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Wilfred J. Ritz

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VIRGINIA LAW AND
THE COMMERCIAL PAPER ARTICLE OF
THE UNIFORM COMMERCIAL CODE

WILFRED J. RITZ*

I. INTRODUCTION
A. GENERAL OBSERVATIONS

1. Scope. Article 3 of the Uniform Commercial Code1 covers Commercial Paper, while Article 8 deals with Investment Securities. From the nomenclature it would appear that a functional division has been effected, but this is only partially true. The definition of a "security" is functional and includes bearer bonds, registered bonds, certificates of stock and other types of investment paper. Commercial paper, on the other hand, is not defined and whether or not it falls within the scope of the Article depends on its form; in effect, notes, including certificates of deposit, checks, and drafts are covered. That these instruments may be used in "noncommercial" transactions seems to be recognized, but nevertheless the instruments are treated as commercial paper. Money and documents of title are excluded from the Article on Commercial Paper.

Bonds, which were covered by the NIL, are excluded from the Article on Commercial Paper. A writing which is a "security" as defined in Article 8 and also meets the formal requirements of Article 3

* A.B. 1938, Washington and Lee University; LL.B. 1950, University of Richmond; LL.M. 1951, Harvard University. Assistant Director Research, 1938-42, Industrial Director, 1946-50, Virginia State Chamber of Commerce; Assistant Professor of Law, Wake Forest College, 1952-53; Associate Professor of Law, Washington and Lee University, 1953-date. Member of Virginia and Massachusetts Bars.

1 The Official Draft is discussed in:
Britton, Formal Requisites of Negotiability—The Negotiable Instruments Law Compared with the Proposed Commercial Code, 26 Rocky Mt. L. Rev. 1-33 (1953); Transfers and Negotiations Under the Negotiable Instruments Law and Article 3
is excluded from Article 3 and governed solely by Article 8. Thus, although the division is based partly on function and partly on form, when they overlap the functional division controls.

By way of contrast, Article 3 on Commercial Paper and Article 4 on Bank Deposits and Collections are not mutually exclusive. Items, or instruments, within the scope of both Articles are subject to the provisions of both, but in the event of conflict the provisions of the Article on Bank Deposits and Collections govern.  

An instrument, as when it is used as collateral, may be within the scope of both the Article on Commercial Paper and the Article on Secured Transactions. Both Articles are then applicable, but in case of conflict Article 9 on Secured Transactions controls. 

2. Instrument—Definition. UCC 3-102(1) states that, "In this Article unless the context otherwise requires ... (e) 'Instrument' means a negotiable instrument." Unfortunately, in order to avoid redundancy, bad grammar, or inconsistency, the context almost always requires that a different definition of the word "instrument" be used. 

As matter of fact, by virtue of UCC 3-805, which brings non-negotiable instruments within the scope of the Article, the context with few exceptions requires that the word instrument be given the dual mean-


The Final Text Edition, November 1951, is discussed in: 

Sutherland, Article 3—Logic, Experience and Negotiable Paper, [1952] Wisc. L. Rev. 290-64. 

The Spring 1950 Draft is discussed in: 


2UCC 3-103(1) and 8-102(1)(b). 

3UCC 4-102(1) and UCC 3-103(2). 

4UCC 3-109(2) and Comment, Point 2, and UCC 9-102(1)(a). 

5E.g., "A 'negotiable' instrument otherwise negotiable..." UCC 3-113. "The negotiability of a 'negotiable' instrument is not affected by..." UCC 3-112 and 3-114.
3. Instruments “Within this Article.” Whereas under the NIL an instrument “to be negotiable” must conform to certain requirements, under the UCC “any writing to be a negotiable instrument within this Article” must conform to the listed requirements. The NIL, thus, lays down an exclusive test of negotiability, while the UCC leaves open the possibility that some writings may be made negotiable by other statutes or by judicial decision.

4. Instruments Not Payable to Order or to Bearer. By virtue of UCC 3-805 the provisions of the Article are extended to one type of paper which is not negotiable. This section reads as follows:

“This Article applies to any instrument whose terms do not preclude transfer and which is otherwise negotiable within this Article but which is not payable to order or to bearer, except that there can be no holder in due course of such an instrument.”

and according to the Comment:

“This section covers the ‘non-negotiable instrument.’ As it has been used by most courts, this term has been a technical one of art. It does not refer to a writing, such as a note containing an express condition, which is not negotiable and is entirely outside of the scope of this Article and to be treated as a simple contract... The typical example is the check reading merely ‘Pay John Doe.’... Commercial and banking practice treats it as a check, and a long line of decisions before and after the original Act have made it clear that it is subject to the law merchant as distinguished from ordinary contract law. Although the Negotiable Instruments Law has been held by its terms not to apply to such ‘non-negotiable instruments’ it has been recognized as a codification and restatement of the law merchant, and has in fact been applied to them by analogy.... In short, the ‘non-negotiable instrument’ is treated as a negotiable instrument, so far as its form permits. Since it lacks words of negotiability there can be no holder in due course of such an instrument, and any provision of any section of this Article peculiar to a holder in due course cannot apply to it. With this exception, such instruments are covered by all sections of this Article.”

This section would seem to create new classifications of instru-
ments, that is, the “non-negotiable” and the “not negotiable” instruments. The “non-negotiable” instrument misses negotiability only for lack of words of negotiability—order or bearer. The “not negotiable” instrument misses negotiability for some other reason as by containing an unauthorized term. This new classification may, at first at least, cause confusion in determining the applicability of precedents in which the court did not advert to such a distinction. Moreover, somewhat incongruously, the section brings into the scope of the Article instruments which the parties intend to be non-negotiable or not negotiable by omission of words of negotiability. Yet, instruments which the parties may intend to be negotiable, but are not so because of the inclusion of an unauthorized term, for instance, are entirely excluded from the Article. The merits for the inclusion of one and the exclusion of the other are not made clear in the Comment.

While the text of the Article and the Comment make clear there cannot be a holder in due course of a “non-negotiable” instrument under Article 3, it does not follow that there cannot be under another Article, such as Article 4 on Bank Deposits and Collections. There appears to be no restriction on the nature of the “item” of which a bank can be a holder in due course.

5. Parole Evidence Rule. The borderline between negotiability and non-negotiability is also affected by Section 3-119 which reads as follows:

“Section 3-119. Other Writings Affecting Instrument.

(1) As between the obligor and his immediate obligee or any transferee the terms of an instrument may be modified or affected by any other written agreement executed as a part of the same transaction, except that a holder in due course is not affected by any limitation of his rights arising out of the separate written agreement if he had no notice of the limitation when he took the instrument.

(2) A separate agreement does not affect the negotiability of an instrument.”

This is one of the few instances in the Article in which the words “obligor” and “obligee” are used, and they are not defined. Whether or not the choice of words is significant is not evident. If not, the words might be used to advantage in other sections.

The section only relates to “written agreements,” so that the strong

11UCC 3-802 is another example.
12See UCC 3-804, which uses the words “plaintiff” and “defendant” and UCC 3-606(1)(a) which uses the phrase “against whom the party has... a right of recourse.”
position taken by the Virginia court against the admissibility of evidence respecting oral agreements, as that the instrument may be discharged in a manner different from that provided in the instrument, is not affected. According to the Comment, the section makes applicable to negotiable instruments "the ordinary rule that writings executed as a part of the same transaction are to be read together as a single agreement." 3

According to the Comment if an instrument, "is negotiable in itself a purchaser without notice of a separate writing is in no way affected by it." 4 The section makes no provision for actions involving accommodation parties. Since an accommodation party is not the obligor, nor the obligee or any transferee, it seems inevitable that confusion will arise under the UCC when the parole evidence rule is invoked in an action involving such a party.

The thought that a holder in due course may have notice of a limitation on his rights and still be a holder in due course is somewhat difficult to fathom. According to the Comment 5 if the purchaser takes the instrument with notice of a defense or claim, as that the instrument is a sham, he cannot be a holder in due course. But if he takes with notice from the separate agreement that under certain conditions the note shall be extended for one year, he may be a holder in due course, but he takes the instrument subject to the limitation. The distinction would seem to be between a "complete" defense, under which no recovery can be had, and a "partial" defense, under which recovery according to the terms of the instrument cannot be had. The latter is a "limitation" and not a defense. Does this definition of "defense" as meaning only a "complete defense" carry over into the sections on holding in due course, in which the words "any defense against or claim to" the instrument are used? 6 Apparently it does in order to make UCC 3-119 effective. But the natural connotation of the words in the section defining a holder in due course has been greatly changed. "Any defense" means "complete defense." Is this definition (derived from the Comment to UCC 3-119) in conflict with UCC 3-304, which provides that "The purchaser has notice of a claim or defense if... the purchaser has notice that the obligation of any

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4UCC 3-119, Comment, Point 3.
5UCC 3-119, Comment, Point 5, and see Comment, Point 2.
6UCC 3-119, Comment, Point 4.
7UCC 3-302(1)(c).
party is voidable in whole or in part..." Or is an obligation voidable in part something more than a limitation and less than a defense?

Although the thought will be developed more fully later, attention should be called to the second section of UCC 3-119 which provides that a separate agreement does not affect the negotiability of an instrument. When a holder with notice of limitations on his rights can still be a holder in due course, but subject to those limitations, what is the peculiar significance of "the negotiability of an instrument"?

Professor Britton has criticized this section on the ground that an "entire mortgage, conditional sale contract or other writing goes into the note for all purposes except that none of its terms can be used for the purpose of destroying negotiability of the note." Furthermore, "by permitting the siphoning of all the terms of the securing instrument into the note, the holder gets the benefit of any and all rules of the law of negotiable paper which perchance are of a higher order than the corresponding rules in the law applicable to the securing instrument. There is no reason why the holder should have such a benefit." Professor Britton concludes that this section, along with 3-805, and the phrase "within this Article" in UCC 3-104 should be striken from the UCC because they obscure the boundary line between negotiable and non-negotiable instruments, the maintenance of which he considers a fundamental legal policy.

6. Exclusive or By Analogy Interpretation. One of the somewhat baffling aspects of the Article on Commercial Paper is its alternative contractive and expansive effect. As has already been pointed out, UCC 3-104, 3-119, 3-805 tend to expand the concept of negotiability. On the other hand other sections are contractive; UCC 3-104(1)(b) provides that an instrument to be negotiable must contain an unconditional promise or order "and no other promise, order, obligation or power," and UCC 3-112 is apparently an exclusive listing of the additional obligations the instrument may carry. In line with this contractive effect is the omission of NIL 10 (Va. Sec. 6-362) under which the precise language of the NIL did not need to be followed, if there was a clear indication of an intention to conform to the requirements of the NIL.

Even more confusing, however, is the question of whether individual sections are exclusive or are to be extended by analogy. Without

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28 Britton, supra, 26 Rocky Mt. L. Rev. 1, 5.
29 Id.
30 Id.
any indication thereof in the text, the Comment to some sections states that it is not exclusive and is to be extended by analogy\(^{21}\) while other Comments are stated to be exclusive.\(^{22}\)

7. Rephrasing of NIL. The language of the NIL has been extensively rephrased in the UCC, even when no change in substance is intended. Categorical statements that no change has been made are impossible, even though the UCC draftsmen state in the Comment that no change is intended. This can be illustrated by considering whether a bona fide transferee after maturity of a negotiable instrument is subject to set-off by the maker against a prior party.

Under the first sentence of NIL 58 (Va. Sec. 6-410) it is provided that:

"In the hands of any holder other than a holder in due course a negotiable instrument is subject to the same defenses as if it were non-negotiable."

The language of UCC 3-306(b) is as follows:

"Unless he has the right of a holder in due course any person takes the instrument subject to...

(b) all defenses of any party which would be available in an action on a simple contract; . . ."

The explanation for the change, in its entirety, contained in Comment, Point 3, to this section in the UCC is:

"Paragraph (b) restates the first sentence of the original Section 58."

Evidently the UCC draftsmen did not have the benefit of the Virginia court's exhaustive analysis in Stegal v. Union Bank and Federal Trust Co.,\(^{23}\) of the question of whether a post-maturity bona fide purchaser for value of a negotiable note from the payee takes the instrument free of set-offs which the maker has against the payee at the time of the transfer or subsequently acquired.

The Virginia court concluded that under the Law Merchant such a purchaser would take the instrument free of set-off. "He takes the instrument subject only to equities attaching to or inherent in the instrument itself at the time of the transfer, and equities arising out of the transaction giving rise to the instrument which exists (though they may not have fully developed) at the time of the transfer."\(^{24}\)

\(^{21}\)UCC 3-104, Comment, Points 1 and 2.

\(^{22}\)UCC 3-605, Comment, Point 2 states that the methods stated in the section by which an instrument may be cancelled "are exclusive."

\(^{23}\)163 Va. 417, 176 S. E. 438 (1934).

\(^{24}\)Id. at 443.
of contrast, under a simple statute of set-offs "an assignee of a non-negotiable instrument took it subject to set-offs (in favor of the promisor) to which it was subject in the hands of the assignor at the time of the assignment and also subject to any set-offs against the assignor which the original promisor might acquire after the assignment before he received notice of it. ... But this did not follow as to a negotiable instrument even when it was transferred after maturity."25

A conflict in the decisions admittedly exists,26 although the UCC does not note the conflict. Britton considers the view taken by the Virginia court in the Stegal case to be the better view.27 It seems clear that the UCC would change the result in the Stegal case since the Virginia court based its decision on a distinction between an action on a simple contract and an action on a negotiable instrument. Yet, so far as the comment in the UCC would indicate, the draftsmen rephrased the NIL without realizing that any change of substance was being effected.

II. FORM AND CONSTRUCTION

A. Requisites of Negotiability

1. General. The fundamental requisites of negotiability of commercial paper remain unchanged. The instrument must be in writing, signed by the maker or drawer, contain an unconditional promise or order to pay a sum certain in money (and no other promise, order, obligation or power given by the maker or drawer except as authorized by the UCC), be payable on demand or at a definite time, and be payable to order or bearer.28

Two terms that were left undefined in the NIL are defined in the UCC. "A 'promise' is an undertaking to pay and must be more than an acknowledgement of an obligation."29 "An 'order' is a direction to pay and must be more than an authorization or request."30 "Definite" is substituted for "at a fixed or determinable future time."31

A writing which complies with these requirements is a "draft"

25Id. at 442. See Va. statute on set-offs, Va. § 8-239.
26Beute1's Brannan, Negotiable Instruments Law 841-4 (7th ed. 1948); Britton, Bills and Notes 728-730 (1943).
27Britton, Bills and Notes, 729-730 (1943).
28Cf. NIL 1(2) with UCC 3-104. (b).
29UCC 3-103(1)(a).
30UCC 3-103 (1)(b).
31Cf. NIL 1(2) with UCC 3-104(1)(c).
(which term is used instead of bill of exchange as under the NIL) if it is an order, and a "check" if it is a draft drawn on a bank and payable on demand. (The UCC, like the NIL, does not deal with the somewhat anomalous position of a post-dated check.) It is a "certificate of deposit" if it is an acknowledgement by a bank of receipt of money with an engagement to repay it, or a "note" if it is a promise other than a certificate of deposit.

