state of Commissioners on Uniformity of Legislation. As these Commissioners thus appointed by the States met in Conference each year the same week the American Bar Association met and in the same place with them, and does so still, it resulted naturally that the work on Uniformity of Legislation has been done at the Conferences, and no longer by the Committee on Uniform State Laws of the American Bar Association.

Turn we now to the annual reports of these Conferences. Many of the earlier ones are already out of print and it is no longer possible to supply a complete set. Among the very first of the Uniform Laws recommended at the Conference in 1892 was one of two short sections relating to promissory notes, checks, drafts and bills of exchange. At this Conference Commissioners appointed for the Promotion of Uniformity of Legislation from the states of New York, Massachusetts, Pennsylvania, New Jersey, Michigan, Delaware and Georgia were in attendance. The first Conference took place at Saratoga Springs, New York, on the 24th and 25th days of August 1892, and the second at New York City on the 15th and 16th days of November 1892. Since then they have been held regularly each year in connection with the meetings of the American Bar Association, at the same place and two or three days prior thereto, in order that the Commissioners may attend the meetings of both bodies.

At the Conference held in Detroit, Michigan, in August 1895, Mr. Bergen, one of the Commissioners from New Jersey, offered resolutions, which were slightly amended in form and then adopted, as follows:—

"*Resolved*, That the Committee on Commercial Law be requested to procure as soon as practicable a draft of a bill relating to commercial paper, based on the English statute on that subject, and on such other sources of information as may be deemed proper to consult, and cause said draft and statute to be printed and sent by mail with a copy of this resolution to every commissioner on uniform law in office.

"*Be it further Resolved*, That the comments on said draft be sent to the chairman of said committee without delay and that said committee meet at a

[1] (Page 366).

place to be appointed by the chairman at such time or place as the chairman may fix, to revise said draft and report the same to the next meeting of this Conference.

"*And be it further Resolved*, That the said committee be authorized to expend a sum not to exceed two thousand dollars in the preparation, printing, and mailing of said draft and bill."

Subsequently the Committee on Commercial Law met and appointed, a sub-committee of three, to carry out the instructions contained in the resolution.

In September 1895 this sub-committee employed John J. Crawford, Esq., of the New York bar, who had made a special study of the law relating to commercial paper, to prepare a draft of a bill as required by the resolution. Upon its completion in December, it was carefully revised by the sub-committee, and annotated for convenience of study. Copies were sent to all the Commissioners of other states and comments were invited. The sub-committee consisted of the three very able and efficient commissioners from New Jersey, J. Franklin Fort, Frank Bergen and J. D. Bedle, and they submitted their report to the legislature of New Jersey, January 24, 1896, in which they stated that although the act in question should not be passed at that January session of the Legislature, of New Jersey, as it was to be submitted to the Conference of Commissioners the next summer, they suggested that the bill be introduced, printed and distributed among the members of the legislature or otherwise published. Their recommendation was adopted and the act was published in pamphlet form with the annotations referred to. Copies were distributed generally throughout the country, in order to make the proposed act as well known as possible.

At the Sixth Conference held at Saratoga Springs, New York, August 15, 17, and 18, 1896, the Committee on Commercial Law presented a copy of this draft of an act on Negotiable Instruments and reported further that in addition to the examination and criticism of the commissioners, the committee had sought the opinions of experts and professors in this branch of the law and had been aided by their suggestions in the final revision of the act as now presented to the consideration of the Conference.

Mr. Crawford was present throughout the sessions of the Conference, and during the three days the session lasted, the Conference examined the act, section by section, going through every section with Mr. Crawford, asking him for explanations, suggesting amendments that sometimes were adopted, but only after full examination and patiently hearing the arguments presented on both sides.

So thoroughly satisfied were the Commissioners present with the draft that on motion of Judge Stiness of the Supreme Court of Rhode Island, after the act was adopted as a whole, it was resolved that the Conference express its high appreciation of the work done by Mr. Crawford in drafting the Negotiable Instruments Act, and that a record of thanks of the Conference be spread on the minutes.

The following year the Committee on Uniform Laws of the American Bankers' Association, having been directed by the Executive Council to prepare a uniform law for commercial paper, with such legal assistance as might be desired, reported that the Negotiable Instruments Law seemed to be a better law for the purpose than any they could possibly frame.

This committee submittted a report giving a summary of the genesis of our law for which the committee acknowledged its indebtedness to an article by Mr. Sherwood published in the Yale Law Journal, to which also the writer would here refer, as well as to this report, published as an introduction to an edition of our act printed and distributed all over the Country by the American Bankers' Association. This committee approved our act ("A more useful or thoroughly prepared statute on Commercial Law would be difficult to find") and recommended the Association to urge its State Associations to present the law to their respective State Legislatures for passage. They recommended further, the appointment of a committee whose duty it should be to correspond with the several State Associations and to look generally after the passage of the law by the several State legislatures.

This report was adopted and the act was re-published and distributed throughout the country by this powerful Association. It has co-operated with the Commissioners on Uniformity of Legislation since then, in endeavoring to secure its adoption by the Legislatures of the various states.

These endeavors have sometimes had a humorous turn even though they exhibit a lamentable phase of American politics. In one state, after a full discussion before the Judiciary Committees of both Houses and a favorable report from both Committees, sundry members learned that the law had been favorably reported upon by the Bankers' Association. Thereupon they reasoned that there must be "something in it" for the bloated capitalist owners of banks, and the act was "held up," to exact payment for its passage. It is still held up in this state and will remain so, until the members become convinced by better education that all there is in it is the

public spirited wish of bankers as well as of lawyers to promote the welfare of their country.

In another state noted for its subservience to a machine and its boss the act was soon carried through both Houses without a negative vote. Upon enquiry how this happened, we were told the boss was assured that the act was a good one, with no politics and no money in it; that it was intended solely for the public good and that it ought to be adopted as it would help him with the people of the state if occasionally he did something for their benefit. Being broadminded enough to see the reasonableness of this proposition, he submitted the act to the lawyers of the machine, and the machine always commands the services of lawyers of high ability. They agreed with the argument advanced and the law was carried through at once.

In another state the act has been "held up" for some years now because the chairman of the Judiciary Committee is opposed to it and will not allow it to be considered by his Committee.

Year after year, however, one state after another has adopted the act, after full consideration before the Judiciary Committee of its legislature of arguments pro and con, until now it is the law of 21 States, 1 District and one Territory.[1]

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[1] New York Laws of 1897 Ch. 612 Became Law May 19, 1897.
New York Laws of 1898 Ch. 336 Became Law April 26, 1898.
Connecticut Laws of 1897 Ch. 74 Approved April 5, 1897.
Colorado Laws of 1897 Ch. 64 Approved April 20, 1897.
Florida Laws of 1897 Ch. 4524 Approved June 1, 1897.
Massachusetts Laws of 1898 Ch. 533 To take effect Jan. 1, 1899.
Massachusetts Laws of 1899 Ch. 130 To take effect Mar. 6, 1899.
Maryland Laws of 1898 Ch. 119 Approved March 29, 1898.
Virginia Laws of 1897-8 Ch. 866 Approved March 29, 1898.
Rhode Island Laws of 1899 Ch. 674 To take effect July 1, 1899.
Tennessee Laws of 1899 Ch. 94 To take effect May 15, 1899.
North Carolina Laws of 1899 Ch. 733 Went into effect March 28, 1899.
Wisconsin Laws of 1899 Ch. 356. To take effect May 15, 1899.
North Dakota Laws of 1899 Approved March 7, 1899.
Utah Laws of 1899 Ch. 149 To take effect July 1. 1899.
Oregon Laws of 1899 Sen. Bill 27. Approved Feb. 16, 1899.
Washington Laws of 1899 Ch. 149 Went into effect March 22. 1899.
Dis. of Columbia Laws of 1899 U. S. Stats. Approved Jan. 12, 1899.
Arizona R. S. 1901 Title XLIX, §§ 3304-3491 To take effect September 1, 1901.
Pennsylvania Laws of 1901 Ch. 162 Approved May 16, 1901.
Ohio Laws of 1902 Sen. Bill 10 To take effect Jan. 1. 1903.
Iowa Laws of 1902 Ch. 130 Approved April 12, 1901.
New Jersey Laws of 1902 Ch. 184 Approved April 4, 1902.
Montana Laws of 1903 Ch. 121 Approved March 7, 1903.
Idaho Laws of 1903 Sen. Bill 86. Approved March 10, 1903.

This long and necessarily dry history has been given to show that the Negotiable Instruments Law is not the product of hasty immature legislation, but is the slow product of an evolutionary process that has been going on for the last quarter of a century. It shows, further, that many editions of the act, have been printed and distributed generally throughout the country, not only by the Commissioners, but also by the American Bankers' Association and by the state legislatures, and articles have been written and published in law journals and elsewhere, explaining the act.

In addition to all this, copies were sent to the Commissioners from each State to distribute in their respective States, the Conference thus doing all it could to secure knowledge everywhere, of the measure proposed.

In Rhode Island, the Commissioners' annual report submitted to the general assembly at its January session 1897, contained the act, annotated by the Commissioners with all the cases that had been decided in Rhode Island upon questions covered by the act.

