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# On Uniformity in Judical Decisions of Cases Arising under the Uniform Negotiable Instruments Act

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# ON UNIFORMITY IN JUDICIAL DECISIONS OF CASES ARISING UNDER THE UNIFORM NEGOTIABLE INSTRUMENTS ACT.

WHEN the American Bar Association was formed in 1878, the first object stated in the call was "to assimilate the laws of the different states," and the first article of the Constitution stated that one of the principal objects of the Association was "to advance the science of jurisprudence, to promote the administration of justice and uniformity of legislation throughout the Union."

At the meeting of that Association in 1887 the Committee on Commercial Law, *inter alia,* recommended that Congress should enact a statute relating to negotiable instruments when used as instruments of interstate or foreign commerce.

In 1889 that Association appointed a Committee on Uniform State Laws, consisting of one member from each state, to prepare and report recommendations and measures to bring about the desired uniformity.

In 1890 an act[1] was passed by the legislature of New York, authorizing the Governor to appoint three commissioners for the promotion of uniformity of legislation, and "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."

This Committee reported a recommendation to request each state and the Congress to follow the same course, it having been found impracticable to secure meetings of one member from each state. Other states, one after another, have appointed such Com-

[1] Chapter 205, Laws of 1890.

missions on uniform state laws, and there are now Commissioners from fifty-three States, Territories, the District of Columbia and the Insular Possessions.

These Commissioners meet in Conference each year, the week before the meeting of the American Bar Association. When so assembled in Conference they are therefore the official representatives of their various jurisdictions in the effort to secure uniform legislation.

In 1895 a conference of such Commissioners from a large number of states was held in Detroit and at that Conference the Committee on Commercial Law was instructed to prepare a codification of the law of bills and notes. This Committee, in turn, referred the matter to a sub-committee, the members of which employed John J. Crawford, Esq., of the New York bar, to draft the proposed law. The bill prepared by him was submitted to the Conference in 1896, and after consideration, section by section, with the draftsman, and the adoption of a few amendments, was adopted by the Conference and recommended to the state legislatures for passage. It has been adopted and is now the law in forty-six states and other jurisdictions forming the Union.

But something more is needed than a uniform law to bring about uniformity in the law of our States and other jurisdictions. There must also be uniformity in the decisions under the uniform law, and to ensure such uniformity in decisions, there must be examination of the decisions in these various jurisdictions, and counsel must cite on their briefs the various decisions in other jurisdictions as well as their own, in cases arising under the same sections of the same uniform law, and the courts must follow these decisions, unless shown to be erroneous, instead of following prior decisions in their own States, decisions arrived at before there was any uniform law, and superseded by the passage of the uniform law.

In the interests of jurisprudence and the formation of a new set of precedents as regards negotiable instruments, based upon uniform decisions of this uniform law, it is a grave and serious cause for regret that this is not being done, and the object of this article is to point this out by an examination of some of the cases.

The courts of the country know the origin and history of the Negotiable Instruments Law, that it is largely derived in its form and provisions from the English act upon the subject, that the great and leading object of the act, not only with the principal commercial states of the Union that have adopted it but also with the Congress of the United States in adopting it for the District of Columbia, was to establish a uniform system of law to govern negotiable instru-

ments wherever they may circulate or be negotiated. Our courts know that it was not only uniformity of rules and principles that was designed, but also to embody in a codified form, as fully as possible, all the law upon the subject, to avoid conflict of decisions and the effect of mere local laws and usages that had heretofore prevailed. The great object sought to be accomplished by the enactment of the statute was to free the negotiable instrument, as far as possible, from all latent or local infirmities that would otherwise inhere in it, to the prejudice and disappointment of innocent holders, as against all the parties to the instrument professedly bound thereby.

The object of this codification of the law with respect to negotiable instruments was to relieve the courts of the duty of citation of conflicting cases and discussion of the discordant views entertained by courts and text writers of the greatest ability upon these questions, and to render certain and unambiguous that which had theretofore been doubtful and obscure, so that the business of the commercial world, largely transacted through the agency of negotiable paper, might be conducted in obedience to a written law emanating from a source whose authority admits of no question.

Where a statute is intended to embody in a code a particular branch of the law, and has specifically dealt with any point, the law on that point should be ascertained by interpreting the language used, instead of doing as before the statute was passed—roaming over a vast number of authorities in order to discover what the law is by extracting it by a minute, critical examination of prior decisions. If such a statute is to have read into it the law prior to its enactment, the value of codifying the law on the subject of negotiable instruments will be greatly impaired, if not destroyed, and the very object for which it was enacted will be frustrated. Where the language of such an act is clear, it must control, whatever may have been the prior statutes and decisions on the subject. Where there is a substantial doubt as to the meaning of the language used, the old law is a valuable source of information.

