THE NEGOTIABLE INSTRUMENTS LAW.

(A REVIEW OF THE AMES-BREWSTER CONTROVERSY.)

Third Paper.

This article concludes a review commenced in the August number of the Register, of the interesting discussion which has taken place between Professor James Barr Ames and Judge Lyman D. Brewster, concerning certain sections of the Negotiable Instruments Law.¹

Sections 65 and 66:

"Sec. 65. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants,

1. That the instrument is genuine and in all respects what it purports to be;

2. That he has a good title to it;

"3. That all prior parties had capacity to contract;
"4. That he has no knowledge of any fact which
would impair the validity of the instrument or render it
valueless.
"But when the negotiation is by delivery only, the
warranty extends in favor of no holder other than the
immediate transferee.
"The provisions of Subdivision 3 of this section do
not apply to persons negotiating public or corporation
securities, other than bills and notes.
"Sec. 66. Every indorser who indorses without
qualification, warrants to all subsequent holders in due
course:
"1. The matters and things mentioned in Subdi-
visions 1, 2 and 3 of the next preceding section; and
"2. That the instrument is, at the time of his indorse-
ment, valid and subsisting.
"And, in addition, he engages that on due present-
ment, it shall be accepted or paid, or both, as the case
may be, according to its tenor, and that if it be dis-
honored, and the necessary proceedings on dishonor be
duly taken, he will pay the amount thereof to the holder,
or to any subsequent indorser who may be compelled to
pay it."

Sections 65 and 66, which deal with the so-called "war-
ranties" of one who negotiates a bill or note, can best be con-
sidered together.

Early English cases established that one sued as acceptor,
drawer or indorser upon a bill or note was "precluded" from
denying to a holder in due course certain things. The
acceptor was precluded from denying the existence of the
drawer, the genuineness of his signature, his capacity and
authority to draw the bill, and the existence of the payee
and his then capacity to indorse. The drawer was pre-
cluded from denying to a holder in due course the existence

*Cooper v. Meyer, 10 B. & C. 468, 1830; Sanderson v. Collman, 4 M.
& Gr. 209, 1842.

*Drayton v. Dale, 2 B. & C. 293, 1823."
of the payee and his then capacity to indorse. Similarly
the indorser was precluded from denying the genuineness
and regularity in all respects of the drawer's signature and
all previous indorsements, nor could he deny that the instru-
ment was, at the time of his indorsement, a valid and sub-
sisting bill, to which he then had a good title.

These cases preclude him on the ground that by drawing,
accepting or indorsing, he admits certain facts which he is
afterwards estopped to deny. Nothing is said in these cases
about "warranties." None of them place the indorser's lia-
bility on the ground that he has made a collateral agree-
ment warranting, for instance, the genuineness of the
drawer's signature. Of course, under the view adopted in
these cases, the estoppel works for the benefit not merely
of the immediate indorsee, but for all subsequent holders
in due course.

The provisions of the English Bills of Exchange Act
accord with this view. By Section 54, par. 2, the acceptor
"is precluded from denying to a holder in due course," etc.
Section 55 "precludes" the drawer. Section 55, par. 2, "pre-
cludes" the indorser. On the other hand, by Section 58,
one who negotiates by mere delivery a bill payable to bearer,
while of course not liable on the instrument, is in the posi-
tion of the vendor of a chattel and "warrants" to his imme-
diate transferee, being the holder for value, that the bill is
what it purports to be, that he has a right to transfer it, and
that he knows no fact which renders it valueless. And
these warranties, like the warranties of the vendor of a chat-
tel, extend only to the immediate transferee, and can be
extended to a subsequent holder only by an express assign-
ment by that transferee.

Turning now to the American act, we find that it follows
the English act in regard to the incidents of the contracts
of the drawer and acceptor. By Section 61, the drawer by
drawing the instrument "admits the existence of the payee
and his then capacity to indorse." By Section 62, an accep-

4 *Collins v. Emett, 1 H. Bl. 313, 1790; Phillips v. Thurn, 18 C. B. N. S.
   694, 1865.

5 *Ex Parte Clarke, 3 Brown, C R. 238, 1791; Thickness v. Bromilow,
   2 Gr. & J. 425, 1832; McGregor v. Rhodes, 6 E. & B. 266, 1856.

tor "admits" the existence of the drawer, the genuineness of his signature, his capacity and authority to draw the instrument, and the existence of the payee and his then capacity to indorse.

But coming to the indorser, we find that by Sections 65 and 66 he "warrants" to all subsequent holders in due course the matters and things enumerated in these sections. The use of the word "warranty" in this connection did not start with the Negotiable Instruments Law. For some years past the American courts have said that an indorsement is a warranty of the genuineness of the instrument's existence and capacity of prior parties, etc. The word has been loosely used and often interchangeably with such expressions as "precludes the indorser from denying"—"estops the indorser to deny"—or, "is an admission," though in some respects the courts have regarded it as a strict legal warranty and have held, for instance, that since the warranty is broken, if at all, at the time of transfer, the warrantor may be sued immediately, before maturity, and without presentment or notice.

Nor can it be doubted that Sections 65 and 66 of the American act use the word "warrants" in its proper legal sense. "The fact that the American statute departs, at this point, from the English statute, on which it is based, which indeed it generally follows ipsissimis verbis, and that it makes a distinction in terms between the incidents of indorsement and those of drawing and accepting, leads to the infer-

"Obviously this is not a necessary result of the indorser's conditional undertaking to pay; and, in the absence of plain public policy calling for it, the existence of such a warranty, taking the word in its ordinary sense, should depend upon the custom. The judicial dicta (and generally the language of the courts in the matter is nothing more) have, however, become so common as to create the belief that warranty is an incident of indorsement. And the statute at last has confirmed the belief and turned a number of loose and unnecessary dicta into law, while at the same time it follows the custom in regard to the incidents of the contracts of the drawer and of the acceptor, treating their acts as admissions merely." Bigelow on the Law of Bills, Notes and Checks, 2d Edition, p. 99.

ence that the word ('warrants') is used in its primary sense. Something certainly is meant beyond indorsement according to the legal import of that act, for the indorser 'warrants' and in addition he 'engages,' etc.⁰

Now for the criticism. It will be observed by Section 66 that the indorser without qualification "warrants to all subsequent holders in due course." Professor Ames, while evidently concurring in the use of the word "warranty," says that to extend it to all subsequent holders in due course is a misconception of the nature of a warranty. His position is:—An indorsement is (1) a transfer of title, (2) a contract to pay the instrument in case of dishonor. The warranty has no connection with the indorser's liability on his contract of indorsement. Like the warranty of the vendor of a chattel, it is a mere incident of the transfer of title. Moreover, the warranty is a collateral agreement, quite extrinsic to the instrument. Plainly, then, the indorser's liability for a breach of warranty extends only to his immediate indorsee as a vendee.