In some inexplicable way, in spite of all the efforts of the Commissioners and of the Bankers' Association to make the Negotiable Instruments Law known throughout the country; notwithstanding the publication of numerous editions of the law and its distribution everywhere; notwithstanding the introduction of this law year after year before legislature after legislature, with its reference to their judiciary committees, public hearings and reports thereon, followed by public discussion and adoption of the law by fifteen states and the District of Columbia by an act of Congress, notwithstanding the efforts naturally made by the expert authorities on this branch of the law to follow legislation thereon and the decisions of the courts upon cases arising thereunder, it was not until years after all this had been going on, apparently not until 1900, that the Negotiable Instruments Law claimed the attention of one who is recognized as standing *primus inter pares* in his knowledge of this branch of the law, Professor Ames, now Dean of the Harvard Law School.[1]

His objections were first made known to the Commissioners when they met in Conference at Saratoga Springs, in August, 1900, four

[1] Mr. McKeehan, on p. 82 of his pamphlet, says that Professor Ames saw the act for the first time after its adoption by four State legislatures. By the antecedent table (p. 267), it will be seen that four states had adopted it in 1897. Then Professor Ames first saw the act some time after 1897, and before it was adopted by the fifth state, which was early in 1898, But his objections were not made known until August, 1900, at which time fifteen states and the District of Columbia had adopted the act.

years after they had adopted the act. At this meeting, on motion of Mr. Saunders, of Virginia, a committee of which the President of the Conference, Judge Brewster, was chairman, with Messrs. Withington, of California, Stiness, of Rhode Island, and Smith, of Illinois, was appointed to meet the Dean, to consider certain suggestions made by him on the subject of the Negotiable Instruments Law, and to report to the Conference their conclusions. They met the Dean that evening and went over with him until late that night, or rather until early the following morning, his objections, and their replies thereto. The next morning they made the following report to the Conference:—

"The committee appointed to consider the criticism suggested by Professor J. B. Ames upon the Negotiable Instruments Law, respectfully report that they met with Professor Ames, and have carefully gone over the points suggested, and are of the opinion that no changes or amendments are necessary or desirable."

This report was received, and after full explanation by the committee, it was voted to approve the report and to adopt its conclusions.

Professor Ames then published an article entitled: "The Negotiable Instruments Law,"[1] in which, while awarding a generous recognition and praise of many merits to the law, he nevertheless pointed out what he alleged were defects that should be amended.

To this Judge Brewster, President of the Conference, published a reply[2] entitled: "A Defense of the Negotiable Instruments Act."

Professor Ames replied in an article[3] entitled: "The Negotiable Instruments Law. A Word More."

Judge Brewster again replied in an article[4] entitled: "The Negotiable Instruments Law. A Rejoinder to Dean Ames."

1902 the Harvard Law Review Publishing Association published a pamphlet containing the Negotiable Instruments Law, all the above articles, together with a supplementary note by Dean Ames, and a reply thereto by Judge Brewster, hereinafter cited from as "the pamphlet" for the sake of brevity.[5]

John Lawrence Farrell, of the New York Bar, also wrote an article entitled, "The Negotiable Instruments Law, a Reply to the

[1] 14 Harv. Law. Rev. p. 241, for December, 1900.

[2] 10 Yale Law Journal, p. 84, in January, 1901.

[3] 14 Harv. Law Rev, p. 442, for February, 1901.

[4] 15 Harv. Law Rev. p. 26, for May, 1901.

[5] Copies of this pamphlet may be procured of the Harvard Law Review, Cambridge, Mass.

Criticisms of James Barr Ames,"[1] subsequently reprinted in pamphlet form.

Charles L. McKeehan of the Philadelphia Bar, also wrote an article entitled, "The Negotiable Instruments Law, a Review of the Ames-Brewster Controversy,"[2] subsequently reprinted in pamphlet form. These are the articles hereinafter referred to.

And finally Professor Ames published another article[3] entitled, "The Negotiable Instruments Law, Necessary Amendments," renewing his criticisms.

The following section of this paper is devoted principally to an examination of these criticisms, for the friends of the law fear that were no answer made, it might be thought that the criticisms so ably presented by such an eminent authority on this branch of the law, are unanswerable.

Section 9-3,[4] is as follows:—

"The instrument is payable to bearer ———. (3) When it is payable to the order of a fictitious person, and such fact was known to the person making it so payable."

The learned Dean thinks the provision should be:—

"If a bill be drawn, or a note made, payable to the order of a person known by the drawer or maker to be fictitious or non-existent, or of a living person, not intended to have any interest in the instrument, and if such bill or note be indorsed by the drawer or maker in the name of the nominal payee, the instrument will have the same effect as a bill or note payable to the order of, and indorsed by, the drawer or maker respectfully."

He objects to treating such an instrument as being payable to bearer.

To this Mr. McKeehan replies:—[5]

"As a matter of fact, however, the act, on this point, merely codifies that which has been the settled law of England and America for more than a century. The arguments in support of Professor Ames' view were fully presented, both to the Court of King's Bench and to the House of Lords, in the leading case of *Minet* v. *Gibson* (1 H. Bl. 569), decided in 1791. Both courts repudiated them, and held that the holder, in due course of a bill payable to the order of a fictitious person, could, as against the drawee who accepted, knowing that no such person existed, declare on the bill as payable to bearer, and recover."

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[1] "The Brief of Phi Delta Phi," Vol. III., No. 2, First Quarter, 1901.

[2] American Law Register, Vol. 41 N. S., Nos. 8, 9, and 10, August, September, and October, 1902.

[3] XVI. Harv. Law Rev. p. 255, for February, 1903.

[4] Crawford, Ann. N. I. L. sec. 28.

[5] P. 12 of his pamphlet.

As the Dean says nothing in his concluding article[1] about this section, it is presumed he no longer insists on his objection.

Whether such an instrument must be indorsed before it can be negotiated, has not been decided, but as a matter of fact, perhaps out of abundance of caution only, a bank will insist upon the name of the payee being indorsed before it will accept such an instrument. This was pointed out by Mr. Farrell on page 157 of his pamphlet.

Sec. 9-1-5,[2] is as follows:—

"The instrument is made payable to bearer:

(1.) When it is expressed to be so payable: or ———

(5.) When the last or only indorsement is an indorsement in blank."

The Dean finds this language, borrowed from 8 (3) of the English act, not well chosen, because a note made payable by A, to the order of B, bearing the anomalous blank indorsement of C, would be payable to bearer, as the only indorsement is an indorsement in blank.

Mr. Farrell answered:—[3]

"This conclusion is unfair, and is the result of an unreasonable interpretation of the sub-section. Aside from that, it is, as a matter of fact, inaccurate. The language of the sub-section shows clearly that reference is made to an indorsement in the ordinary and regular course. The instrument is payable to bearer *only* when the indorsement is made in *blank*. How could this include or refer to an anomalous indorsement, which is always in blank?"

It is not necessary to examine the Dean's further exceptions, Judge Brewster's reply,[4] the Dean's reply to this,[5] and the Judge's concluding reply,[6] for as the Dean does not refer to this subject in his last article,[7] it is presumed he no longer insists on his objections.

This last article is in the nature of a judicial summing up, at the end of a learned controversy over abstruse propositions of law by an acknowledged authority, and therefore calls for the most careful examination. The learned Dean,[8] "retains his conviction that it is wiser to have no code at all than to adopt the Negotiable Instruments Law in its present form." This is a serious indictment, not only of the drafter of the act and of the commissioners, all lawyers, coming from all over the United States, but equally of the judiciary committees of the legislatures of the twenty-three jurisdictions

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[1] XVI. Harv. Law Rev. 255.
[2] Crawford, sec. 28-1-5.
[3] P. 137 of his article.
[4] P. 52 of the pamphlet.
[5] P. 63 do.
[6] P. 74 do.
[7] Harv. Law Rev. February, 1903.
[8] Op. 261.

within the Union, that have recommended the adoption of this law, It includes the judiciary committees of both Houses of Congress. Is the indictment warranted?

Our formidable accuser thinks[1] that sections 20, 40, 65-4, 130-3, 120-5, 120-6, and 137, "would be wisely amended by making them uniform with the English Act," and that sections 124 and 186 "not only change well established American law, but also threaten serious injustice."

We will examine these objections *seriatim*. Section 20[2] is as follows:—

"Where the instrument contains, or a person adds to his signature words indicating that he signs for on behalf of a principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized, but the mere addition of words describing him as an agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

This section is similar to Art. 95 of the German Exchange Act, and was deliberately adopted after mature consideration by the Commissioners at their Conference in 1897, when they spent three days examining the law, section by section. They changed the section as drawn by Mr. Crawford, in order to do away with the unjust principle of law that courts have felt bound to follow, even when condemning it, that one who signs an instrument in a representative capacity, even though duly authorized by his principal, is individually bound, unless he adds to his signature the explicit statement that he is not signing in his individual capacity. It was admitted by the Commissioners that the agent signing in his representative capacity should be personally liable if he have no authority so to sign. If A, mistakenly believing he is authorized, signs a negotiable promissory note "A, agent for B," and delivers it to C, the payee, why should not A be liable individually for the whole amount of the note? Should not A have ascertained what his authority was before signing such a note? Why should his liability be limited, if B afterward becomes bankrupt? Does it not add to the negotiability of the instrument and to the simplicity of the transaction, to lay down a rule under which all may know in advance that in such a case A is answerable for the full amount of the note, instead of being answerable for the uncertain amount, that perhaps cannot be reduced to certainty until long afterward when it is ascertained through the slow process of proceedings in

[1] P. 256.