2. On Demand. As under the NIL, instruments payable on demand are those payable at sight or on presentation or in which no time for payment is stated. The last sentence of the present NIL 7 (Va. Sec. 6-359) is omitted with the result that a person taking an instrument after maturity cannot acquire due course status as against a party indorsing after maturity. Indorsers after maturity, however, are not entitled to presentment, notice of dishonor, or protest.

3. Unconditional Promise or Order. A promise or order is not unconditional if the instrument states that it is subject to or governed by any other agreement, but it is not made conditional by statements that show the instrument is subject to implied or constructive conditions, show the consideration, the transaction that gave rise to the instrument, that it was drawn under a letter of credit, or that it is secured. A promise or order is not unconditional if an instrument is to be paid only out of a particular fund, but indication of a particular fund to be debited does not render it conditional. However, the promise or order of a governmental agency to pay out of a particular fund, and of a partnership, unincorporated association, trust, or estate, to pay only out of its entire assets is unconditional. This section is intended to resolve certain conflicts that developed under the NIL, as well as to extend negotiability in a limited area.

4. Sum Certain. The meaning of a sum certain is clarified so as to resolve any conflicts by making clear that stated different rates of interest before and after default or a specified date, or stated discount or addition if paid before or after the fixed date, will not affect the certainty of the sum. Provision for payment with costs of collection or an attorney's fee or both upon default does not affect the

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3Britton, supra, 26 Rocky Mt. L. Rev. 1, 31.
4UCC 3-104(2).
Cf. 3-108 with NIL 7 (Va. § 6-359). See McVeigh's Ex'r v. Howard, 87 Va. 599 (1891) which takes the same view.
5Cf. UCC 3-108 and Comment with NIL 7 (Va. § 6-359).
6Cf. UCC 3-105 with NIL 3 (Va. § 6-355).
certainty of the sum, but the UCC would not validate such terms if otherwise illegal.38

5. Money. A negotiable instrument must be payable in money. Money is not limited to legal tender, but means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.39 "Currency" or "current funds" are money.40 Instruments payable in foreign currency are negotiable and may be satisfied by payment in dollars at the buying sight rate on the day the instrument is payable, or if payable on demand, on the day of demand. If a foreign currency is specified as the medium of payment, the instrument is payable in that currency.41

While the provision that instruments expressed in foreign currencies are negotiable clarifies a point that was a little doubtful under the NIL, the additional provisions as respects payment of such instruments are perhaps more illusory than of real content. Under the exchange controls now in effect throughout the world except in the United States and Canada, circulation of a country's currency outside its own territory is generally prohibited. Instruments calling for the payment in the United States of a foreign currency subject to exchange control would probably be void and payment in that currency illegal under the law of the country whose currency is involved. More important, the UCC does not indicate what result will follow from a default in payment in foreign currency of an instrument specifying such currency as the medium of payment. It may be that if action is then brought a judgment will be recovered in American dollars calculated at the rate of exchange prevailing on the date of the default. If so, the provision in the instrument specifying foreign currency as a medium of payment has for all practical purposes been nullified.

That the judgment must be in dollars, or at least dischargeable in dollars, would seem to be required in Virginia under Section 6-341. This section of the Virginia Code, like the UCC, does not touch the really important issue involved in actions respecting foreign curren-

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39 Cf. UCC 1-201(24).
40 Cf. UCC 3-107(1) with NIL 6(5) (Va. § 6-358 (5)).
41UCC 3-107(2).
cies, that is, the time which, or the rate of exchange that, will be used to convert foreign currencies into dollars. In times of fluctuating exchange rates this is a difficult problem at the very heart of issues involved in the litigation.

While Section 6-341 of the Virginia Code is not inconsistent with the UCC, its value is doubtful, since it would prevent entry of a judgment calling for payment of a foreign currency. Admittedly, American courts have not done this, but there appears to be no inherent reason why it cannot be done in appropriate cases. And it is probably the only effective way to carry out the provisions in the UCC as respects instruments payable in foreign currencies.

6. Definite Time. “Definite time” has been substituted for “fixed or determinable future time.” As a result the rule of NIL 4(3) (Va. Sec. 6-356) that provides that an instrument payable a fixed time after specified event which is certain to happen, thought uncertain as to the time of happening, is reversed. Instruments payable “one year after the war” are no longer negotiable.42

7. Acceleration Clauses.43 The provision relating to acceleration clauses which was included in the NIL section on “Sum Certain” has been shifted in the UCC to the section on “Definite Time.”44 Ambiguities and conflicts under the NIL have been resolved by giving a blessing to all acceleration clauses,45 but this blessing has been slightly diluted by a restrictive definition of an option to accelerate at will.

3-109 Definite Time.

“(1) An instrument is payable at a definite time if by its terms it is payable . . .

(c) at a definite time subject to any acceleration; . . .”

1-208 Option to Accelerate at Will.

“A term providing that one party may accelerate payment or performance or require collateral or additional collateral not on stated contingencies but ‘at will’ or ‘when he deems himself insecure’ or in words of similar import means that he has power to do so only in the good faith belief that the prospect of payment or performance is impaired but the burden of establishing lack of good faith is on the party against whom the power has been exercised.”

42 Cf. UCC 3-109(2) with NIL 4(3) (Va. § 6-356(3)).


44 Cf. NIL 2 (3) (Va. § 6-354 (3)) with UCC 3-109(1)(c).

45 Country Club of Portsmouth, Inc. v. Wilkins, 166 Va. 325, 186 S. E. 23 (1936) upheld an automatic acceleration clause.
Section 6-348 of the Virginia Code relating to the rate of interest allowable to banks, stockbrokers, brokers dealing in options and futures, says that:

"...any bank may charge in advance the legal rate of interest upon the entire amount of any loan, payable in weekly, monthly or other periodical installment, and any note evidencing such an installment loan may provide that the entire unpaid balance thereof, at the option of the holder, shall become due and payable upon default in payment of any stipulated installment, without impairing the negotiability of such note, if otherwise negotiable."

Under the UCC it would seem that this provision permitting a clause in a certain type of bank paper authorizing acceleration at the option of the holder would be unnecessary under UCC 3-109.

Although the two sections of the UCC are not "technically" repugnant, Professor Britton has expressed the fear that unexpected and conflicting results may develop. He also expressed the view that UCC 3-109 as drafted, together with UCC 1-218, may invite the courts to take a more narrow view of acceleration clauses than was intended by the drafters of the UCC. He advocates eliminating 1-208 and redrafting 3-109.46

8. Extension Clauses. Professor Britton has also criticized the UCC provisions as to extension clauses.47 These provisions are as follows:

"Section 3-109. Definite Time.

"(1) An instrument is payable at a definite time if by its terms it is payable . . .

(d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or automatically upon or after a specified act or event."

"Section 3-118. Ambiguous Terms and Rules of Construction.

"The following rules apply to every instrument: . . .

(f) Notwithstanding any terms of the instrument, the holder may extend it only with the consent of the maker at the time of extension. Unless otherwise specified consent to extension authorizes a single extension for not longer than the original period."

The criticism made by Britton of these sections is fourfold:

(a) Literally Section 3-109 (1)(d) authorizes a clause which permits

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46 Britton, supra, 26 Rocky Mt. L. Rev. 1 at 10-15.
47 Id. at 15-19.
the holder to extend time of payment, before or after maturity, indefinitely, contrary to the principle that the time of payment of a negotiable instrument must be at a definite time. This defect is cured by Section 3-118 (f) by requiring the consent of the maker at the time of extension. The cure, however, is so broadly worded that Section 3-109(1)(d) is nullified in that every extension of time at the option of the holder can only be made with the consent of the maker.

(b) While 109(1)(d) applies against both makers and acceptors, 3-118(f) only requires the consent of makers. The possibility is thus open for a clause that permits the holder to extend time of payment indefinitely as against an acceptor, without his consent. The alternative is to read “acceptor” into Section 3-118(f).

(c) There appears to be no purpose in the use of the word “further” as respects extension clauses giving the option to the maker, the word not being used as respects extension clauses in which the holder has the option.

(d) Section 3-109(1)(d) requires that an extension at the option of the maker or automatically upon or after a specified act or event must be to a further definite time. This further definite time may be the “indefinite” definite time permissible under this section in the option to extend given to the holder. Section 3-118 does not cure this defect since no reference is made to that section.

Professor Britton advocates, in the light of these criticisms, elimination of Section 3-118 and redrafting 3-109(1)(d).

9. To Order. The definition of order instruments has been clarified.48 “Or assigns” is accepted as the equivalent of “or order.” An instrument conspicuously designated on its face as “exchange” or the like and naming a payee is order paper.

An instrument may be payable to the order of two or more payees together or in the alternative; the word “jointly” contained in the NIL has been eliminated because of a possible implication of a right of survivorship that might be derived.49

An instrument payable in the alternative, as to the order of “A or B,” is payable to either and may be negotiated, discharged, or enforced by the one in possession. If the payees are not in the alternative, as “A and B,” the instrument is payable only to both, both must indorse or bring action, and the rights of one are not discharged without his consent by the act of the other.50

48 Cf. NIL 8 (Va. § 6-360) with UCC 3-110.
49 Id.
50 Cf. NIL 41 (Va. § 6-393) with UCC 3-116.
An instrument payable to the order of an estate, trust, or fund is payable to the order of its representative or his successor.\textsuperscript{51} If the instrument is payable to a fiduciary, other than an agent or officer, for a specified person or purpose, it is payable to the named payee; subsequent holders are put on notice of the payee's fiduciary position.\textsuperscript{52}

The policy of NIL 42 (Va. Sec. 6-394) under which an instrument payable to a person as "cashier" or other fiscal officer of a bank or corporation is deemed payable either to the bank or corporation or to the officer is continued, but expanded so as to include any instrument payable to a named person as agent or officer of a specified person. Such instruments are payable to the principal but the agent or officer may act as if he were the holder.\textsuperscript{53}

In an instrument payable to a named person with additional words describing him in any other manner, as "John Doe, 1121 Main Street" or "John Doe, Trustee," the additional words are without effect on subsequent parties, the instrument being payable unconditionally to the payee named. Such a payee, if otherwise identified, may negotiate, enforce, or discharge the instrument even though he does not meet the description.\textsuperscript{54}

10. To Bearer. The purpose of the UCC with respect to bearer paper is to take instruments which purport to designate a named payee out of this classification.\textsuperscript{55} Instruments payable to fictitious named payees are thus order instruments, as they appear to be on their face. To handle the problem of the fictitious payee, indorsements in such fictitious names are made effective.\textsuperscript{56}

Bearer instruments are consequently limited to those which are payable to bearer, order of bearer, a specified person or bearer, cash, order of cash, "or any other indication which does not purport to designate a specific payee."

"Pay to the order of__________" is an incomplete instrument and not payable to bearer. Probably, an instrument in which a line is drawn through the space for the payee's name is bearer paper, since the line is an indication which does not purport to designate a specific payee. Because of the difficulty of distinguishing in print between a handwritten line, a printed line, and a blank space, the comment on

\textsuperscript{51}UCC 3-110.
\textsuperscript{52}UCC 3-117.
\textsuperscript{53}\textsuperscript{Cf.} NIL 42 (Va. § 6-394) with UCC 3-117.
\textsuperscript{54}UCC 3-117.
\textsuperscript{55}\textsuperscript{Cf.} NIL 9 (Va. § 6-361) with UCC 3-111.
\textsuperscript{56}UCC 3-405.
this point is not clear and is susceptible of the interpretation that the
instrument is incomplete.\textsuperscript{67}

Nor is the UCC entirely clear as to the nature of an instrument
that reads "Pay order of Treasurer of X Corporation," there not being
such an officer or such a corporation, and the instrument is so drawn
through mistake.

A comment in the UCC states that "Pay Treasurer of X Corpora-
tion," there not being such an officer, is not bearer payer. Unfortu-
nately, the illustration used is not order paper either, but non-nego-
tiable.

In \textit{First Wisconsin National Bank of Milwaukee v. People's Na-
tional Bank of Rocky Mount, Virginia},\textsuperscript{58} a draft was drawn on a
printed form in favor of the First National Bank of Milwaukee, also
printed. This bank had become consolidated as the First Wisconsin
National Bank of Milwaukee. Through inadvertence the name of the
payee was not corrected. The Virginia Supreme Court of Appeals
held that the First Wisconsin National Bank could be considered the
legal holder as the instrument was bearer paper because payable to
the order of a fictitious or non-existent person under NIL 9(3) (Va.
Sec. 6-361). The UCC would change this result.

The Virginia Court also thought that the instrument could be
treated as one in which the name of a payee is wrongly designated
and under NIL 43 (Va. Sec. 6-395) could be indorsed by payee intended
as described in the instrument. Under UCC 3-203 the indorsement
may be as in the instrument, or correctly, or both; with a person taking
the instrument for value being able to require signature in both
names.

More doubtfully the Virginia Court thought the bank "had the
right to insert its own name as payee," apparently on the theory that
the instrument was incomplete. It is doubtful, even if sound under the
NIL, that this result could be reached under the UCC.

11. \textit{Order-Bearer.} Under UCC 3-111 an instrument payable to
"order of bearer" is bearer paper. Under UCC 3-110(3) "An instrument
made payable both to order and to bearer is payable to order unless the
bearer words are handwritten or typewritten."

While these sections have been criticized by Professor Britton,\textsuperscript{69}
it would seem that the proper application of UCC 3-111 by its terms is
only to instruments in which no payee is designated and conversely

\textsuperscript{67}UCC 3-111, Comment, Point 2.
\textsuperscript{58}136 Va. 276, 118 S. E. 82, 36 A. L. R. 726 (1923).
\textsuperscript{69}Britton, 26 Rocky Mt. L. Rev. 1 at 25-27.
UCC 3-110(3) only applies when there is a designated payee. As so interpreted the sections can be applied without difficulty.