While the general purpose was to preserve the existing law, so far as it was uniform, yet in many respects in which there was a conflict or doubt, under the authorities, the language of the statute lays down rules which are not to be ignored simply because in some respects a change in the law is effected.

The primary purpose of the adoption of the negotiable instruments code was to obtain uniformity of decision where before there was great diversity. The state legislatures having enacted the code in the identical language of each other (or nearly so) it

would be unfortunate, indeed fatal, to such uniformity, if courts, under the pretext of judicial interpretation or construction, were so to vary and violate the plain provisions of the code as to undo and overthrow the very purpose of the code.

The statute was enacted for the purpose of furnishing, in itself, a certain guide for the determination of all questions covered thereby relating to commercial paper, and therefore, so far as it speaks without ambiguity as to any such questions, reference to case law as it existed prior to the enactment is unnecessary and is liable to be misleading. The Negotiable Instruments Law is not merely a legislative codification of judicial rules previously existing in this state, making that written law which was before unwritten. It is, so far as it goes, an incorporation into written law of the common law of the state, so to speak, the law-merchant generally as recognized, with such changes or modifications and additions as to make a system harmonizing, so far as practicable, with that prevailing in other states.

Some of the provisions of the law are simply declaratory of the existing law, while others have altered or changed the law as heretofore declared. The purpose of the legislation is to produce uniformity on the subject among the several states, and to make certain and definite, by statute, the rules of the law governing negotiable paper. The Acts in the different states are very similar, many of their provisions being identical in language, and the manifest purpose of all is, as far as possible, to prescribe definite and fixed rules regulating the whole subject.

In all situations where the Negotiable Instruments Law conflicts with prior adjudications, as to instruments made subsequent to that time, the former should rule.

Prior to the adoption of this Act by the various states in which it is in force, there was a great lack of uniformity in the statutes of those states and in the decisions of the courts, with reference to the law merchant. A merchant engaging in business in one state and doing business with citizens in other states, would frequently find that a note which was negotiable under the law of his domicil was in fact non-negotiable at the place where is was executed or was to be paid. This led to great confusion in the conduct of commercial affairs. To obviate this difficulty, the Negotiable Instruments Act was passed by the legislatures of several states. The provisions of these various Acts are substantially the same, and they should be construed so as to maintain, as far as possible, the idea of uniformity. Where the Negotiable Instruments Act speaks, it controls;

where it is silent, resort must be had to the law merchant or to the common law regulating commercial paper.

The Negotiable Instruments Law is, in the main, merely a codification of the common-law rules on the subjects to which it relates. It was intended principally to simplify the matter by declaring the rule as established by the weight of authority. There are few innovations in the law merchant as before settled by the courts. Where it lays down a new rule, it controls; but where its language is consistent with the rule previously recognized, it should be construed as simply declaratory of the law as it was before the adoption of the act.

It is matter of common knowledge that the Negotiable Instruments Act was drafted for the purpose of codifying the law upon the subject of negotiable instruments and making it uniform throughout the country through adoption by the legislatures of the several states and by the Congress of the United States. The design was to obliterate state lines as to the law governing instrumentalities so vital to the conduct of interstate commerce as promissory notes and bills of exchange, to remove the confusion or uncertainty which might arise from conflict of statutes or judicial decisions among the several states and to make plain, certain and general the controlling rules of law. Diversity was to be moulded into uniformity. This Act in substance has been adopted by many states. While it does not cover the whole field of negotiable instrument law, it is decisive as to all matters comprehended within its terms. It ought to be interpreted in such a way as to give effect to the beneficient design of the Legislature in passing an Act for the promotion of harmony upon an important branch of the law. Simplicity and clearness are ends especially to be sought. The language of the Act is to be construed with reference to the object to be attained. Its words are to be given their natural and common meaning, and the prevailing principles of statutory interpretation are to be employed. Care should be taken to adhere as closely as possible to the obvious meaning of the Act, without resort to that which had theretofore been the law of any particular commonwealth, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law in the different states.

By the enactment of the Negotiable Instruments Law the legislature intended to cover the whole subject of negotiable instruments and thus to set at rest questions touching the rights of the parties which had theretofore been left to be determined by a critical examination of the prior decisions of the courts.