[2] Crawford, Ann. N. I. L., sec. 39.

bankruptcy, how much B's assigned estate will divide among his creditors?

Nor is it a valid objection as urged by the Dean that "this is a departure from the English act and from the almost universal current of judicial decisions."[1] A code is not formulated to follow the current of decisions when the current is wrong, and the law ought to be changed. At the Conference in 1896, when the Negotiable Instruments Law was considered in detail by the Commissioners, and this was changed from the form proposed by Mr. Crawford, the draftsman of the act, the Commissioners present from Rhode Island were insistent upon the change to the form adopted, having in mind, and calling to the attention of their co-commissioners, the Rhode Island case of *Roger Williams Nat. Bank* v. *Groton Mfg. Co.*,[2] in which the defendants who indorsed "Trustees of Estate of Amos D. Smith," with authority to do so, were nevertheless held personally liable, although such was not the understanding of any of the parties to the transaction, because they had not added to their indorsement anything clearly restricting by the use of apt words their liability to their representative capacity. The decision was good law, yet a shock to the conscience, and it was felt by the Commissioners that such should no longer be the law under the Negotiable Instruments Law.

Mr. McKeehan sums the matter up well, p. 31 of his pamphlet, when he says that the rule the Commissioners adopted is supported by the authority of several states, by the German code, by some of the best expert opinion of England, tends to increase the negotiability of the instrument, and enables a plaintiff to know and prove with ease and certainty the amount to be recovered.

Nor can it be said that the rule imposes upon the parties a contract not in the contemplation of any one, when they enter into such a contract with an explicit statute in force before they enter into it, that specifies that this is what such a contract means. They have implied knowledge, if not actual knowledge, of the law. It is negligence for A to make such a contract without ascertaining what the law is.

"The agent should not be allowed to take refuge behind the statement that he supposed he had authority. Where he has signed the instrument with full knowledge that he did not have authority, there should certainly be no question as to his liability."[3] *

[1] Pamphlet, p. 36. [2] 16 R. I. 504. [3] P. 139 of Mr. Farrell's article.

* The learned Dean thinks that an innocent but mistaken agent should not be charged with greater damage than he caused. The answer is that if he does not disclose his princi-

The next objection of the learned Dean is to 40:—[1]

"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 Dean objects to this section as inconsistent with sections 9-1 and 9-5:—[2]

"The instrument is payable to bearer: (1.) When it is expressed to be so payable. . . (5.) When the only or last indorsement is an indorsement in blank."

There are two ways in which this can be construed. One is the way proposed by the Dean, that it includes instruments originally made payable to bearer and also instruments subsequently indorsed specially, thus reviving the objectionable doctrine of *Smith* v. *Clarke*, Peake 225, in which Lord Kenyon failed to follow the custom of merchants, as he should have done. The other way is to construe this section as applicable only to instruments originally made payable to bearer, a construction vigorously upheld by both Mr. Farrell and Mr. McKeehan, by convincing arguments to which the reader is referred. This view is further sustained by the fact that such was the custom of merchants before Lord Kenyon changed the law.

Upon the familiar principle that a document or statute is to be so construed as to give effect to all its provisions, if possible, it follows that a court of justice would not adopt a construction that would negative one section of this law, when it has before it another construction that would give effect to both sections, a construction, too, that has in its favor other strong reasons, as above shown. It is possible that the learned Dean is under some misapprehension caused by overlooking Sec. 9-5: "The instrument is payable to bearer:—(5.) When the only or last indorsement is an indorsement in blank."

The learned Dean's conclusion that section 40 should be expunged is therefore unwarrantable.

The learned Dean objects to section 65-4:—[3]

"Every person negotiating an instrument by delivery or by a qualified indorsement warrants. * * * (4.) That he has no knowledge of any fact

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pal, credit is given to him, not to the principal. Therefore he should be liable for the whole amount, leaving him to his remedy over, if any there be, against his undisclosed principal, and thus the instrument is rendered more negotiable.

[1] Crawford, 70. [2] Crawford, 28-1 and 28-5. [3] Crawford, 115-4.

which would impair the validity of the instrument or render it valueless. But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee."

His first objection is that it

"Introduces the novel distinction that a transferor by delivery is a warrantor of title and genuineness only to his immediate transferee while the similar warranty of the indorser without recourse runs to all subsequent holders. There is no authority for this arbitrary distinction. The only decision on the point is against this distinction."

Citing *Watson* v. *Chesire*,[1] good authority on the point that every one admits, that an indorser without recourse cannot be charged on his indorsement.

Here, as elsewhere, it would seem that the Dean has a different conception from that of the Commissioners as to the requirements of a code. It is not a question of following authority. The courts follow the authority of precedents. Codifiers are not obliged to, unless the reasoning of the precedents and the good results derived from following them are convincing to their minds. Codifiers may make a distinction—even what the learned critic calls an arbitrary distinction—if they see good reason for it. This question is not whether it is an arbitrary one, nor whether there is authority for it —the question is whether the distinction is one that should be made.

There is a plain, common sense reason for the distinction. One selling a note verbally and giving title by delivery only, should be bound to his immediate vendee only, for he has made no representation to anyone but to that vendee. If he sells and delivers a horse, verbally warranting him to be sound, his verbal warranty does not run to any third person to whom his vendee may sell the horse. But when a vendor of a promissory note indorses it, even though he add "without recourse," he holds the note out as genuine to anyone into whose hands it may come.

A note passing by manual delivery, is like a bank note. One who has had a counterfeit bank note in his possession, is liable to the person to whom he passes it, but is not liable to a third person to whom it afterwards is passed by the person to whom he passed it.

Further, one taking title by delivery only is properly presumed to have only such knowledge of antecedent facts as are disclosed by the instrument. An indorsement, even when made "without recourse," carries with the instrument itself, knowledge to all

[1] 18 Iowa, 202.

subsequent holders that a delivery without any indorsement does not carry.

The Dean objects further that [1]

"Another new and unfortunate distinction is introduced by sub-section 4 by which the transferor of an instrument void for usury is not liable as a warrantor, unless he was aware of the usury, whereas the transferor of an instrument void for coverture or voidable for infancy is liable as a warrantor, although he is ignorant of the coverture or infancy."

The reason for the distinction is obvious. Usury is the result of conduct between the parties of which an indorser is not presumed to have knowledge. Coverture, infancy or other disability affect the competency of the parties to make any contract. An indorser is presumed to warrant the genuineness and competent character of previous parties, but not the result of their conduct unless he is aware of it and it was illegal.

The details of the interesting discussion between the Dean and Judge Brewster on this point may be found on pages 39, 55 and 65 of the pamphlet above cited. Suffice it to say that the Dean there proposed an amendment, subsequently more fully elaborated, [2] and that the Judge made merry with his critic, the Dean, for objecting to what in earlier days the Dean had himself suggested, i.e. that an indorser without recourse is responsible as a warrantor to the indorsee and subsequent holders. At page 65 of the pamphlet the Dean frankly confessed that a youthful indiscretion, committed so long ago that it had passed from his memory, made him fair game for the alert sportsman, thus adding a touch of humor to this learned, recondite controversy.

Sec. 119-4[3] is as follows:—

"A negotiable instrument is discharged. (1.) By payment in due course by or on behalf of the principal debtor. * * * (4.) By any other act which will discharge a simple contract for the payment of money."

The Dean says:—

"The acceptance of a chattel in satisfaction of an unmatured simple contract claim discharges it. Therefore, such a provision discharges the note."

The explanation given by Judge Brewster in his first reply to the Dean[4] has not yet been met. The section evidently relates to acts between the parties. Otherwise the section would reverse established law as to a note in the hands of an innocent purchaser. No one contends the negotiable instruments law has done this, and

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[1] P. 257.

[2] Harv. Law Rev. for Feb., 1903.

[3] Crawford, Ann. N. I. L. 200-4.

[4] Pamphlet, p. 57.

therefore, this section must be construed in such a way as to make it consistent with the rest of the act. Sec. 57 clearly shows that a holder in due course holds the instrument free from any defect of title of prior parties etc., and requires Sec. 119-4. A forced construction that would be "revolutionary, unjust and absurd," to use Mr. McKeehan's words, (p. 63 of his pamphlet) is not to be expected of any court taking a broad view of the whole act and especially of Sec. 57.

This count in the indictment fails also, even if we admit it would have been well in matter of form, had the section contained the explicit statement that it relates to acts between the parties.