12. Terms and Omissions Not Affecting Negotiability. As under the NIL negotiability is not affected by an omission of a statement of consideration, or where the instrument is drawn or payable, or that it is undated, antedated, or postdated. An undated instrument payable “thirty days after date” is incomplete because not payable at a definite time. The date may be inserted as provided in the section on incomplete instruments. When the instrument is dated, time of payment is determined from the stated date. Similarly, time of payment of antedated or postdated instruments is determined by the stated date. An antedated instrument may be due before it is issued.

Dates in instruments are presumed correct.

Under the NIL a seal did not affect the negotiability of an instrument, but under some decisions certain provisions of the NIL, as those relating to consideration, were held inapplicable to sealed instruments. This is changed under the UCC. Sealed instruments are within the Article on Commercial Paper. However, other statutes or rules of law relating to sealed instruments still may be applied as a longer statute of limitations. The Virginia statute of limitations of ten years on negotiable instruments under seal and of five years on others would not be affected by the UCC.

Statements that collateral has been given, or authorizing sale on default, or promises to give additional collateral on demand are permitted; the NIL only made explicit reference to authorizations to sell collateral if the instrument was not paid at maturity.

Likewise permitted is a “term authorizing a confession of judgment on the instrument if it is not paid when due.” Since Virginia

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Cf. NIL 6 (Va. § 6-358) with UCC 3-112(1)(a).
Cf. NIL 12 (Va. § 6-364) and NIL 19 (Va. § 6-365) with UCC 3-114(1).
Cf. NIL 13 (Va. § 6-365) with UCC 3-115.
Cf. NIL 13 (Va. § 6-365) with UCC 3-114, Comment, Point 2.
UCC 3-114, Comment, Point 2.
UCC 3-114, Comment, Point 2.
Cf. NIL 11 (Va. § 6-369) with UCC 3-114(3).
Cf. NIL 6(4) (Va. § 6-358(4)) with UCC 3-118.
Cf. NIL 6(4) (Va. § 6-358(4)) with UCC 3-118.
Cf. NIL 5(1) (Va. § 6-357(1)) with UCC 3-112(1)(b) and (c).
Cf. NIL 5(2) (Va. § 6-357(2)) with UCC 3-112(1)(d). The first sentence of Comment, Point 2, UCC 3-112 is poorly phrased, reading “As under the original Section 5 (2), paragraph (d) is intended to mean that a confession of judgment may be authorized only if the instrument is not paid when due, and that otherwise negotiability is affected. It would seem that the word “otherwise” should be omitted and the word “affected” changed to “unaffected.”
has recognized the validity of negotiable instruments containing powers of attorney.\textsuperscript{71} It is worthy of note that under UCC 3-109(1)(c) an instrument may contain any acceleration clause, but under UCC 3-112(1)(d) only a term authorizing a confession of judgment on the instrument “if it is not paid \textit{when due}” is permitted.

In \textit{Walker v. Temple}\textsuperscript{72} the court impliedly recognized the validity of a warrant of attorney to confess judgment “at any time,” although confession of judgment was in fact taken after maturity, and the court considered the attorney named to be the agent of the obligor.\textsuperscript{73} It is at least doubtful if a term authorizing a confession of judgment when a default is brought about under an acceleration clause is permitted. “When due” may well refer to the maturity date stated in the instrument.

Also permitted is a term purporting to waive the benefit of any law intended for the advantage or protection of any obligor.\textsuperscript{74} A new term permitted under the UCC is one in a draft providing that the payee by endorsing or cashing it acknowledges full satisfaction of an obligation of the drawer.\textsuperscript{75}

Terms otherwise illegal, however, are not validated by the UCC.\textsuperscript{76}

The provision in the NIL giving the holder an election to require something to be done in lieu of payment of money\textsuperscript{77} has been dropped as being primarily of importance in investment securities and undesirable in commercial paper.\textsuperscript{78}

\section*{B. Construction}

1. \textit{Ambiguous Terms}. The UCC provides rules of construction similar to the NIL for determining the meaning of ambiguities in negotiable instruments.\textsuperscript{79} Where there is doubt whether the instrument is a draft or a note the holder may treat it as either. A draft drawn on the drawer is effective as a note. Handwritten terms control typewritten and printed terms, and typewritten control printed. Words control

\textsuperscript{71}Colona v. Parksley National Bank, 120 Va. 812, 92 S. E. 979 (1917).
\textsuperscript{72}130 Va. 567, 107 S. E. 720 (1921).
\textsuperscript{73}The opinion does not reveal the type of “contract” for the payment of money that was involved.
\textsuperscript{74}Cf. NIL 5(3) (Va. § 6-357(3)) with UCC 3-112(1)(e).
\textsuperscript{75}UCC 3-112(1)(f).
\textsuperscript{76}Cf. NIL 5(3) (Va. § 6-357) last sentence with UCC 3-112(2).
\textsuperscript{77}NIL 5(4) (Va. § 6-357 (4)).
\textsuperscript{78}UCC 3-112, Comment.
\textsuperscript{79}Cf. UCC 3-118 with NIL 17 (Va. § 6-369) and 68 (Va. § 6-420).
figures except that if the words are ambiguous, figures control. Unless the instrument otherwise specifies, two or more persons who sign as maker, acceptor or drawer or indorser and as a part of the same transaction are jointly and severally liable even though the instrument contains such words as "I promise to pay."

2. Payable Through Bank. Under the UCC an instrument "payable through" a bank, or the like, designates that bank as a collecting bank to make presentment, but does not of itself authorize the bank to pay the instrument. This section is new.\textsuperscript{80}

3. Payable At Bank.\textsuperscript{81} Under Section 3-121 the UCC proposes alternative rules, either of which may be used by states adopting the Code.

"Alternative A—
A note or acceptance which states that it is payable at a bank is the equivalent of a draft drawn on the bank payable when it falls due out of any funds of the maker or acceptor in current account or otherwise available for such payment.

"Alternative B—
A note or acceptance which states that it is payable at a bank is not of itself an order or authorization to the bank to pay it."

According to UCC draftsmen, Alternative A states the New York commercial understanding and Alternative B states the understanding in the south and west. Alternative A is in accord with NIL Section 87 (Va. Sec. 6-440) in effect in Virginia. Original section 87, according to the Comment on Section 3-121, has been so extensively amended that uniformity has not been achieved, and in many parts of the country the section has been consistently disregarded in practice. Present practices are well established, with the division along geographical lines. The instruments involved are chiefly promissory notes, which infrequently cross state lines, so that there is no great need for uniformity. This rationale has, however, been criticized and the adoption of a provision essentially similar to Alternative A urged.\textsuperscript{82}

4. Accrual of Cause of Action. In Section 3-122 the UCC makes explicit provision for the time at which causes of action accrue on negotiable instruments and interest rates. The rule that action can be

\textsuperscript{80}UCC 3-120.

\textsuperscript{81}Steffen, Instruments "Payable At" a Bank, 18 U. of Chi. L. Rev. 55-76 (1950). This article criticizes this section as contained in the Spring 1950 draft. Alternative "A" taken in conjunction with other sections of the Code seems to go a long way to meet the author's criticisms.

\textsuperscript{82}Id. at 56-57.
brought on a demand note immediately upon issue, without demand, is continued. However, an exception is made as respects certificates of deposit; following banking custom a demand must be made before any liability is incurred by the bank. A similar provision is contained in Va. Section 8-13 relating to statutes of limitations, which provision would be unnecessary if the UCC were adopted.

Demand on time certificates can only be made on or after the date of maturity. A cause of action against a maker or an acceptor on a time instrument accrues on the day after maturity. A cause of action against a drawer of a draft or an indorser of any instrument accrues upon demand following dishonor; notice of dishonor is a demand. Unless otherwise provided in the instrument, interest runs at the rate provided by law for a judgment from the date of demand in case of a maker of a demand note, and from the date of accrual of the cause of action in all other cases.

The section makes no explicit reference to when the cause of action accrues on paper which has been accelerated.

5. Interest. Section 3-122 (4) of the UCC provides:

"(4) Unless an instrument provides otherwise, interest runs at the rate provided by law for a judgment.

"(a) in the case of a maker of a demand note, from the date of demand;

"(b) in all other cases from the date of accrual of the cause of action."

This section resolves a conflict in the cases by providing that interest on demand notes runs from the date of demand and not the date

63In Mann v. Bradshaw's Adm'r, 196 Va. 551, 118 S. E. 326 (1923) in which the question was not directly involved the court said the cause of action of the last indorser against a prior indorser accrued upon payment by the last indorser. The court held that the cause of action was on the instrument and so covered by the five-year statute of limitations and not the three-year statute on implied contracts.

64See Country Club of Portsmouth, Inc. v. Wilkins, 166 Va. 325, 186 S. E. 23 (1936). Due date clear from terms of acceleration clause.

See also Walker v. Temple, 130 Va. 567, 107 S. E. 720 (1921). Warrant of attorney authorizing confession of judgment "at any time" does not change statute of limitations, which still runs from due date.

65See Smedley, Interest Damages in Virginia, 28 Va. L. Rev. 1138-1166 (1942) for a comprehensive discussion of the subject.

66UCC 3-118(d) continues the rule contained in NIL 17(a) (Va. § 6-369(2)) that when an instrument calls for payment without specifying the date, the instrument is to be construed as providing for interest from its date, or if undated then from its issue. The UCC makes clear that the "judgment rate at the place of payment" is intended.
of the note. Interest on a note with a definite time of payment begins to run on the day after maturity under the UCC; the Virginia cases contain conflicting dicta as to whether interest in such cases runs from the date of receipt of the money\textsuperscript{77} or the date when the loan is payable.\textsuperscript{88}

In Virginia an instrument expressly provided to be "without interest" bears interest after maturity.\textsuperscript{89} The UCC is not clear on this point.

Under Virginia Code Section 8-223 the jury, and perhaps the court, has discretion to fix the time when interest commences and the rate in "any action...on contract."\textsuperscript{90} The section seems to be in fundamental conflict with UCC 3-122(4), and perhaps also with the policy underlying the NIL. Under Virginia law it is not entirely clear whether a jury can handle interest differently from that called for by an express contract provision, or the scope of the discretion that may be exercised when there is no explicit contract provision relating to interest.\textsuperscript{91} If the jury returns a verdict that does not allow interest, the sum found nevertheless bears interest from the date of the verdict. Similarly, if the judgment of the court fails to allow interest, the judgment nevertheless bears interest.

The Virginia law as to the interest rate provided by law for a judgment is not clear. A federal court seems to have taken what may be conflicting views of Virginia law on this point, one view being that the legal rate of 6 per cent is required,\textsuperscript{92} while under the other view an express contract rate will continue after judgment.\textsuperscript{93}


\textsuperscript{78}Chapman's Adm'rs v. Shepherd's Adm'r, 24 Gratt. 377 (1874); Roberts' Adm'r v. Cocke, 28 Gratt. 207 (1877); McVeigh's Ex'r v. Howard, 87 Va. 599, 13 S. E. 31 (1891); Parsons v. Parsons, 167 Va. 374, 189 S. E. 448 (1937); Beale v. Moore, 183 Va. 519, 32 S. E. (2d) 696 (1945).

\textsuperscript{79}Goins v. Garber, 131 Va. 59, 108 S. E. 858 (1921).

\textsuperscript{80}See also Va. § 8-347, which excepts by reference Va. § 6-422 of the NIL from its operation.

\textsuperscript{81}Washington and Old Dominion Railway v. Westinghouse Electric and Manufacturing Co., 120 Va. 620, 91 S. E. 646 (1917); Latham v. Powell, 127 Va. 382, 103 S. E. 698 (1920); Riverside and Dan River Cotton Mills, Inc. v. Thomas Branch & Co., 147 Va. 509, 137 S. E. 620 (1927); Pittston Co. v. O'Hara, 191 Va. 886, 63 S. E. (2d) 34 (1951).


Some amendments of the Virginia statutes would seem to be desirable if the UCC is adopted.94

C. INCOMPLETE INSTRUMENTS

Section 3-115 of UCC provides as follows:

“(1) When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.

“(2) If the completion is unauthorized the rules as to material alteration apply (Sec. 3-407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting.”95

According to subsection (1) while an instrument is “still incomplete in any necessary respect it cannot be enforced until completed…” It is not clear whether this provision would affect the result in Allen v. Rouseville Cooperage Co.96 In that case an instrument was sued upon which was payable “forty-five—after.” The plaintiff in his pleading set forth an exact copy of the note and alleged that the note was payable “forty-five days after date.” Circumstantial evidence indicated that this was the true intention, and the court held that by this allegation the plaintiff “in effect exercises his authority to fill in the blank.”97 The court distinguished Chestnut v. Chestnut,98 in which a note was held inadmissible in evidence which contained the marginal notation, “$1,800. Eighteen hundred dollars,” but which was blank in the body as to the amount payable. The distinction was that in the Chestnut case there was a “variance between the note declared upon and the note offered in evidence.”99

At common law in the United States when an incomplete instrument was negotiated to a holder for value, who was without notice of any limitation upon the authority to complete the instrument other

94UCC 3-122(4) could be amended to provide that interest runs at the rate “of six per centum per annum” instead of the rate “provided by law for a judgment.” Va. § 8-223 should also then be amended to provide that it would be inapplicable to cases arising under the UCC.
95Cf. with NIL 13 (Va. § 6-365), 14 (Va. § 6-366), and 15 (Va. § 6-367).
96157 Va. 355, 161 S. E. 50 (1931).
97Id. 157 Va. at 371.
98104 Va. 539, 52 S. E. 348 (1905).
than that given by the incomplete instrument itself, the authority in such holder to complete it was absolute. It was not a defense against such holder for value that the instrument was not completed strictly in accordance with the authority given. This rule was changed under NIL 14 (Va. Sec. 6-366) so that the person in possession only had prima facie authority to complete the instrument. The holder who takes for value must ascertain at his peril the real authority of the person intrusted with the incomplete instrument.

Under the UCC an unauthorized completion of an incomplete instrument constitutes a material alteration. Even so, a party who is not a holder in due course can enforce the completed instrument according to the authority given if the material alteration is not also fraudulent. If the completion of the instrument is fraudulent, then a party who is not a holder in due course cannot enforce the instrument against any party whose contract has been changed, unless the party has assented or is precluded from asserting the defense. A subsequent holder in due course can enforce the completed instrument, whether the completion was fraudulent or not, either as completed or according to the authority given.

