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X-4749

General Counsel
American Bankers Association

December 8, 1926.

Benj. Strong, Governor,
Federal Reserve Bank,
New York City

My dear Sir:

The Committee on Commercial Law of the Commissioners on Uniform State Laws will have a meeting early in January. Professor Williston of Harvard University, who is a member, wishes to present to the committee for its consideration a draft of proposed amendments to the Negotiable Instruments Law. He has just written the General Counsel asking if he has any suggestions and if so to submit them within a fortnight.

For the past ten years attempts have been made to have the Commissioners recommend various amendments and such attempts have failed. This invitation comes as a welcome surprise.

Accordingly we are passing this communication along to you with the request that you and your attorney please submit within the next week any proposed amendments to the N. I. Act which you may have in mind. We are enclosing several amendments that have been suggested to this office. These suggestions are only tentative, but we would like to have your criticism.

Knowing how important this matter is, we hope it will have your early attention.

Very truly yours,

TBPJr/S

Thomas B. Paton, Jr.

Enclosures.

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From Office of General Counsel,
American Bankers Association,
110 East 42nd St., New York, N. Y.

December 8th, 1926.

SUGGESTED AMENDMENTS TO NEGOTIABLE INSTRUMENTS ACT.

Full text of act, pages 797 to 827, Vol. 1, Paton's Digest.

1. Payor bank as equitable purchaser of stopped check or other instrument payable at bank: Should the Negotiable Instruments Act be amended to protect a payor bank where it pays a check or other instrument in violation of a stop payment order to a holder in due course? Consider the advisability of inserting an amendment to the Negotiable Instruments Act to the effect that a bank violating a stop order becomes subrogated as equitable purchaser to the rights of the holder. This subject is discussed in opinions 4519a, 4520a, and 4521a of Paton's Digest. Where a stopped check or other instrument has been paid by a bank, payment is regarded as final and recovery from the party receiving the money is not allowed. The account of the drawer or maker on the other hand cannot be charged by the bank which violated the stop order. Under these circumstances it would seem equitable that the payor bank should be subrogated as equitable purchaser to the rights of the holder. See Hiroshima v. Bank of Italy, 248 Pac. (Cal. App. 1926) 947.

2. Certification of altered checks: This subject is discussed fully in opinion 111a of Paton's Digest. It is suggested that Sec. 62 be amended to read as follows (the underlined words are new matter): Sec. 62. "The acceptor by accepting the instrument engages that he will pay it according to the tenor (of his acceptance) the instrument as drawn by the maker or drawer and admits:

(1) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

(2) The existence of the payee named by the maker or drawer and his then capacity to indorse."

The practical reasons for suggesting this amendment are set forth in opinion 111a of Paton's Digest and it is suggested that this amendment be provided for in order that certifying banks be protected against being held liable upon altered or raised checks.

3. Payee as holder in due course: There is a conflict of authority in the decisions before and after the Negotiable Instruments Act as to whether or not a payee can be a holder in due course. It may be desirable to amend the Negotiable Instruments Act by a provision

to the effect that the payee coming within the qualifications which constitute a holder in due course cannot be deprived of that status by reason of the fact that he is payee. For discussion of this subject see opinions 2436 et seq. in Paton's Digest.

4. Extension of warranty by indorser by having it run not only to holders in due course but also to the drawee bank: It has been suggested that Sec. 66 of the N. I. Act be amended providing that the indorser's warranty run to the drawee, such warranty, however, not to include drawer's signature. See opinion 2674a of Paton's Digest. In the case where the drawee bank is allowed to recover from the indorser of money paid on a forged indorsement, the different courts adjudge recovery upon two grounds, (1) that the bank receiving payment warrants the genuineness of the prior indorsements, (2) that the bank receiving payment has received money under a mistake of fact without consideration which the law implies a contract to repay. An amendment extending the warranty to the drawee is suggested as the better rule of recovery. This subject is discussed in opinions 2676, 2191, 2741 of Paton's Digest. See also State v. Broadway National Bank, 282 S.W. (Tenn. 1926) 194.

5. Instrument payable at bank presented after maturity: Attention is called to the desirability of fixing a definite rule authorizing a bank to pay or refuse to pay an instrument payable at a bank when presented after maturity. The section in the N. I. Act referred to is Sec. 87. For discussion see opinion 215a, 218a and 3739 of Paton's Digest.

6. "Pay any bank or banker" as an unrestrictive indorsement, i. e. title-conveying: Is it desirable that the N. I. Act be amended making it clear that this form of indorsement in use by banks is title-conveying rather than agent creating? It is suggested for consideration that this indorsement be specifically designated as a nonrestrictive one unless coupled with words making it otherwise. There is a conflict of authority on this point. For discussion see 2771a and 2192a of Paton's Digest. See particularly Sands v. Parker et al., 284 S.W. (Tenn. 1926) 902. See also First Nat. Bank of Fort Smith v. Brunk, 280 S.W. (Ark. 1926) 372.

7. Stale checks: It might be well to consider the advisability of inserting a provision in the N. I. Act not only limiting the time of negotiation of checks but also the time after which a bank can safely refuse to pay same. See paton's Digest, opinion 1202 et seq., particularly 1204a.

8. Reasonable time limit for negotiation of instruments: The suggestion has been made that it might be advisable to fix or recommend a definite period of time as a reasonable time limit for negotiation of instruments in conformity with actual experience and practice, in line with legislation as passed in New Hampshire and South Dakota. For references on this subject see Sec. 53 N. I. Act on p. 805, Paton's Digest. See also Secs. 71 and 193 of the N.I. Act on pp. 808

and 823 respectively of Paton's Digest. See also opinion 2442a.