Another answer, suggested by Mr. Farrell, is as follows:—

"As anything is a payment which a creditor accepts as payment or for the purpose of extinguishing the debt due him, the acceptance of a chattel in satisfaction of a note, would discharge it. But discharge by payment is covered by sub-sections one and two, and as the acceptance of a chattel before the maturity of the debt, is not a payment in due course, or at maturity, as required by the sub-section covering discharge by payment, the attempt to discredit sub-section 4 fails."

The next objection of the Dean is to Sec. 120-3. (Crawford, Sec. 201-3.)

"A person secondarily liable on the instrument is discharged:— 3. By the discharge of a prior party."

These words: "discharge of a prior party," must be construed in connection with the context. In all the other subdivisions of the section, some act of the parties is expressly mentioned, as "intentional cancellation." "valid tender," "release" and "agreement." So in the section immediately preceding, only acts of the party are referred to. Why then should it be supposed that in subdivision 3, the word "discharge" is used in a different sense, and is intended to include discharges by operation of law? It is only by wresting the words from the context that any ambiguity is created. As to the bar of the statute of limitations, the delay that permits the statute to run is the act of the parties, and is not by operation of law.

How can there be any doubt that this, too, relates to acts between the parties? The learned Dean has not met the answer by Judge Brewster at page 57 of the pamphlet.

"The law has long been settled that the discharge of the liability of a bankrupt maker of a note does not affect the liability of the other parties on the note. It is generally held that the statute of limitations against an indorser runs, not necessarily from the date of the note, but from the time when the

indorser's liability accrues. When, therefore, the language of sub-section 3 is used (exactly as given in a number of the text-books) it, of course, refers to a discharge by the holder and not a discharge by act of the law, as the whole context, referring to acts of parties and not any acts of the law, clearly indicates. Thus Randolph, second edition, page 769, says the release of a prior indorsement discharges subsequent indorsers, assuming, of course, their release by the holder. That this is the natural meaning and interpretation of sub-section 3, Sec. 120, is fairly inferable from this fact. Ten books on commercial paper have been published since the Negotiable Instruments Law was legislatively adopted. All of them treat more or less fully of that law; Huffcut, Randolph, Bigelow, Norton, generally, and Selover and Crawford and the special books on the New York and Colorado acts, treating of that act alone. Not one of these ten authors intimates that sub-section 3 has changed the law in the slightest degree. In all the reports of the various commissioners to their respective States, elaborately stating every change of the law made by the Negotiable Instruments Law, no allusion is made to sub-section 3.

It is not necessary to invoke the aid of the rule of law in Sutherland on Statutory Construction, Sec. 156, that codes that condense and reaffirm in general, the rules of the common law, do not repeal the exceptions to these rules which they reaffirm; or the similar doctrine of Endlich on Statutes, Secs. 127-205, that in statutes or revision condensing or in general re-stating the common law, no change is presumed except by the clearest and most imperative implication. How far this doctrine is carried in England, in regard to the Bills of Exchange Act, is shown in the case of the *Bank of England* v. *Vagliano*, L. R. 1891, Appeal Cases, page 144. But were this doctrine invoked, the simplest application of the rule or of Sec. 196 would at once relieve the sub-section in question of the misrepresentation put upon it by the Dean. Nevertheless, our critic, whose adjectives here and there are surprisingly vigorous, describes this aphorism of the law merchant as 'the most mischievously revolutionary provision of the new code.'"

The very vigorous defense of this section by Mr. Farrell, pages 154-155 of his pamphlet, should also be read in this connection.

Can the Dean believe that the courts would adopt a conclusion that would constitute, in his words, "a legal monstrosity?"[1] a conclusion, that, also in his words would be "the most mischievously revolutionary provision in the new code?"[2]

Mr. McKeehan, p. 69 of his article, sums up well Judge Brewster's reply, but he concludes, p. 70:—

"It is to be earnestly hoped that the courts will adopt Judge Brewster's interpretation (construction.) It is to be as earnestly regretted that the commissioners did not express themselves unmistakably on so important a point."

The express statement might have been added that this section also relates to acts between the parties. Undoubtedly it will be so construed by the courts.

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[1] P. 259 Harv. Law Rev., Feb., 1903.

[2] P. 42 of the H. L. R. pamphlet.

Mr. Farrell contends that this section means that if the holder, by acts either of omission or commission, shall impair or destroy the rights of prior parties to indemnity, from one liable over to them, the latter are discharged. The learned Dean reads into this section the words, "by operation of law," but he does not convince us that he does so with sufficient cause. He then reasons:—

"One secondarily liable would be discharged, therefore, if any prior party should be discharged by the Statute of Limitations, or if any prior indorser should be discharged by the holder's failure to give him due notice of dishonor, and, in jurisdictions where joint obligations are not made joint and several by statute, the death of a surety co-maker, would discharge all subsequent parties."

Mr. Farrell continues:—

"If a holder should allow the debt to drag along for years, until, by force of the Statute of Limitations, the debtor is discharged, upon what theory, either of human law or of abstract justice, he is entitled to protection? Why should the law go to unreasonable extremes to guard the interests of one who is himself negligent in not suing within the statutory period? In addition it would be an injustice to an intermediate indorser.

Mr. Farrell says also, (p. 155):—

"According to Professor Ames's literal interpretation, if an intermediate indorser should, upon receiving notice, do absolutely nothing, instead of giving notice to the person liable over to him, thereby taking advantage of his knowledge that the holder had not sent notice to the first indorser, whom the holder probably knew nothing about, such intermediate indorser would himself be discharged. But the law does not contemplate that a man shall, by pursuing a policy of masterly inactivity or worshiping the god of silence, relieve himself from his obligations. Professor Ames understands all this and knows that no other construction would or reasonably could be put upon the language by the courts."

The Dean's final objection to this sub-section is:—

"If the holder appoint an indorser his executor, the law, regardless of the intention of the parties, discharges all subsequent indorsers. Is this a discharge by operation of law or by the act of the parties?"

Notwithstanding the positive statement by so eminent an authority, it is submitted that there is no discharge in such a case. The executor—indorser and subsequent indorsers remain liable, and the former is regarded as holding the debt in trust for the creditors and legatees. The common law rule has been changed by statute. And even if it were still in force, it would be a discharge *by operation of law* and not "*by an act between the parties*," as the Dean would have us believe.

Secs. 120-5 and 120-6 (Crawford, secs. 201-5 and 6 are as follows:

"A person secondarily liable on an instrument is discharged—

(5.) By release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

(6.) By an agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."

The learned Dean says "No elasticity of interpretation can correct the errors of these sub-sections." But are they errors? Not according to Daniels.[1]

As Mr. Farrell points out, the "party primarily liable" is the person, who, by the terms of the instrument, is absolutely required to pay the same, while the "principal debtor" may be the party who appears on the face of the instrument to be secondarily liable.[2]

In the opinion of the drafter of the act and of the Commissioners it was deemed right that this should be the law, irrespective of conflicting decisions, and therefore they adopted this section. If by "the errors of these sub-sections" the learned Dean means that the Commissioners did not follow the particular line of precedents that he considers the best as authorities, there is room for difference of opinion. All that need be said further is that the Commissioners and the Dean are of different opinions and we must trust to future decisions to decide which was right.

Sec. 137 (Crawford, sec. 225), is as follows:—

"Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same."

The Dean says in his first article commenting on this section: "A refusal to accept is an acceptance."[3] Judge Brewster replied[4] pointing out that it is not a refusal to accept that is to be deemed an acceptance, but the refusal to return—a very different thing. The Judge also pointed out[5] that the provision making the destruction of a bill to be an acceptance was taken from the statutes of eight states, New York, Alabama, Arkansas, Idaho, Kansas, Nevada, Washington, and California, that the bankers regarded it

[1] Neg. Ints. 5th Ed. 1903, §§ 1326-1388a.
[2] See p. 157 of his pamphlet.
[3] P. 134.
[4] P. 51.
[5] P. 72.

as a simple practical, definite working rule, and that none of the twelve commentators on the N. I. L. had suggested the least objection to it.

In his latest article the critic finds this additional objection: "if the drawee should throw the bill in the fire, the payee would have no remedy until after dishonor for non-payment."

"True. But even if the drawee should accept and then not pay at maturity, the payee would have no remedy until after dishonor for non-payment. How is he prejudiced? And supposing the payee had taken the bill that the drawee refused to return, in absolute payment of a claim against the drawer, is not his position simplified and bettered by being thus enabled to sue the drawer on his acceptance?"

If he had not thought it would be bettered, he would not have so chosen.

Sec. 124 (Crawford, sec. 205), is as follows:—

"Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized or assented to the alteration, and subsequent indorsers"

In the learned critic's first artitle[1] he said that this section, under which the holder in due course may enforce payment of an altered instrument according to its original tenor, is one of the "judicious changes for the better" made by the American law. But in his "Supplementary Note"[2] after the decision in *Jeffrey* v. *Rosenfeld*[3] he holds that an innocent payee should be protected, as well as a holder in due course. As Mr. McKeehan well says,[4] "How one can see any ambiguity in Section 124 is a mystery."