Let it not be thought that this is the overwrought statement of

this law prompted by the vivid imagination of one of its admirers actively associated with its creation and with its subsequent adoption by the forty-six states, territories, districts and possessions of the United States in which it is now in force. It is not his work at all but is made up, generally in the very words used from decisions by the courts in their opinions in cases arising under the law, decided by them.[2]

Having been President of this Conference from 1901 until 1908, the writer has collected all the cases that have arisen under the Negotiable Instruments Law, and he has now a collection of one thousand and ninety-one such cases, each case on three cards for three sets, one set arranged alphabetically, one by states, and one by sections of the law in question. He regrets to be obliged to report that in three hundred and eighty-seven of these cases the Negotiable Instruments Law is ignored by the courts in the decisions, and (so far as the reports show) by the counsel in these cases, with the result that not one of the other seven hundred and four cases in which the Act was cited, is cited in any of these three hundred and eighty-seven cases.

It is submitted that it is no excuse or reason for omitting to cite the Act where it is in force, that the decisions are in accord with its

[2] These cases are: Brewster v. Schrader, 26 Misc. 480 (1899); Wirt v. Stubblefield, 17 A. C. (D. C.) 283 (1900); Baltimore & Ohio R. Co. v. First Nat. Bk. of Alex., 102 Va. 753, 47 S. E. 14 (1904); Am. Bk. of Orange v. McComb, 105 Va. 473, 54 S. E. 14 (1906); Vander Ploeg v. Van Zunk, 135 Iowa, 350, 112 N. W. 807 (1907); Rockfield v. The First Nat. Bk., 77 Oh. St. 311, 83 N. E. 392 (1907); Dollar Svs. Bk. v. Barberton Pottery Co., 17 Oh. Decs. 539 (1907); Columbia Banking Co. v. Bowen, 134 Wis. 218; 114 N. W. 451 (1908); Wisner v. First Nat. Bk. of Gallatin, 220 Pa. 21, 68 Atl 955 (1909); First Nat. Bk. of Shawano v. Miller, 139 Wis. 126, 129 N. W. 820 (1909); Mechs.' & Farmers' Bk. v. Katterjohn, 137 Ky. 427, 125 S. W. 1071 (1910); Campbell v. Fourth Nat. Bk., 137 Ky. 555, 126 S. W. 114 (1910); State Bk. of Halstad v. Bilstad (Iowa), 136 N. W. 204 (1912); Brophy Grocery Co. v. Wilson, 45 Mont. 489 (1912); Union Tr. Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912).

See also Mut. Loan Assn. v. Lesser, 76 App. Div., 614 (1912), which was an action against the maker of negotiable promissory notes, there was conflicting testimony whether the words "with interest," were on the notes when they were negotiated, or whether they were added afterwards. After dismissal of the complaint and upon appeal from judgment for the defendants, O'Brien, J., said:

"The fact clearly appears, however, and is not disputed, that the error which crept in upon the trial was in not drawing the court's attention to the provision of the Negotiable Instruments Law which changed the old rule as to the voiding of a note in case it is altered." (Citing Laws, 1897, c. 612, sec. 205.)

It is not claimed that the attitude of the New York courts is one of hostility or even of indifference to the Act. On the contrary, in the case of Shattuck v. Guardian Tr. Co., 204 N. Y. 200 (1912), reversing the same case, 145 App. Div. 734, 130 N. Y. Supp. 658 (1912), it was held that the Act is one of those general statutes that promulgate rules of substantive law rather than those of pleading or evidence. It is claimed, however, that the Negotiable Instruments Law now in force in 46 States and subdivisions of the United States and the decisions under it are not receiving due consideration by the lawyers and judges of the country generally.

provisions. It is true the Act, in the main, is but a statement in concise form, of well recognized principles of the law merchant governing negotiable instruments, except in those cases where divergent principles previously followed in many courts, called for the adoption of one principle and all the precedents under it, and for the rejection of the opposite or contrary principle. But whether the Act follows some principle concerning which there is no difference of opinion, or whether it follows one of two divergent principles and thereby negatives any contrary principle hitherto followed in some jurisdiction that has adopted the Act, it is confidently and strenuously insisted that when adopted the Act itself is the source and the only source of authority, and therefore it should be cited and followed and decisions under the same sections in cases under the same law are the only real precedents. Of course former decisions and old text books may be cited by way of illustration or explanation, or to explain the historical development of the principle involved, but the real authorities are the provisions of the Act and the decisions under it, whether in the state where the particular case is being argued or whether they be decisions in the courts of other states under the same sections of the same uniform law. It is only by following this course that uniform decisions under a uniform law can bring about uniformity throughout the nation.