Theory aside for a moment, it is certain that had the act limited the so-called "warranties" to the immediate indorsee, it would have changed the law. These rules were based originally upon the doctrine of estoppel; yet, whatever be their true explanation, it seems never to have been denied that one who indorses a bill without qualification cannot, as against any subsequent holder in due course, plead, for instance, that the drawer was without capacity to contract. Even those who speak of the incidents of the indorser's contract as "warranties" hold this view. So that in extending this protection to all subsequent holders in due course, the act has merely codified that which has long been the law.

As to the theory of the criticism—there can be little doubt that the "warranties" of the indorser (for such they are under the act) are incidents of the transfer of the instrument and not of the contract of indorsement. But of course, like other choses in action, they are assignable, and there is no serious difficulty in saying that they require no express assignment, but are assigned by the indorsement of the

instrument. Of course, it will be asked, why should an indorsement be considered as the assignment of a collateral contract, which is an incident, not of the contract of indorsement, but of the transfer of the instrument? The answer must be that such an interpretation of the indorsement best carries out the intention of the parties and preserves or tends to preserve the untrammelled negotiability of the instrument by affording this protection to the holder in due course. It is further to be observed that in one sense these warranties do arise from the contract of indorsement. As Mr. Norton points out, upon the strict analogy of the sale of other personal property, it would follow that the implied "warranty" of the indorser would be confined to a warranty of title. But the indorser also warrants that the instrument is genuine and that the drawer had capacity to contract. The real reason for this is that he may not set up facts which are wholly inconsistent with his promise of indemnity.

Thus we see that so far the results reached by Section 66 are just, and are based on sound business sense. The only difficulty is that we are now obliged to explain as a "warranty" that which arose as an estoppel. Yet the difficulty is not insuperable if we regard them as choses in action, extrinsic to the instrument, but peculiar only in this, that they require no express assignment, but are assigned by the indorsement of the instrument.

This prepares us for the next criticism. Turning back to Section 65, we find that a warranty of the transferrer by delivery inures only to the benefit of his immediate transferee, whereas the similar warranty of the indorser "without recourse" runs in favor of all subsequent holders. The critic says that the idea that the indorser "without recourse" is liable to any but his immediate transferee is an original invention of the Negotiable Instruments Law.

"To say

10 Norton on Bills and Notes, 3d Edition, 163.

11 Judge Brewster answers this by showing that the view adopted by the act was asserted by Professor Ames some twenty years ago. "An indorsement without recourse, like a transfer by delivery merely, being, in substance, a sale, the indorser is responsible to the indorsee and subsequent holders for the validity of the title and the genuineness of the instrument which he purports to sell." 11 Ames' Cases on Bills and Notes, p. 840. The Dean smilingly replies that that was a youthful
that such an indorser is liable in any manner on the bill is to contradict the plain language of his indorsement. His liability is extrinsic to the bill. As the vendor of the bill, he, like the vendor of other personal property, is liable to his vendee, but to no subsequent purchaser, for the genuineness and title of the thing sold.¹²

Of course, under the English view, the indorser without recourse would not be liable to subsequent holders, because, not being able to sue him on his indorsement, they could make no use of the estoppels. And it would seem that such a result is the one intended by the parties and accords with the popular interpretation of a qualified indorsement. Nevertheless, if the reasoning suggested above in the discussion of Section 66 be sound (and it seems to be the only reasoning by which a warranty can be extended to subsequent holders) the framers of the act would have been strangely inconsistent had they limited the warranty of the indorser without recourse to his immediate indorsee. A indorses "without recourse" to B. It is everywhere the law that B. could still sue A. for a breach of warranty, which is a collateral agreement incident to the sale of the instrument. Suppose B. indorses to C. If the warranty is assigned by the indorsement, C. could sue A. in case the warranty were broken. Moreover, the same result would follow if B. indorsed "without recourse" to C., for the qualification cannot possibly do more than curtail B.'s liability and cannot be construed as curtailing C.'s rights against parties prior to B.

Next we notice that by Section 65 the warranty of the transferrer by delivery extends only to his immediate transferee. This is a codification of what has always been the

¹² Professor Ames cites one case squarely in point which sustains his view. Watson v. Chesire, 18 Iowa, 202, 1865. There seems to be no case in point the other way, although in three New York cases a point was decided which indicates that indorsers without recourse would there be held liable to subsequent indorsees. Herrick v. Whiting, 15 Johnson, 240, 1818; Shaver v. Ehle, 16 Johnson, 201, 1819; Baskin v. Wilson, 6 Wendel, 474. Two of these cases held that when a maker is sued by a transferee remote from the payee who indorsed without recourse, the payee is incompetent to testify on behalf of the plaintiff for the reason that he is an interested party and by proving the plaintiff's case would be relieving himself from liability on his implied warranty to the plaintiff.
law, but, as Professor Ames remarks, if the indorser "without recourse" is liable to subsequent holders for a breach of warranty, why not also the transferee by delivery? Undoubtedly the liability of the two has always been supposed to be identical. The only answer is that the transferee not having *indorsed* the instrument to a subsequent holder, there has been no assignment of the warranty.

Professor Ames makes a further criticism on this same point. Turning to the warranties of one who indorses without qualification, he points out that "an accommodation indorser is obviously not a vendor. The party accommodated fills that position. The accommodation indorser is, therefore, not liable as a warrantor, but is chargeable only as indorser upon the bill after maturity and due notice of dishonor." Yet, by Section 66, the accommodation indorser is liable as a warrantor. Here, again, the difficulty is to justify the provision of the act on the theory of warranty. As an estoppel, the matter would be simple enough. The very indorsement of the accommodation indorser should preclude him from setting up that the bill is not genuine or that prior parties had no capacity to contract, facts which are wholly inconsistent with his contract of indemnity. But on what legal principle he can be saddled with the warranties of a vendor is far from clear.