The reference in NIL 14 (Va. Sec. 6-366) to the delivery of a signature on an otherwise blank paper in order that it may be converted to a negotiable instrument has been omitted as involving an obsolete and undesirable practice. “The omission is not intended, however, to mean that any person may not be authorized to write in an instrument over a signature either before or after delivery,” according to the Comment in the UCC. It is difficult to see, nevertheless, how such a result can be reached under the language of the UCC, since a blank piece of paper would not have “contents at the time of signing” that show that it is “intended to become an instrument."

The language of subsection (2), “even though the paper was not delivered” reverses the rule set forth in NIL 15 to the effect that

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100 Frank & Adler v. Lilienfeld, 33 Gratt. 377 (1880).
102 UCC 3-407(2)(b).
103 UCC 3-407(2)(a).
104 This is the interpretation placed on UCC 3-407 in the Comment, Point 4, 3d paragraph. The section quite clearly states that the subsequent holder in due course can enforce the instrument as completed, and it would seem under the actual wording of the text of the section that this is the only remedy of a holder in due course.
105 UCC 3-115, Comment, Point 3.
an incomplete instrument which had not been delivered, if completed and negotiated without authority, was not a valid contract in the hands of any holder as against any person whose signature was placed thereon before delivery. Nondelivery and unauthorized completion after delivery are not, under the UCC, valid defenses against a holder in due course. ¹⁰⁸

The effect of an instrument blank only as to the payee's name is not entirely clear under the UCC. Such an instrument cannot be treated as bearer paper under the UCC, a result sometimes reached under the NIL.¹⁰⁷ Under the UCC the instrument is an incomplete order instrument.¹⁰⁸ Under UCC 3-115(1) the instrument "cannot be enforced until completed."¹⁰⁹ Perhaps, bringing suit upon the instrument would constitute such completion.¹¹⁰

Suppose the maker of a note delivered the note to A, authorizing him to fill in his own name as payee. A fails to do so and transfers the instrument to B for value. It would seem that for B to fill in his own name as payee would be a material alteration as the instrument would be completed "otherwise than as authorized."¹¹¹ Nevertheless, as the filling-in would not be fraudulent, the instrument could be enforced "according to the authority given."¹¹² Yet, under the authority given, the instrument can be completed only by filling in A's name as payee. The transfer would vest in the transferee, B, such rights as the transferor had¹¹³ and the specifically enforceable right to have the unqualified indorsement of the transferor.¹¹⁴ Nevertheless, the difficulty posed by Section 3-115(1) that the instrument cannot be enforced until completed remains, since B's name is written in as payee while the instrument must be enforced as though A's name was written thereon. Under the NIL it would seem there was no unqualified right to fill in the name of a predecessor in title. Yet, in special circumstances this might be done.¹¹⁵ Perhaps, the problem can be worked out under the UCC, but no improvement over the NIL is readily ascertainable.

¹⁰⁶Sutherland, supra, at 245-6.
¹⁰⁷Britton, Bills and Notes 328-9 (1943).
¹⁰⁸UCC 3-111, Comment, Point 2.
¹⁰⁹Britton, supra, at 26 Rocky Mt. L. Rev. 1, 27-28 criticizes this provision as a "triumph of historic formalism over substance."
¹¹²UCC 3-407(1)(a).
¹¹³UCC 3-407(2).
¹¹⁴UCC 3-201(1).
¹¹⁵UCC 3-201(3).
¹¹⁶Britton, Bills and Notes 327-8 (1943).
III. NEGOTIATION AND TRANSFER

A. Negotiation

"Issue" under the UCC "means the first delivery of an instrument to a holder or a remitter."\(^{116}\) "Issue" under the NIL is defined as "the first delivery of an instrument, complete in form, to a person who takes it as a holder."\(^{117}\) The UCC has thus made two changes in the concept of "issue": A remitter may take by issue and an incomplete instrument may be issued.

A "holder" is defined under both the UCC \(^{118}\) and the NIL \(^{119}\) as a person who is in possession of an instrument drawn, issued, or indorsed to him or to his order or to bearer or in blank. By reason of the change in the definition of "issue" a remitter becomes a "holder" under the UCC, whereas he was not under the NIL.

"Negotiation," under the UCC, "is the transfer of an instrument in such form that the transferee becomes a holder."\(^{20}\) The language of the NIL is similar.\(^{121}\) However, the NIL also states that if an instrument is payable to order "it is negotiated by the indorsement of the holder completed by delivery."\(^{122}\) So that the NIL seems to draw a distinction between the "issue" and the "negotiation" of an instrument. "Issue" is the first delivery to a holder, who will ordinarily be the payee. Subsequent transfers between holders constitute negotiations.

If, under the NIL, the first delivery of an instrument to the payee is not a negotiation, and if also in order to be a holder a party must take by negotiation, then the payee cannot be a holder in due course.\(^{123}\) Some courts, including the Virginia court in National Bank of Suffolk v. American Bank and Trust Co., \(^{124}\) in order to permit a payee to be a holder in due course have taken the position that the NIL definition of negotiation is not exclusive and that a payee may take by negotiation.

The UCC provides that bearer instruments may be negotiated by delivery and that "if the instrument is payable to order it is negotiated

\(^{116}\) UCC 3-102(1)(a).
\(^{117}\) NIL 191 (Va. § 6-544).
\(^{118}\) UCC 1-201(20).
\(^{119}\) NIL 191 (Va. § 6-544).
\(^{20}\) UCC 3-202(1).
\(^{121}\) NIL 30 (Va. § 6-382), first sentence.
\(^{122}\) NIL 30 (Va. § 6-382), second sentence.
\(^{123}\) NIL 52 (Va. § 6-404).
\(^{124}\) 165 Va. 710, 177 S. E. 229 (1934).
by delivery with any necessary indorsement." Since no indorsement is necessary in order for the payee to become a holder of the instrument, it would seem that the payee takes by negotiation. If so, the roadblock under the NIL to holder in due course status for payees has been removed on the theory used by the Virginia court in the American Bank and Trust Co. case.

Having opened the road the draftsmen of the UCC chose not to follow it, but instead struck a new path through virgin territory by eliminating the requirement that a holder in due course take an instrument by negotiation. A payee may be a holder in due course, not because he takes by negotiation, but because negotiation is not necessary to holder in due course standing.

What the difference is under the UCC between the "issue" of an instrument and the "negotiation" of the instrument is not readily apparent. And there appears to be no ascertainable reason why any distinction should be made! The whole idea of "issue" as distinguished from "negotiation" should be dropped.

Moreover, if a holder in due course can reach that lofty status without even taking the instrument by negotiation, wherein lies the peculiar significance of negotiability?

B. Transfer

1. General. The transfer of an instrument vests in the transferee such rights as the transferor has therein. It may be the transfer of a limited interest, as a security interest. It may be for value or as a gift.

2. Transfer without indorsement. Any transfer for value, but not as a gift, of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor, unless there was an agreement, express or implied, to the contrary. The type of indorsement to which the trans-

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125 UCC 3-202(1).
126 But see Britton, supra, 32 Tex. L. Rev. 153, 159.
127 UCC 3-302(2) and Comment, Point 3.
129 UCC 3-201(1); see also Kentucky Virginia Stone Company v. Fortner, 159 Va. 234, 165 S. E. 401 (1932). Note payable to Price Stone and Lime Company. Evidence showed that R. N. Price owned the note, which was not indorsed. Held that administrator of Price could enforce note against the maker.
130 Cf. UCC 3-201 with NIL 27 (Va. § 6-379).
131 UCC 3-201, Comment, Point 2.
feree was entitled is not clear under the NIL.\textsuperscript{132} As under the NIL negotiation does not take place until the indorsement is actually made, so that until then the transferee cannot become a holder in due course,\textsuperscript{133} nor is there a presumption that the transferee is the owner.\textsuperscript{134}

3. Shelter. The shelter provision of NIL 58 (Va. Sec. 6-410) under which a holder who derives title through a holder in due course acquires all the rights of such holder in due course in respect to all prior parties is one example of the transferee taking the rights of his transferor, and is continued in the UCC.\textsuperscript{135}

The shelter doctrine is subject to the exception "that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course."\textsuperscript{136} Under Virginia law a fraudulent payee cannot improve his position by routing an instrument through a holder in due course, nor will a third person who ostensibly acts for himself but actually is acting for the fraudulent payee be permitted to acquire the rights of a holder in due course from whom he obtains the instrument. Dictum in the same cases indicates that if a holder in due course transfers the instrument to a party who has notice of the original fraud but was not a party to it, then such a party will not acquire the rights of the holder in due course.\textsuperscript{137}

The same result would follow under the UCC since a party "who as a prior holder had notice of a defense" cannot acquire the rights of a holder in due course.\textsuperscript{138}

C. INDORSEMENT FORMALITIES

1. Indorsements on Separate Instruments. "An indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof," according to the UCC.\textsuperscript{139} This provision would change the result in \textit{Colona v.}
Parksley Nat. Bank,\footnote{Va. 812, 92 S. E. 979 (1917).} in which a signature in a letter of assignment attached to a note was held to be a sufficient indorsement. By implication the Colona case also holds that indorsements may be written on separate papers even though there is room on the instrument for additional indorsements. This question, on which there has been a conflict of authority, is not dealt with in the UCC, so that this implicit holding in the Colona case remains unchanged.

2. Partial Assignments. "An indorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less, it operates only as a partial assignment."\footnote{Colona v. Jordan, 57 Va. 566, 14 S. E. 709 (1892).} This provision in the UCC is similar to that in the NIL, but also states the effect of an attempted negotiation of a part of an instrument. It operates as a partial assignment with the effect prescribed for such assignments under the law of the particular state.\footnote{See supra, p. 15 for discussion with reference to a Virginia case.}

3. Wrong or Misspelled Names. Under the UCC instruments payable to a person under a misspelled or a wrong name may be indorsed by him either correctly or as in the instrument. A person taking the instrument for value may require signature in both names.\footnote{Cf. UCC 3-202(3) with NIL 32 (Va. § 6-384).}

D. Types of Indorsements

1. General. The five kinds of indorsements under the NIL\footnote{NIL 33 (Va. § 6-385).} have been reduced to three under the UCC. Qualified and restrictive indorsements are assimilated to special and blank indorsements. A special indorsement, as under the NIL, specifies the person to whom or to whose order the instrument is payable.\footnote{Cf. UCC 3-204(2) with NIL 34 (Va. § 6-386) and 31 (Va. § 6-383). But see Britton, supra, 32 Tex. L. Rev. 159, 161, who says that permissive use of the signature alone is substituted for what is probably mandatory under the NIL. Professor Britton seems clearly in error on this point since NIL 34 (Va. § 6-386) does not include such a mandatory requirement; in fact it does not refer to the point.} A blank indorsement, as under the NIL, specifies no particular indorsee and may consist of a mere signature.\footnote{See supra, p. 15 for discussion with reference to a Virginia case.} Conditional indorsements are treated in a separate
section under the UCC, but as in the NIL are not defined.\textsuperscript{147}

2. Effect of Special Indorsements on Bearer Paper. Although there is little case law,\textsuperscript{148} it has been thought that under the NIL a special indorsement will control a prior blank indorsement of an instrument payable to order on its face.\textsuperscript{149} This view is made explicit under the UCC.\textsuperscript{150} Under NIL 40, however, an instrument payable to bearer on its face and specially indorsed could, nevertheless, be negotiated by delivery. The UCC changes this rule, providing that any instrument specially indorsed becomes payable to the order of the special indorsee and his indorsement is required to further negotiation.\textsuperscript{161}

Under NIL 35 (Va. Sec. 6-387) a blank indorsement could be converted into a special indorsement by writing over the signature "any contract consistent with the character of the indorsement." This provision has been eliminated from the UCC as being misleading and inducing the writing in of unauthorized terms constituting material alterations of the indorser's contract. The only utility, according to the Comment, of the section was in permitting a holder to name a special indorsee without signing his name, a result that can be accomplished by an indorsement without recourse. Another purpose of the section has been pointed out by Professor Britton, who thinks the section should be restored to the UCC.\textsuperscript{162} Under the section a holder can write in his own name as special indorsee, and thus protect himself in event the instrument is stolen and gets in the hands of a holder in due course. This purpose, under either the NIL or the UCC, can be accomplished by the holder specially indorsing the instrument to himself.

3. Effect of a Conditional Indorsement. The restrictive indorsement which prohibits the further negotiation of the instrument, as "Pay A Only,"\textsuperscript{153} under NIL 36(1) (Va. Sec. 6-388(1)) has been assimilated to a conditional indorsement under the UCC.\textsuperscript{154} This is done by construing such an indorsement as if it read "Pay A on condition that he does not transfer."\textsuperscript{155} Under the UCC a conditional

\begin{enumerate}
\item Cf. UCC 3-205 with NIL 39 (Va. § 6-391).
\item Britton, Bills and Notes 247-250 (1943).
\item NIL 9(5) (Va. § 6-381(5)) and NIL 34 (Va. § 6-386).
\item UCC 3-204 (2).
\item UCC 3-204 (1).
\item Britton, supra, 32 Tex. L. Rev. 153 at 165.
\item Power v. Finnie, 4 Call 411 (Va. 1797) is the only American case involving such an indorsement.
\item UCC 3-205.
\item UCC §-205, Comment, Point 1.
\end{enumerate}
indorsement and one purporting to prohibit further transfer is not effective to prevent further transfer or negotiation, and payment may be enforced in disregard of the limitation. But the indorsee and subsequent transferees other than a collecting or payor bank, take the instrument or its proceeds subject to any rights of the indorser. This is the same result provided for in the NIL as respects conditional indorsements except that under the NIL collecting banks would hold the instrument or its proceeds subject to any rights of the indorser, while under the UCC they do not. Only a collecting bank can be a holder in due course of an instrument with a conditional indorsement or one purporting to prohibit further transfer.

4. "Qualified Indorsements." Although the UCC does not use the term "qualified indorsement," the UCC does provide that words of assignment, condition, waiver, limitation or disclaimer of liability and the like accompanying an indorsement do not affect its character as an indorsement. A conflict under the NIL has been resolved by providing that words of guaranty operate as an indorsement.

5. "Restrictive Indorsements." Section 36 (Va. Sec. 6-388) and 37 (Va. Sec. 6-389) of the NIL stating when an indorsement is restrictive and its effect along with NIL 47 (Va. Sec. 6-399) which provided that an instrument remained negotiable until restrictively indorsed, have been eliminated from the UCC. As has already been mentioned the restrictive indorsement that prohibits further negotiation has been assimilated to the conditional indorsement. The other two types provided for in the NIL, that is, the indorsement that constitutes the indorsee the agent of the indorser ("for collection") and the indorsement that vests the title in the indorsee in trust for or to the use of some other person ("Pay A in trust for B") are covered in UCC 3-206, which reads as follows:

\[\text{References}\]

Under NIL 39 (Va. § 6-391) the payor of an instrument conditionally indorsed could disregard the condition and make payment. The UCC makes explicit, what might be implied under the NIL, that a holder can disregard the condition in enforcing payment from prior parties. See Britton, supra, 32 Tex. L. Rev. 153, 164.