It is a constant subject for marvel that the very courts that cite the Act in one case may ignore it in the next, although equally applicable. This shows that want of knowledge of the existence of the Act cannot be offered in explanation. Surely, by this time, whenever a case arises in any court in a jurisdiction where the Act is on the statute book, the first inquiry should be, what has the Act to say on the law of this case, and the next inquiry should be, what are the decisions under this Act, in the different jurisdictions in which it is in force.

This article is one of a series of similar articles, each one taking up a different set of decisions under this uniform law, the object being to arouse the attention of the profession of the law, judges as well as lawyers, to the necessity of a study of the decisions under the Act in all the jurisdictions where it is the law, if we would give effect to the uniform law, instead of ignoring the uniform law, as if it did not exist, and following old decisions in the particular jurisdiction, decisions arrived at before there was any uniform law. With this explanation we enter upon an examination of the following cases, not to show that some of them are erroneous, but to show that they ignore the uniform law on their statute books and the decisions under it.

In the case of *Briel* v. *Exchange Nat. Bank,*[3] the negotiable note in suit read: "We promise to pay" and was signed Briel Shoe Co., Fred C. Briel, Prest., J. H. Taylor, Mgr. It was held that the note imposes, *prima facie,* a personal liability upon the defendant, Fred C. Briel, subject however to be shifted by pleading and proof. The court cited the Negotiable Instruments Law, § 4977, Ala. Code, 1907, § 39 (20)[4] while admitting the fact that the note in question is, on its face, the obligation of the Briel Shoe Co. Therefore the question that arises when the name of a principal is disclosed did not arise here. The court says, it might "be observed that the body of the note does not disclose the identity of those intending to bind themselves thereby—that is to be learned from the signature or signatures." It is not usual to recite in a note "I, John Smith, promise to pay" * * * and to sign "John Smith."

The court said that this section of the Negotiable Instruments Law is in accord with these doctrines of the former Alabama decisions "and is declaratory of the law as it has always been in this state." It is submitted that this is misleading. The section had been passed on in several cases decided in states that had adopted the Negotiable Instruments Law before the case was decided, not one of which is cited, however.[5]

In the first two of these cases the Negotiable Instruments Law was cited, in the last two it was not cited. Eighteen cases have been decided in which this section is applicable and in seven it is not mentioned. In one case[6] although cited, the Negotiable Instruments Law is not applicable, for the note sued on was non-negotiable and the Act applies only to negotiable instruments.[7] Since the adoption of the Negotiable Instruments Law in Alabama, twelve cases have arisen in that state in which this law, the statute law of the state, is applicable. In ten of these twelve cases the law was not cited.

In *Gray* v. *Baron,*[8] the note sued on, with stock as collateral security, was placed in escrow with instructions to deliver the stock upon payment of the note within a year, or to deliver it proportionately as payments on account might be made within the year. No payments were made within the year, a contingency not provided for.

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[3] 172 Ala. 475, 55 So. 808.

[4] The Section numbers first given are those of the New York act, and the next (in brackets) are those of the Conference Draft.

[5] Chatham Nat. Bk. v. Gardner, 31 Pa. Super. Ct. 135 (1906); Germania Nat. Bk. v. Mariner, 129 Wis. 544 (1906); Dunbar & Co. v. Martin, 103 N. Y. Supp. 91 (1907); Dunham v. Blood, 207 Mass. 512 (1911).

[6] Daniel v. Glidden, 38 Wash. 556.

[7] Sec. 2 (191) defining "instrument."

[8] 13 Ariz. 70.

It was correctly held there was no delivery of the note and the plaintiff could not sue on it, but the Negotiable Instruments Law was not cited. Under § 90 (51) the plaintiff was not the holder, for under § 35 (16) there had been no delivery. The counsel for the defendant appellant stated correctly the principles involved, but instead of citing the Negotiable Instruments Law as the true source of authority, cited a number of cases decided before the adoption of the Negotiable Instruments Law. Failing to cite the statute of the state, they failed to cite any one of twenty-four cases decided under that law in other states under the same uniform law.[9]

*Woodward* v. *Donovan*[10] furnishes another striking illustration of neglect of or indifference to the Negotiable Instruments Law although it is the statute law of the state. The court says, in its opinion: "The mere possession of a promissory note or bond is *prima facie* evidence of the legal title to the instrument and of the right of the one in possession to sue thereon; and in the case of an instrument of that character, made payable to some person other than the one in possession, the presumption arising from possession is that the one in possession may sue thereon in the name of the person to whom it is made payable," citing three Illinois cases decided before Illinois adopted the Negotiable Instruments Law, instead of referring to the section of the Illinois statute, both counsel and court thereby ignoring forty-three cases that have been decided under this section. It is not meant by this that fault is found with the decision itself. It is endeavored to be pointed out to the members of the bar and to judges in the forty-six states that have adopted the Negotiable Instruments Law that they are neglecting to pay attention to the law that is on their statute books and also to pay attention to cases that are decided under that statute. For instance, out of the forty-three cases above alluded to, there are thirty cases in which this section of the Negotiable Instruments Law is not mentioned, although in some few cases other sections are cited. If the statute law, the Negotiable Instruments Law, is not cited, it is a