As to extending the warranties of the indorser to subsequent holders, therefore, the gist of the matter seems to be this: The results reached in Sections 65 and 66 are in the main just. The only possible objections would seem to be that the accommodation indorser should not be subject to suit till after maturity, and that the warranty of the indorser "without recourse" should extend only to his immediate indorsee. Certainly with these two exceptions, the results reached are those which have long been the law. But the rules are stated in terms which are difficult to justify on any legal theory.

Professor Ames makes a further and a different criticism

13 Central Bank v. Davis, 19 Pick. 373; Sus. Bank v. Loomis, 85 N. Y. 207; Case v. Bradburn, 1 Daly, 256.
14 If the accommodation indorser is a warrantor, he may be sued before maturity. This changes the law. See cases cited in preceding note.
of these two sections. "The transferrer by delivery or by a qualified indorsement not only warrants, in Section 65, paragraphs 1, 2 and 3, the genuineness of the instrument, his title to it, and the capacity of prior parties, but also, by Section 65, par. 4, "that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless." Why, asks Professor Ames, should his knowledge be irrelevant in the case of forgery or capacity of prior parties and yet be essential when the instrument is invalid because of usury or other statutory real defence, or if the transfer is after maturity, by reason of payment, failure of consideration, or other personal defence?

There is much force in the criticism. Subsection 65, par. 4, is evidently a codification of the New York case of Littauer v. Goldman,\textsuperscript{15} which held that a defendant who transferred by delivery to the plaintiff a note tainted with usury in its inception, of which defect, however, the defendant was ignorant, could not be held liable on an implied warranty. The court, after reviewing a number of cases, concludes that there are only two implied warranties in the transfer of negotiable paper, namely, a warranty of title, and a warranty that the instrument is genuine and not forged. That case is "admittedly supported by no precedent,"\textsuperscript{16} and there are decisions flatly against it.\textsuperscript{17} As Chief Justice Shaw said, in Lobdell v. Baker,\textsuperscript{18} "Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties; but he has the right to believe, without inquiring, that he has the legal obligation of the contracting parties appearing on the bill or note." That was a case of infancy, but the remark is equally applicable to a note tainted with usury in its inception. For in the latter case the indorsee does not get that legal obligation for which he contracted. It would seem, therefore, that the transferrer should

\textsuperscript{15} 72 N. Y. 506.
\textsuperscript{16} Wood v. Sheldon, 42 N. J. 421. It is also disapproved of in Meyer v. Richards, 163 U. S. 385 (pages 411 and 412).
\textsuperscript{17} Giffert v. West, 33 Wis. 617; Daskam v. Ullman, 74 Wis. 474; Hannum v. Richardson, 48 Vt. 508; Knight v. Lanfear, 7 Rob. (La.) 172.
\textsuperscript{18} 3 Met. 469.
be held liable for a breach of warranty since the thing sold is not what it purported to be. Furthermore, as the critic points out, if "scienter" is necessary in the case of the indorser without recourse, why is it not equally necessary in the case of one who indorses without qualification? Yet Section 65, par. 4, is not incorporated by reference in Section 66.10

Section 68:

"As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. Joint payees or joint indorsees who indorse are deemed to indorse jointly and severally."

Professor Ames thinks that the last sentence—which introduces a change into the law—is a blunder which should be cancelled. He says, "Joint makers, joint drawers and joint acceptors are liable only jointly. Why this arbitrary distinction?"

Judge Brewster replies that the change was made for convenience' sake, and that it "is in accord with the theory of the law already established in most of the states which adopted the reform procedure, say three-fourths of the states of the union." Mr. Arthur Cohen also thinks that this change is an improvement, "by reason of its sweeping away certain technicalities. There has always been a tendency in the law merchant to consider contracts which are in form joint contracts as being intended to be joint and several." Still, Professor Ames' query "Why this distinction?" re-

10 Professor Ames proposes as a substitute for Section 65–4 "that the instrument is subject to no real defence, nor, if the transfer is after maturity, or after dishonor noted on the bill, to any personal defence." In the opening of his first article, Professor Ames justly remarks that the new code would have gained in simplicity and arrangement had due emphasis been given to the distinction between real and personal or equitable defences.

10 Referring to 2 Bliss, 53, Pomeroy, 2d Edition, 326, Conn. Rules of Practice, page 1, Sec. 2. For the American statutes see Randolph's Commercial Paper, Sec. 1660.
mains unanswered. If joint indorsees are to be liable jointly and severally (and it would seem that they ought to be) why not joint drawers also? Instead of cancelling the latter part of this section, however, would it not have been better to widen its scope and include joint drawers, joint makers, and joint acceptors?

Section 70:

Section 70 provides that "Presentment for payment is not necessary in order to charge the person primarily liable on the instrument."21

This, says Professor Ames, changes the law and for the worse as to certificates of deposit. The weight of authority, represented by the leading commercial states,22 is that they must be presented to charge the bank. Five states hold that presentment is not necessary.23 Furthermore, under this section, "presentment would not be necessary in the case of bank notes circulating as money." The critic suggests that the words "except in the case of bank notes and certificates of deposit" should be inserted after the word "necessary" in the first line.

Of course, this section was intended to apply to the maker of a note and acceptor of a bill. Evidently, from Judge Brewster's reply, the point as to certificates of deposit did not occur to the Commissioners. His defence is, "In view of the fact that no person would be likely to bring a suit on such instruments when he could get the money at the bank, and the further fact that no harm could come to the promisor excepting as to costs, which are in most, if not all the states, subject to the discretion of the court, the objection does not seem to be practical."

21 The remainder of the section reads, "but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers."

22 Indiana, Massachusetts, New Jersey, New York, Pennsylvania, South Dakota, Vermont.

23 California, Iowa, Michigan, Minnesota, Wisconsin.
1. The numerous reported cases of suits brought on certificates of deposit dispose of the first part of that defence.