9. Protection of rights of holder in due course of negotiable instrument based on gambling and usurious consideration: This subject is discussed in 1161a of Paton,s Digest, a quotation from which reads as follows: "The needed protection would be afforded by a simple amendment of the Negotiable Instruments Act to the effect that where a negotiable instrument is declared void by any statute because based on a gaming or usurious consideration or otherwise in violation of statute, it shall nevertheless in the hands of a holder in due course be enforceable against all parties liable thereon. Or, as an alternative, the specific statutes of different states which avoid instruments for usury or gaming might be separately amended by the insertion of provisions excepting from their application, negotiable instruments in the hands of holders in due course."

10. Instruments payable in "current funds": Amend Sec. 2 of the N. I. Act by including as negotiable instruments those payable in "current funds." For discussion see opinions 428, 1048a and 1216 of Paton's Digest.

11. Exchange as medium of payment of negotiable instruments: The Negotiable Instruments Act requires as a condition of negotiability that instruments be payable in money. Certain states have passed acts giving the drawee bank the option under certain specified conditions of paying in money or in exchange. Map 26, and opinion 1285a of Paton's Digest. The instruments consequently are not technically payable in money since the drawee has the option to pay in something else. It is unlikely that the legislatures in passing such acts had any intention of rendering checks nonnegotiable. It might be well to clarify the situation so far as checks payable in these states are concerned by expressly providing that an instrument payable at the payor's option in cash or exchange shall be considered negotiable whether the option be given by statute or in the instrument itself.

12. Waiver of presentment, protest, and notice of dishonor: Attention is called to the ambiguity in the meaning of the word "waiver" in Sec. 110 of the N. I. Act. Should not this ambiguity be cleared up by proper amendment expressly stating that the waiver includes not only waiver of notice but also waiver of presentment and protest? It might also be amended by stating that if the waiver is on the face of the instrument it is binding on all parties but where it is written on the back above the signature of the indorser it binds such indorser only. It might also be well, if possible, to give a definite legal effect to a waiver on the back of an instrument inserted in a box. Suppose an indorsement written above the signature of the indorser by its terms expresses to bind all the indorsers. Should this situation be clarified?

13. Payment of check once dishonored upon second presentment: This subject is discussed in opinion 4082 et seq. of Paton's Digest, wherein it appears that it is the custom of banks to pay checks once dishonored upon second presentment. Apparently the point has never been decided by the courts. It is suggested that this matter be considered. Should the rule be definitely fixed by amendment to the Negotiable Instruments Law?

14. Post-dated checks: There is no provision in the Negotiable Instruments Act providing for the negotiability of post-dated checks before due date. It is suggested that Sec. 1 of subdiv. 3 of the N.I. Act be amended by including the case of a post-dated check which is neither payable on demand or at a fixed determinable future time. See Mullin, J., Kuflik v. Vaccaro, 170 N.Y. Suppl. 14; see also 21 A.L.R. p. 229, Wilson v. Midwest State Bank (bottom first column, p. 233, to the effect that a post-dated check is irregular and carries notice of the defect upon its face).

15. Interest on instrument falling due on Saturday, Sunday or holiday and not paid until next business day: The question has been raised as to whether an instrument draws interest for the two added days. An opinion has been rendered, 2913a of Paton's Digest, to the effect that the interest is collectible. This subject is mentioned here for discussion as to whether or not it is necessary to have the N.I. Act amended to make the point certain. See also opinions 2497 and 2498a of Paton's Digest.

16. Presentment and protest of lost note: The Negotiable Instruments Act, Sec. 160, under title II, covering bills of exchange makes provision for protest covering the situation where a bill is lost. There is no express provision covering the situation where a note is lost. Should an amendment be made providing for the presentment and protest upon copy of the lost note or the written particulars thereof? Questions of this nature have been submitted to the Office of the General Counsel. See opinion 4139 of Paton's Digest.

Unusual situations which have come up under the Negotiable Instruments Act.

The following cases are submitted for information as showing unusual decisions handed down by the courts which have a bearing upon the Negotiable Instruments Act. No state-wide recommendation has been suggested.

1. Interim receipts: In the case of Manhattan Company v. Morgan, 150 N.E. 594, the New York Court of Appeals pointed out that amendment of the Negotiable Instruments Act was the proper remedy to make interim certificates entitling the bearer to bonds of the Kingdom of Belgium negotiable. Following this decision the New York Legislature

passed a law known as the Hofstadter Securities Receipts Law providing for the negotiability not only of interim receipts but of a variety of other instruments such as equipment trust certificates and other forms which the banking world and investors have always treated as negotiable. Would it be desirable to amend the Negotiable Instruments Act to cover situations suggested by this New York statute. See Legal Service Bulletin, of the American Bankers Association, No. 2, p. 8.

2. Unauthorized certificate of deposit: The decision of the Supreme Court of west Virginia in Merchants Bank and Trust Company v. Peoples Bank of Keyser, 130 S.E. 142, would have a serious effect, if followed, upon the negotiability of certificates of deposit. Read the note to the digest of this case in 231la of Paton's Digest. As far as West Virginia is concerned it is questioned whether the N. I. Act, Sec. 23, needs an amendment on this point.

3. Trade Acceptance: Negotiability of a trade acceptance under the N.I. Act has been denied by the Supreme Court of Florida in Citizens' State Bank of Marianna v. Carmichael, 103 So. 111. This decision is criticised in opinion 168a of Paton's Digest. It is submitted that the N. I. Act needs no amendment on this point, it being clearly set forth. The problem is a serious one for Florida bankers and as stated in opinion 168a "the effect of such a decision is to give notice to the commercial world that so far as the state of Florida is concerned, the standard form of trade acceptance contained in this clause is not negotiable but is subject to defenses." A remedy for the situation is needed.