[9] Some of these cases are: Hodge v. Smith, 130 Wis. 326, 110 N. W. 192; Key v. Usher, 30 Ky. L. J. 667, 99 S. W. 325, in which the Negotiable Instruments Law was not cited; Linick v. Nutting, 125 N. Y. Supp. 93; Mass. Bk. v. Snow, 187 Mass. 159, 172 N. E. 959; Moak v. Stevens, 45 Misc. 147, 91 N. Y. Supp. 903 (a noticeable case); Niblock v. Sprague, 200 N. Y. 391; Paulson v. Boyd, 137 Wis. 241, 118 N. W. 841 (see comment in Branan, The Negotiable Instruments Law); Pfister v. Heins, 136 App. Div. 457; Schultz v. Kosbab, 125 Wis. 157 (the Negotiable Instruments Law not cited); Smith v. Dotterweich, 200 N. Y. 299 (the Negotiable Instruments Law not cited); Schiffer v. Felisher, 158 Mich. 270, 122 N. W. 543 (the Negotiable Instruments Law not cited); Stoughton v. Chu Fong, 130 N. Y. Supp. 228 (the Negotiable Instruments Law not cited); Strauss v. Citizens State Bk. of Elmhurst, 164 Ill. App. 520.

[10] 187 Ill. App. 503.

matter of luck whether the decision, although following former cases in the same state, will be in accord with it, with the chances in favor of such accord, because the Negotiable Instruments Law does not make radical changes in the law of bills and notes. Nevertheless, by not citing the actual statute law, the true source of authority is ignored, with the occasional result that the decision is wrong, because in conflict with that law and further, all the cases under that statute are also ignored.[11]

It is noteworthy that while cases decided before the adoption of the Negotiable Instruments Law are cited, as well as the Negotiable Instruments Law, none of the cases cited in the foregoing note refer to the numerous decisions in the courts of other states, under the same sections of the same uniform law, but again, unless lawyers and judges cultivate the habit of examining cases in the different state and federal courts arising under the same sections of the same law, how can uniform decisions be secured?

Again, in the case of *People's Nat. Bk. of Hackensack* v. *Rice*,[12] § 90 (51) the statute law of the state, was not cited. Consequently all the cases in the various states decided under this same section there in force also, some 87 in number, were ignored. The court cited three New York decisions of 1878, 1893 and 1901. In the last named case the Negotiable Instruments Law was referred to but without citing § 90 or any of the many cases arising under it.

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[11] The following are cases in which sec. 90 (51) was applicable, yet it was ignored: Am. Soda Fountain Co. v. Hogan, 17 N. Dak. 375; Bk. of Bromfield v. McKinley, 53 Colo. 279, 125 Pac. 493; Darden v. Holloway, 1 Ala. App. 661; Eddy v. Fogg, 192 Mass. 543; Fay v. Hunt, 190 Mass. 378; Hill v. Buchanan, 71 N. J. L. 301; Hillman v. Stanley, 56 Wash. 320; Hutchings v. Reinhalter, 23 R. I. 518; Jefferson Co. Svs. Bk. v. Interstate Svs. Bk., 5 Ala. App. 363, 59 So. 348; Jump v. Leon, 192 Mass. 511; King v. Bellamy, 82 Kans. 310; Lipscomb v. Talbott, 243 Mo. 1, 147 S. W. 798; Lowell v. Bicksford, 201 Mass. 543; Mertin & Garrett v. Mask, 158 N. C. 436; Milbank-Scampton Co. v. Packwood, 154 Mo. App. 204, 133 S. W. 667; Rhodes v. Guhman, 156 Mo. App. 344; Roller v. McKinney, 159 N. C. 319, 74 S. E. 966; Smith v. Bayer, 58 Ore. 526, 115 Pac. 148; Stanley v. Penny, 75 Kans. 179; Sykes v. Kruse, 49 Col. 560; Whidden v. Sprague, 203 Mass. 526.