Cf. UCC 3-205 with NIL 39 (Va. § 6-391). The result as respects payor banks was reached because the drawee bank did not take the instrument by negotiation. See Britton, supra, 32 Tex. L. Rev. 153, 165-167.

UCC 3-203, Comment, Point 3. According to this comment it would appear that a payor bank can be a holder in due course. This appears to be erroneous since the paying bank does not take by negotiation and is not a holder.

Cf. UCC 3-202(4) with NIL 38 (Va. § 6-390).

Liability of such an indorser may be affected by the words of guaranty, however, under UCC 3-202(4).
"Section 3-206. Indorsement 'For Collection,' 'for Deposit,' to Agent or in Trust.

"When an indorsement whether blank or special, states that it is 'for collection,' 'for deposit,' or otherwise for the benefit or account or use of the indorser or another person

(a) the first taker under that indorsement must apply any value given by him for or on the security of the instrument in the manner and to the person or account directed by the indorsement;

(b) to the extent that he does so he becomes a holder for value;

(c) later holders for value are not affected by the direction contained in the indorsement unless they have reasonable grounds to believe that a fiduciary has negotiated the instrument in the breach of duty (Subsection (a)(b) of Section 3-304)."

What were formerly restrictive indorsements are treated either as special or blank indorsements with effect given to the language in the indorsement which made the indorsement restrictive under the NIL. Subsequent takers can become holders in due course, contrary to the holdings under the NIL. The first indorsee holds the instrument as a fiduciary and is subject to the duties that relationship imposes. Subsequent holders for value are not affected by the form of the indorsement unless they have notice of the fiduciary's breach of duty.

Instruments entering the banking chain for collection, of course, become subject to Article 4 on Bank Deposits and Collections.

Presumably, the draftsmen of the Code considered that the rules respecting special and blank indorsements were sufficiently explicit to handle "collection" indorsements. Doubt might be expressed, however, whether this is true as respects such an indorsement as "Pay any Bank or Banker" which is not referred to in the UCC. Does such an indorsement specify "the person to whom or to whose order" the instrument is payable, and so constitute a special indorsement? Or, does the indorsement specify "no particular indorsee," and so constitute a blank indorsement? Perhaps, the net effect of Article 3 and Article 4 taken together will make it unnecessary to decide whether "Pay any Bank or Banker" and similar indorsements are special or blank.

See, e.g., Gulbranson Dickinson Co. v. Hopkins, 170 Wis. 326, 175 N. W. 93 (1919).

UCC 3-204. See also UCC 3-102 requiring that an "order" identify the person to pay with reasonable certainty.
E. REACQUISITION

An instrument returned or reacquired by a prior party may be reissued or further negotiated. Intervening parties are discharged as against the reacquiring party and subsequent holders not in due course. The reacquiring party may strike any indorsement not necessary to his title, and if he does so, such intervening parties are discharged as to subsequent holders in due course as well.103

IV. RIGHTS OF A HOLDER

A. GENERAL

Every holder of an instrument, whether he is the owner or not, may transfer or negotiate it, and may discharge it164 or enforce payment in his own name.165

B. HOLDER IN DUE COURSE DEFINED


"(1) A holder in due course is a holder who takes the instrument
(a) for value; and
(b) in good faith including observance of the reasonable commercial standards of any business in which the holder may be engaged; and
(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

"(2) A payee may be a holder in due course.

"(3) A holder does not become a holder in due course of an instrument:
(a) by purchase of it at judicial sale or by taking it under legal process; or
(b) by acquiring it in taking over an estate; or
(c) by purchasing it as part of a bulk transaction not in regular course of business of the transferor.

103Cf. UCC 3-208 with NIL 48 (Va. § 6-400), NIL 50 (Va. § 6-402) and NIL 121 (Va. § 6-474).

164This statement is limited by UCC 3-603 involving claims of third persons to rights in the instrument.

"(4) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased."  

2. Taking for Value. "Consideration" and "value" are distinguished throughout the Article on Commercial Paper. "Consideration" refers to what the obligor has received for his obligation, and is important only on the question of whether his obligation can be enforced against him. "Value" is important only on the question of whether the holder who has acquired that obligation qualifies as a particular kind of holder.

"Section 3-303. Taking for Value.

A holder takes the instrument for value

(a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or

(b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or

(c) when he gives a negotiable instrument for it or makes an irrevocable commitment to a third person."

The apparent conflict in the NIL as to whether an executory promise to give value was itself value is resolved in favor of the view that it is not value. Thus, according to Article 3, the giving of bank credit not drawn upon and which may be revoked is not a taking for value.

However, under UCC 4-208(1)(b) in the Article on Bank Collections a bank has a security interest in an item, or gives value, when "it has given credit available for withdrawal as of right... whether or not the credit is drawn upon and whether or not there is a right of charge-back." Whatever may be the meaning of this language it supersedes the provisions of Article 3 relating to value to the extent of any inconsistency.

Cf. with NIL 52 (Va. § 6-404).

UCC 3-408, Comment, Point 1.

UCC 3-303, Comment, Point 2.

Cf. NIL 25 (Va. § 6-277) with NIL 54 (Va. § 6-405).


UCC 3-103(2) and 4-102(1). Marsh believes that courts could reach the same conflicting results as to whether bank credit is value under the UCC as under the NIL. Marsh, supra, 34 Ore. L. Rev. 93, 42. On the other hand, Britton considers that UCC 303 (a) and 4-208 codify the rule that bank credit is not value and the first-in, first-out rule.
Taking an instrument for collateral security is a taking for value.\textsuperscript{172} A taking in payment or as security for an antecedent claim against any person, whether or not the claim is due, is value.\textsuperscript{173} The language of the UCC somewhat extends the NIL provisions by providing that there is a taking for value even though the claim does not arise out of contract, and is not due, and is a claim against any person.

The UCC explicitly provides that the giving of a negotiable instrument or any irrevocable commitment, as a letter of credit, to a third person constitutes a taking for value.

This section, it will be noted, applies only to holders, defining when they take for value. The UCC recognizes that there may be a transfer for value to a transferee other than a holder. In fact it is the "transfer for value" that determines whether the transferee is entitled to the transferor's indorsement.\textsuperscript{174} Yet the UCC does not define a transfer for value in that context. Presumably, it would be the same as when a holder takes the instrument. By analogy, perhaps, the requirements of a taking for value by a holder could be held applicable to taking for value by a transferee other than a holder. On the other hand, the way is open for a court to define "value" differently when the transfer is to one other than a holder than when it is to a holder. It would seem that Section 3-303 could well be expanded to cover a transferee's taking an instrument for value instead of limiting the section to "holders."

3. \textit{In Good Faith.} Under the NIL the requirements or "good faith" and "without notice" for due course holding are not entirely differentiated since a person may have knowledge of such facts that his action in taking the instrument amounts to bad faith.\textsuperscript{175} Under the UCC "good faith" means "honesty in fact."\textsuperscript{176} This has been the test applied by the Virginia court. "The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a

\begin{itemize}
\item \textsuperscript{172} Accord: Dunnington v. Bank of Crewe, 144 Va. 36, 131 S. E. 221 (1925); Anderson v. Union Bank of Richmond, 117 Va. 1, 83 S. E. 1080 (1915); Colona v. Parksley Nat. Bank, 120 Va. 812, 92 S. E. 979 (1917); City Coal and Ice Co., Inc. v. Union Trust Co. of Maryland, 140 Va. 600, 125 S. E. 697 (1924).
\item \textsuperscript{174} UCC 3-201(3).
\item \textsuperscript{175} NIL 56 (Va. § 6-408).
\item \textsuperscript{176} UCC 1-201(19).
\end{itemize}
speculative issue as to his diligence or negligence."^{177} However, the UCC also provides that the "good faith" requirement includes the "observance of the reasonable commercial standards of any business in which the holder may be engaged." According to the Comment this provision only makes explicit what has been implicit in the case-law.^{178} Fears have been expressed that the change made by the UCC will bring uncertainty in the law and may even represent the substitution of a "suspicious circumstances" test for the "honesty in fact" test.^{179} It would seem, however, that a question of fact is presented whenever a purchaser takes an instrument under "suspicious circumstances." Was the taking in good or bad faith? The UCC provides a serviceable test for resolving this question of fact as does the NIL. The difficulties arise in applying the test, whatever may be the precise phraseology.^{180}

4. Notice to Purchaser. One of the most extensive sections in the Article on Commercial Paper relates to "Notice." It is intended to remove uncertainties in existing law.^{181}


"(1) The purchaser has notice of a claim or defense if (a) the Instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay; . . .

"(5) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim . . .

(d) that an incomplete instrument has been completed, unless the purchaser has notice of any improper completion."

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^{178} UCC 3-302, Comment, Point 1.

^{179} Britton, 49 Northw. U. L. R. 417, 430-432; Marsh, supra, 34 Ore. L. Rev. 33, 37 and 45.

^{180} The Virginia court has held that a purchase of instruments at a considerable discount does not show knowledge of such facts as to constitute bad faith. Moore v. Potomac Savings Bank, 160 Va. 597, 169 S. E. 922 (1933) (notes for $5,000 purchased for $5,400); Fleshman v. Bibb, 118 Va. 582, 88 S. E. 64 (1916) (notes sold at discount of 20 per cent on day following execution, at which time maker did not know of fraud in the transaction); City National Bank of Roanoke, Va. v. Hundley, 112 Va. 51, 70 S. E. 494 (1911) (notes for $2,400 purchased for $1,750); Crum v. Hanna, 140 Va. 366, 125 S. E. 219 (1924) (bond for $500 purchased at discount of $25). However, a makeshift transaction between payee and purchaser for the purpose of cutting off the maker's defenses is not a taking in good faith. Stevens v. Clintwood Drug Co., 155 Va. 353, 154 S. E. 515 (1930); Duncan v. Carson, 127 Va. 306, 103 S. E. 665 (1920) (a transfer from the company to the president was found not to be in good faith).

^{181} UCC 3-304.
Under the NIL it is necessary that the holder take an instrument which is "complete and regular upon its face" in order to be a holder in due course. The UCC eliminates this as a separate requirement of holder in due course status. Instead, it is treated as a part of the question of notice to the purchaser.

"The purchaser has notice of a claim or defense if the instrument is so incomplete... as to call into question its validity, terms or ownership or to create an ambiguity as to the party to pay." Since an incomplete instrument will necessarily be ambiguous as to its terms in some respect, it would seem that its terms will always be called into question so that a purchaser takes with notice of a claim or defense. If this section should be so construed the net result would be that in order to be a holder in due course the purchaser would be required to take an instrument complete on its face, and, probably, without knowledge that the instrument has been completed after issuance.

On the other hand, under the UCC, knowledge that "an incomplete instrument has been completed, unless the purchaser has notice of any improper completion" does not of itself give the purchaser notice of a defense or claim. Under this provision a purchaser would not have notice of a defense or claim if he knew that an entire instrument had been written over a signature.

It would seem that litigation will be inevitable with resultant conflicts in authority under these provisions which are susceptible of such extreme interpretation, depending upon which subsection of Section 3-304 is emphasized.

Another ambiguity lies in the phrase "so irregular as to... create an ambiguity as to the party to pay." This may mean either an ambiguity as to who is the maker or drawer, or as to who is the payee. If the latter, the provision is in direct conflict with subsection (5)(d), whenever the purchaser takes with knowledge that the instrument has been completed by filling in the payee's name. The word "such" in the clause "bears such visible evidence of forgery or alteration" carries the unfortunate connotation that something more than visible evidence of forgery or alteration is required.

6. Notice—a Defense. The UCC states that apart from incomplete and irregular instruments,

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“(1) The purchaser has notice of a claim or defense if...
(b) the purchaser has notice that the obligation of any party
is voidable in whole or in part, or that all parties have been
discharged.”

A purchaser under the UCC “has notice of a claim or defense if...
the purchaser has notice that the obligation of any party is voidable
in whole or in part, or that all parties have been discharged.” Under
this section notice of any defense prevents the holder from being a
holder in due course and subjects him to all claims and defenses. This
would change the result in Moore v. Potomac Savings Bank. In
this case a payee fraudulently secured notes from the maker. The payee
then transferred them to a bank as security for a loan at a usurious
rate of interest. The Virginia court held that the bank could recover
against the maker since it was “not charged with knowledge of defect
in title to the notes in question because it discounted them at a
greater rate of interest than that allowed lenders…” Under the
UCC, notice of the bank that the obligation of the payee was voidable
in part, that is, as respects usurious interest, would seem to be notice
of the defense of the maker, so that no recovery could be had on the
notes.

Although purporting to define notice this section does not do so,
since it defines notice in terms of notice. “The purchaser has notice...
if the purchaser has notice…” Whether notice requires actual know-
ledge, or only “reasonable grounds to believe” as in UCC 3-304(2),
is not made clear.

A holder may become a holder in due course as respects some
parties on the instrument and not as respects others. This occurs when
he takes the instrument with notice of the discharge of some, but not
all of the parties. He takes subject to the defenses of the party dis-
charged, but not subject to defenses of other parties or claims to the
instrument.

7. Notice—A Claim. The UCC states that apart from incomplete
and irregular instruments,

“(2) The purchaser has notice of a claim against the instrument
when he has reasonable grounds to believe
(a) that the transfer to him is a preference voidable under
the law of bankruptcy or insolvency;

180 Va. 597, 169 S. E. 922 (1933).
181 Id. at 605. Although District of Columbia law governed the case the court
considered D. C. law to be the same as that of Virginia. See also Fischer v. Lee,
98 Va. 159, 35 S. E. 441 (1900).
182 See UCC 3-601, Comment, Point 2.
(b) that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty."

"(5) Knowledge of the following facts does not of itself give the purchaser notice of a defense or claim....

(e) that any person negotiating the instrument is or was a fiduciary;...."