2. "No harm could come to the promisor excepting as to costs." All right. But how about the promisee? If no presentment is necessary, the holder's right of action accrues on the date of the certificate, and the statute of limitations runs from that date. It follows that after six years the holder cannot get his money. This result is unjust. Nor is it a true answer to say that such a holder, like the holder of a demand note, has slept on his rights by allowing six years to slip by. He has not. Business-custom determines such a question, and the fact is, as everyone knows, that by the custom of merchants the holder of a certificate of deposit is a depositor, who, like any other depositor, may leave his money in the bank for an indefinite period. The idea that he must withdraw it within six years would be a novel one to a banker. So Section 70, in so far as it applies to certificates of deposit, not only ignores the language of such instruments, which always is that the money shall be paid "on the return of this certificate," but, by barring the holder's right of action after six years from the date of the certificate, runs counter to the understanding of the business community, which regards such an individual as a depositor.

It is not likely that much harm will result from this section, as the use of certificates of deposit is very limited and appears to be decreasing. Nevertheless, the framers of the act slipped up on this point.

Section 119:

"A Negotiable Instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

3. By the intentional cancellation thereof by the holder;

*In states where right of action accrues on date of certificate, statute runs from that date. When action accrues only after demand, statute runs from date of demand. For collection of authorities see Am. and Eng. Encyc. of Law, 2d Edition, 804."
"4. By any other act which will discharge a simple contract for the payment of money;
"5. When the principal debtor becomes the holder of the instrument, at or after maturity in his own right."

Professor Ames criticises the fourth paragraph of this section. He says, "If a creditor accepts a horse in satisfaction of his claim, not yet matured, the simple contract claim is discharged. But if the holder accepts a horse from the maker before maturity, in satisfaction of the note, the note is not discharged. The accord and satisfaction gives the maker merely a personal defence, which is cut off the moment the note is transferred to a holder in due course."

Judge Brewster's answer is, "The section evidently relates to acts between the parties. If the maker allows his note to remain outstanding, and so to be transferred, of course he should be held liable." "This," as Professor Ames says, "is very sound law, but, with all deference, this subsection declares just the opposite. The language is that by such an accord and satisfaction 'a negotiable instrument is discharged.' If it is discharged, the maker can never be charged upon it. In all the other subsections of this section the discharge is complete and final."

The critic seems to have the best of it. Payment of a note before maturity is no defence against a holder in due course. That has always been the law. But a simple contract claim is discharged by payment before the claim is due, and now comes Section 119 and says that such a payment discharges a negotiable instrument. The Judge's only answer is that this section "evidently relates to acts between the parties."

1. What is meant by "acts between the parties?" 2. Why does this section evidently relate only to such acts?

Mr. Farrell makes a curious answer to this criticism. He says that Professor Ames is "construing the language of one of the component parts of a section without reference to its connection with the others. The section declares that an instrument is discharged: by payment by the principal debtor; by payment by the accommodated party; by the holder's intentional cancellation, and (4) 'by any other act
which will discharge a simple contract for the payment of money,' i.e., any other act which will discharge a negotiable instrument, which is but a simple contract for the payment of money, as distinguished from a specialty, in the extinguishment of which the same formality is required that is necessary to its creation. Do the other subsections, specifying the methods of extinguishment, refer to negotiable instruments, or to some other form of contract?'

Let us see. In the first place, Mr. Farrell misstates Subsection 1. It does not read "By payment by the principal debtor." It reads, "By payment in due course . . . by the principal debtor." That makes a difference. Now Subsection 4 reads "By any other act which will discharge a simple contract for the payment of money." I.e., any act other than the acts specified in Subsections 1, 2 and 3. But payment before maturity is not within the acts specified in Subsections 1, 2 and 3, and it is an act which discharges a simple contract for the payment of money. Therefore by Subsection 4, payment before maturity will discharge a negotiable instrument.

But Mr. Farrell says that Subsection 4 ("By any other act which will discharge a simple contract for the payment of money") means "any other act which will discharge a negotiable instrument, which is but a simple contract for the payment of money, as distinguished from a specialty, in the extinguishment of which the same formality is required that is necessary to its creation." Now, with all deference to the purpose of Section 119 was to answer this question, "What acts will discharge a negotiable instrument?" To say that the answer given is "A negotiable instrument is discharged by acts 1, 2, 3," and "any other act which will discharge a negotiable instrument" is to say that Mr. Crawford and the Commissioners had lost their wits.


29 That reminds one of the celebrated excuse for drinking:

"If I the reasons well divine,
There are just five for drinking wine:
Good wine, a friend, or being dry,
Or lest you should be by and by,
Or any other reason why."
Perhaps a negotiable instrument is "a simple contract for the payment of money, as distinguished from a specialty." But it is certainly true that such an instrument is negotiable, and in this respect differs from all other simple contracts for the payment of money. From this negotiability arise certain rules not applicable to non-negotiable contracts for the payment of money. At least one of these rules relates to the discharge of a bill or note, and Professor Ames' illustration shows that Subsection 119, par. 4, goes too far in that it practically places the discharge of a negotiable instrument and the discharge of a non-negotiable simple contract for the payment of money on the same footing.

Why Subsection 119, par. 4, was inserted does not appear. As Professor Ames says, "It would be superfluous even if it were accurate." It has no counterpart in the English act, nor apparently in any other existing code. Mr. Crawford's Annotation, which usually gives the cases upon which each section is based, is silent as to 119, par. 4. But that this subsection will be permitted to upset such a rule as that which declares that payment before maturity is no defence against a holder in due course, is unbelievable, though it must be confessed that in limiting its meaning, the courts will probably have to proceed on the ground that any other interpretation would be revolutionary, unjust and absurd.

Section 120, par. 3:
"A person secondarily liable on the instrument is discharged:
(3) By the discharge of a prior party."

"The entire section reads:
"A person secondarily liable on the instrument is discharged:
1. By any act which discharges the instrument.
2. By the intentional cancellation of his signature by the holder.
3 By the discharge of a prior party.
4. By a valid tender of payment made by a prior party.
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.
6. By any agreement binding upon the holder to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."
"This subsection," says Professor Ames, "is the most mischievously-revolutionary provision in the new code. It means that if the maker is discharged by the statute of limitations, all the indorsers are ipso facto discharged. It means that if a joint note is executed by 'A., principal,' and 'B., surety,' and B. dies, whereby the whole burden survives to A., all the indorsers are discharged. It means that if by some inadvertence due notice should not be given to the first indorser so that he would be discharged, all subsequent indorsers, although duly notified, would also be discharged. It would mean, but for the saving grace of Section 16 of the National Bankrupt Law, that an indorser would be discharged if any prior party received his discharge in bankruptcy."