Among the cases making proper reference to sec. 90 (51) of the Negotiable Instruments Law as the source of authority for the decision, are the following: Callaghan v. Louisville Dry Goods Co., 140 Ky. 712, 131 S. W. 995; Choteau Tr. & Bankg. Co. v. Smith, 133 Ky. 418, 118 S. W. 279; Craig v. Palo Alto Stock Farm, 16 Idaho, 701, 102 Pac. 393; Fishburn v. Loudenshausen, 50 Ore. 363, 92 Pac. 1060; Gen. Conf. Assn. v. Mich. Sanitarium, 166 Mich. 504 (but the note in suit was dated before the adoption of the Negotiable Instruments Law in Michigan); Home Land Co. v. Osborn, 19 Idaho 95, 112 Pac. 764; Johnson Co. v. Koch, 38 Pa. Super. Ct. 553; Melton v. Pensacola Bk. & Tr. Co., 190 Fed. 126; New Haven Mfg. Co. v. N. H. Pulp & Board Co., 76 Conn. 126; R. M. Owen & Co. v. Storms & Co., 78 N. J. L. 154, 72 Atl. 441; Poess v. Twelfth Ward Bk., 43 Misc. 45, 86 N. Y. Supp. 442; Rogers v. Morton, 46 Misc. 494; Schlesinger v. Kurzrok, 94 N. Y. S. 442; Swansby v. Northern St. Bk., 150 Wis. 572.

[12] 149 App. Div. 18 (1912).

In *Merchant's Nat. Bk.* v. *Wadsworth,*[13] it having been shown that the payee took the note relying upon representations of the maker that were fraudulent, in the absence of evidence to show that the plaintiff indorsee took the note in good faith, etc., the verdict and judgment for the defendant were upheld. No fault can be found with the principle thus relied upon—but why was not the actual statute law of the State, § 98 (59) cited as the court's real authority? The Supreme Court of this state has misapplied the Negotiable Instruments Law in *Gen. Conf. Ass'n.* v. *Mich. Sanitarium,*[14] and has failed to follow it in this case, *Merchant's Nat. Bk.* v. *Wadsworth,*[15] both in the same year.

In 106 cases in states that have adopted the Negotiable Instruments Law arising under the provisions of the section under consideration, it is remarkable to find that 34 have failed to cite the Negotiable Instruments Law nor does it appear that counsel drew the attention of the court either to the Act or to the decisions, in the courts of other states, of cases arising under the same section of the law identically the same in such states, although lawyers and judges refer to many cases, especially in their own jurisdiction, decided before there was any Negotiable Instruments Law. It is submitted that this is negecting the real source of authority and is setting up an incorrect one in its place. Nor does it seem to be any sufficient excuse to say that whether the Negotiable Instruments Law be cited or not, the result is the same, for the Negotiable Instruments Law is no radical revision or change of the law of negotiable instruments. Sometimes the result is not the same and then the decision of the particular case is not only at variance with the statute law of the state, it is at variance with the many decisions in other states of cases decided under the same sections of the same law, that are not cited because of the omission to cite the actual statute law of the state and the decisions under it, and that is a breach in the uniformity, not only of the law, but of decisions under the law, that the Commissioners on Uniform State Law are trying to bring about.

In view of this frequent neglect by lawyers and judges to cite the Negotiable Instruments Law and cases decided under it, and to follow them as the controlling authority, in those jurisdictions where the Negotiable Instruments Law has been adopted, it is refreshing to turn to the clear cut statement in *Brophy Grocery Co.* v. *Wilson,*[16]

[13] 166 Mich. 528 (1911).
[14] 166 Mich. 504 (1911).
[15] 166 Mich. 528 (1911).
[16] 45 Mont. 489, 124 Pac. 518.

that by the enactment of the Negotiable Instruments Law the legislature intended to cover the whole subject of negotiable instruments, and thus to set at rest questions touching the rights of the parties, which had theretofore been left to be determined by a critical examination of the prior decisions of the courts, and that in so far as its provisions are clear and unambiguous, they must control.

Occasionally we find a case like that of *American Nat. Bk.* v. *Lundy*,[17] in which not only the Negotiable Instruments Law is cited but also several of the one hundred and thirteen cases that have arisen under §§ 94, 95 (55, 56) of that law.