Somewhat surprisingly this UCC section does not undertake to state when a purchaser has notice of a "claim," since the two isolated situations covered in UCC 3-304(2) can hardly be considered an exclusive listing. As respects the two listed, "reasonable grounds to believe" gives notice of a claim. Is the same test applicable to notice of other claims or is "actual knowledge" required? Although under UCC 3-304(2) notice of the specified claims does not give notice of defenses, it would seem that this result is required under the definition of holder in due course. A holder cannot be a holder in due course if he has notice of "any defense... or claim..."\(^{186}\)

Knowledge that a fiduciary is negotiating the instrument does not alone give notice of a defense or claim.\(^{187}\) Subsection 2(b) is intended to carry out the policy underlying Section 6 of the Uniform Fiduciaries Act specifying when the purchaser has notice of a claim against the instrument because of reasonable grounds for believing the fiduciary is committing a breach of trust.\(^{188}\) Since UCC 3-304 (2)(b) is limited to claims only, knowledge by a purchaser of actual misconduct by a fiduciary in one respect, that is committing a breach of trust, carries no implication and is not notice to a purchaser that the fiduciary has misconducted himself otherwise, as by fraudulently securing negotiable instruments from a maker. This position seems somewhat inconsistent with that of UCC 3-304 (1) under which notice of any defense is notice of all defenses and claims.

8. Notice—Instrument Overdue. The purchaser of an instrument in fact overdue or dishonored may be a holder in due course if he takes

\(^{250}\) UCC 3-302 (1)(c).


\(^{259}\) Accord: Sawyer v. National Bank of Commerce of Norfolk, Virginia, 166 Va. 439, 186 S. E. 1 (1936). Notes showed that payee was trustee in deed of trust. Purchaser knew payee was unable to meet financial obligations, that he habitually lent money for his mother-in-law, and took note in exchange for another note as security for payee's personal indebtedness to bank. Chase & Co. v. Norfolk National Bank of Commerce and Trusts, 151 Va. 1040, 145 S. E. 725 (1928). Check drawn by agent of company with bank as payee deposited to agent's personal account. Bank held liable to company.
without notice that it is overdue or dishonored. A purchaser has notice that an instrument is overdue if he has reasonable grounds to believe that any part of the principal is overdue, or there is an unsecured default in payment of another instrument in the same series, or that an acceleration has been made, or that he is taking a demand instrument after demand has been made or more than a reasonable length of time from its issue. A reasonable length of time for checks drawn and payable in the United States is presumed to be thirty days.

Knowledge of a default in payment of interest or in payment of any other instrument not of the same series is not of itself notice of a defense or claim, which according to the Comment means that it is not notice that the instrument is overdue. There thus seems to be a conflict between text and comment as to "what it is that notice of default in interest does not give notice of—that the instrument is overdue or that there is a claim or defense." Knowledge of either would bar the purchaser as a holder in due course.

9. Notice—other. Purchasers of instruments conditionally indorsed or indorsed in such a manner as to prohibit further negotiation, except when in the course of bank collections, have notice of a claim against the instrument. A purchaser does not have notice of a defense or claim from the fact alone that an instrument is antedated or postdated; that it is issued or negotiated in return for an executory promise, or accompanied by a separate agreement, unless the purchaser has notice that a defense or claim has arisen from the terms thereof; or that any party signed for accommodation. Filing or recording a document does not of itself constitute notice to a person who would otherwise be a holder in due course. Presumably the Virginia view that a purchaser is not charged with notice of the powers contained in a corporation charter would follow under the UCC, but the point is not made explicit. To be effective, notice must be received at such time and in such manner as to give a reasonable opportunity to act on it.

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180 UCC 3-304(1)(c).
181 Cf. UCC 3-304(4) with NIL 52(2) (Va. § 6-404(2)) and NIL 45 (Va. § 6-397).
182 UCC 3-304(b)(f).
183 UCC 3-304, Comment, Point 8.
184 UCC 3-304(3).
185 City Coal and Ice Company, Inc. v. Union Trust Co. of Maryland, 140 Va. 600, 125 S. E. 697 (1924).
186 UCC 3-304(7).
10. "A payee May be a Holder in Due Course." With this direct approach the UCC resolves the conflict in the cases on the question.\textsuperscript{108} According to the Comment:

"The position here taken is that the payee may become a holder in due course to the same extent and under the same circumstances as any other holder. This is true whether he takes the instrument by purchase from a third person or directly from the obligor. All that is necessary is that the payee meet the requirements of this section."

The full implications of this provision of the UCC are not immediately apparent. The difficulty under the NIL of holding that a payee was a holder in due course arose from the requirement in NIL 52 (Va. Sec. 6-404) that the instrument be "negotiated" to the holder, and under NIL 90 (Va. Sec. 6-382) the negotiation of an order instrument seems to require the "indorsement of the holder." When faced with the problem the Virginia court held that the definition of negotiation in the NIL was not exclusive and a payee could take by negotiation.\textsuperscript{109} Although the definition of negotiation in the UCC is broad enough to cover a transfer to a payee,\textsuperscript{200} the UCC draftsmen have not followed this approach, but instead simply abolished any requirement that a holder in due course take by negotiation.\textsuperscript{201} So that a holder in due course, and a fortiori, a holder, does not have to take an instrument by negotiation. What significance remains to the term "negotiation" is difficult to see.

Even more troublesome, however, is the fact that the UCC provides that the payee dealing directly with the maker may be a holder in due course if he meets the requirement of holding in due course. As a result, in an action by the payee against the maker, by the provisions of UCC 3-307 the maker has the burden of alleging and proving a defense and the payee-holder has the burden of proving he has no notice of the defense.

The situation is especially confusing when want or failure of consideration is the defense. "'Consideration' refers to what the obligor has received for his obligation, and is important only on the question of whether his obligation can be enforced against him."\textsuperscript{202} "Value" is important "only on the question of whether the holder who has ac-

\textsuperscript{108}UCC 3-302(a).
\textsuperscript{109}National Bank of Suffolk v. American Bank and Trust Co. 163 Va. 710, 177 S. E. 229 (1934).
\textsuperscript{200}UCC 3-202(1).
\textsuperscript{201}UCC 3-302, Comment, Point 3.
\textsuperscript{202}UCC 3-408, Comment, Point 1, and UCC 3-303, Comment, Point 2.
quired that obligation qualifies as a particular kind of holder."

Since in an action by the payee against the maker what the payee gave is what the maker received, it does not seem as though the draftsmen have in fact achieved their purpose of drawing a comprehensive distinction between value and consideration.

The broad view of the UCC draftsmen that a payee taking an instrument from the obligor may meet the requirements of due course holding is not necessary since the problem under the NIL arose when the payee did not deal directly with the maker, but through a third person. And it is examples of this type that are given in the UCC Comment. Is this third person the agent of the maker or the payee? Is the knowledge of this third person to be imputed to his principal? This has always been the real problem and it remains unchanged under the UCC for UCC 3-305(2) provides:

"To the extent that a holder is a holder in due course he takes the instrument free from ... all defenses of any party to the instrument with whom the holder has not dealt ...

Controversy will now concentrate on this underlined provision. Have the parties dealt with each other or not?

11. Who Are Not Holders in Due Course. The UCC undertakes to state existing case law as to situations in which the purchaser takes an instrument under unusual circumstances which indicate he is a successor in interest to the prior holder and does not acquire holder in due course status. These situations are: by purchase at judicial sale, taking under legal process, taking over an estate, or purchasing as part of a bulk transaction not in regular course of business of the transferor. The latter has particular application to the purchase by one bank of a substantial part of the paper held by another bank which is threatened with insolvency and seeking to liquidate its assets. This was the situation in Beach v. Bank of Pocahontas and the UCC states the result of that case.

The purchaser of a limited interest, as a security interest, acquires holder in due course status only to the extent of the interest purchased.

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200UCC 3-303, Comment, Point 2.
204UCC 3-303, Comment, Point 2, and UCC 3-408, Comment, Point 1.
205UCC 3-302, Comment, Point 3.
207UCC 3-302(5).
208UCC 3-302, Comment, Point 4.
209157 Va. 274, 160 S. E. 68 (1931).
210Cf. UCC 3-302(4) with NIL 27 (Va. § 6-379).
C. Rights of Holder in Due Course

A holder in due course takes the instrument free from the claims of any person and the defenses of any party with whom the holder has not dealt, except infancy, incapacity, duress, illegality, fraud in the factum, discharge in insolvency proceedings, and any other discharge of which the holder has notice when he takes the instrument. The real defense of nondelivery of an incomplete instrument provided in Section 15 (Va. Sec. 6-367) has been eliminated.211

Real defenses remain, under the UCC, good defenses as against a holder in due course. The extent to which infancy, incapacity, duress, and illegality are real defenses is left to be determined by the law of each state. The UCC, however, undertakes to define "fraud in the factum" as a real defense. In order for fraud to be available as a defense against a holder in due course, the fraud must constitute "such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms."212

Although a real defense based on infancy remains under the UCC, a claim based on infancy is not good against a holder in due course, since he takes free of all valid claims on the part of any person.213

This provision would change the result in Strother v. Lynchburg Trust and Savings Bank.214

Negotiation is effective to transfer an instrument although made by an infant, a corporation exceeding its powers, or any other person without capacity, or although the instrument was obtained by fraud, duress, mistake, in an illegal transaction, or in breach of duty,215 and even though the transaction is entirely void as to such person.216

In the Strother case the lands of an infant were sold under decree of court, the court directing that coupon bonds be taken in pay-

212 UCC 3-305(2)(c).
213 UCC 3-306(a).
214 155 Va. 829, 156 S. E. 426, 73 A. L. R. 166 (1931).
215 UCC 3-207.
216 Id., Comment, Point 1.
ment and delivered to the infant when he reached his majority. The Commissioner appointed to make the conveyance procured the infant's indorsement on the bonds and pledged them as collateral to a bank to secure his personal loan. On reaching his majority the infant endeavored to disaffirm his indorsement and recover the bonds from the bank. The Virginia court held that the infant's indorsement, under the NIL, was effective so that a negotiation of the bonds ensued, but that the transfer could be disaffirmed and the infant could recover back the bonds even from the holder in due course.

Under the UCC the infant would have a defense in an action brought against him on his contract of indorsement, but his claim to recover the bonds would be cut off by a holder in due course. Whether the result reached by the Virginia court or the one that would be reached under the UCC is more desirable seems debatable since the equities involved are so nearly in balance. Nevertheless, certain implications of the UCC position may well be considered.

Could the infant recover back the money if he disaffirmed after the holder in due course has collected on the instrument from the maker? It would seem not, if the purpose of the rule is to be given effect. Yet does not this present the anomalous situation of a negotiable instrument having greater currency than cash itself? If an infant enters into a voidable transaction with a party who does not know of his infancy and pays cash, the transaction can be disaffirmed and the cash recovered back. But if the infant in the same transaction gives a negotiable instrument, whether his own or that of another person, it cannot be recovered back, for under UCC 3-305(1) a holder in due course takes an instrument free of all claims to it on the part of any person, and not just the claims of persons other than the party with whom he dealt. If the person with whom the infant dealt transfers the instrument to a third person or cashes the infant's check, can the infant then disaffirm and recover back the proceeds? To allow this would seem to defeat the policy underlying the UCC provisions on the subject. Yet not to allow it would mean that a person is better protected when he takes a negotiable instrument than when he takes cash from an infant.

D. Rights of One Not Holder in Due Course

Unless a person qualifies as a holder in due course in his own right or by transfer from a holder in due course he takes an instrument subject to all valid claims on the part of any person, and all defenses of any party which would be available in an action on a simple contract, including want or failure of consideration, nonperformance
of any condition precedent, non-delivery, or delivery for a special purpose. He also takes subject to the defense that he or a person through whom he holds the instrument acquired it by theft.

A party liable on the instrument cannot himself assert as a defense the claim of any third person, except that the instrument was acquired by theft, unless the third person himself defends the action.217

The UCC continues the rule of the NIL that as against a party other than a holder in due course nondelivery, or a conditional delivery, or a delivery for a special purpose only may be shown as a defense.218 The UCC makes explicit, however, that conditional delivery refers only to a condition precedent,219 and not to a condition subsequent.220 The UCC does not endeavor to distinguish a condition that is precedent from one that is subsequent.

E. Procedure

1. Burden of Establishing Signatures, Defenses and Due Course.221 “Burden of establishing” under the UCC means “the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence.”222

“(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue
(a) the burden of establishing it is on the party claiming under the signature; but
(b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.”

218 Cf. UCC 3-306(c) with NIL 16 (Va. § 6-368).
220 Accord: Clark v. Miller, 148 Va. 83, 92 S. E. 556 (1927) and Continental Trust Co. v. Witt, 139 Va. 458, 124 S. E. 265 (1924) (oral evidence that instruments not to be paid under certain circumstances held inadmissible under parol evidence rule); Barrett v. Vaughan & Co., 163 Va. 811, 178 S. E. 64 (1935) and Crafts v. Broadway National Bank of Richmond, Va., 142 Va. 702, 128 S. E. 364 (1925) (oral evidence that collateral would be exhausted before the note was enforced held inadmissible under parol evidence rule).
221 Cf. UCC 3-307 with NIL 59 (Va. § 6-411).
222 UCC 1-201(8).
Although not covered by the NIL, under Va. Section 8-114 signatures are admitted unless "denied by an affidavit accompanying the plea putting it in issue." Virginia practice only requires that the genuineness of the signature be put in issue; the UCC requires that the effectiveness of the signature be specifically denied. The UCC does not require verification, which is now required in Virginia.

In Hillman v. Cornett\textsuperscript{223} it was held that once a signature was put in issue by the pleadings, the burden of proving the signature is on the plaintiff and "in the absence of any evidence of the genuineness of the signature... judgment should have been given for the defendant."\textsuperscript{224} This rule would be changed for under the UCC the party claiming under a signature is aided by a "presumption." \textsuperscript{225} "'Presumption' or 'presumed' means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence."\textsuperscript{226} So, under the UCC the party denying a signature must make a sufficient showing in support of the denial as would support a finding in his favor before the plaintiff is required to produce any evidence, with the presumption requiring a finding for the plaintiff. Once such evidence is introduced the burden of establishing the signature by a preponderance of the total evidence is on the plaintiff.\textsuperscript{226} The exception in the UCC with reference to the denial of signatures of a dead person or an incompetent, in which case there is no presumption that the signature is genuine or authorized, would seem to be in accord with Virginia law as to all cases in which signatures are denied.

If the UCC is adopted in Virginia, it would seem desirable to amend Va. Section 8-114 so as to exclude cases falling under UCC 3-307(1)(a), the latter being inconsistent with the interpretation placed on Va. Section 8-114.