"The only person who has ever suggested a doubt as to the meaning of this section is Mr. Justice Morton, who wrote the opinion in *Jeffrey* v. *Rosenfeld*, *supra*. In that case a note secured by a mortgage was altered, though by whom did not appear. On a bill in equity to restrain the foreclosure of the mortgage the court sustained the holder's right to foreclose without interpreting Section 124 of the code, though Justice Morton, in an *obiter dictum* of some length, remarked that the question of interpretation was one that deserved serious consideration. After referring to the authorities in this country that decided that a material alteration made by a stranger will not avoid the instrument, he adds, 'It would seem not unreasonable to suppose it was the intention of the framers of the American act that Section 124 should be construed according to the law of this country, rather than that of England.' As a generality, that remark is profoundly true, and applies to all the

[1] (P. 32 of the pamphlet).
[2] (P. 83, pamphlet.)
[3] 61 N. E. R. 49.
[4] (P. 74 of his pamphlet).

sections of the new act. They should be construed according to American law rather than English law. As applicable to the particular point under discussion, however, the remark is of small value. If the language of 124 is clear and unmistakable, it should be given its plain meaning. To construe it according to the American law does not mean to knock it down simply because it changes American law somewhat. The learned Judge points out no ambiguity in the language of this section. His sole reason for doubting its very plain meaning is that it changes the law. As a matter of fact, we learn from Judge Brewster that it was intended to change the law; that Mr. Crawford reported to the Conference in 1896 in favor of adopting the common law rule as to alterations by a stranger, in order that the law of the two countries might be uniform on this important point, and in order that the benefit of written evidence might be preserved. This view was approved by the Conference, and section 124 was inserted to restore the English rule.

Professor Ames thinks that the change is for the worse, though he vouchsafes no reasons. Under such circumstances, the profession cannot be blamed for accepting without question the judgment of the learned and experienced experts who drafted the new act. But at all events there is no ambiguity in this section. Its meaning is unmistakable."

The changes suggested in this section by the learned Dean may be excellent ones, but they should have been suggested before the negotiable instruments law was generally adopted and they would require the same changes in the English act, or there would be lack of uniformity.

Sec. 186 (Crawford, sec. 322), is as follows:—

"A check must be presented for payment within a reasonable time after its issue or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay."

We must consider Sec. 89 (Crawford, sec. 160), with it. It is as follows:—

"Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged."

The Judge's answer is sound. He says, supposing that the drawer of a check is discharged by the failure of the holder to give notice of dishonor, what is the harm? The debt itself is not discharged and the holder can sue and recover his debt just as he could have done before the check was given. Sec. 186 is taken from the English act, as also sec. 89. If sec. 186 is, as the Dean now says, "opposed to the American and English precedents," then both the acts change the law, and it is certain that both the English and American Law did it inadvertently (so the Dean says). But is this probable?

Mr. McKeehan concludes:—

"But the fact that these same provisions have proved satisfactory in the English Act for twenty years—while not disproving the objection that they are inaccurate—does indicate that little or no harm will result from that inaccuracy."

After a very careful study of Dean Ames' objections, of Judge Brewster's and of Mr. Farrell's replies (this was before Mr. McKeehan's article was written) the judiciary committee of the legislature of Pennsylvania, that state so noted for the sharpness of its lawyers, thought it inadvisable to change a word of the act, and passed it accordingly without any change, after a thorough discussion of all the objections raised by Dean Ames, including the case of *Jeffrey* v. *Rosenfeld*.[1]

"This concludes the discussion. If it is permitted to offer a cautious generalization on this controversy, it is submitted that although Professor Ames has pointed out two or three actual errors in the new law and has shown that in still other instances the language might have been improved upon, nevertheless, these errors and imperfections are not sufficiently numerous or important to make one seriously doubt the advisability of adopting the Negotiable Instruments Law in every state in the Union. It is easy to lose one's perspective and sense of proportion in such a matter. The flaws in the act, few though they be, when grouped together and considered alone, seem formidable. Yet when a survey is made of the entire statute, when one regards the many salutary provisions which settle disputed questions or introduce needed changes, when one studies the admirable simplicity and accuracy of most of its provisions and considers the comparative unimportance of most of the flaws which have been discovered, then the shortcomings of the Negotiable Instruments Law shrink to their real size and (though still apparent) do not seem likely to impair its usefulness. It is unfortunate that the commissioners did not have the benefit of Professor Ames' criticisms when they were revising the original draft of the act. That some of them would have been adopted (to the benefit of the act) can scarcely be doubted. But the act having been started on its course and legislatively adopted in a number of states before these errors were discovered, it was decided, and no doubt wisely decided that it was unnecessary and impolitic to start the work of amendment at that stage in its career. The readiness of several state legislatures to adopt the act in spite of criticisms that have been made upon it and the very small amount of litigation that has arisen under it in jurisdictions where it has been in force for several years, have thus far vindicated the soundness of the Commissioner's decision.

"Undoubtedly, however, Professor Ames has rendered substantial service to the Negotiable Instruments Law. He has pointed out the difficulties and possible dangers that lurk in some sections of it, and a careful study of his criticisms by those courts which will be called upon from time to time to construe these sections, will serve to avoid some confusion and several unfortunate decisions. After all, many, if not most of the flaws in the act can be overcome by a careful interpretation."[2]

[1] 61 N. E. R. 49.

[2] By Mr. McKeehan, at the close of his article.

Our work is human and therefore it has flaws, as all human work has, even the work of our eminent critic. It would be impossible to draw an act that would not show some deficiencies when subjected to the minute analysis our law has been subjected to. It is confidently submitted however that it contains no "startling innovation," "legal monstrosity" nor "mischievous uncertainty;" that there is nothing "mischievous" about it and that it shows no "return to archaic formalism" nor "inadvertence of the American and English codifiers;" and that it cannot be said that "no elasticity of interpretation can correct the errors of this sub-section." Our critic finds all these evils in it, and in speaking of section 137 says in his last article it is "worse than the writer first supposed."

The very violence of the language used by a critic who increases in vehemence every time he returns to the attack, defeats the end sought by him, as no one will expect the courts of this country to adopt constructions of the Negotiable Instruments Law that will bring about the awful results the learned Dean says are the necessary consequences of our poor work.

It is remarkable how few cases have arisen under this law in the many states that have adopted it. I have found only forty-two, and of these, sixteen have arisen in New York, the great financial center of the country. The following is a summary of these cases, in so far as questions under the Negotiable Instruments Law are concerned, following the order of its sections.

Louisville Coal Mining Co. v. *Int. Tr. Co.* 71 Pac. Rep. 898. Col. Ct. of Apps. 1903.

Under Sess. Laws Col. 1897 s. 30 (Crawford Ann. N. I. L. s. 2 "Indorsement," means an indorsement completed by delivery. See also s. 60) an allegation that the payee "indorsed and transferred" is enough, confirming antecedent cases. Under the N. I. L. an allegation that the payee indorsed the note to the plaintiff would have been enough.

N. H. Mfg. Co. v. *N. H., P. & B. Co.*, 55 At. Rep. 604 (Conn.) 1903.

The plaintiff endorsed a negotiable promissory note to a bank, for collection, before maturity. It was protested and returned to the plaintiff and was produced at the trial with the endorsement cancelled.

Held, the plaintiff became an endorsee in possession, upon the return of the protested instrument, and invested with the rights of

all holders of commercial paper. See Gen. St. 1902, Chap. 234, s. 4170 (Crawford, Ann. N. I. L. s. 2.)

Such an indorsee in possession may cancel the indorsement it had made. See do. s. 4218 (Crawford do. s. 78.)

Its mere possession of the note was sufficient to maintain suit. See do. 4221, (Crawford do. s. 90.)

Merritt v. *Jackson*, 181 Mass. 69, 1902.

In an action against the indorser of a negotiable promissory note payable on demand, demand made three months after the date of the note is not made within a reasonable time, under the Mass. N. I. L. St. 1898, c. 533, s. 193 and s. 71 (Crawford, Ann. N. I. L., s. 4 and s. 131), and under the law merchant in Mass.

Zander v. *N. Y Security & Trust Co.*, 78 N. Y. Supp. 900-1902.

A certificate of deposit issued by a trust company, payable to the person named therein or his assigns, is not a negotiable instrument under the N. I. L. (Laws of 1897, c. 612, s. 20,) nor under the law merchant. Affirmed by the Supreme Court, Appellate Division, March 6, 1903. See 81 N. Y. Supp. 1151.

Nat. Sav. Bk. v. *Cable*, 48 At. Rep. 428-Conn. 1901.

An order, payable to A or order out of a fund of $300.00 "or what may be due on my deposit book," is conditional, and therefore is not a negotiable instrument and does not import a consideration under the N. I. L. of Conn. (Pub. Acts, 1897, c. 74, s. 1-2 (Crawford, Ann. N. I. L., s. 20), confirming the law merchant.

Shepard v. *Abbott*, 60 N. E. Rep. 782-Mass. 1901.

A direction to charge payment to a certain fund does not render a bill non-negotiable, when the order states when the payment is to be made. It is not conditional upon the coming due of that particular payment. See Crawford, Ann. N. I. L., s. 20. The N. I. L. is not cited, however, although adopted in Mass. in 1898. Although the order was made payable on or before Nov. 1, 1899, it may have been given before the N. I. L. was adopted.