Judge Brewster's reply is that Subsection 3 means only the discharge of a prior party by the holder, and to show this he argues:

1. The other paragraphs of Section 120 refer to acts of the parties, not to acts of law.

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This section, which has no counterpart in the English act, seems to have been developed out of the New York case of Shutts v. Fingar, 100 N. Y. 539, 1885. In Merritt v. Todd, 23 N. Y. 28, 1861, the New York court laid down the rule that in order to charge the indorser of a demand note in New York, it is not necessary, as it is in other jurisdictions, to present the note for payment within a reasonable time. Merritt v. Todd was followed by later New York cases, though it has now become obsolete through the adoption by New York of the Negotiable Instruments Law, which provides that an instrument payable on demand must be presented within a reasonable time after issue. "In Shutts v. Fingar the holder failed to present a similar note to the maker until after the latter was discharged by the statute of limitations, but claimed the right, under the authority of Merritt v. Todd, to charge the indorser by a presentment at any time. The court, however, declined to follow that case to its logical conclusion. While adhering to the doctrine that the presentment of a demand note need not be made within a reasonable time, they decided that such a note must be presented before the maker was discharged by the statute of limitations. This, it will be seen, is a totally different proposition from that of Subsection 3. Since Merritt v. Todd has become obsolete through the adoption of the Negotiable Instruments Law, Shutts v. Fingar is now nothing more than a legal curiosity." And see, also, Crawford's An. N. I. L. 84, notes A and C.
2. In none of the ten books on commercial paper published since the new act was legislatively adopted, is there a suggestion that Subsection 120, par. 3, changed the law.

3. That two or three text-books state the law in words practically the same as those used in Subsection 120, par. 3.

4. It is a rule of statutory construction that in statutes or revisions condensing or in general restating the common law, no change is presumed except by the clearest and most imperative implication.

Judge Brewster thinks that the critic is unjust in trying to read into Subsection 3 the words "by operation of law." Professor Ames retorts that Judge Brewster is trying to read into this subsection the words "By the holder." Furthermore, says the critic, if the words "by the holder" are to be read in, this subsection will apply to only one case which is not already covered by the other paragraphs of this section and in that one case it works injustice. A. makes a note for the accommodation of B. If the holder, with knowledge of the accommodation, releases A., this subsection would discharge B., the accommodated indorser. Yet the decisions are the other way, and rightfully, for the action of the holder in releasing A. has not prejudiced B., since the latter could not, on paying the holder, have any right over against the accommodation maker.

The rather lame answer given amounts to this: If all that is true, what possible harm can Subsection 120, par. 3, do, except to discharge the indorser in the case you suppose?

The subsection says simply "By the discharge of a prior party." That would seem to mean any discharge; a discharge by operation of law, or a discharge by the holder. If the Commissioners meant only the latter (and of course that is all they did mean) why did they not say so? It is to be earnestly hoped that the courts will adopt Judge Brewster's interpretation. It is to be as earnestly regretted that the Commissioners did not express themselves unmistakably on so important a point.

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*Collott v. Haigh, 3 Campbell, 281; Hill v. Read, D. & Ry. N. P. 26; Sargent v. Appleton, 6 Mass. 85; Parks v. Ingram, 22 N. H. 283; and see also Ludwig v. Iglehart, 43 Md. 39; Gloucester Bank v. Worcester, 10 Pick. 528; Bruen v. Marquand, 17 Johnson, 58.*
Professor Ames also criticises paragraphs 5 and 6 of Section 120, which read:

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

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

They are inaccurate, he says, in point of law. "If the party primarily liable is an accommodation acceptor or maker, a release of him by the holder, or a binding agreement to give him time, does not discharge the accommodated drawer or indorser. The discharge of the drawer or indorser in such cases would be highly inequitable. The action of the holder cannot possibly prejudice them, for, under no circumstances, would they, on paying the holder, have any right, either by subrogation or indemnity, against the accommodation acceptor or maker."

Professor Ames assumes that both these subsections have to do with releasing or giving time to "the person primarily liable." Possibly there is room for doubt as to that. Subsection 5 speaks of "the principal debtor." Now the person "primarily liable" on the instrument is the person who, by the terms of the instrument, is absolutely required to pay the same; whereas, by the words "principal debtor" we usually or at least very frequently mean the person ultimately liable for the amount of the instrument. If A. makes his note for B.'s accommodation, A. is "primarily liable," for, by the terms of the instrument, he is absolutely required to pay the same, but B., the accommodated payee, is "the principal debtor" who must ultimately foot the bill. On the other hand, paragraph 6 evidently refers to an extension of time given to the person "primarily liable." Now, if Subsection 5 refers only to a release of "the principal debtor," Professor Ames' illustration of the accommodation note is not in point, because the accommodated indorser
would not be discharged by a release of the accommodation maker, the latter not being "the principal debtor." But by Subsection 6 an extension of time given to the accommodation maker would discharge the accommodated indorser.30

Assuming, however, that Professor Ames is correct in supposing that both Subsections, 5 and 6 apply to the person primarily liable on the instrument, even though he may not be the principal debtor, his illustration shows that these subsections are not wholly satisfactory.

Judge Brewster’s reply admits that the cases dealing with the point raised by Professor Ames’ illustration are sound, but says that they are not disturbed by the Negotiable Instruments Law, for “The law is intended to set out the legal liability on the instrument as such, in the due course of commercial transactions. It could never be held to mean that a party who had paid money for another’s accommodation could not at law, if not on the instrument, recover it back. That is a matter between the parties, entirely outside of the effect of the instrument in the hands of a holder.”

The answer is scarcely responsive, as Professor Ames is talking about taking away from the holder his right against the accommodated indorser, and not about a person’s right to recover money paid for another’s accommodation; but evidently Judge Brewster’s idea is that the act is dealing solely with the discharge of the instrument, and does not discharge any other actions at law that the parties may have. That is true, but it furnishes no reason for denying an action on the instrument whenever an action on the instrument should lie. Moreover, if the holder, in Professor Ames’ illustration, took the note in absolute payment of a debt, what rights would he have against the accommodated indorser after the latter is discharged from liability on the note?