When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.\textsuperscript{227} This is in accord with the Virginia law as stated in Holdsworth v. Anderson Drug Co.\textsuperscript{228} A transferee who is not a holder by establishing his right to the instrument, accounting for the absence of any necessary indorsement, establishes that he has the rights

\textsuperscript{223}197 Va. 200, 119 S. E. 74 (1923).
\textsuperscript{224}Id. at 203.
\textsuperscript{225}UCC 1-201(31).
\textsuperscript{226}UCC 3-307, Comment, Point 1.
\textsuperscript{227}UCC 3-307(1)(b).
\textsuperscript{228}18 Va. 359, 87 S. E. 565 (1916).
of a holder and is entitled to recover unless the defendant establishes a defense.\textsuperscript{229}

The defendant has the burden of introducing evidence of a defense and of establishing it by a preponderance of the evidence.\textsuperscript{230} In the light of this provision no explicit reference is made to every negotiable instrument being deemed prima facie to have been issued for a valuable consideration.\textsuperscript{231} The burden of establishing want or failure of consideration is on the defendant.\textsuperscript{232} The plaintiff may recover on an instrument, without introducing any evidence, even though the defendant has introduced some evidence of a defense.\textsuperscript{233} If the plaintiff endeavors to meet the defense by establishing that he has the rights of a holder in due course, he must do so by introducing and establishing by a preponderance of the evidence each element of due course holding, that is, that he or a prior party took the instrument for value, in good faith and without notice.\textsuperscript{234}

V—LIABILITY OF PARTIES

A. SIGNATURES

1. Form. Under both the NIL and the UCC it is provided that no person is liable on a negotiable instrument unless his signature appears thereon.\textsuperscript{235} Without specific reference to any section of the NIL the Virginia court held in \textit{Parksley National Bank v. Chandler}'s

\textsuperscript{229}UCC 3-307, Comment, Point 2.
\textsuperscript{231}NIL 24 (Va. § 6-376). See Murphy’s Hotel Company, Inc. v. Herndon’s Administrator, 130 Va. 565, 91 S. E. 634 (1937); Reid v. Windsor, 111 Va. 825, 63 S. E. 1101 (1911). See also Brenard Manufacturing Co. v. Brown, 120 Va. 757, 92 S. E. 850 (1917); Ford v. Engleman, 118 Va. 89, 86 S. E. 852 (1915), to the effect that want or failure of consideration is a defense.
\textsuperscript{233}Cf. UCC 3-401 with NIL 18 (Va. § 6-370).
Admr's\textsuperscript{236} that an oral guaranty of payment of a note was enforceable against the guarantor, the Statute of Frauds being satisfied. The Comment in the UCC states that this result remains unchanged.

A signature may be made by using any name, including a trade or assumed name, and may be by a mark.\textsuperscript{237}

A signature is an indorsement unless the instrument clearly indicates that a signature is made in some other capacity.\textsuperscript{238} In \textit{Colona v. Parksley National Bank}\textsuperscript{239} the Virginia court held that certain signatures on the face of a note were made in the capacity of indorsers and not makers. This result might have been reached from an examination of the instrument alone. However, the court appears also to have permitted parole evidence to show the intention of the parties. According to the Comment to the UCC, "Parole evidence is not admissible to show any other capacity" than indorsement. "The question is to be determined from the face of the instrument alone, and unless the instrument itself makes it clear that he has signed in some other capacity the signor must be treated as an indorser."\textsuperscript{240} Literally construed the UCC comment would not permit the introduction of parole evidence to show that a person signed in a capacity other than an indorser, but would permit parole evidence to show that the person signed as indorser, which was the situation in the \textit{Colona} case. Although susceptible of this construction the Comment probably is intended to mean that parole evidence is inadmissible in either event, and the capacity in which a party signs must be determined solely from the face of the instrument.

A signature may be made by an agent or other authorized representative and his authority established as in other cases of representation. No particular form of appointment is necessary.\textsuperscript{241} An authorized representative who signs his own name is personally liable unless the instrument shows the name of the person represented and shows that the signature is made in a representative capacity.\textsuperscript{242} "The name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative

\textsuperscript{236}170 Va. 394, 196 S. E. 676 (1938).
\textsuperscript{237}Cf. UCC 3-401 with NIL 18 (Va. § 6-376).
\textsuperscript{238}Cf. UCC 3-402 with NIL 17(6) (Va. § 6-369(6)) and NIL 63 (Va. § 6-415).
\textsuperscript{239}120 Va. 812, 92 S. E. 979 (1917).
\textsuperscript{240}UCC 3-402, Comment.
\textsuperscript{241}Cf. UCC 3-403(1) with NIL 19 (Va. § 6-371).
\textsuperscript{242}Cf. UCC 3-403(2) with NIL 20 (Va. § 6-372). Accord: Hawthorne v. Austin Organ Co., 71 F. 2d 945 (4th Cir. 1934).
capacity.” This provision of the Code would leave unchanged the result in Coal River Collieries v. Eureka Coal and Wood Co., in which the president’s signature followed that of the corporation, but without revealing the “office” of the signer. The UCC eliminates NIL dealing with signatures by procuration as involving a practice unknown in the United States.

2. Unauthorized Signatures. An unauthorized signature, under the UCC, is one “made without actual, implied or apparent authority and includes a forgery.” Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it. The UCC takes the position, however, that an unauthorized signature operates as the signature of the unauthorized signer in favor of any person who in good faith pays the instrument or takes it for value. The UCC settles a conflict by providing that an unauthorized signature may be ratified for all purposes of the Article on Commercial Paper, including relieving the unauthorized signer from liability on his signature. Such ratification does not affect the rights of the person ratifying against the actual signer nor the provisions of the Criminal Law.

3. Imposters: Fictitious Payees. The UCC has adopted a new approach to the problem of impostors and fictitious payees, providing as follows:

“Section 3-405. Impostors; Signatures in Name of Payee.

“(1) An indorsement by any person in the name of a named payee is effective if

(a) an impostor by use of the mails or otherwise has induced

243UCC 3-403(2).
245UCC 1-201(43).
246UCC 3-401(1). Accord: Central National Bank of Richmond v. First and Merchants National Bank of Richmond, 171 Va. 289, 198 S. E. 883 (1938); Hillman V. Cornett, 137 Va. 200, 119 S. E. 74 (1923); Pettyjohn v. National Exchange Bank of Lynchburg, 101 Va. 111, 43 S. E. 203 (1903) (silence must amount to bad faith in order to preclude the person whose name has been forged from denying his signature). See also Shepherd v. Mortgage Security Corporation of America, 139 Va. 274, 123 S. E. 553 (1924) (defendant’s signature forged as maker, but genuine as indorser, held liable to bona fide purchaser on indorsement).
247UCC 3-404(1).
248UCC 3-404(2).
the maker or drawer to issue the instrument to him or his
confederate in the name of the payee; or
(b) a person signing as or on behalf of a drawer intends the
payee to have no interest in the instrument, or
(c) an agent or employee of the drawer has supplied him
with the name of the payee intending the latter to have no
such interest."

"(2) Nothing in this section shall affect the criminal or civil
liability of the person so indorsing."

The UCC abolishes any distinction between instruments secured
to the order of specific payees by impostors acting through the mails
and acting face-to-face, adopting the rule that has generally prevailed
in the face-to-face situations. Imposture, according to the Comment,
refers to impersonation and does not include a false representation
that the party is the authorized agent of the payee. "The drawer who
takes the precaution of making the instrument payable to the prin-
cipal is entitled to have his indorsement."

Whereas under the NIL, instruments payable to fictitious payees
were bearer instruments, not requiring indorsements, the UCC
provides that they are order instruments so that indorsements are
necessary to negotiation. However, indorsements by any person are
effective. Thus, the result reached in Norton v. City Bank & Trust Co.
would remain unchanged, but the result would be reached by a dif-
ferent road under the UCC.

Subsection (1)(b) restates the substance of NIL 9(3) (Va. Sec.
6-361(3)) but limits its application to drafts only. Subsection (1)(c),
which likewise is limited to drafts, changes NIL 9(3) in substantially
the same way as many states have done, but not Virginia. Under the
NIL an instrument is payable to a fictitious or non-existing person only
if such fact, that is, that the ostensible payee is to have no interest
in the instrument, is known to the person making it so payable.
Under the UCC this rule is expanded to include situations when an
agent or employee of the drawer has supplied the drawer with the
name of the payee, the agent or employee intending that the payee
shall have no interest in the proceeds, while the actual drawer is
deceived, believing that he is making a draft payable to a real payee.

230UCC § 3-405, Comment, Point 2.
231NIL 9(3) (Va. § 6-361(3)).
232294 Fed. 839 (4th Cir. 1923).
B. Alteration

1. Negligence Contributing to Alteration or Unauthorized Signature. By a new provision the UCC adopts the doctrine of Young v. Grote. Any person whose negligence substantially contributes to a material alteration or an unauthorized signature is precluded from asserting the alteration or unauthorized signature against a holder in due course, a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of his business. A duty of care is thus imposed on persons making negotiable instruments, but no effort is made to define negligence. Negligence has usually been found where spaces have been left in the body of the instrument in which words or figures may be inserted. The section is not intended to require any unusual precautions as the use of sensitized paper, indelible ink, or protectograph. The section is to extend to situations in which a party has notice of forgeries of his signature and is negligent in failing to prevent further forgeries and negligently mailing an instrument to the wrong person with the same name as the payee.

2. Alteration. The UCC substitutes a general definition for material alteration in place of the list of illustrations contained in the NIL. An alteration is material which "changes the contract of any party thereto in any respect," including a change in the number or relations of the parties, unauthorized completion of an incomplete instrument, or adding to or removing any part of the writing as signed.

The severe rule contained in NIL 124 (Va. Sec. 6-477) that an in-

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125 Bing. 253 (1827).
126 UCC 3-406.
127 Hoffman v. Planters National Bank, 99 Va. 480, 39 S. E. 134 (1901) suggests that the maker of a note who leaves spaces through careless execution of the instrument might be held liable on the instrument. The Code takes this view as to drafts, but not as respects notes. It is not entirely clear under the Code whether the same rule might be applied to notes, by analogy, or whether the limitation in the UCC to Code is intended to be exclusive.
130 Accord: Harnsberger v. Nicholas, 176 Va. 255, 10 S. E. (2d) 873 (1940) (changing due date from 10 years after date to 1 year after date); Stegel v. Union Bank Trust Co., 165 Va. 417, 176 S. E. 438 (1934) (notation that interest has been paid not a material alteration).
instrument that has been materially altered without the assent of all parties is avoided as against prior parties except as against a party who has himself made, authorized, or assented to the alteration is changed in the UCC. To have any effect under the UCC the alteration must be both fraudulent and material and be made by a holder, spoliation not affecting the holder. Even then only a party whose contract is thereby changed, and who has not assented or is not precluded from setting up the defense is discharged. 260 Otherwise, the instrument can be enforced according to its original tenor, or as respects incomplete instruments according to the authority given.

A subsequent holder in due course may in all cases enforce the instrument according to its original tenor 261 and when an incomplete instrument has been completed he may enforce it either as completed or according to the authority given.

In *Harnsberger v. Nicholas*, 262 an innocent material alteration was held to avoid the instrument, but recovery could still be had on the underlying obligation. Under the UCC this result would be reached directly by allowing recovery on the instrument according to its original tenor.

**C. Acceptances**

1. General. An acceptance, under the UCC, "is the drawee's signed engagement to honor the draft as presented." 263 The acceptance must be written on the draft under the UCC, thus eliminating the "virtual" or "collateral" acceptances provided for in the NIL. 264 However, the UCC provides that liability in contract, tort, or otherwise arising from any letter of credit or other obligation or representation is not affected. 265 The front door having been closed on the "virtual acceptance," this provision may leave the back door ajar to its reception. 266 The UCC has eliminated NIL 137 (Va. Sec. 6-490), under which

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260 Accord: Hoffman v. Planters National Bank, 99 Va. 480, 39 S. E. 134 (1901) (alteration of name of payee is a material alteration changing the relations of the parties as respects the maker).


264 Cf. UCC 3-410(1) with NIL 132 (Va. § 6-485) and 191 (Va. § 6-544).

267 NIL 134 (Va. § 6-487) and 135 (Va. § 6-488). See Jones v. Crumpler, 119 Va. 143, 89 S. E. 232 (1916), NIL 133 (Va. § 6-486) has also been eliminated; under this section a holder could require an acceptance on the bill and treat a refusal to so accept as a dishonor.

269 UCC 3-409(2) and UCC 3-410, Comment, Point 3.

266 As respects innocent material alterations the UCC opens the front door to recovery on the instrument.
some courts held that a drawee retaining an instrument more than twenty-four hours accepted it by "retention." A signature alone is a sufficient acceptance under the Code, whereas the NIL somewhat ambiguously referred to an acceptance as being "in writing and signed by the drawee."

A draft may be accepted although it has not been signed by the drawer, or is otherwise incomplete, or is overdue, or has been dishonored. Where the draft is payable after sight and the acceptor fails to date his acceptance the holder may complete it by supplying a date in good faith. An acceptance becomes operative when completed by delivery or notification.

The UCC abolishes the "qualified acceptance." The holder may refuse any preferred acceptance that varies the draft in any manner and treat the draft as dishonored, in which case the drawee is entitled to have his acceptance cancelled. The holder may assent to an acceptance that varies the draft which will be effective against the acceptor, but by doing so the holder discharges each drawer or indorser who does not affirmatively assent, changing the NIL under which silence is deemed an assent. Under the UCC, however, a draft is not varied by an acceptance to pay at any bank in continental United States; under the NIL an acceptance was unqualified if it was to pay at a particular place anywhere, "unless it expressly states that the bill is to be paid there only and not elsewhere."

2. Certification of Checks. The certification of a check under the UCC is an acceptance instead of the "equivalent of acceptance" as under the NIL. The rule of NIL 188 (Va. Sec. 6-542) that a certification procured by the holder discharges the drawer and prior endorsers is continued. According to the Comment an indorsement with

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267 Under UCC 3-419(1)(a) a refusal to return the instrument on demand constitutes a conversion.
268 NIL 132 (Va. § 6-485).
269 Cf. UCC 3-410(1) with NIL 138 (Va. § 6-491).
270 Cf. UCC 3-410(3) changing NIL 138 (Va. § 6-491), last sentence, which uses the date of first presentment in the absence of agreement to the contrary. The Comment to the UCC says parole evidence is inadmissible to show an agreement not written on the draft.
271 This is implied in NIL 191 (Va. § 6-544).
272 Cf. UCC 3-412 with NIL 139 (Va. § 6-492), 140 (Va. § 6-493), and NIL 141 (Va. § 6-494).
273 Cf. UCC 3-412(1) with NIL 142 (Va. §§ 6-495).
274 NIL 142 (Va. § 6-495).
275 NIL 140 (Va. § 6-493).
276 Cf. UCC 3-411(1) with NIL 187 (Va. § 6-541).
the words "after certification" will continue the indorser's liability even after the holder obtains certification. The UCC states the generally accepted rule that a bank has no obligation to certify a check unless otherwise agreed, in which case it may be liable for breach of the agreement. Recognizing banking practice, the UCC provides that "A bank may certify a check before returning it for lack of proper indorsement. If it does so the drawer is discharged." This protects the drawer from a continuing contingent liability.