Wis. Meeting of Baptists v. *Babley*, 91 N. W. Rep. 678, 1902. Laws 1899, c. 356, s. 1675-5 subd. 2 (Crawford, Ann. N. I. L. s. 24-2) provides that the character of an instrument otherwise negotiable is not affected by a provision which authorizes a confession of judgment if the instrument is not paid at maturity,

Held, that a note containing a power of attorney to enter judgment upon it at any time after its date, "whether due or not," is not a negotiable instrument, following antecedent cases.

McLeod v. *Hunter*, 29 N. Y. Misc. Rep. 558-1899.

"I promise to pay to the order of A. $2,000.00 at his office, New York City," is a note payable on demand under the N. I. L. (Laws, 1897, c. 612, s. 26) confirming the law merchant.

In this respect it cannot be varied by oral evidence.

The omission of the words "for value received" does not impair the note, affect its legal import, or weaken the presumption that it was given for value.

Guerrant v. *Guerrant*, 7 Va. L. Reg. 639-1902.

Under the N I. L. of Va. c. 866, Laws of 1897-8, s. 8 and 14 (Crawford, Ann. N. I. L. s. 27 and s. 33) one taking a negotiable instrument before a blank in it is filled, is put upon notice, and must ascertain the real authority of the person intrusted with the incomplete instrument, reversing the previous rule as in 33 Gratt. 377 established.

Boston Steel & Iron Co. v. *Stener*, 66 N. E. Rep. 646. Mass. 1903.

A check payable to the plaintiff was handed by defendant drawer to her husband, to be delivered to the plaintiff, to pay a debt to become due from her to the plaintiff, was fraudulently handed by the husband to the plaintiff in payment of a debt he owed the plaintiff and was accepted by the plaintiff in settlement thereof in good faith. *Held*, the plaintiff is a bona fide purchaser for value without notice, under St. 1898, c. 533 s. 69 and s. 4 (Crawford Ann. N. I. L. s. 91 and s. 51) affirming antecedent cases.

A check payable to the plaintiff was handed by defendant drawer to her husband, to be delivered to the plaintiff in payment of her debt to him, the amount being left blank and being filled in by the plaintiff's manager with the husband's consent, and was applied towards payment of his indebtedness to the plaintiff. *Held*, under St. 1898 c. 533, s. 14 or 31 (Crawford, Ann. N. I. L. s. 33) evidence was admissible to show the authority given to the husband and the purpose for which it was given.

Greeser v. *Sugarman*, 37 Misc. Rep. N. Y. 799-1902.

One is a holder in due course who takes a note, even from a thief, in good faith, for value, before maturity, without notice of any defect, under the N. I. L. (Laws of 1897, c.612,ss.35, 91, 96) affirming the law merchant.

Megowan v. *Peterson*, 65 N. E. Rep. 738, N. Y. 1902.

Under the N. I. L. (Laws of 1897, c. 612, s. 39) where, in an action against defendant personally upon a negotiable promissory

note signed by him as "trustee," the evidence is conflicting as to whether the property bought for which the note was given was for the assigned estate or otherwise, and whether the payee agreed to accept the note in the maker's representative capacity, the jury must pass upon the question in dispute.

Tolman v. *Am. Nat. Bank*, 22 R. I. 462, 1901.

Under P. L. R. I. c. 674, s. 31. (Crawford, Ann. N. I. L. s. 42), where one procures a check by falsely pretending he is another person (the maker knowing there is such a person) and indorses it in the name of such payee, the indorsement conveys no title.

Before the N. I. L. the cases were contradictory on this point and this case and other provisions of the act have given rise to much controversy. See the articles in the pamphlets, etc., already cited.

It is confidently submitted that the decision is correct. Suppose A calls at my office and presents to me a bill of Smith against me that he has picked up in the street, falsely representing himself to me as being Smith. I do not know the man, but I know there is such a man as Smith and that I owe him the bill in question. Therefore I give A a check to the order of Smith, relying upon the bank not to pay the check unless Smith's indorsement is identified. A fraudulently indorses the name of Smith on the check, and the bank pays the check without taking pains to identify the indorsement. I see no ground for holding the bank can charge the amount of that check to my account. In fact, one of the reasons why we deposit our money in bank and pay our bills by check is that we may be protected from such losses. The bank would be negligent in not requiring identification of Smith's indorsement. This is a duty assumed by a bank when it receives money to be paid out upon the depositor's orders.

"The fact that the plaintiff has been imposed upon did not relieve the bank from its duty to see that the money was paid according to order" by Stiness, C. J., at p. 467.

The only argument to the contrary that occurs to me is the contention that the question should be left to the jury, upon all the evidence, to decide what was the intention of the drawer of the check when he delivered it, and whether the bank was negligent. Did the drawer intend the money should be paid to the man who was actually before him, or did he intend it should be paid to the man that man told him was before him, and whom he was mislead into thinking was before him? There was no element of estoppel

in the case, for the bank had no knowledge of the false impersonation of the fraudulent indorser until after it had paid the check.

Further, the 24th section of the English Bills of Exchange Act begins with the words "subject to the provisions of this act." It is therefore subject to the 60th section, and the bank would consequently be protected according to the English law. The 23rd section of the American act (Crawford, Ann. N. I. L. s. 42) contains no such introducing words and has no section corresponding to the 60th section. The question is therefore what is the effect of the 23rd section; or what was the English law independently of a statutory provision similar to that contained in the 60th section of the English act. This point seems to have been decided by *Mead* v. *Young*, 4 Term. Rep. p, 28, which was followed in *Graves* v. *American Bank*, 17 New York Reports, 205. According to these cases, the bank would not be protected and could not debit the customer's account with the money paid.

The N. I. L. states imperatively that where a signature is made without authority of the person whose signature it purports to be, it is wholly inoperative, and the decision follows the law, whatever may be said of antecedent cases, whether in England or in the United States.

Contra see *Hoffman* v. *Am. Ex. Nat. Bk.* 96 N. W. 112. Sup. Ct. Neb. 1901.

B, an imposter, representing himself to be B′, another person of the same name, induced A to believe he was B′. Acting on such belief A procured a draft to his own order, indorsed it to the order of Peter W. Brubaker, the name common to B & B′, and delivered the draft to B supposing him to be B′. B indorsed the draft, was identified as Peter W. Brubaker at defendant's bank on which the draft was drawn and received the amount thereof.

Upon suit by A against the payee bank it was held that A cannot recover.

There are two important facts, as I understand this case, that distinguish it from the case of *Tolman* v. *Bank*.

(1.) The two persons, the imposter and the person for whom the draft was intended. bore the same name, Peter W. Brubaker. Therefore B did not commit forgery when he signed in that name, unless he imitated the signature of B′, but he only obtained money under false pretenses.

In *Tolman* v. *Bank* the two persons bore different names and therefore the payee forged the other person's signature when he riod sendthe check.

(2.) The bank required identification and obtained it, through the notary who accompanied Peter W. Brubaker (B) to the bank and introduced him there. The element of estoppel, or conduct of the plaintiff that "precluded him from setting up the forgery or want of authority" was therefore present in this case. There was nothing to indicate it was Peter W. Brubaker of Indiana and not Peter W. Brubaker of Nebraska that A intended the draft for. It is submitted that where one sends a check or draft to the order of "B of Indiana," a defendant bank is not protected if it pays it to B of Nebraska. But that was not this case, as no restrictive words were added. What distinguishes the case of *Tolman* v. *Bank* was that the bank did not require identification and was therefore negligent. There was no conduct on the part of A on which the defendant bank relied, nothing that precluded the plaintiff from setting up the forgery.

The head note in the case of *Hoffman* v. *Bank* is misleading, indeed it is not easy to tell even from the decisions themselves whether B & B' bore the same name. The opinion by the first commissioner gives this impression, while the opinion by the second commissioner leaves it in doubt.

The N. I. L. is not in force in Nebraska, but it is cited, and the case of *Tolman* v. *Bank* is also cited, but not followed. The opinion of Hastings, Commissioner, affirmed by the Supreme Court, rests on estoppel, or in the language of the N. I. L., the plaintiff is "precluded from setting up the forgery or want of authority." There was reason for this in this particular case, as the defendant bank exacted identification of Peter W. Brubaker, but in the case of *Tolman* v. *Bank*, where the defendant bank did not exact identification, this would be to create a new meaning for estoppel and to make it include what it never yet has included, for how can there be estoppel or conduct on which the defendant bank relied, of which it had no knowledge when it acted?

The case of *First Nat. Bank* v. *Am. Ex. Nat. Bank* 49 N.Y. App. Div. 349 (1900) does not seem to have arisen under the N. I. L.

For an interesting examination of this question and citation of cases pro and con, see the Banking Journal for May and June, 1901, and August, 1902.

Pettyjohn v. *Nat. Ex. Bank* 43 S. E. Rep. 203, Va. 1903.