Finally, Professor Ames objects to Subsections 5 and 6 as the superfluous introduction of doctrines of suretyship into a negotiable instruments code, and if these are to be introduced, he thinks that other doctrines of suretyship of equal

30 But the cases on this point make no distinction between releasing an accommodation maker or acceptor and giving him an extension of time. See cases cited in preceding note. Nor does there appear to be any reason for making such a distinction.
importance should be inserted, as, for instance, the doctrine that the accommodation maker or acceptor, although the party primarily liable on the instrument, will be discharged if the holder, with knowledge of the accommodation, releases or undertakes to give time to the accommodated drawer or indorser.

Section 124:

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

"But when an instrument has been materially altered, and is in the hands of a holder in due course not a party to the alteration, he may enforce payment thereof according to its original tenor."

The criticism of this section is contained in a note published subsequent to the articles in the Harvard Law Review and is based upon the case of Jeffrey v. Rosenfeld, decided by the Supreme Court of Massachusetts in September, 1901.

At the common law, the material alteration of a negotiable instrument without the assent of all parties liable thereon avoided the instrument except as against a party who made, authorized or assented to the alteration, and subsequent indorsers. The rule applied to an alteration made by a stranger as well as to an alteration made by a party to the instrument. Section 64 of the English act perpetuates the common law rule with the exception of a proviso inserted for the benefit of a holder in due course, under which he may enforce,

Section 64 of the English Bills of Exchange Act reads,

"Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

"Provided, that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour."

61 N. E. R. 49.
according to its original tenor, a bill which has been materially altered, if the alteration is not apparent. The proviso, however, does not concern us in this discussion.

The American courts early changed the common law rule to the extent of holding that an alteration made by a stranger was a mere spoliation or trespass, and that the holder could still enforce the instrument in its original form. Now Section 124 of the American act is practically the same as Section 64 of the English act. Therefore, says Professor Ames, we are in this dilemma: "Either the English and American sections, although expressed in the same terms, must be interpreted differently, or else the American law is changed, and, as it seems to the writer, for the worse. To avoid the second horn of the dilemma involves great straining, not to say perversion, of simple English words."

How one can see any ambiguity in Section 124 is a mystery. It reads, "When a negotiable instrument is materially altered . . . it is avoided," etc. An alteration made by a stranger is not excepted, and certainly it is none the less an alteration because made by a stranger. To say that such an alteration is not covered by Section 124 would be, as Professor Ames says, "a great straining, not to say perversion, of simple English words." Judge Brewster agrees with the critic on this point. The only person who has ever suggested a doubt as to the meaning of this section is Mr. Justice Morton, who wrote the opinion in Jeffrey v. Rosenfeld, supra. In that case, a note secured by a mortgage was altered, though by whom did not appear. On a bill in equity to restrain the foreclosure of the mortgage, the court sustained the holder's right to foreclose without interpreting Section 124 of the code, though Justice Morton, in an obiter dictum of some length, remarked that the question of its interpretation was one that deserved serious consideration. After referring to the authorities in this country which decided that a material alteration made by a stranger will not avoid the instrument, he adds, "It would seem not unreasonable to suppose that it was the intention of the framers of the American act that Section 124 should be construed according to the law of this country, rather than that of England." As a generality, that remark is profoundly true and applies.
to all the sections of the new act. They should be construed according to American law rather than English law. As applicable to the particular point under discussion, however, the remark is of small value. If the language of Section 124 is clear and unmistakable, it should be given its plain meaning. To construe it according to American law does not mean to knock it down simply because it changes American law somewhat. The learned Judge points out no ambiguity in the language of this section. His sole reason for doubting its very plain meaning is that it changes the law. As a matter of fact, we learn from Judge Brewster that it was intended to change the law; that Mr. Crawford reported to the Conference in 1896 in favor of adopting the common law rule as to alterations by a stranger, in order that the law of the two countries might be uniform on this important point, and in order that the benefit of written evidence might be preserved. This view was approved by the Conference, and Section 124 was inserted to restore the English rule.

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

Section 137:
"Where a drawee to whom a bill is delivered for acceptance destroys the same, or refuses within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill accepted or non-accepted to the holder, he will be deemed to have accepted the same."

Says Professor Ames, "A refusal to accept is an acceptance! Such a perversion of language would be strange enough anywhere, but in a deliberately framed code is well nigh inexplicable. As a consequence of this fantastic provision the holder may bring concurrent actions: against the drawee because of his fictitious acceptance, and..."
the drawer because of the drawee's non-acceptance. Nor is anything gained by this fiction, of which there is no trace in the English act. All the demands of justice are met by holding the misconducting drawee liable for a conversion of the bill."

How the holder could bring concurrent actions is not clear. He may sue the drawee, for under this section the latter is deemed to have accepted. But how could he proceed "against the drawer because of the drawee's non-acceptance?" The drawee "is deemed to have accepted." In legal effect, therefore, he has accepted, and so the holder must wait until the bill is dishonored for non-payment, before a right of action accrues against the drawer.

Mr. Cohen also disapproves of Section 137, though on another ground, namely, that this section "would seem to imply that if a bill be destroyed or not returned accepted within a reasonable time, notice of dishonor need not be given to the drawer. This is not in my opinion the law, and ought not to be the law." There is force in this objection. By destroying the instrument or refusing to return it to the holder, the drawee surely indicates that he does not propose to honor it. It would seem that the drawer should be instantly apprised of this in order that he may proceed at once to recover the funds that he has placed in the drawee's hands. And if the destruction of a bill amounted to a dishonor of it, the drawer would have that right, but by regarding it as an acceptance all actions are postponed until after the day of maturity.

The idea that the wrongful retention or destruction of a bill by the drawee to whom it had been presented for acceptance, is of itself an acceptance, seems to have been introduced in 1808 by Lord Ellenborough in the case of Harvey v. Martin. He reiterated that view in a dissenting opinion in Jeune v. Ward, but the majority decided otherwise, and held that such a destruction or refusal to return, while rendering the drawee liable for conversion, was not an acceptance. Jeune v. Ward settled the English law on this point, and it has never been changed. On principle, that decision

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31 Campbell, 425 N.
32 B. & A. 653, 1818.
seems to be correct; and the view there expressed is approved by such commentators as Bayley, Chitty, Story, Parsons, Daniel and Tiedman, all of whom regard the idea that the retention or destruction of a bill amounts to an acceptance, as illogical and quite unnecessary.