3. Drafts as Assignments. Article 3 of the UCC, like the NIL, provides that a check or other draft does not in itself operate as an assignment of any funds in the hands of the drawee, so that the drawee is not liable to the holder for dishonor. The drawee is not liable until he accepts the instrument, as by the certification of a check.

Section 2-506(1) of the Article on Sales provides that "A financing agency by making payment or advances against a draft which relates to a shipment of goods acquires to that extent the shipper's rights in the goods and his right to have the draft honored by the buyer..." The Comment does not make clear what is meant by the seller's "right to have the draft honored by the buyer." The provision could mean that a draft drawn by a seller on a buyer of goods operates as an assignment, so that the scope of UCC 3-411 in Article 3 would be limited.

D. Contracts of Parties

1. Maker, Drawer and Acceptor. The contract of maker, drawer, and acceptor are substantially the same under the UCC as under the NIL. Both maker and acceptor engage to pay the instrument according to its tenor at the time of his engagement. The UCC resolves a conflict in the cases under the NIL as to whether the acceptor engages to pay an instrument as originally drawn, or if altered, according to its tenor at the time of his acceptance. The latter view is accepted.

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277 UCC 3-411(2).
278 UCC 3-411(3).
279 Id., Comment, Point 3.
281 Reaves Warehouse Corp. v. Easley, 150 Va. 256, 142 S. E. 356 (1928).
283 Cf. UCC 3-419(1) with NIL 60 (Va. § 6-412) and 61 (Va. § 6-413).
A drawer engages that upon dishonor of the draft and the taking of the necessary steps of diligence he will pay the draft. This liability may be disclaimed by drawing without recourse.\footnote{Cf. UCC 3-413(2) with NIL 61 (Va. § 6-413).}

In any of the above contracts the party admits as against subsequent parties, including a drawee, the existence of the payee and his then capacity to indorse.

2. Indorser. Under the UCC, as under the NIL, by indorsement the indorser engages that upon dishonor, if the necessary steps of diligence are taken, he will pay the holder according to the tenor of the instrument at the time of his indorsement.\footnote{Cf. UCC 3-414 with NIL 66 (Va. § 6-418), last sentence. Accord: Shepherd v. Mortgage Securities Corp. 139 Va. 274, 123 S. E. 553 (1924).} Under the UCC this contract runs in favor of any subsequent indorser who takes up the instrument, even though he was not obliged to do so, whereas under the NIL the contract only runs in favor of any subsequent indorser who may be compelled to pay.\footnote{Cf. UCC 3-414(1) with NIL 66 (Va. § 6-418).}

Under both the UCC and the NIL indorsers are liable to one another in the order in which they indorse, which under the UCC is presumed to be the order in which their signatures appear on the instrument. Parole evidence is admissible to show that in fact they indorsed in a different order or that they otherwise agreed as to their liability to one another.\footnote{Cf. UCC 3-414(2) with NIL 68 (Va. § 6-420). Accord: Mann v. Bradshaw's Adm'r, 136 Va. 351, 118 S. E. 326 (1923); Cox v. Hagan, 125 Va. 656, 100 S. E. 666 (1919); Alphin v. Lowman, 115 Va. 441, 79 S. E. 1029 (1913) (agreement as to liability not within Statute of Frauds).}

By an indorsement without recourse the indorser makes no contract of indorsement, that is, he does not engage to pay if the instrument is dishonored,\footnote{Cf. UCC 3-414(1) with NIL 38 (Va. § 6-399) and NIL 65 (Va. § 6-417).} and he warrants that he has no knowledge of any defense by any party good as against him.\footnote{UCC 3-417(3).} The other warranties are the same.

Under UCC 3-414 relating to contracts of indorsement it would seem that words similar in meaning to "without recourse" are sufficient, but under the warranty section, UCC 3-417 (3), there is no provision for words of similar meaning. It is not clear whether this difference is intentional or not.

3. Accommodation Party. Under the UCC "An accommodation party is one who signs the instrument in any capacity as surety for
another party to it."290 By using the word "surety" the UCC recognizes that accommodation parties are always sureties and may be compensated. Under the NIL the accommodation party must sign the instrument "without receiving value therefore."291 The UCC endeavors to incorporate the entire background of the law of suretyship as applied to negotiable instruments.292 This view of the UCC would affect the reasoning of the Virginia court in Barrett v. Vaughan & Co.,293 in which it was said that an indorser guaranteeing payment on an instrument, "has voluntarily made himself primarily liable thereon, hence the question of whether time was extended to the makers is immaterial."294

Under the language of the UCC the party accommodated must also be a party to the instrument in order for there to be an accommodation party. This probably is not necessary under the language of the NIL.295 The effect of the change on such a case as Wilson v. Stowers296 is not clear. In this case Stowers, as maker, gave a note payable to Wilson, as payee, for the accommodation of Dutton, who was not a party to the instrument. The Virginia Court held that Stowers was liable to Wilson on the note as an accommodation party under NIL 29 (Va. Sec. 6-381), consideration having moved from Wilson to Dutton. Under the UCC it would seem that Stowers could not be treated as an accommodation party since Dutton, the party accommodated, was not a party to the instrument. Want of consideration under the UCC is a defense against any person not having the rights of a holder in due course and "consideration" refers to what the obligor has received for his obligation.297 From Stowers' standpoint, then, there was no consideration and he has a valid defense if Wilson, the payee, is not a holder in due course. Since under the UCC a payee may be a holder in due course if the instrument is taken for value, in good faith, and without notice, it may be that Wilson is a holder in

290UCC 3-415(1).
291NIL 29 (Va. § 6-381).
292UCC 3-415, Comment, Point 1. Accord: Ward v. Bank of Pocahontas, 167 Va. 169, 187 S. E. 491 (1936). Under suretyship law a failure or delay in resorting to collateral security available to holder does not discharge an indorser. See Va. § 49-25 under which a "surety, guarantor or endorser" may require a creditor to take action.
293163 Va. 811, 178 S. E. 64 (1935).
294Id. at 818. The result of the case, however, would be the same since it appears that the indorser had also agreed to extensions of time.
295NIL 29 (Va. § 6-381).
296161 Va. 418, 170 S. E. 745 (1933).
297UCC 3-408 and Comment, Point 1.
due course. The consideration moving from Wilson to Dutton would constitute value; he took the instrument in good faith; and so the principal question is whether he took the instrument without notice of a defense.\textsuperscript{208} Answering the question of whether or not Wilson took the instrument with notice of a defense necessarily involves circuitous reasoning in which the premise assumed will dictate the conclusion. If Stowers has a defense, then Wilson has notice of it and is not a holder in due course, and so the defense is good. If Stowers does not have a defense, then Wilson does not have notice of a defense and is a holder in due course, and the defense is not good.

With the difference already noted, the UCC like the NIL provides, that when an instrument is taken for value before it is due the accommodation party is liable in the capacity in which he has signed, even though the taker knows of the accommodation.\textsuperscript{209} Consideration is not necessary to the contract of an accommodation party.\textsuperscript{210} An indorsement not in the chain of title is notice, under the UCC, of its accommodation character;\textsuperscript{211} an accommodation party is not liable to the party accommodated, and if he pays the instrument he has a right of recourse against the party accommodated.\textsuperscript{212} With these provisions in the Code, NIL 64 (Va. Sec. 6-416) relating to the liability of an irregular indorser is eliminated.

Section 3-415(3) of the UCC seems to change the rule in Virginia that parole evidence is inadmissible to show accommodation as against a party who did not know of the accommodation at the time he took the instrument.\textsuperscript{213} But the precise nature of the change is not clear because of the ambiguity with which the UCC provision is phrased. This section of the UCC provides:

"As against a holder in due course and without notice of the accommodation, oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges

\textsuperscript{208}UCC 3-302 (1) and (2).
\textsuperscript{211}UCC 3-415(4).
\textsuperscript{212}UCC 3-415(5). This provision is intended to change the result of such cases as Quimby v. Varnum, 190 Mass. 211, 76 N. E. 671 (1906), which held that the accommodation party had no rights on the instrument against the accommodated party since he had no former rights to which to be remitted under NIL 121 (Va. §5-474).
dependent on his character as such. In other cases the accommoda-
tion character may be shown by oral proof.”

The only reference to this subsection in the Comment states that
“Under subsection (3) except as against a holder in due course with-
out notice of the accommodation, parol evidence is admissible to
prove that the party has signed for accommodation.” If this is what
the text of the UCC section means, it would seem that the language “to
give the accommodation party the benefit of discharges dependent
on his character as such” is unnecessary and confusing. As worded, the
phrase in the second sentence, “in other cases” is very ambiguous.
(a) It may refer to cases in which parol evidence is sought to be in-
troduced against a party other than the one designated in the first
sentence (holder in due course without notice of the accommodation),
or (b) it may refer to cases in which parol evidence is sought to be
introduced for a purpose other than that listed in the first sentence
(to secure benefit of discharge dependent on status as accommodation
party), or (c) it may refer to cases involving the use of parol evidence
against a person and for a purpose other than those referred to in
the first sentence. These ambiguities are illustrated by the facts in the
Virginia case of Elswick v. Combs. The receiver of an insolvent
bank held notes signed by T. C. Elswick and indorsed by Gusta Els-
wick, his wife, and B. E. Elswick, their son; the opinion does not dis-
close who was named as payee in the notes. The Elswicks endeavored
to set-off a deposit belonging to Gusta against liability on the note.
Under Virginia law the deposit of an indorser cannot be set-off
against the liability of a solvent maker, unless the indorser is the
principal debtor, with the maker an accommodation party. The Vir-
ginia court held that parol evidence was inadmissible to show a rela-
tionship of the parties other than that disclosed by the instrument,
unless the holder took the instrument knowing of the accommoda-
tion. Under the UCC, on these facts, it would seem that parol evidence
would be admissible to establish the defense if the UCC section is in-
terpreted as in (a) above, but it would not be admissible if interpreted
as in (b) or (c) above, since the benefit of the discharge does not de-
pend on the character of an accommodation party as such. This is,
of course, assuming that the bank is not a holder in due course, which
under the UCC it might be even though named as payee in the note.

The section, when read in conjunction with UCC 3-305 on the
rights of a holder in due course distinguishes between two types of

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304 UCC 3-415, Comment, Point 1.
holders in due course; those who take with notice and those who take without notice that there is an accommodation party on the instrument. The former are subjected to "suretyship" defenses and the latter are not. Notice of the accommodation received after the instrument is acquired by a holder in due course is apparently without effect. Such an interpretation brings the section into conflict with Va. Code Secs. 49-25 and 49-26, under which a "surety, guarantor or endorser" may require a creditor to take action within fifteen days against the principal debtor and prosecute it with due diligence or forfeit his rights against such "surety, guarantor or indorser."

The provision contained in UCC 3-415 probably leaves unchanged the result in Cox v. Hagan, but the situation seems not to be explicitly covered in the Code. In Cox v. Hagan, it would appear, several makers signed a note, some of them for the accommodation of others. Hagan then signed as accommodation indorser, not knowing some of the makers were accommodation parties. Hagan paid the note and brought action against the accommodation parties. The Virginia court held that parol evidence was inadmissible to show the accommodation character of the maker's signatures since the plaintiff did not know of it. The court did not indicate whether the result would have been different if the plaintiff had known of the accommodation.

UCC 3-415(2), providing that the accommodation party is liable in the capacity in which he has signed "even though the taker knows of the accommodation," does not seem to apply since Hagan, as accommodation indorser, was not a "taker." UCC 3-414(2), relating to the order of liability of indorsers, is not applicable since the accommodation maker is not an indorser. UCC 3-415(5), which provides that an accommodation party is not liable to the party accommodated, and, if he pays, has a right to recourse against such party, is not entirely apropos since an accommodation maker is hardly the "party accommodated."

Contract of Guarantor. The UCC makes explicit provision for the contract of a guarantor on a negotiable instrument, whereas the NIL is silent with respect thereto. Words of guaranty added to the signature of a sole maker or acceptor do not affect his liability, but added to the signature of one of two or more makers or acceptors creates a presumption that the signature is for accommodation of the others.

\[\text{UCC } 3-416.\]
When words of guaranty are used by a party it is not necessary to take the steps of diligence to charge him. By using "Payment guaranteed" or similar words a signer engages to pay without resort by the holder to any other party. The words "Collection guaranteed" or their equivalent mean that the signer will pay only after the holder has reduced his claims to judgment and execution has been returned unsatisfied, or the maker or acceptor is insolvent, or it is otherwise apparent that it is useless to proceed against him.

ADDENDUM

Since this article was put in type the American Law Institute's Enlarged Editorial Board has issued Supplement No. 1 (January, 1955) which recommends amendments to the Uniform Commercial Code. These amendments require the following significant changes in this article:

1. The consent of the maker, at the time, to an extension of time by the holder is no longer required. 3-118(f). See pp. 12-13.
2. Negotiability is not affected by a promise "or power to maintain or protect collateral" or to give additional collateral. 3-112(c). See p. 16.
3. The policy of the NIL permitting a holder to convert a blank into a special indorsement continues unchanged. 3-204(g). See p. 28.
4. Restrictive indorsements have been added and defined as including conditional indorsements and those for the benefit or account of the indorser or another person. Liability is imposed, for mishandling instruments restrictively indorsed, or any transferee or payor, except an intermediary bank or a payor that is not a depositary bank. 3-205, 3-206, 3-304. See pp. 27-30, 37-38.
5. Observance of reasonable commercial standards as an aspect of taking in good faith has been eliminated. 3-302, 3-406. See pp. 31, 34, 49.
6. The provision under which transfers that are preferences may give notice of claims against the instrument has been eliminated. 3-304(2). See p. 36.
7. See report of Sub-Committee on Article 3 for an interpretation of 3-307 relating to defenses and due course holding that would change Virginia law. Supplement No. 1 at pp. 115-5. See p. 45.
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