Under N. I. L. of Virginia, Art. 1, s. 23, c. 866, Laws of 1897-8 (Crawford, Ann. N. I. L. s.42) action will not lie against a member of a firm whose name has been fraudulently written as indorser

on a negotiable promissory note of the firm of which he was a member, but which firm was dissolved at the time the note was delivered, of which fact the taker was ignorant, affirming antecedent cases.

Bank of Monticello v. *Dooly*, 113 Wis. 590, 1902.

Upon examination of its assets, the directors of plaintiff bank found a negotiable promissory note signed by its cashier as a joint maker, who, upon being interrogated, said that the defendant was to indorse the note, and went out and brought the defendant in who thereupon indorsed the note. Held, under the N. I. L. (Laws 1899, c. 356, s. 1675-50, Crawford, Ann, N. I. L. s.50) that the fact that the defendant received no consideration for his indorsement would not relieve him from liability on the note.

Deyo v. *Thompson*, 53 App. Div. N. Y., 9-1900.

A non-negotiable promissory note does not import a consideration, under the N. I. L. (Laws, 1897, c. 612, s. 50) and the law merchant, but changing the provisions of Part 2, c. 4-tit. 2-1-R. S. N. Y. 768.

A subsequent holder for value, bona fide, can recover, notwithstanding the one he takes from may have knowledge of the infirmities of the instrument. See the N. I. L. Code, Art. 13, s.77, affirming 75 Md. 406 at 419 (1892) antecedent to the N. I. L. See also Code, Art. 13, s. 43-45 (Crawford, Ann. N. I. L. ss. 50-51-52).

A holder for value from the payee, with the knowledge that the payee took it as an accommodation note, may recover of the maker. Code, Art. 13, s. 48, affirming antecedent case, 40 Md. 562 (Crawford Ann. N. I. L. s. 55).

The breach of an executory agreement forming the consideration of a negotiable instrument, is not a defense as against an indorsee who took the note for value before maturity with knowledge of the agreement, but without knowledge of any breach, before his purchase, citing many former decisions.

Bringman et als Adms. v. *Glahn*, 71 App. Div. N. Y. 537-1902.

An action was brought upon the defendant's negotiable promissory note. The plea was want of consideration. At the trial the plaintiff read the note in evidence, and rested. In the absence of evidence of want of consideration, the plaintiff is entitled to recover under the N. I. L. (Laws, 1897, c. 612, s. 50) following a prior decision in 153 N. Y. 67 and the law merchant.

Brewster v. *Schrader*, 26 Misc. Rep. N. Y. 480-1899.

The holder of a negotiable promissory note, given as collateral security for an antecedent debt, is entitled to recover against an

indorser in fraud of whose rights this note has been diverted from the purpose for which it was given, under the N. I. L. (Laws 1897, c. 612, s. 51) changing the law in New York and overruling the leading case of *Coddington* v. *Bay*, 20 Johns. 637, decided in 1822—and affirming the rule in *Railroad Co.* v. *Nat. Bank*, 102 U. S. 14 at 26 decided in 1880.

The plaintiff is a holder for value whose title to the note is unaffected by any existing equities between antecedent parties.

The rest of the opinion treats of "reasonable diligence" in giving notice of the dishonor of the note, holding it was a question of fact for the jury upon the evidence put in on both sides.

This opinion merits careful study. It is the first one so far examined in which the provisions of the N. I. L. have changed the antecedent law in New York and it must certainly be admitted that the rule thus enforced is the correct one, as had already been held in the Supreme Court of the United States, for it gives increased efficacy to negotiable instruments in the hands of purchasers for value before maturity without notice of any defects.

Roseman v. *Maloney*, 83 N. Y. Supp. 749, 1903.

Although under the N. I. L. c. 612, Laws 1887, s. 51, "an antecedent or pre-existing debt constitutes value," in an action against an accommodation indorser, there must be evidence that the holder of the instrument gave up an antecedent debt, either wholly or qualifiedly, to constitute consideration. In the absence of such evidence, a just result cannot be permitted to be disturbed by predicating error upon a refusal to charge on an issue not embraced within the evidence.

Payne v. *Zell*, 98 Va. 294-1900.

Under acts, 1897, 1898, pp. 896, 918, s. 25 (Crawford, Ann. N. I. L., s. 51), one who takes a negotiable promissory note in good faith for value, without notice of any defect, for a pre-existing debt, is a holder for value and can recover thereon.

Mohlman Co. v. *McKane*, 60 App. Div. N. Y. 546-1901.

The acceptance of a negotiable promissory note payable at a future date, for goods sold and delivered to the maker of the note, operates as forbearance of the right to sue the purchaser, until the maturity of the note, and constitutes a consideration for an indorsement of the note made for the purpose of procuring its acceptance, under the N. I. L. (Laws, 1897, c. 612, s. 51) affirming cases antecedent to that law as to such indorsement.

When notice of the dishonor is sent by mail to the defendant indorser, directed to the place where the maker dated the note, the indorser not having added her address to the indorsement, it is sufficient notice of dishonor. See Laws, 1897, c. 612, ss. 175, 179, and also 160

Brooks v. *Sullivan*, 129 N. C. 190, 1901.

Where a negotiable promissory note is transferred before maturity as collateral security for a pre-existing debt, the transferree is not such a holder for value that he takes free from equities of which he had no notice.

Semble. This rule is changed by Laws, 1899, c. 733, ss. 25-27 (Crawford, Ann. N. I. L. ss. 51-53).

Nat. City Bk. v. *Toplitz*, 81, N. Y. Supp. 422, 1903.

The maker of an accommodation note is not relieved from liability by an extension of time of payment given without her consent.

The N. I. L. (Laws, 1897, c. 612, s. 55) provides that the maker of an accommodation note is primarily liable, and s. 3 provides that the person primarily liable on a negotiable instrument is absolutely required to pay the same.

Bankers' Iowa State Bk. v. *Mason Hand Lathe Co.*, 90 N. W. Rep. 612, Sup. Ct. Iowa, May 22, 1902.

Want of consideration is not a defense to an action on a negotiable promissory note, against an accommodation indorser, even though the plaintiff acquired the note with knowledge that the defendant was only an accommodation indorser. (Crawford, Ann. N. I. L. s. 55).

The N. I. L. adopted in Iowa in 1902, is not referred to.

Schwartz v. *Wilmer*, 90 Md. 136, 1899.

A purchaser for value in due course of a promissory note can recover against an accommodation maker, whether or not he knew him to be only an accommodation maker, when he took the instrument under the Neg. Ins. Act of 1898, c. 119 (Crawford, Ann. N. I. L. s. 55) confirming antecedent law, 69 Md. 356.

Waiver of notice of dishonor may be before or after dishonor, and may be expressed or implied, under the N. I. L. of 1898, s. 128 (Crawford, Ann. N. I. L. s. 180) confirming antecedent law in Md. s. 68 Md. 587.

When an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor. See the N. I. Act of 1898, s. 143 (Crawford, Ann. N. I. L. s. 205)

changing the antecedent law in Md. As this act was not in force at the time the parties' rights became fixed, the law prevailed as it stood before the passage of the act.

Strickland v. *Henry*, 66 App. Div. N. Y. 23, 1901.

A negotiable promissory note made for the accommodation of the payee, and transferred by him before maturity to a third person at 40 per cent discount for interest is not enforceable by the transferee against the accommodation maker.

Transferee's want of knowledge that it was accommodation paper and had no inception until it passed into his hands, is immaterial. The N. I. L. (Laws, 1897, c. 612, s. 55) has not altered this rule.

The M. Groh's Sons v. *Schneider*, 34 Misc. Rep. N. Y. 195, 1901.

Where the evidence given upon the trial of an action upon a check tends to show that the holder had knowledge the check was originally delivered upon a condition that had not been fulfilled, and that its payment had been stopped; and the holder accepts it in payment of a past indebtedness of the immediate assignor, the question whether the holder was a holder in due course under N. I. L. (Laws, 1897, c. 612, ss. 91, 94, 95) is for the jury.

Valley Sugs Bk. v. *Mercer*, 55 At. Rep. 435, Md. 1903.

Under the N. I. Act, Art. 13, s. 75, Md. (Crawford, Ann. N. I. L. s. 95), providing that the notice that will prevent an assignee of a negotiable promissory note from recovery of a maker, is actual knowledge of the infirmity or defect, or knowledge of such facts that his conduct in taking the instrument amounted to bad faith, mere suspicion of defect of title, or knowledge of circumstances that would excite suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of transfer, will not defeat his title, following earlier Md. cases.

Black v. *First Nat. Bk.*, 54 Atl. Rep. 88 (Md. 1903).

A holder for value of a negotiable promissory note, without notice of fraud or breach of faith of intermediate parties, can recover of the maker. See the N. I. L. Code, Art. 13, s. 75 (Crawford, Ann. N. I. L. s. 95) affirming 82 Md. 518 (1896), a case antecedent to the N. I. L.

Drinkall v. *Morris State Bk.*, 88 N. W. R. 724 (N. Dak. 1901).

Both at common law and under ss. 55, 59, c. 100, Rev. Codes 1899 (Crawford, Ann. N. I. L. ss. 91, 99), when defendant bank issued its cashier's check to the plaintiff's order, and the plaintiff indorsed and delivered it to a gambler in payment for chips used in

gambling, and was present when the defendant paid the amount of the check to the gambler, the plaintiff protesting against such payment, the defendant bank is liable to plaintiff for the amount of the check.