Mr. Farrell, in defending Section 137, recalls the rule that the holder of an instrument may join the drawer and drawee in the same action, and points out that if he were restricted to an action for conversion against the drawee, that action sounding in tort could not be joined with the action ex contractu against the drawer. Whether the advantage which results from the simple fact of joining the two actions will compensate for dispensing with the necessity of notifying the drawer of the refusal to return the instrument or the destruction thereof, and for adopting a rule so questionable on principle, may be seriously doubted. One never views without concern the insertion of a pure legal fiction in a statute.

But the rule adopted is far from being without support. By the New York statute, from which this section of the code is copied, "every person upon whom a bill of exchange is drawn, and to whom the same is delivered for acceptance, who shall destroy such bill, or refuse, within twenty-four hours after such delivery, or within such other period as the holder may allow, to return the bill, accepted or non-accepted to the holder, shall be deemed to have accepted the same." And several states have substantially copied the New York statute.

Judge Brewster says that from all these states came the report that this provision "had worked well." The bankers regarded it as a simple, practical, definite, working rule." Probably, therefore, we are justified in hoping that it will "work well" in the Negotiable Instruments Law.

* Bayley on Bills, Chapter vi, Sec. 1; Chitty on Bills, star page 296; Story on Bills, Sec. 248; 1 Parsons, 285; 1 Daniel's Negotiable Instruments, Sec. 500; Tiedman on Commercial Paper, Sec. 224.

*2 Rev. St. of N. Y. (6th Ed.) 1161. Though it was decided that under this statute the holder, in order to recover, must prove a conversion of the bill. Matteson v. Moulton, 79 N. Y. 627.

*3 Alabama, Arkansas, Idaho, Kansas, Nevada, Washington, California.
Section 175:

"Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter."

When a bill has been protested for non-payment, a third person—who may or may not be a party to the bill—may intervene and pay the bill for the honor of any party or parties thereto. The payer for honor is then, by Section 175, subrogated to the rights of the holder as regards the party for whose honor he pays, and all persons liable to the latter. Suppose A. draws on B. and the latter accepts for A.'s accommodation. The bill is dishonored and X. pays it for the honor of the drawer. Since B., the accommodation acceptor, would not be liable to the accommodated drawer in case the latter took up the bill, X., the payer for honor, cannot, under this section, sue B. He may sue only A. and all parties liable to the latter."

This rule was laid down in 1808 by Lord Erskine in *Ex Parte Lambert.* For many years that case was everywhere regarded as an authority. No text writer doubted its soundness, and the only two American cases in which the point has been raised, decided in 1835 and 1846, followed Lord Erskine without hesitation. But in *Ex Parte Swan,* decided in 1868, Malins, V. C., condemned the doctrine of Lord Erskine and laid down the opposite rule, viz, that the payer for honor should be subrogated to the rights of the holder against the party for whose honor he pays, and all parties prior to (not liable to) the latter. In 1882, however, the English code enacted Lord Erskine's rule. Professor Ames says that this was evidently a mere oversight. "Mr.

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38 This section is identical with Section 68-5 of the English act.
39 13 Ves. 179. Disapproving of the contrary view expressed in *Ex parte Wackerbath,* 5 Ves. 574, 1800.
41 L. R. 6 Eq. 344-365.
Chalmers, in his excellent treatise, is careful to indicate every instance in which the English act modifies the previous law, but he gives no intimation that Section 68-5 introduced any change. One must infer that he was unconscious of any change. This inference is confirmed by the first edition of his Digest, published four years before the passage of the English act, in which he defines the right of the payer for honor in substantially the same language as that of the act. Mr. Chalmers' statement of the result of the decisions is in general so accurate that one wonders at this slip, which is all the more surprising, because in his table of cases overruled, he includes Ex Parte Lambert as overruled by Ex Parte Swan."

Of course it is possible, though scarcely likely, that when Judge Chalmers published his Digest in 1878, he overlooked the fact that Ex Parte Lambert had been overruled by Ex Parte Swan. It is scarcely believeable, however, that the experts who revised Judge Chalmers original draft of the Bills of Exchange Act, who certainly had both cases before them, should have been unconscious of the fact that they were codifying the over-ruled decision. The probable, natural and reasonable explanation is that they preferred the doctrine of Lord Erskine to the doctrine of Chancellor Malins. However this may be, Lord Erskine's doctrine has certainly been the law for twenty years last past in England, and it is the doctrine laid down in the only two American cases on this point. Therefore, when one criticises the American Commissioners for not digging up the rule of Ex Parte Swan, it would seem to be incumbent on him to show very clearly that Ex Parte Lambert is wrong and Ex Parte Swan right. It is true that the latter rule prevails in the codes of Germany and France, and that it formerly prevailed in the California code. Beyond this, Professor Ames presents nothing in support of it. As a matter of fact, it is far from clear that the rule of the American and English acts is not the better of the two. It certainly lessens

"Page 192.


Sec. 3209 III Randolph's Commercial Paper.
litigation, for if the payer for honor may sue the accommodation acceptor the latter will then proceed against the accommodated drawer. Aside from this, there seems to be justice and common sense in the view that when X. steps in and pays for A.'s honor a bill on which the latter is liable as drawer, X. should be regarded (except as to his undoubted right to reimbursement from the man whose debt he has paid), as having stepped into A.'s shoes, and therefore should have only those rights which A. would have had in case he had paid his own debt.

Section 186:

"A check must be presented for payment within a reasonable time after it is issued, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay." 45

No similar provision is made for the effect of not giving due notice of dishonor when the check has been presented but not paid. Now Section 185 provides that "Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." Therefore the effect of a failure to give due notice of dishonor to the drawer of a check must be governed by Section 89, under which delay in giving notice of dishonor to the drawer of a bill absolutely discharges him, although the delay has not caused him any loss. In other words, delay in presenting a check for payment discharges the drawer from liability thereon only to the extent of the loss caused by the delay, but delay in giving the drawer notice of dishonor absolutely discharges him. Yet the Courts and the text writers give the same effect to delay in presenting a check and delay in sending notice of its dishonor. 46 In both cases the drawer is discharged only to the extent of the

45 This provision is copied from Section 74 of the English act.
loss caused by the delay. That is Professor Ames' objection to this section.