The case of *Strickland* v. *Nat. Salt Co.*,[18] suggests whether in the future no instrument can be negotiable unless it comports with the elements of negotiability stated in the Negotiable Instruments Law wherever that statute is in force. It was held in this case that a certificate of indebtedness promising to pay, but containing an agreement to keep free from incumbrance certain property on which depended the value of collateral held in pledge for the security of the certificate, is not a negotiable instrument. In the opinion by SWAYZE, J., the learned judge, after explaining § 24 (5), says: "Although this act was not passed until after the certificates in question were issued, it was in this respect intended as a codification of the common law.[19] Whether this contract is governed by the law of New Jersey, where it purports to have been made, or by the law of Ohio, where it was to be performed, or by the law of New York, where it is said to have been delivered, is immaterial. The New York Negotiable Instruments Law was passed in 1897 and contains the same provision. The Ohio act was passed in the same year (1902) and if the certificate is an Ohio contract, the common law must prevail; there is nothing to show that the common law of Ohio differs from the law of New Jersey. In any event therefore, the rule of law applicable is that set forth in the fifth section of the Negotiable Instruments Act. None of the exceptions in that section covers the present case. . . . We have dealt with the certificate in this respect in accordance with the common law as codified in the act of 1902, for the reason that this certificate was issued prior to that act. We are not to be understood, however, as holding that no instrument can hereafter acquire the elements of negotiability unless it answers the requirements of the statute. Mr. MACHEN in his excellent work on Corporations, at § 1740 A. calls attention to the danger of holding that the Negotiable Instruments Act prevents a

[17] 21 N. Dak. 167, 29 N. W. 99.

[18] 79 N. J. Eq. 182 affirming the same case 77 N. J. Eq. 328.

[19] He means, of the law merchant applicable to bills and notes.

further development of the law merchant, but that question is not now before us."

Turning now to MACHEN we find the section referred to to be too long for quotation, but in part he says: "Being in derogation of the common law, the act (meaning the Negotiable Instruments Law) should be construed strictly." And on the next page, after giving as an example the case of certain bonds of the city of Baltimore, he says: "Does the statute require that notwithstanding this clear and uniform usage, the instruments must be held to be non-negotiable? At common law, the mercantile custom might be recognized; and as the statute does not, in express terms, provide that the custom of merchants must be disregarded, it is submitted that the courts should adhere to the safe and beneficial principles of the common law."

The "danger" alluded to, can only arise when the Negotiable Instruments Law itself is disregarded, and this would seem to have been the case in this instance, for both Mr. MACHEN and the learned judge have overlooked § 196 (7): "In any case not provided for in this act the rules of the law merchant shall govern," by which it will be seen that instead of providing that "the custom of merchants must be disregarded," it is expressly provided, not only that they shall be regarded, but that they shall govern. If therefore by the custom of merchants, new elements of negotiability are recognized by merchants, they can be put in proof before the court, as they were before Lord MANSFIELD and his famous jury. Although the Negotiable Instruments Law provides tests by which to determine negotiability, it does not provide that no other test recognized by the custom of merchants shall constitute negotiability.

An earnest protest is here in order against the misleading use of the term "the common law of negotiable instruments" in the above quotations and elsewhere. We do not speak of the common law of admiralty, nor of the common law of equity; why should we speak of the common law of the law merchant? The law merchant is a separate system of law, just as equity, admiralty, the canonical law are. Indeed, as the learned judge above quoted says: "At common law, the mercantile custom might be recognized," that is to say, the common law recognizes the law merchant. But this does not mean there is a common law of negotiable instruments.

*Phair* v. *Stevens*,[20] is an interesting case, showing a change in Tennessee in consequence of the adoption of the Negotiable Instruments Law. Before then, in that state, an accommodation indorser

[20] 124 Tenn. 669.

before delivery was liable as maker, and as such was liable at maturity without notice of demand. But since the adoption of the Negotiable Instruments Law the Tennessee courts have held that such a writing of one's name on the back of a note makes him an indorser, at least unless it is shown that he intended to be bound in some other capacity. (See §§ 113, 114 (63, 64)). The court cites three cases to the same effect decided under these sections of the Negotiable Instruments Law. There are forty-three more of them, not cited by the court. An attempt was made by the court to distinguish this case from *Mercantile Bk. of Memphis* v. *Busby*,[21] in which the same court, notwithstanding these sections of the Negotiable Instruments Law, followed the rule in effect in Tennessee before the adoption of the Negotiable Instruments Law by citing § 186 (115) providing that notice of dishonor is not required to be given to an indorser . . . "3. Where the instrument was made or accepted for his accommodation," holding that the facts disclosed showed that the note in suit was really executed for the benefit of every person whose name appeared on it. But it would seem to be further necessary to show that the holder of the note or any subsequent indorsee took it with knowledge that the note was so executed, and the report of the case does not show this. This was not an action between the parties to the note, but by a holder taking without knowledge of the relationship between the parties expressed on the note when the parties put their names there, no matter whether on the face or on the back. If, when putting their names on the back of the instrument, they intended to become bound to some subsequent indorsee, only as makers and not as indorsers, they must say so in writing on the note, or write their names on its face.