McNamara v. *Jose*, 28 Washington, 461, 1902.

Under Sess. Laws, Wash. 1899,p. 350, ss. 52, 56, 57 (Crawford, N. I. L., ss. 91, 95, 96), where the plaintiff in good faith purchased a negotiable promissory note before maturity for one-half the face value, he may collect the full amount from the maker, although the maker has a good defense against the payee, affirming antecedent cases.

Andrews v. *Robertson*, 87 N. W. Rep. 190 (Wisc. 1901).

The payee of a negotiable promissory note, with knowledge of a defect in the instrument, selling it to an innocent purchaser for value, and repurchasing it, cannot recover thereon. He is not, within the N. I. L., s.1676, c. 356, Laws of Wisc. 1899 (Crawford, Ann. N. I. L., s. 97), an innocent purchaser for value without notice.

Wirt v. *Stubblefield*, 17 App. Cases, D. C., 283-1900.

A negotiable promissory note, although made upon a gambling consideration, is valid in this District, in the hands of a bona fide purchaser for value without notice, before maturity, under the N. I. L., s. 57 (Crawford, Ann. N. I. L., s. 97).

The English Statutes, 16 Car. 2, c. 8 and 9, Anne c. 14 against gaming, etc., in this respect are repealed, and a different rule established under the N. I. L.

Lucker v. *Iba.*, 54 App. Div. N. Y., 566-1900.

The holder of a negotiable promissory note given to him by a member of a firm in payment of such member's own debt, ostensibly signed by the firm, but not by the name authorized in the articles of partnership, cannot recover of the firm. He is not a holder in due course under the N. I. L. (L. 1897, c. 612, s. 98) affirming cases decided antecedent to the N. I. L.

McMann v. *Walker*, 72 Pac. Rep. 1055 Sup. Ct. Col. May 5, 1903.

A negotiable promissory note to the order of a foreign corporation that had not complied with Col. law (Sess. Laws, 1897, c. 51) without doing which it could not do business in the state, is nevertheless valid in the hands of an innocent purchaser for value without notice, before maturity. (Sess. Laws, Col. 1897, c. 64, s. 60, Crawford, Ann. N. I. L., s. 110).

McLean v. *Bryer*, 24 R. I., 599, 1903.

Where a negotiable promissory note was transferred for value to the plaintiff sixteen months after its issue and the defendant signed her name on the back before delivery of the note to the payee (who transferred the note to the plaintiff), she became an indorser, under Pub. Laws R. I., c. 674, ss. 71, 72 (Crawford, Ann. N. I. L., s.113, 114).

Cohn v. *The Cons. Butter & Egg Co.*, 30 Misc. Rep. N. Y. 725-1900.

The provisions of the N. I. L. (L. 1897, c. 611, s. 114) as to the liability of irregular indorsers, apply only to persons who indorse before delivery to the payee.

Since the statute, the legal presumption is changed where the complaint alleges that the irregular indorsers indorsed before delivery to the payee.

The true intention of indorsers as between themselves can always be shown by oral evidence.

The German Am. Bank v. *Milliman*, 31 Misc. Rep. N. Y., 87-1900.

The maker of a negotiable promissory note has until the close of the banking hours of the bank where the note is made payable, in which to pay it, under the N. I. L. (L. 1897, c. 612, ss. 130 to 135) affirming the prior rule in such cases.

In re Swift, 106 Fed. Rep. 65 (Mass., 1901).

Under the N. I. L. (Mass. Laws, 1898, c. 533, ss. 82-115, Crawford N. I. L., ss. 142-186) as well as under prior decisions in Mass., and under the law merchant, words or acts of a maker and indorser of a negotiable promissory note which misled and put the holder off his guard, and reasonably induced him to omit due presentment and notice of non-payment, constitute an implied waiver thereof.

Second Nat. Bank v. *Smith*, 94 N. W. Rep. 664, Wisc. 1903.

In an action against the indorser of a negotiable promissory note, dated in Wisconsin, but actually executed, negotiated and made payable in Indiana, in the absence of evidence to the contrary the note must be considered an Indiana contract. The laws of Indiana control upon all questions relating to the construction and legal effect of the contract, (days of grace and manner of notice to the indorser) while the law of Wisconsin controls as to the form of the remedy, the conduct of the trial and the rules of evidence (the kind and sufficiency of the evidence necessary to prove dishonor).

In the absence of evidence to the contrary, the presumption is that the law of Indiana as to what notice of dishonor is necessary to charge indorsers, is the same as that of Wisconsin.

A certificate of the notary in Indiana, fully showing that the note itself was presented, that payment thereof was refused and that it was protested, that notice of the protest of "the aforementioned note" (a copy of which was attached), was served on the indorsers by depositing copies in the postoffice, is sufficient to charge the indorsers, under Laws, 1899, p. 720, c. 356, s. 1678-25 (Crawford, Ann. N. I. L. s. 167.

Ebling Brewing Co. v. *Rheinheimer*, 32 Misc. Rep. N. Y. 594, 1900.

Under the N. I. L. (L. 1897, c. 612, s. 179), notice of dishonor to an indorser who has added no address to his signature, mailed to him directed to the place where he resides is sufficient, affirming cases decided prior to the N. I. L.

Twelfth Ward Bk. v. *Brooks*, 63 App. Div. N. Y. 220, 1901.

In an action on a negotiable promissory note by an indorsee, against an indorser, allegation of payment thereof by a subsequent indorser (who is only secondarily liable) under the N. I. L. (L. 1897, c. 612, s. 202), and prior law. (137 N. Y. 444), is demurrable.

Hoffman v. *Planters' Nat. Bk.*, 39 S. E. Rep. 134 (Va., 1901).

The bank, without the knowledge or consent of the payee of a negotiable promissory note, but not indorsed by him, struck out his name as payee and inserted another name. Held, this was a material alteration under the N. I. L. (Acts, Va., 1898, ss. 124, 125, Crawford, Ann. N. I. L. ss. 205, 206), and under the law merchant, that avoided the note as to such payee, upon suit by the bank.

Jeffrey v. *Rosenfeld*, 179 Mass., 506, 1901.

Semble, that a bill in equity seeking relief on the ground of alteration of a certain negotiable instrument, should describe the alteration, that the court may see whether it was a material alteration, as a matter of law, under Mass. St. 1898, c. 533, s. 125 (Crawford, Ann. N. I. L. s. 206).

Quaere, whether the rule laid down in *Drum* v. *Drum*, 133 Mass., 566, would be applied, that a material alteration of such an instrument by a stranger, will avoid it, or whether, following probably s. 64 of the English Bill of Exchange Act, the rule would be applied that the effect of a material alteration, by whoever made, would be to avoid the note as to all parties, except those consenting to it, and subsequent endorsers?

Westburg v. *Chicago Lumber Co.*, 94 N. W. Rep. 572 Wisc., 1903.

Under the laws 1899, p. 733, c. 356, s. 1680K. (Crawford, Ann. N. I. L. 225), mere retention of a bill of exchange by the drawee to whom it has been delivered for acceptance, is not equivalent to acceptance. Some circumstance, either destruction or refusal to return to the holder, if within the N. I. L., or some circumstance, contractual or tortious, to arouse estoppel, if by reason of non-negotiability, this instrument is governed only by the common law, must be shown in addition, and where the facts are in dispute, it is a question for the jury, confirming the antecedent cases. The Wisc. act says also "mere retention of the bill is not acceptance." Crawford, note to s. 225, considers these words unnecessary.

Under Rev. St. Wisc. 1898, s. 1680, as amended by laws, 1899, c. 356 (Crawford, Ann. N. I. L. s. 210, see also s. 20) a draft that has no time of payment expressed, and is not payable to order, or bearer, is non-negotiable.

It will be noticed not only how few cases have arisen under the Negotiable Instruments Law, but also how few of the cases have arisen in consequence of any defect in that law, and that very few cases have been carried to the courts of last resort. Indeed, the wonder is that many of these cases were ever brought, for it is difficult to see how the result could have been otherwise than as was decided. In the language used by Werner, J. in *Brewster* v. *Shrader*, 26 Misc. Rep. N. Y. 480, 1899, commenting on s. 51 of the N. Y. N. I. L. ("An antecedent or pre-existing debt constitutes value") and overruling the leading case in N. Y. of *Coddington* v. *Bay*, 20 Johns, 627, 1822:—

"The language of this section, when given its usual and ordinary signification, ought to leave no room for doubt upon the subject. There is, however, such a universal disposition among lawyers to look for some hidden or subtle meaning in the most simple language, that it has become quite the fashion to require the courts to construe statutes, which to the average lay mind, seem to require no construction."

What the learned judge says of this case might well be said of several objections and several cases we have been considering.

The conclusion we reach, upon a review of these cases, is that the general result is to increase the negotiability of negotiable instruments, and this is certainly in the interest of commerce.

The writer acknowledges his indebtedness, in the preparation of this paper, to the gentlemen from whom he has so often quoted.

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