Judge Brewster shifts his ground somewhat in replying to this criticism. In his first paper he seems to admit that delay in notifying the drawer of a check will absolutely discharge the latter, and says, "Suppose it is so, technically, with reference to the check itself. What is the harm? The debt is not discharged, except for laches. The holder can sue on his debt just the same as he could have done before the check was given. . . . The section seems to be harmless in any view."

Professor Ames disposes of that answer as follows: "In all other cases a creditor who, by his laches, discharges his debtor from liability on a bill given in conditional payment of a debt, forfeits also all right to the debt. Furthermore, suppose a check to be given in absolute payment of the drawer's debt, or in consideration of the payee's release of a claim against a third person. Surely in either of these cases, the holder who loses his right on the check, has lost everything."

Then in his second paper, Judge Brewster claims that, "Since the only penalty for delay in presentment (186) is the loss occasioned by delay, and not a discharge, the natural inference therefrom would be that the same exceptional exemption as to checks would continue in case of non-payment, namely, that the only penalty would be the loss occasioned by the delay, and not any absolute discharge, as claimed by the Dean." All admit that this ought to be the law, and again it is pertinent to inquire, "If the Commissioners meant that, why did they not say so?" A few short words would have settled the matter. Why, then, rely on "the natural inference"? Does the history of the making and interpreting of statutes vindicate the wisdom of relying on the courts to "infer" the right thing, or does it rather teach that the language of a statute cannot be too clear? And in this case it may not be such "a natural inference" after all, when the learned Chairman of the Conference which framed the act sees it only after second thought.

Judge Brewster regards Professor Ames' objections to this section as "the most truly academical criticism in the
whole list." Evidently his reason for this view is that although the rules laid down in Sections 89 and 186 are copied from the English act, and have been repeated in all the cases and text-books since the first edition of Byles on Bills, no one has doubted during all this period that the same result flows from delay in sending notice of the dishonor of a check as from delay in making presentment. As to the cases and the text-books, that argument is worth little. Language used by a court must be construed with strict regard to the particular facts to which the language relates, and is authoritative only when so construed. Language used by a text writer is not authoritative at all, and is of little assistance even, unless construed with reference to the particular line of cases under discussion. Language used in a statute is read in a different light. An inaccuracy of statement which causes little confusion and no real harm in the opinion of a judge or in a text-book, may prove positively mischievous in a statute. But the fact that these same provisions have proved satisfactory in the English act for twenty years—while not disproving the objection that they are inaccurate—does indicate that little or no harm will result from that inaccuracy.47

This concludes the discussion. If it is permitted to offer a cautious generalization on this controversy, it is submitted that although Professor Ames has pointed out two or three actual errors in the new law and has shown that in still other instances the language might have been improved upon, nevertheless, these errors and imperfections are not sufficiently numerous or important to make one seriously doubt the advisability of adopting the Negotiable Instruments Law in every state in the union. It is easy to lose one's perspective and sense of proportion in such a matter. The flaws in the act, few though they be, when grouped

"Mr. Farrell argues that Section 89 cannot refer to a check, because it provides that when an instrument has been "dishonored by non-acceptance or non-payment" notice of dishonor must be given. And he reasons that since a check need not be presented for acceptance, Section 89 does not apply. The error is obvious. Section 89 reads, "dishonored by non-acceptance or non-payment." Therefore when a check is dishonored by non-payment, Section 89 does apply.
together and considered alone, seem formidable. Yet, when a survey is made of the entire statute, when one regards the many salutary provisions which settle disputed questions or introduce needed changes, when one studies the admirable simplicity and accuracy of most of its provisions and considers the comparative unimportance of most of the flaws which have been discovered, then the shortcomings of the Negotiable Instruments Law shrink to their real size and (though still apparent) do not seem likely to seriously impair its usefulness. It is unfortunate that the Commissioners did not have the benefit of Professor Ames' criticisms when they were revising the original draft of the act. That some of them would have been adopted (to the benefit of the act) can scarcely be doubted. But the act having been started on its course and legislatively adopted in a number of states before these errors were discovered, it was decided, and no doubt wisely decided that it was unnecessary and impolitic to start the work of amendment at that stage of its career. The readiness of several state legislatures to adopt the act in spite of the criticisms that have been made upon it and the very small amount of litigation that has arisen under it in jurisdictions where it has been in force for several years, have thus far vindicated the soundness of the Commissioners' decision.

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

Finally, the whole controversy should serve as a useful lesson to those who will in future direct the preparation of statutes codifying other branches of the law in this country. The Negotiable Instruments Law was originally drafted with the greatest care by a learned expert. It was then re-

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48 Professor Ames saw the act for the first time after its adoption by four state legislatures.
vised by a sub-committee of the Commissioners on Uniform State Laws, and was then revised by the Commissioners themselves at their annual conference. In addition to this, the statute, prior to its adoption by the Conference, had been brought to the attention of a number of experts generally throughout the country, and had received at least some consideration at their hands. Moreover, all who shared in the preparation of the act enjoyed the very great advantage of having before their eyes the English Bills of Exchange Act, which offered suggestions on every important point; afforded a constant opportunity for useful comparisons; whose provisions moreover could be examined in the light of twenty years' experience. In spite of all this, some errors (precisely how serious no one can say as yet) crept into the Negotiable Instruments Law which might have been avoided had the act, prior to its final revision, been subjected for several years to the most searching criticism obtained by giving to it the widest publicity and by soliciting the active co-operation of the considerable number of men whose thorough knowledge of the law of negotiable paper, whether from the standpoint of the banker, the practitioner or the student, had fitted them to render valuable assistance in the preparation of a code on that subject. The two or three additional years consumed by pursuing this method would have yielded an ample return, and those who would object to the labor, expense and time required by this method little understand the gravity and difficulty of the task of stating the law in a series of authoritative, abstract propositions. Many will regard the shortcomings of the Negotiable Instruments Law as not very serious but all may well remember that these shortcomings (such as they are) can probably be ascribed to the lack of adequate criticism.

Charles L. McKeehan.