*Hunter* v. *Harris*.[22] To give credit to a promissory note of one Hulse, the plaintiff and the defendant agreed to become accommodation co-makers with Hulse, the real party. The note was signed by the plaintiff and by Hulse as makers. Intending so to sign as a co-maker, but finding there was no longer room on the face of the instrument for his signature, the defendant wrote his name on its back. Upon its dishonor, it does not appear that notice thereof was given to the defendant. The payee brought suit on the instrument against the plaintiff and recovered whereupon this plaintiff brought suit against defendant for contribution, as co-surety on the note. It was held that the plaintiff was entitled to recover. The result reached is right, although hardly by the route followed by the court.

[21] 120 Tenn. 652, 113 S. W. 390.
[22] 63 Ore. 505, 127 Pac. 786.

Eliminating all but the two accommodation parties (the plaintiff and the defendant) what was the agreement between them when they put their names on the note (no matter where)? It was that each one should become equally liable *as between themselves*. This would seem to be enough to dispose of the case, especially as the note was paid and therefore this was not a suit on the note, which, indeed, the court stated. The note was used by the defendant as evidence to escape the consequences of his own agreement, in the attempt to exclude evidence of that agreement by claiming that no testimony was admissible to explain why his name was on the back of the note.

But further examination of the case is necessary because of the citation by the court of several sections of the Negotiable Instruments Law and of cases decided under that law and also before the adoption of that law. The sections cited are 55, 113, 114, 3, 118 (29, 63, 64, 192, 68).

§ 118 (68) provides that, as respects one another, indorsers are liable *prima facie*, in the order in which they indorse, but evidence is admissible to show that as between or among themselves, they have agreed otherwise. It is difficult to understand why the court cited this section, for there was but one indorser, the defendant.

Among the cases cited in the decision are: *Lumbermen's Nat. Bk.* v. *Campbell*,[23] *Cellars* v. *Meachem*,[24] *Murphy* v. *Panter*,[25] *White* v. *Savage*,[26] *Haddock* v. *Haddock*,[27] and *Deahey* v. *Choquet*,[28] all cases under the Negotiable Instruments Law. Let us examine briefly some of these cases.

In *Cellers* v. *Meachem*[29] an accommodation maker of a note who wrote "surety" after his signature, was held not to be relieved from liability by an extension of time of payment without his consent.[30] In *Haddock* v. *Haddock*[31] one who wrote his name in blank, before delivery, on the back of a bill payable to the drawer's order, was held to be an indorser, the draft having been accepted by the drawee.

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[23] 61 Ore. 123, 121 Pac. 427.

[24] 49 Ore. 186, 89 Pac. 426, 10 L. R. A. N. S. 133.

[25] 62 Ore. 522, 125 Pac. 292.

[26] 48 Ore. 604, 87 Pac. 1040.

[27] 192 N. Y. 49.

[28] 28 R. I. 338.

[29] 49 Ore. 186, 89 Pac. 426, 10 L. R. A. N. S. 133.

[30] But see the following authorities as to the liability of a surety, and quaere, whether, being a surety, he was primarily liable: Hubbard v. Gurney, 64 N. Y. 457; Eaton & Gilbert on Commercial Paper, 401, sec. 80, c.; Bigelow on Bills, Notes and Cheques, 43 and the vigorous dissenting criticism on this case in Law Notes, p. 105, Sept. 1905, by T. A. S. (Thomas A. Street ?).

[31] 192 N. Y. 49.

Parol evidence was held to be admissible to show whether such an indorser was an accommodation party and whom he accommodated.[32]

It is submitted that in order to carry out the beneficent purposes of the Conference of Commissioners on Uniform State Laws, the bench and bar of the country must do their part by looking to the Act as the source of authority in all jurisdictions where it is in force, and must further become familiar with and follow the decisions in other jurisdictions as well as their own, under the same sections of this uniform law. Only by so doing can we secure uniformity of decisions under this or any other uniform law.

We remember Morgan's "undigested securities." The decisions made without citation of the Act or of the cases under it, in whatever jurisdiction, will remain a mass of undigested decisions unless brought into co-ordination in the manner suggested and thus made a body of precedents for cases under the uniform law.

AMASA M. EATON.

PROVIDENCE, R. I., NOVEMBER, 1913.

[32] See note upon this case upon p. 78, 2nd Ed. of "The Negotiable Instruments Law, Annotated." Prof. Branan.